EEOC GUIDANCE RESTRICTS "NO HIRE" POLICIES FOR APPLICANTS WITH CRIMINAL RECORDS

Client Advisories

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On April 25, 2012, the U.S. Equal Employment Opportunity Commission (the "EEOC") issued a guidance document concerning employer use of criminal records to deny employment to otherwise-qualified job applicants. According to the EEOC's *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (the "Enforcement Guidance"), employers that utilize blanket "no hire" policies for applicants with criminal records face a greater risk of liability for illegal discrimination claims regarding those rejected applicants. Although this Guidance Document is not a formal court decision and not legally binding, it does provide a strong source of legal support against employers deciding never to hire an applicant with a criminal record.

The law cited by the EEOC - Title VII - prohibits, among other things, discrimination in employment on the basis of an individual's "protected characteristics," such as an individual's race, color, religion, sex, or national origin. This newly-issued Guidance provides that consideration of an individual's criminal record in employment decision may violate Title VII in one of two ways. First, an employer engages in "disparate treatment" discrimination if it treats two employees with the same criminal record differently based on their protected characteristics (e.g. race or gender). Second, even where an exclusion based on criminal records is applied uniformly, the employer may still violate Title VII if the exclusion would disproportionately and unjustifiably exclude individuals falling into a particular protected class (for example, individuals of a particular race). This is referred to as "disparate impact."

The Enforcement Guidance states that, in order to avoid a charge of disparate impact discrimination, an employer's exclusion based on criminal history must be "job related for the position in question and consistent with business necessity." This is similar to what is currently required when considering applicants with physical disabilities under the Americans with Disabilities Act. Critically, the EEOC concludes that so-called "Blanket no hire" policies do not meet this legal standard. The EEOC's rationale is that those Blanket policies do not take into

account the nature and timing of the criminal offense in relation to the job position for which the applicant is applying.

The EEOC advises that there are certain circumstances under which employers may properly use a criminal record to determine an applicant's employment eligibility. These are when an employer considers: (i) the nature of the crime; (ii) the time that has elapsed since the crime was committed; and (iii) the nature of the job. If a review using these criteria would exclude an otherwise-qualified applicant, the employer should then provide an opportunity for an individualized assessment of the applicant's particular circumstances, according to the Enforcement Guidance.

The EEOC gave one concrete example of a proper exclusion that meets the "job related and consistent with business necessity" standard. That is, the EEOC referenced an employer's rule prohibiting anyone with a conviction for theft-related crimes from working in a position with access to personal financial information for four years following the conviction. In the EEOC's example, the employer relied on data regarding recidivism for theft crimes, and also offered rejected individuals an opportunity to provide additional information showing that the exclusion should not be applied to them (in other words, the employer allowed for an "individualized assessment").

The Enforcement Guidance also provides two general rules for employers who are preparing policies regarding exclusions based on criminal history. First, employers should note that a policy that excludes every individual with a criminal record is automatically *not* job-related or consistent with business necessity and will be found to violate Title VII. Again, the employer *must* consider the factors listed above before it can rely on the criminal conviction as the reason to deny employment to the applicant.

Second, an employment decision excluding an individual based on an arrest (as opposed to a conviction), in and of itself, also will not be found to be job-related or consistent with business necessity, since arrests are not indicative of guilt. However, an employer may make an exclusion based on the particular conduct underlying the arrest if that conduct would render an individual unfit for the position at issue. The EEOC provides the example of an assistant principal at an elementary school who is arrested and charged with inappropriate physical contact with students. After investigating the incidents, the school determines that the individual's explanation for his alleged conduct lacks credibility. According to the Enforcement Guidance, the school's actions do not violate Title VII because the employment decision was based on evidence of inappropriate conduct, not on the arrest.

As explained earlier, this EEOC Guidance is <u>not</u> a Court decision. A Court is the one that will ultimately determine whether these Blanket "no hire" policies are essentially unlawful, as the EEOC suggests. However, EEOC Guidance documents are always given strong consideration by a Court, so until a Court addresses this issue, employers that presently utilize blanket "no hire" policies for applicants with criminal histories should rework their hiring processes. Careful analysis of an individual's criminal record must be performed before using it to reject a candidate. Convictions for offenses having no direct correlation to the position, or isolated incidents that occurred far in the past, are particularly suspect.

If you have any questions about this important new Guidance Document, or hiring questions in general, please contact a member of Archer's Labor and Employment Law Department in Haddonfield, N.J., at (856) 795-2121; in Philadelphia, Pa., at (215) 963-3300; or in Hackensack, N.J. at (201) 342-6000.

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