Legal Backgrounder

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EEOC's Limits on Criminal Background Checks: Bad Policy Based on "Completely Unreliable" Data

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In April 2012, the Equal Employment Opportunity Commission (EEOC) issued Enforcement Guidance on employers' use of criminal records in hiring and other employment decisions.[1] This is part of a concerted EEOC effort to attack the use of criminal records in employment decision making—even though the Commission uses such records in its *own* hiring. The Guidance reflects the EEOC's belief that, simply because national statistics show higher arrest, conviction, and incarceration rates for certain racial minorities, a criminal record screening policy or practice likely has an unlawful *disparate impact* based on race or national origin.[2] Thus, the Guidance requires an employer to demonstrate that, for positions in question, the policy or practice is "job related and consistent with business necessity." The EEOC's enforcement position unduly stretches the limits of its authority, presumes that it can establish that using criminal conviction records screening has a disparate impact, and imposes unwarranted burdens on employers, while creating unnecessary conflicts with state laws and risks to the public.

How EEOC Has Employed the Guidance So Far

The Guidance bars exclusions based solely on arrests, which do not establish that criminal conduct has occurred, but concedes that a conviction usually is sufficient evidence that the person engaged in particular conduct. For these reasons, employers generally have eschewed using arrest records except as to open and unresolved arrests. Unfortunately, the Guidance sets a high bar for establishing that excluding individuals with convictions is "job related and consistent with business necessity." It states that employers must first use a "targeted screen" that considers (1) the offense's severity, (2) the time since the conviction or sentence served, and (3) the nature of the job at issue.

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[1] EEOC Enforcement Guidance No. 915/002, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), available at http://www1.eeoc.gov/laws/guidance/arrest_conviction.cfm. The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), which is responsible for enforcing affirmative action by federal contractors under Executive Order 11246 (30 FR 12319, as amended), subsequently issued its own directive essentially adopting the EEOC's Guidance. OFCCP Directive 2013-02 (Jan. 29, 2013), available at http://www.dol.gov/ofccp/regs/compliance/directives/dir306.htm.

[2] An employment practice violates Title VII of the Civil Rights Act of 1964 if it is shown to cause a statistically significant disparate impact on the selection of a classification protected under Title VII, and the employer fails to demonstrate that the practice is "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

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Employers must then perform an "individualized assessment" that allows those excluded by the screen to demonstrate that the exclusion is unwarranted due to their particular circumstances, *e.g.*, because the record is not accurate or because some other factor makes exclusion unnecessary. Thus, the Guidance generally rejects using bright-line screens.

The Guidance recognizes a defense of compliance with *federal* laws and/or regulations that mandate exclusion based on convictions, such as for positions in airport security, the securities industry, banks and insurance, for childcare workers in federal agencies or facilities, and where federal security clearances are needed. However, it maintains that mere reliance on similar *state* law exclusions is not a defense; the employer must show that the exclusion is otherwise job related and consistent with business necessity. Inexplicably, federal employees' childcare is shielded from the hiring of convicted individuals while the EEOC will not recognize the same protection for children when only state law is involved.

The EEOC recently joined with the Federal Trade Commission to issue guidance on the procedures for obtaining criminal and other background information and its use under both Title VII and the Fair Credit Reporting Act (FCRA).[3] In June 2013, the EEOC sued both Dollar General and BMW, alleging that their use of convictions to bar employment has an unlawful disparate impact on African-Americans.[4] Both cases are in the discovery stage.

The Practical Impact of the Guidance

Although the Guidance technically does not have the force of law, the EEOC is behaving as if it does.[5] Any employer that considers convictions in the hiring process without performing a "targeted screen" followed by an "individualized assessment" risks being accused of having a practice with an unlawful disparate impact that it cannot show is job related or consistent with business necessity. This would be the case whether or not the EEOC is able to establish that the practice actually led to a disparate impact. Consequently, many employers may attempt to comply with the Guidance rather than try to defend reliance on a bright-line exclusion rule, achieving the EEOC's goal of reducing the use of criminal convictions without pursuing litigation or even promulgating a new regulation.

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[3] *Background Checks: What Employers Need to Know* (Mar. 20, 2014) available at http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm. Employers performing background credit or criminal checks must also comply with the FCRA's requirements, as well as state and local laws that may limit the use of credit reports to specific types of jobs or restrict when criminal record inquiries can be made.

[4] *EEOC v. Dolgencorp LLC d/b/a Dollar General*, No. 1:13-cv-04307 (N.D. Ill., filed June 11, 2013); *EEOC v. BMW Mfg. Co. LLC*, No. 7:13-cv-01583 (D.S.C., filed June 11, 2013).

[5] The State of Texas has sued the EEOC, alleging that the Guidance is really an improperly promulgated invalid regulation and that the Guidance's actual goal is to encourage the hiring of felons. *State of Texas v. EEOC*, No. 5:13-cv-00255-C, Amended Complaint (N.D. Tex. Mar. 18, 2014).

Court Rejections of EEOC's Position

Several court decisions strongly suggest that the EEOC will be unable to meet the threshold requirement of showing that employer use of convictions actually had a disparate impact. Notably, in both *EEOC v. Kaplan Higher Education Corp*., and *EEOC v. Freeman*,[6] trial courts barred as wholly unreliable the EEOC's proffered expert testimony purporting to show that the use of criminal background and/or credit checks had a disparate impact. The *Freeman* judge even described the EEOC's expert's report as "completely unreliable," "mind boggling," and "worthless." These cases show that the EEOC will face considerable difficulty in presenting appropriate data to establish both the race of applicants and the racial composition of the qualified population in the relevant labor market. The EEOC also may be unable to identify the particular practice allegedly causing a disparate impact, especially if an employer has different background checks depending on the specific job sought and/or considers subjective and objective criteria beyond simple conviction records. Unless the EEOC presents alternative "expert" testimony in the pending *Dollar General* and *BMW* cases, the result is likely to be the same as in *Kaplan* and *Freeman*.

Other Problems from EEOC's Misguided Guidance

Besides incurring the added costs of performing screens and assessments on applicants unlikely to be hired, employers may have to spend more time and money defending discrimination claims by rejected applicants. The Guidance provides no safe harbor and little help for employers making judgment calls in the individual assessment process. For example, when is a person's history of violence old enough that it is no longer relevant? Does a conviction for assault of a family member meet the EEOC's test to establish that an applicant presents an unacceptable risk? Employers following the EEOC's process of individualized targeted screens and assessments may be subject to the perverse result of more accusations of disparate *treatment* than under less discretionary screening processes. As essentially happened in *Freeman*, the employer may even remain exposed to a claim that, overall, there is still a disparate *impact*. These are real concerns for employers to which the EEOC gives little consideration.

It is highly significant that compliance with the Guidance may not provide a defense if the employer hires someone with a conviction for a crime of violence who subsequently harms customers or fellow workers, nor if it hires someone with an old fraud or theft conviction who then again commits fraud or theft against the company, co-workers, or customers. Although the EEOC might prefer that employers abandon all use of criminal records (except where required by federal law), most employers cannot do so without exposing themselves to considerable liability for negligent hiring or other common law claims if they hire someone with a criminal record who then commits a similar offense. These claims, recognized in essentially every state, are based on the theory that an employer has a duty to hire only those applicants who are fit for the job and do not pose an undue risk of harm to customers, co-workers or the public.

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[6] *EEOC v. Kaplan Higher Education Corp*., No. 1:10 CV 2992, 2013 U.S. Dist. LEXIS 11722 (N.D. Ohio, Jan 28, 2013), *aff'd* _ F.3d _, 2014 Fed App. 0071P, 2014 U.S. App. LEXIS 6489 (6th Cir. Apr. 9, 2014); *EEOC v. Freeman*, 961 F. Supp. 2d 783 (D. Md. 2013). *Freeman* currently is on appeal to the U.S. Court of Appeals for the Fourth Circuit.

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The Guidance Places Employers in an Untenable Position

All told, compliance with the Guidance places employers in an untenable situation when state laws place bright-line bars on hiring convicted individuals as, *e.g.*, home-health or child-care employees. If the employer follows the state law, the EEOC may accuse it of failing independently to establish job relatedness and business necessity. If the employer decides not to risk the EEOC's wrath and hires the person, it may be subject to state prosecution, loss of license, or civil lawsuits if the person commits a new crime. The EEOC should not impose such a dilemma on employers.

Despite the Guidance's deficiencies, until the courts further consider it, and in order to avoid becoming an EEOC target, employers should consider (1) not seeking credit and criminal background information until at least after an initial screening (and, where required by state or local law, after an interview or conditional offer); (2) setting up target screens; and (3) where a criminal background check reveals convictions, providing an opportunity to challenge the information's validity (as the FCRA requires) and consideration of whether the exclusion is truly job related. When rejecting an applicant because of a conviction, employers should keep a record as to the reason, noting how the conviction related to the job in question and to business necessity. (As is generally the practice, employers should not seek or use information concerning mere arrests due to the lack of probative value of this information where there was no conviction.) Following these steps will at least establish the basis for a job relatedness/business necessity defense if the EEOC somehow manages to establish that using criminal record information actually caused a disparate impact.

The better solution would be either for the EEOC to withdraw the Guidance and permit employers to do what the EEOC itself does in its screening of applicants, or for the courts to reject the EEOC's effort to enforce it.

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