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EEOC Issues Revised Enforcement Guidance on Use of Criminal Background Checks in Employment Settings

On April 25, 2012, the Equal Employment Opportunity Commission (“EEOC”) issued a revised Enforcement Guidance (“Guidance”) regarding the use of arrest and conviction records in making employment decisions. The EEOC has taken the position that under certain circumstances, if an employer’s reliance on a criminal background check results in the exclusion of individuals of a particular race, national origin, or color from a position, and if the exclusion is not job related and is inconsistent with business necessity, an employer may violate Title VII of the Civil Rights of 1964, as amended (“Title VII”).

Arrest vs. Conviction

Employers should be aware that the EEOC differentiates between reliance on arrest records and on conviction records. The EEOC has opined that because evidence of an arrest does not necessarily mean the individual is guilty of a crime, employers may not exclude applicants from employment or terminate employees simply because they have been arrested. However, an employer may base an employment decision on the conduct underlying the arrest if the conduct makes the individual unfit for the position. On the other hand, if an individual has been convicted of a crime, the conviction sufficiently shows that the individual engaged in the conduct underlying the conviction. Employers may, therefore, rely on conviction records when making

employment decisions, in certain circumstances.

Defenses to Title VII Liability

While employers may base employment decisions on conviction records, they must do so in a way that does not result in a discriminatory exclusion from employment. For example, if an employer implements a facially neutral policy, like rejecting all applicants with criminal convictions, the employer may violate Title VII if the policy disproportionately impacts individuals of a particular race, color, national origin, or other protected category. If, however, an employer can show that a policy or employment decision is job related and consistent with business necessity, the employer may avoid liability under Title VII.

The EEOC continues to support the standards set forth in *Green v. Missouri Pacific Railroad* for determining whether an employment decision is job related and consistent with business necessity. Under *Green*, the employer should consider the following: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct and/or completion of the sentence; and (3) the nature of the job held or sought. Thereafter, the EEOC recommends that employers develop a “targeted screen” where the employer considers the three *Green* factors

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and then provides an opportunity for an individualized assessment for people excluded by the policy in question. The EEOC recommends that the individualized assessment include a notice to the individual that he/she is ineligible for a position because of a criminal conviction; an opportunity for the individual to explain why the conviction should not result in exclusion from employment; and consideration as to whether additional information provided by the applicant/employee warrants an exception to the exclusion.

The EEOC sets forth other defenses to discrimination charges related to exclusions based on criminal history. Where an employer can validate its policy under the Uniform Guidelines on Employee Selection, the employer will meet the “job related and consistent with business necessity” defense. In addition, where an employer can demonstrate that it relied on federal laws and/or regulations that prohibit individuals with certain criminal records from holding particular positions or engaging in particular occupations, the employer may avoid liability under Title VII. Employers must be more careful, however, when relying on state or local laws and/or regulations as a defense to a discrimination charge, because if state/local laws and regulations are inconsistent with Title VII, Title VII may preempt the law/regulation.

Recommendations for Employers

In light of this new Guidance, employers should review their policies regarding the use of and reliance upon criminal background checks when making employment decisions. The EEOC suggests that employers eliminate any policies that result in a blanket exclusion from employment and tailor their policies for screening applicants and employees by identifying essential job requirements, outlining specific criminal offenses that may render an applicant or employee unfit for the position, and engaging in individualized assessments. Employers should carefully consider whether an exclusion from employment is job related and consistent with business necessity before making any employment decision based on a criminal background check. In addition, employers in New York should be mindful of existing state requirements that impact consideration of conviction and arrest records in the context of employment.

If you have any questions or need further guidance to ensure your business complies with the EEOC’s Guidance, please contact [Adam Harris](#) at (212)-758-7724 or any other attorney at the Firm.

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