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Reevaluating Employment Background Checks after the EEOC's Guidance

Employers' use of background screening for job applicants should be reevaluated after the EEOC's April 25, 2012, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*. The Guidance provides that employers may violate Title VII if they treat criminal history information differently for applicants or employees. The EEOC noted that an employer's facially neutral policy can adversely affect an employee or applicant with a criminal history and have a disparate impact based on prohibited characteristics, such as race and national origin. Per the EEOC's Guidance, an employer cannot now simply reject an applicant because of his/her criminal record under an employer's exclusionary policy. In the wake of the EEOC's Guidance, employers using criminal background screening should now be prepared to prove a solid business reason (job necessity) for seeking the information.

Arrest and Conviction Records

It is the EEOC's position that employers cannot deny a job simply because a person has been arrested, as an arrest by itself does not prove that a person engaged in any wrongful conduct. Instead, before denying employment under an exclusionary policy due to an arrest, an employer must consider the underlying conduct and the factual circumstances. The employer should also provide the person with the opportunity to explain before taking action based on an arrest. An employer may then make an employment decision based on the conduct underlying the arrest if the conduct makes the candidate "unfit" for the position at issue. The underlying conduct, not the arrest, must be relevant for the employment decision.

In contrast to arrest records, the EEOC recognizes that a conviction can serve as sufficient evidence that a person engaged in particular conduct. Nonetheless, the EEOC cites concerns with the accuracy and relevance of the record evidence of a conviction (e.g., outdated records or if the conviction was later expunged). Further, the EEOC recommends that employers not ask about convictions on job applications. If, however, employers decide to make such inquiries, the EEOC states that the inquiries should be limited to convictions for which the exclusion is "job related" for the position at issue and is consistent with a "business necessity."

Job Related and Business Necessity

The EEOC has provided some guidance in determining whether an employer's criminal record policy is job related and consistent with a business necessity. Absent a validation study that meets the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.5 (general standards for validity studies), the EEOC believes that an employer can meet the "job related and consistent with business necessity" defense by a targeted screening process that considers the factors outlined in *Green v. Missouri Pacific Railroad*, 523 F. 2d 1290 (8th Cir. 1975). Those factors are:

1. The nature and gravity of the offense or conduct. The employer may look to the specific elements of the crime committed to see if the crime may be associated with the job. In terms of the gravity, an employer would give less weight to misdemeanor crimes.
2. The time that has passed since the offense or conduct and/or completion of the sentence. No specific time frame was given in the Guidance, but case law has reinforced the fact that time is probative for assessing the overall risk an applicant poses with a particular job.
3. The nature of the job held or sought. This inquiry includes a look at the job title, the specific job duties, essential functions of the job, how much supervision and interaction takes place, and the working environment.

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The EEOC believes that a policy or practice requiring an automatic exclusion from employment because of any criminal conduct would be inconsistent with these factors because it does not focus on the dangers of the particular crimes and the risks in particular positions.

The employer must then provide an opportunity for an individualized assessment for those excluded by the policy to determine if the policy is job related and consistent with business necessity. This individualized assessment should:

- Provide notice to the individual that he/she may be excluded because of a criminal conviction.
- Give the individual an opportunity to demonstrate the policy exclusion does not apply to him/her due to the particular circumstances (the number of offenses involved, age at the time of conviction, evidence that the individual performed the same type of work post-conviction with no known incidents of criminal behavior, rehabilitation efforts, character references, among other types of evidence).
- Consideration by the employer whether the additional information warrants an exception to the policy and shows that the policy is not job related and consistent with business necessity.

Best Practices

The EEOC's Guidance does not mean that employers should abandon background screening altogether. In fact, to do so could run afoul of an employer's obligation to use reasonable care when hiring employees and lead to liability if third parties are harmed by an employee. Many courts have held an employer liable for an employee's actions if the employer fails to conduct a reasonable investigation into the employee's background prior to hiring.

In an effort to comply with these obligations without running afoul of Title VII with respect to criminal background policies, employers should at a minimum review their policies. In this regard, it is recommended that:

- Employers develop a narrowly tailored written policy and procedures for screening applicants and employees for criminal conduct.
- Identify in the policy the essential job requirements and the actual circumstances under which the jobs are performed.
- The policy should determine the specific offenses that may demonstrate unfitness for performing such jobs and the duration of exclusions for criminal conduct.
- Employers record the justification for the policy, procedures and exclusions, including a record of consultations and research considered in crafting the policy and procedures.
- Train managers, hiring officials and decision makers on how to implement the policy and procedures consistent with Title VII.

Employers need to craft policies and procedures for conducting criminal background checks carefully, considering both the new EEOC Guidance and the need to provide a safe workplace with honest, productive employees. The employment law professionals at Wilson Elser are available to help employers in structuring background check policies under this developing area of law.