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Alert

EEOC Issues New Guidance Regarding Applicants and Employees with Criminal Records

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New guidance from the U.S. Equal Employment Opportunity Commission ("EEOC") provides that employment decisions based on criminal history may constitute employment discrimination and suggests that employers eliminate policies or practices that generally exclude people from employment based on criminal records. New York law has long limited the use of arrests, criminal charges and convictions in employment decisions. This *Alert* summarizes the EEOC's guidance, revisits federal and New York state laws regarding background checks and permissible uses of criminal records in connection with employment decisions, and addresses how to comply simultaneously with the statutes and disclosure obligations imposed in federal securities regulations.

EEOC Enforcement Guidance on Arrest and Conviction Records in Employment Decisions
The EEOC Office of Legal Counsel issued Enforcement Guidance ("the Guidance") on April 25, 2012 consolidating and updating its previous guidance regarding the use of arrest or conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (Title VII). The Guidance confirms what some courts and other guidance had concluded — that under some circumstances, use of an applicant's or employee's criminal history to make an employment decision may violate the prohibition against employment discrimination under Title VII.

Title VII prohibits employment discrimination based on race, color, religion, sex or national origin, but does not reference criminal history. The Guidance cites national data on criminal records showing that policies that exclude applicants from employment based on criminal history have a disparate impact on certain protected classes of individuals.

The Guidance describes two ways an employer may defend employment decisions based on criminal history. First, there is no violation if the consideration of criminal history is job-related for the position in question and the employment decision is consistent with business necessity. To fall within this exclusion, either (a) the criminal conduct may validly exclude the applicant for the position in question under the EEOC's Uniform Guidelines on Employee Selection Procedures (see 29 C.F.R. § 1607.5), meaning there is data or analysis about the relationship between the specific criminal conduct and specific work performance or behavior, or (b) the employer may develop a targeted screen. Targeted screening of the specific candidate and criminal history at issue involves an individualized assessment that must consider, at a minimum, the following factors: (1) the nature of the crime committed, (2) the time elapsed since the crime was committed, and (3) the nature of the job sought. The policy must provide for individual assessment of employees and applicants to determine whether it is job-related and consistent with business necessity. Failure to individually assess does not create a violation of Title VII in and of itself, but failure to do so increases the likelihood of a violation.

The second defense is compliance with federal law. If federal law or regulations preclude hiring based on criminal history, then employers do not violate Title VII by making employment decisions based on such criminal history. For example, the National Child Protection Act of 1993, as amended by the Violent Crime Control and Law Enforcement Act of 1994, allows for federal criminal background checks of individuals who work for, own, or operate a business that provides care to the elderly or individuals with disabilities, as well as those who are responsible for the safety and well-being of children. The Guidance warns that an employer may not have such defense if it asserts that state and local laws and regulations prohibit the hiring. State and local laws and regulations are preempted by Title VII if they "purport to require or permit the doing of any act which would be an unlawful employment practice under Title VII." If an employer's exclusionary policy or practice is not job-related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not necessarily shield the employer from Title VII liability.

The Guidance outlines the important distinction between arrest and conviction records. Arrests do not establish criminal conduct because they may not result in criminal charges and even once charged, the accused is innocent until proven guilty. Because arrests are not sufficient to establish criminal conduct, a policy or practice based on arrest alone is generally not job related or consistent with business necessity so as to fall within the first exception discussed above. New York employers also should be aware that the New York State Human Rights Law prohibits inquiry or adverse action based on an arrest or criminal accusation not then pending.

According to the Guidance, a conviction is generally sufficient evidence of criminal conduct under most circumstances. An employer, therefore, may be able to make an employment decision based on conduct underlying a conviction if the conduct makes the individual unfit for the position without violating Title VII under the exception described above. New York employers, however, must be aware of the requirements of New York law described below on the use of criminal convictions in employment decisions. The Guidance also suggests that there may be reasons that an employer should not rely on evidence of a conviction for an employment decision (e.g., the fact that a significant number of state and federal criminal record databases include incomplete criminal records) and therefore the targeted screening of the individual applicant should take such factors into consideration.

The Guidance's Best Practices section suggests that employers should eliminate policies or practices that generally exclude people from employment based on criminal records. Instead, the Guidance suggests that employers should develop a narrowly tailored written policy with screening procedures and individualized assessments to fall within the exceptions described above. The EEOC also recommends training decision-makers, such as managers and hiring personnel, about Title VII and its prohibition on employment discrimination. These individuals should be advised that when asking questions about criminal records, they should limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity. They should also be reminded to keep information about applicants' and employees' criminal records confidential.

New York Laws Limiting Use of Criminal Background in Employment Decisions

New York employers must also consider state laws restricting the use of criminal history in employment decisions. New York Executive Law Section 296 makes it unlawful to inquire about or take adverse employment action based upon a non-pending arrest or criminal accusation that was terminated in favor of an employee or applicant. The statute explicitly exempts inquiries required or permitted by statute. New York Correction Law Article 23-A governs how and when an employer can use a criminal conviction in determining whether to hire a new employee or take adverse action against an existing employee. Section 752 of Article 23-A prohibits denial of employment based on conviction for criminal offenses unless there is a direct relationship between the criminal offense and the job or an unreasonable risk to property. Section 753 of Article 23-A describes the factors an employer must consider in hiring decisions involving a conviction. For more information about Article 23-A and amendments to the New York General Business Law that increased protection for employees and prospective employees with criminal convictions, effective Feb. 1, 2009, please see our Nov. 20, 2008 *Alert*.

Criminal Background Disclosure Requirements of Form ADV

Employers that are registered as investment advisers, or that file as exempt reporting advisors with the Securities and Exchange Commission, are required to make inquiries of certain employees to ensure that their disclosures on Form ADV are accurate. Inquiries beyond the substantive scope of Form ADV, or made to

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individuals not covered by Form ADV, could potentially subject employers to liability under Title VII or New York law as described above. If an inquiry pursuant to Form ADV uncovers a criminal conviction, the employer should perform the individualized assessment discussed above (and also set forth in the EEOC Guidance) before taking adverse employment action, to fall within the EEOC's defense for targeted screening and the exception under New York Corrections Law for crimes with a direct relationship to the job.

Additional Background Check Requirements Under the Fair Credit Reporting Act
Employers must also be cognizant of the requirements of the Fair Credit Reporting Act (FCRA), which regulates how background history is obtained and used. Under the FCRA, employers that use investigative services must obtain an employee's written consent before seeking an employee's credit report, investigative consumer reports (which could include background checks), or conducting background checks. Employers who decide not to hire someone or to take adverse action against an employee based on information obtained in these reports must provide a copy of the report and let the applicant or employee know of his or her right to challenge the report under the FCRA. Information obtained from the applicant or employee during this process should be considered when making employment decisions.

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