

Legal Alert

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Mike King
mking@gblaw.com
602-256-4405

New EEOC Guidelines Attempt to Clarify Use of Criminal Background Checks when Screening Future Employees

The Equal Employment Opportunity Commission (EEOC) recently settled an investigation of PepsiCo for \$3.13 million. What did PepsiCo allegedly do wrong? PepsiCo conducted criminal background checks as part of its hiring policy. The EEOC said that Black applicants were excluded from being hired at PepsiCo because of the criminal background check policy. The EEOC taught PepsiCo a \$3.13 million lesson!

On the other hand, pick up the local newspaper and read the headlines. Nearly every day you can find a situation where an employer could have protected its existing employees and community members by conducting criminal background checks and not hiring a convicted criminal. Clearly, some balance is needed!

EEOC Enforcement Guidance

In typical government fashion, the EEOC issued a 52-page document called the EEOC Enforcement Guidance on April 25, 2012 to clarify the guidelines for criminal background checks as a means of screening future employees. EEOC Commissioner Constance Barker thinks the guidelines will harm businesses, however. She said: All this new guidance does is to put business owners between a rock and a hard place: conduct criminal background checks to protect your employees and the members of the public you serve and you bear the risk of having to defend your action as discriminatory; don't conduct a background check and you take the risk that an employee, or a member of the public, will be harmed.

So What's in the EEOC Enforcement Guidance?

For starters, the EEOC tells us: "An employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964 . . ." Your helpful federal government provides a list of "best practices" to keep employers out of trouble for discrimination when using criminal background checks to disqualify applicants. One "best practice" identified by the EEOC is: "Eliminate policies or practices that exclude people from employment based on any criminal record." Gee, that was helpful! If we hire felons, at least we won't be discriminating!

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Disparate Treatment Discrimination

A clear example of improper discrimination using criminal background checks is “disparate treatment.” A violation of the Civil Rights Act might occur if an employer treats applicants or employees differently based upon their races or national origins despite similar prior criminal convictions. For example, if the Asian applicant and the White applicant were both convicted of fraud and you refused to hire the Asian applicant because of the conviction, but hire the White applicant anyway, you have probably unlawfully discriminated.

Disparate Impact Discrimination

The EEOC says: “An employer’s neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity...” The EEOC even tells us that neutral policies on criminal background checks are likely to get employers in trouble for discrimination. According to the EEOC, national data shows that not hiring people based on criminal records has “a disparate impact based on race and national origin.”

Possible Defenses

Employers can defend discrimination cases arising from criminal background checks if the criminal background checking policy is “job related and consistent with business necessity.” The EEOC gives two circumstances where employers will consistently be able to meet the “job related and consistent with business necessity” defense.

One is where the employer determines that the particular criminal conduct which disqualifies job applicants shows the relationship between the criminal conduct and subsequent work performance or behaviors. For example, convicted pedophiles shouldn’t work in childcare!

The second circumstance is where the employer screens based upon (1) the nature of the crime, (2) the time elapsed after the crime, and (3) the nature of the job. That makes sense, but then the EEOC says: “The employer’s policy then provides an opportunity for an individualized assessment for those people identified by the screening, to determine if the policy as applied is job related and consistent with business necessity.” The EEOC says that if you do not include the individualized assessment, you are more likely to violate Title VII.

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Stop and think about that! You can't engage in disparate treatment by treating people from different races or national origins differently despite the same type of criminal history. But if your neutrally applied screening mechanism eliminates people, the EEOC says you should do "individualized assessments." Such "individualized assessments" invite opportunities for "disparate treatment" which would clearly be discriminatory violations! As soon as your individualized assessment causes you to hire the White guy instead of the African American, you're in trouble!

If you need assistance in drafting policies and procedures to comply with the EEOC Guidance for the use of arrest and conviction records in employment decisions, please contact Mike King, mking@gblaw.com or at (602) 256-0566..