A Timely Analysis of Legal Developments

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Two New EEOC Criminal Record Lawsuits Underscore Important Strategic and Practical Considerations for Employers Conducting Background Checks

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In March 2010, an employer successfully persuaded the Equal Employment Opportunity Commission (EEOC) to concede its disparate impact discrimination lawsuit against the employer based on its criminal record screening policies in a federal case in Michigan.[1] The EEOC was ordered to pay $250,000 in attorney's fees and $500,000 in costs, including expert witness fees. In February 2013, a different employer successfully persuaded a federal court in Ohio to dismiss the EEOC's disparate impact discrimination lawsuit against the employer based on the employer's credit history screening policies.[2] In a similar disparate impact discrimination case that is currently pending in Maryland involving both criminal records and credit history information, a different employer has made a similar motion to dismiss the EEOC's lawsuit, and the federal court could issue a ruling at any time.[3]

Nonetheless, on June 11, 2013, the EEOC filed two new criminal record lawsuits, one in South Carolina, and one in Illinois. The new lawsuits reflect the EEOC's vigorous interest in enforcing its interpretation of Title VII of the Civil Rights Act of 1964, which is detailed in the EEOC's updated enforcement guidance, titled, "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964."4[4]A flurry of new EEOC charges and broad-based investigations by the EEOC are virtually certain to follow in the next 12 to 24 months. This result is expected based on the EEOC's Strategic Enforcement Plan, which refers to "Eliminating Systemic Barriers in Recruitment and Hiring" as one of the EEOC's "National Priorities" (e.g., "use of screening tools," "background screens," etc.).[5]

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1 *See EEOC v. Peoplemark, Inc.*, Case No. 1:08-cv-00907 (W.D. Mich. filed Sept. 29, 2008). The EEOC has appealed the district court's order awarding attorney's fees and costs to Peoplemark as the prevailing party.

2 *See* Rod Fliegel, Jennifer Mora and William Simmons, *EEOC Suit Against Employer Screening Applicants Based on Credit History Information Dismissed*, Littler ASAP (Feb. 4, 2013).

3 *See EEOC v. Freeman*, 8:09-cv-02573 (D. Md., Filed Nov. 30, 2009).

4 Available at www.eeoc.gov/laws/guidance/arrest_conviction.cfm and EEOC, Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII, www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.

5 *See* Strategic Enforcement Plan, approved by the EEOC on December 17, 2012, available at http://www.eeoc.gov/eeoc/plan/sep.cfm.

For employers, these developments underscore the importance of continuing to monitor closely case developments involving consideration of criminal records in the hiring process in order to assess opportunities to fortify their Title VII compliance. It is also prudent for employers, especially large and nationwide employers, to be mindful of the EEOC's construction of Title VII and the raft of questions and strategic considerations concerning the EEOC's recommended best practices regarding criminal background checks.

Below, we briefly summarize the EEOC's updated guidance and the allegations in the two new lawsuits. In addition, we highlight a key pending case that may impact the EEOC's compliance efforts in dealing with criminal history. We also provide straight forward answers to some of the more pressing questions. Although we do not delve deeply into related considerations, such as the proliferation of new state law criminal history restrictions, employers should continue to stay abreast of state law and local developments.[6]

Summary of the EEOC's Updated Guidance

The EEOC maintains with regard to conviction record screening policies that an "employer needs to show that the policy operates to effectively link specific criminal conduct and its dangers with the risks inherent in the duties of a particular position." The EEOC offers two examples where "employers will consistently meet the 'job related and consistent with business necessity' defense."

First, the statute will be satisfied if the employer "validates" the criminal conduct screen for the position at issue by relying on the three different approaches set forth in the Uniform Guidelines on Employee Selection Procedures. The EEOC appears to recognize the very significant data challenges associated with formal validation in this context.

Second, an employer may deploy a "targeted screen" that considers the three *Green* factors (derived from *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1975)), which have been the centerpiece of the EEOC's guidance for the past 25 years): (1) the nature and gravity of the offense; (2) the time that has passed since the offense and/or completion of the sentence; and (3) the nature of the job held or sought.

The guidance adds some "flesh to the bones" in describing how these factors should be used, but most importantly takes the position that an "individualized assessment" should be made by an employer in virtually all instances before the employer disqualifies an individual for employment based on past criminal conduct. The guidance enumerates the following specific factors for an employer to consider in this assessment: (1) the facts or circumstances surrounding the offense or conduct; (2) the number of offenses for which the individual was convicted; (3) older age at the time of conviction or release from prison; (4) evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct; (5) the length and consistency of employment history before and after the offense or conduct; (6) rehabilitation efforts, e.g., education and training; (7) employment or character references and any other information regarding fitness for the particular position; and (8) whether the individual is bonded under a federal, state, or local bonding program.

The EEOC's guidance provides that where an applicant or employee does not respond to requests for such information, the employer may make its employment decision without the information. The EEOC also acknowledges that an employer may be able to justify a targeted criminal records screen solely under the *Green* factors (i.e., one without an individualized inquiry), but only where the targeted records screen is "narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question."

If an employer conducts an individualized assessment, the guidance suggests that the employer: (1) inform the applicant that he or she may be excluded based on the past criminal conduct; (2) provide an opportunity to the individual to establish that the exclusion should not apply; and (3) consider whether the individual assessment shows that the policy should not be applied to the applicant.

The guidance recognizes that some state and local laws may restrict or prohibit the employment of individuals with records of certain criminal conduct. However, in the EEOC's view, Title VII preempts state and local laws if they "purport[] to require or permit the doing of any act which

6 *See* Jennifer Mora, Rod Fliegel and Sherry Travers, *The Flurry of New Employment Laws Regulating the Use of Criminal Records Continues with Expanded Restrictions in Indiana, North Carolina, Texas, and Buffalo, New York*, Littler ASAP (June 7, 2013). *Also see* Dale Deitchler, Rod Fliegel, Susan Fitzke and Jennifer Mora, *Minnesota Enacts "Ban the Box Law" Prohibiting Employment Application Criminal History Checkmark Boxes and Restricting Criminal Record Inquiries Until After Interviews or Conditional Job Offers*, Littler ASAP (May 17, 2013).

would be an unlawful employment practice under Title VII." As a result, the EEOC takes the position that 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 will not shield the employer from Title VII liability.

The updated guidance concludes with recommended Employer Best Practices, i.e., the EEOC's framework for employers to follow in creating a "narrowly tailored written policy and procedures for screening for criminal records." In keeping with the Best Practices, employers must identify essential job requirements and the "actual circumstances under which the jobs are performed," determine the specific offenses that may demonstrate unfitness for performing such jobs, and determine the duration of exclusions for criminal conduct (including an individualized assessment). The EEOC further recommends recording the justification for the policy and procedure, providing related training and education to managers, hiring officials and decision makers, and maintaining criminal record information in a confidential manner. (Section VIII, Employer Best Practices)

Summary of the EEOC's New Lawsuits

The lawsuits, separately filed in federal courts in South Carolina and Illinois, allege that the employers violated Title VII by implementing and utilizing criminal background check policies that resulted in employees being terminated and others being screened out for employment. One lawsuit alleges that the employer "disproportionately screened out African Americans from jobs" and that the employer's policy containing "blanket exclusions" for convictions was not "job related and consistent with business necessity." In the other lawsuit, the EEOC alleges that the employer's policy conditioning its job offers on criminal background checks resulted in a disparate impact against African Americans on a nationwide basis. The EEOC announced that the lawsuits are "the latest in a series of systemic cases the Commission has filed to challenge unlawful hiring practices."

Potential Impact of Pending EEOC Lawsuit

While these cases proceed through the courts, the Maryland case noted above, filed in November 2009,[7] provides a "roadmap" concerning some of the legal and factual issues to be litigated when dealing with criminal (and credit) history. In that case, the EEOC alleged, in relevant part, that the employer's use of credit history information and criminal records had a disparate impact on African American and Hispanic job applicants (and male applicants generally).[8]

On December 21, 2012, the employer filed a motion for summary judgment. While the employer requested dismissal on various grounds, including challenging the EEOC's expert testimony, the argument to be most closely watched is the employer's claim that the EEOC relies solely on the cumulative effects of various elements of an employer's criminal record (and credit) policies, rather than identifying the specific criminal offenses (e.g., theft-related offenses, sex offenses, drug trafficking, etc.) relied on to exclude applicants that have a disparate impact on African American or male applicants. In response, the EEOC argues that the overall practice of excluding individuals based on a criminal (or credit) record can be looked at in its totality and its adverse impact on those in a protected group.

Oral argument is expected to be heard later this month. The summary judgment ruling will be significant for both employers and the EEOC, but regardless of the outcome, the losing party will argue that the decision is not binding because it is merely the decision of one district court on the issue. An appeal to the Circuit Court of Appeals is likely.

Answers to Pressing and Immediate Questions

While the case summaries discussed above provide an update on the EEOC's enforcement activities and some guidance regarding the EEOC's approach in challenging employer practices, below is some practical guidance for employers when considering the EEOC's guidance and the use of criminal records for employment purposes.

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7 *See EEOC v. Freeman*, 8:09-cv-02573 (D. Md., Filed Nov. 30, 2009).

8 The district court dismissed the EEOC's claims as they pertained to the Hispanic workers.

Is the updated enforcement guidance "the law"?

The guidance represents the EEOC's construction of Title VII. The federal and state courts are not bound by and do not have to defer to the guidance. Indeed, the EEOC issued this guidance in part because of criticism of its prior guidance as unpersuasive by the U.S. Court of Appeals for the Third Circuit. That said, it is a certainty that the EEOC will rely on its guidance in administrative enforcement actions, and at least some courts are likely to defer to the guidance based on the EEOC's role in enforcing Title VII since the statute's enactment in 1964.

Does the EEOC prohibit employers from asking about criminal records on employment applications or early in the hiring process?

No. The guidance notes that some states require employers to wait until late in the hiring process to ask about conviction records, but the EEOC only "recommends" that employers not ask about convictions on job applications. If employers do so, however, the EEOC advises that such inquiries be "limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity."

Does the EEOC prohibit employers from considering criminal records in hiring and employment decisions?

No. The EEOC takes the position that employers should be circumspect in using criminal records, based largely on the national data concerning disproportionate arrest and conviction rates, but does not purport to prohibit employers outright from considering criminal records.

Is the EEOC going to presume disparate impact in its investigations?

The EEOC stops short of saying that it will presume a disparate impact from the use of arrest and/or conviction data, but does state that the national data "supports" a finding with regard to race and national origin. An employer defending a charge of discrimination on this basis will have the opportunity to contest a finding of disparate impact based, for example, on data concerning local arrest and conviction rates for protected class members.

To satisfy the business necessity standard, is the EEOC requiring formal validation of a criminal record screening policy?

No. The EEOC takes the position that formal validation is one way to satisfy the business necessity standard (though an unlikely one, based on significant data challenges), but states that an alternative is to deploy what it calls a "targeted screen," i.e., a screen that incorporates the Green factors, and in most instances provides an opportunity for an individualized assessment of potentially disqualified ex-offenders. The EEOC enumerates a list of factors to consider.

Does the EEOC address the significance of older criminal history information, a question that garnered significant attention at the EEOC's public meetings?

Yes. One of the factors for determining whether use of conviction records is job related and consistent with business necessity, according to the EEOC, is the time that has passed since the offense, conduct and completion of the sentence. However, the EEOC does not suggest, much less define, a bright-line standard in this regard. In fact, the EEOC says that whether the "duration of an exclusion will be sufficiently tailored to justify the business necessity standard will depend on the particular facts and circumstances of each case." The EEOC further notes that academic studies demonstrate the risk of recidivism declines over time, and these studies may inform an employer's consideration of aged conviction or arrest data.

Can an employer still use a consumer reporting agency (or background screening company) to gather and report the criminal history information?

Yes. The guidance does not purport to prohibit employers from using consumer reporting agencies to provide background check reports, but does seem to warn employers away from using such agencies when they provide unreliable information.

Does it matter whether an employer is subject to regulatory requirements?

Yes. The EEOC acknowledges that some employers are subject to regulatory requirements, but cautions employers about adopting screening policies that exceed those requirements.

Conclusion

Employers that use or are considering using criminal records to screen applicants or employees should consider the following:

- Employers that want to assess potential disparate impact risks should consider conducting a privileged review of their criminal record-based screening policies to help identify areas of opportunity to fortify Title VII compliance.[9] Questions to consider include whether the policy:
    - incorporates variation among different roles within the company;
    - strategically sequences the consideration of criminal records and other types of background information;
    - accounts for the developing body of criminological literature discussing recidivism; and
    - requires confidential handling and destruction of sensitive information.
- Employers should continue to be mindful of, and comply with, the various laws that impact the use of criminal records in addition to Title VII, including state fair employment laws and the federal and state fair credit reporting laws, such as the Fair Credit Reporting Act.[10]

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9 For a comprehensive review of the EEOC's updated guidance and related legal concerns, including applicable state law compliance issues, *see* Barry Hartstein, Rod Fliegel, Jennifer Mora and Marcy McGovern, *Criminal Background Checks: Evolution of the EEOC's Updated Guidance and Implications for the Employer Community*, Littler Report (May 17, 2012).

10 *See* Rod Fliegel and Jennifer Mora, T*he FTC Staff Report on "40 Years of Experience with the Fair Credit Reporting Act" Illuminates Areas of Potential Class Action Exposure for Employers*, Littler Report (Dec. 12, 2011).