Westlaw Journal
EMPLOYMENT
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 31, ISSUE 3 / AUGUST 30, 2016

EXPERT ANALYSIS

California Fair Employment & Housing Council Considers Proposed Rules to Restrict Employer Use of Criminal History

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In April 2012, the Equal Employment Opportunity Commission (EEOC) issued its long-awaited "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (2012 Guidance).

The updated guidance does not prohibit employers from using criminal records, but outlines what the EEOC considers recommended best practices, including a recommendation that employers, among other things:

(1) remove from employment applications the question that asks job applicants to self-disclose their criminal record;

(2) not make an employment decision based solely on the fact of an arrest record; and

(3) conduct an "individualized assessment" before rejecting an applicant or terminating an employee because of a conviction.

Since that time, most legislation at the state and local level impacting employer use of criminal records has focused almost exclusively on "banning the box." Specifically, numerous jurisdictions have implemented statutes and ordinances that require employers to remove the criminal history question from job applications and to wait until a later time, such as after an interview or a conditional offer (depending on the jurisdiction), to present the criminal question to job applicants.[1]

Earlier this year, however, the California Fair Employment & Housing Council (FEHC) issued proposed regulations that set out numerous ways in which employers can face liability when using a job applicant's or employee's criminal history in hiring and in making other employment decisions.

In many ways, the proposed regulations borrow heavily from the EEOC's 2012 Guidance. Specifically, if adopted, the regulations will not outright prohibit a California employer from considering criminal information.

Moreover, even though one's status as an "ex-offender" is not considered a protected characteristic under California law or Title VII, the regulations, if adopted, will allow an applicant or employee to bring a discrimination claim if the employer's use of conviction records results in an "adverse impact" (referred to by the EEOC as "disparate impact") on those in protected classes, such as race, national origin and gender.

The high points of the proposed regulations, originally released in March 2016 and recently amended in July 2016, are summarized below.

Although this Insight does not delve deeply into related considerations, such as the interplay between the proposed regulations and the Fair Credit Reporting Act (FCRA), employers should continue to be mindful of their obligations under these laws when using criminal background reports provided by third-party consumer reporting agencies.[2]

In addition, nationwide employers should continue to be mindful of so-called "ban the box" laws and the fair employment laws in some states that extend various protections to ex-offenders as "ex-offenders," rather than as members of an otherwise protected class.

PROPOSED PROHIBITION ON CONSIDERING CERTAIN MARIJUANA CONVICTIONS

California currently prohibits employers from considering certain types of criminal records, including an arrest or a detention that did not result in a conviction, certain petty marijuana convictions and infractions that are older than two years and convictions that have been sealed, judicially dismissed, expunged or statutorily eradicated by law. The FEHC proposes to expand this list to include *any* non-felony possession of marijuana conviction that is older than two years.

The regulations would allow an applicant or employee to bring a discrimination claim if the employer's use of conviction records results in an "adverse impact" on those in protected classes, such as race, national origin and gender.

PROPOSED STANDARDS FOR PROVING ADVERSE IMPACT DISCRIMINATION

The regulations propose to prohibit an employer from considering criminal history in employment decisions if doing so would result in an adverse impact on individuals within a protected class. This theory of discrimination may result from the administration of a facially-neutral policy or procedure; specifically, criminal record screening policies that disproportionately affected members of protected classes.

According to the proposed regulations, a job applicant or employee will bear the threshold burden of proving that an employer's criminal background screening policy has an adverse impact on a protected class.

In establishing adverse impact, the applicant or employee can rely on state- or national-level statistics showing substantial disparities in the conviction records of one or more protected characteristics, unless there is a persuasive basis to expect a different result after accounting for any particularized circumstances, such as

(1) the geographic area covering the applicant or employee pool,

(2) the particular types of convictions being considered, or

(3) the specific job at issue.

If there is a persuasive basis to expect a different result after accounting for these circumstances, or if an applicant or employee presents evidence beyond statistics in the first instance, the regulations would allow the applicant or employee to establish adverse impact by presenting conviction statistics that address the particularized circumstances and show substantial disparities in the conviction records of one or more protected classes, or offering any other evidence that proves an adverse impact.

Similar to the defense of a disparate impact theory of liability under Title VII, the FEHC's proposed regulations state that if a job applicant or employee can establish an adverse impact, the burden will shift to the employer to prove that its conviction policy is job-related and consistent with business necessity.

In this regard, the employer will be required to show that its policy bears a "demonstrable relationship to successful performance on the job and in the workplace and measure the person's fitness for the specific job, not merely to evaluate the person in the abstract."

The employer also will be required to establish that the policy or practice is appropriately tailored to the position at issue, taking into account certain factors, derived from *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1975) (the centerpiece of the EEOC's position for the past 25 years):

(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.

On this point, depending on whether the employer has a "bright-line" conviction disqualification rule or conducts an individualized assessment of the conviction, the proposed regulations set out in detail (not fully explained here) the ways in which an employer will be able to prove that a policy or practice of considering conviction history in employment decisions is appropriately tailored to the job at issue.

Importantly, the FEHC proposes a rebuttable presumption that a policy is not sufficiently tailored to meet the job-related and consistent with business necessity affirmative defense if the employer has a bright-line disqualification policy that includes convictions that are older than seven years (unless subject to an exemption described below).

If an employer can meet its burden of proving that its policy or practice of considering conviction history is job-related and consistent with business necessity, the applicant or employee still may be able to prevail if he or she can demonstrate there is a less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice.

The employer will be required to show that its policy bears a "demonstrable relationship to successful performance on the job and in the workplace and measure the person's fitness for the specific job, not merely to evaluate the person in the abstract."

PROPOSED NOTICE REQUIREMENTS

Before an employer may take an adverse action (e.g., declining to hire, discharging, or declining to promote) against an applicant or employee based on conviction history, the regulations propose to require an employer to give the applicant or employee notice of the disqualifying conviction and provide him or her with a reasonable opportunity to present evidence that the conviction information is factually inaccurate.

If the employee can demonstrate the record is factually inaccurate, the employer will not be permitted to consider the record. This notice is required regardless of whether the conviction history is derived from a third-party background check report or some other source (*e.g.*, the employer's independent court records or internet research). This is different from the FCRA, which requires certain notices if the employer takes adverse action against an applicant or employee based, even in part, on information contained in a background check report.

PROPOSED EXEMPTIONS FOR CERTAIN REGULATED EMPLOYERS

The FEHC recognizes that some employers are subject to federal or state laws or regulations that (1) prohibit individuals with certain criminal records from holding certain positions or (2) mandate a screening process employers are required or permitted to utilize before employing individuals in such positions.

The proposed regulations also note that some federal and state laws and regulations make criminal history a determining factor in eligibility for occupational licenses. In these situations, according to the FEHC, compliance with these laws or regulations constitutes a defense to an adverse impact claim under California law.

PROPOSED INTENTIONAL DISCRIMINATION

The proposed regulations also address the non-controversial subject of intentional or "disparate treatment" discrimination. Specifically, the FEHC reiterates the long-standing rule that it is unlawful for an employer to treat applicants or employees differently when considering conviction history if such treatment is substantially motivated by a protected characteristic.

NEXT STEPS FOR EMPLOYERS

The comment period for the amended version of the proposed regulations expired on July 22, 2016. The FEHC anticipates sending the proposed regulations in final form to the Office

of Administrative Law by December 2016. Final approval could come as early as February 2017, with the effective date set in the final version.

In the meantime, 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/adverse impact risks should consider conducting a privileged review of their criminal record-based screening policies and procedures to help identify areas of opportunity in terms of fortifying the policies and procedures as defensible under California law, if the regulations are adopted, and Title VII.

- Employers should continue to be mindful of, and comply with, the various laws that impact the use of criminal records in addition to the California Fair Employment and Housing Act and Title VII, including state fair employment laws and the federal and state fair credit reporting laws, such as the FCRA.

NOTES

[1] *See* Jennifer Mora, Philip Gordon and Matthew Curtin, *Connecticut Becomes the Third Jurisdiction in 2016 to "Ban the Box",* Littler Insight (June 3, 2016); Jennifer Mora, *Vermont Joins the Ranks of Cities and States that "Ban the Box,* Littler Insight (May 10, 2016); Philip Gordon and Jennifer Mora, *Austin Becomes the First City in Texas to "Ban the Box",* Littler Insight (Mar. 25, 2016).

[2] *See* Jennifer Mora, *Federal Courts Increase Scrutiny of Employer Compliance with the FCRA's Adverse Action Requirements,* Littler Insight (Jan. 4, 2016); Rod Fliegel, Jennifer Mora, and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers,* Littler Report (Aug. 1, 2014).

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