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EEOC Issues New Guidance on Criminal Background Checks

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On April 25, 2012, the Equal Employment Opportunity Commission ("EEOC" or "Commission") issued new Enforcement Guidance on criminal background checks, after the Commissioners approved it in a 4-1 vote. The EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et. seq.* (the "Guidance") consolidates and supersedes the Commission's 1987 and 1990 policy statements on the subject matter as well as the discussion of arrests and convictions in the agency's Race & Color Discrimination Compliance Manual Chapter.

The EEOC stated that guidance was needed to address a 2007 decision from the U.S. Court of Appeals for the Third Circuit in *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232 (3d Cir. 2007), that criticized past Guidance. It also said new Guidance was needed to address the rise in conviction rates generally, and the disproportionately high conviction rates of African American and Hispanic men. Finally, it said the new Guidance was needed to address the increasing availability and ease with which criminal background checks can be conducted and the widespread use of such checks by employers.

The Guidance describes the circumstances under which use of arrest and conviction records in hiring may run afoul of Title VII of the Civil Rights Act of 1964 ("Title VII") under either a disparate treatment of disparate impact theory. It continues to endorse employer use of the factors set out in the *Green v. Missouri Pacific Railroad Company*, 523 F.2d 1158, 1160 (8th Cir. 1975), when making employment decisions based on conviction record. The *Green* factors are:

- The nature or gravity of the offense or conduct;
- The time elapsed since the offense, conviction; and/or completion of the sentence; and
- The nature of the job sought or held.

In the Guidance, the EEOC also discusses two circumstances in which an employer's criminal conviction policy will "consistently meet" Title VII's "job related and consistent with business necessity" defense. According to the Commission, employers who are able to validate their use of background screening policies and practices or to develop a targeted screen using the *Green* factors and provide employees with criminal records an opportunity for an "individualized assessment" will meet the defense. Nonetheless, the Guidance acknowledges that Title VII does not necessarily require individualized assessment, and, in discussing the Guidance at yesterday's hearing, Commissioner Lipnic noted that there are certain industries, jobs and situations in which a policy that did *not* include individualized assessment would likely be acceptable.

During the meeting, EEOC also made clear that compliance with another federal law, such as the FDIC Act, which requires banks to conduct criminal background checks on applicants and restricts their hire of individuals with certain conviction histories, is a defense to a claim of discrimination under Title VII. The Guidance also clarifies that compliance with federal statutes and regulations governing eligibility for occupational licenses and registration is also a defense to a Title VII claim. The Commission emphasized, however, that in situations where an employer imposes an exclusion that goes beyond the scope of a federally imposed restriction, the discretionary aspect of the policy would be subject to Title VII analysis.

The Guidance is more circumspect as to whether compliance with state law could form the basis of a defense, noting that Title VII preempts state laws that conflict with it. However, it is likely that an individual's ability to satisfy state law requirements for conduct of a specific position is a qualification that is job related and consistent with business necessity. For example, if a state prohibits individuals with certain conviction records from being licensed to perform a specific job, such as a social worker, then an employer's decision not to hire an individual who cannot qualify for a license should satisfy Title's VII's job related and consistent with business necessity standard. Commissioner Victoria Lipnic urged EEOC field offices to be mindful of the bind the Guidance seemingly places on employers who are faced with possibly running afoul of Title VII when merely complying with state law, and to be flexible in their approach to enforcement in this circumstance.

The Guidance also sets out the EEOC's view that decisions based on arrests are not job related and consistent with business necessity, but that employment decisions could be based on the problematic conduct underlying an arrest.

Following its interpretation of the legal requirements, the Guidance offers best practice tips for employers that include:

- Eliminate policies that impose an absolute bar to employment based on any conviction;
- Train hiring managers about appropriate use of conviction history in hiring and promotion, and separation;
- Tailor screening procedures to ensure that they are job related and consistent with business necessity;
- Do not ask applicants for disclosure of convictions that are not job related and consistent with business necessity; and
- Keep information about applicants’ and employees' conviction history confidential.

What Employers Should Do Now:

- Review background screening policies and practices in light of the new guidance; and
- Make adjustments needed to the extent practices cannot be justified as job related and consistent with business necessity.
- Recruiters and job interviewers must be trained in connection with the EEOC's Guidance in order to be credible witnesses in any challenge to the employer's hiring, promotion, or separation decision-making.

Please contact your Proskauer lawyer for more information or with any questions you have in updating your policies.