



EEOC ISSUES GUIDANCE ON EMPLOYERS' USE OF ARREST AND CONVICTION RECORDS



Gerard Jabaley
 "Employers have reported that their use of criminal history information is related to ongoing efforts to combat theft and fraud, as well as heightened concerns about workplace violence and potential liability for negligent hiring."

On April 24th the Equal Employment Opportunity Commission (EEOC) issued enforcement Guidance on employers' use of arrest and conviction records in employment decisions under Title VII. Among other topics, the Guidance discusses:

- How employers' use of an individual's criminal history in making employment decisions could violate the prohibition against employment discrimination;
- The differences between the treatment of arrest records and conviction records; and
- Best practices for employers.

Employers' use of criminal history information is particularly important, inasmuch as one survey reveals that 92% of responding employers stated that they subjected all or some of their job candidates to criminal background checks. Employers have reported that their use of criminal history information is related to ongoing efforts to combat theft and fraud, as well as heightened concerns about workplace violence and potential liability for negligent hiring.

Arrest Records

The EEOC and the courts have long distinguished between arrest and conviction records for purposes of making employment decisions. The EEOC Guidance states that the fact of an arrest does not establish that criminal conduct has occurred, and that an exclusion based on an arrest, in itself, is not job related and consistent with business necessity, particularly if it has an adverse effect on protected groups. Many protected groups, such as African-Americans and Hispanics, are arrested at a rate substantially higher than their proportion of the general population. If such national data is used as a comparison, disqualifying a person due to an arrest record could disqualify a substantially higher proportion of protected group applicants, thus resulting in a violation of Title VII, unless the employer could justify the criteria as job-related and consistent with business necessity. The

Guidance does indicate, however, that an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question. Unfortunately, the Guidance is somewhat unclear as to how or the extent to which the employer must show a factual basis for believing the underlying conduct actually occurred, as opposed to being a mere allegation.

Conviction Records

In contrast, the Guidance indicates that a conviction record would usually serve as sufficient evidence that a person engaged in particular conduct. However, the Guidance indicates that in certain circumstances, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision. The Guidance cites with approval an old 1975 Eighth Circuit ruling, *Green v. Missouri Pacific Railroad*, 523 F.2d 1290, 1293 (CA 8 1975), which held that it was discriminatory under Title VII for an employer to "follow the policy of disqualifying for employment any applicant with a conviction for a crime other than a minor traffic offense." The Eighth Circuit identified three factors that were relevant to assessing whether the exclusion is job related for the position in question and consistent with business necessity:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense or conduct and/or completion of the sentence; and
- The nature of the job held or sought.

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The Guidance goes on to utilize the concepts from the *Green* ruling to set forth the circumstances in which the EEOC believes employers will consistently meet the “job related and consistent with business necessity” defense when utilizing criminal records:

- The employer validates the criminal conduct screen for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if data about whether the criminal conduct is related to subsequent work performance or behavior is available and such validation is possible); or
- The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the 3 factors identified by the *Green* court), and the employer’s policy then provides an opportunity for an individualized assessment for those people identified by this screen to determine whether the policy as applied is job related and consistent with business necessity.

Individual Assessment

The most significant aspect of the Guidance is the EEOC’s statement that although Title VII does not require an individualized assessment in all circumstances, the use of a screen that does not include an individualized assessment is more likely to violate Title VII. Therefore the EEOC suggests that best practices requires that an employer conduct an “individualized assessment” after it informs an employee or applicant that he or she may be screened out due to a criminal record and that the individual then be provided an opportunity to respond. This insures that the employer considers all circumstances before making a final decision. A relevant survey by the Society of the Human Resource Management indicates that many employers already allow job candidates to explain the results of a criminal background check.

When providing an employee or job applicant an opportunity to demonstrate that the exclusion does not properly apply to him, the individual should be permitted to explain all relevant individualized evidence, including for example:

- The facts or circumstances surrounding the events or conduct;
- The number of offenses for which the individual was convicted;
- Older age of the time of conviction, or release from prison;
- 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;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references or any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

This type of information will assist the employer in determining whether or not the screening and disqualification policy as applied to the individual applicant or employee is job-related and consistent with business necessity. If the individual does not respond to the employer’s attempt to gather additional information about his background, the employer may make its employment decisions without the information.

The Guidance further states that in evaluating the nature and gravity of the events or conduct as part of the individualized assessment, the nature of the offense or conduct should be assessed with reference to the harm caused by the crime (e.g., theft causes property loss). The legal elements of the crime may also be instructive. For example, a conviction for felony theft may involve deception, threat, or intimidation. With respect to the gravity of the offense, offenses identified as misdemeanors may be less severe than those identified as felonies. With respect to the time that has passed since the offense or conduct, or completion of the sentence, the Guidance notes that the *Green* court did not endorse a specific time frame for criminal conduct exclusions, although it did note that permanent exclusions from all employment based on any and all offenses were not consistent with the business necessity standard. The Guidance cites subsequent cases that indicate that a plaintiff might have a legal claim when he presents evidence that “there is a time at which a former criminal is no longer any more likely to recidivate than the average person...” Cases or studies noted in the footnotes in the Guidance indicate that having a clean record for seven to fifteen years suggests that the conviction data may no longer be relevant and therefore, possibly not sufficient to establish a job-related business necessity defense.

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WHAT THE SUPREME COURT'S DECISION ON HEALTH REFORM MEANS FOR EMPLOYERS



Cathy Shuck
"The Court held that the individual mandate is a constitutional exercise of Congress' Taxing Power."

On June 29, 2012, the last day of its 2011 Term, the U.S. Supreme Court rejected challenges to the Patient Protection and Affordable Care Act ("ACA"), resolving the question of whether or not President Obama's signature legislative achievement is constitutional. The Court held that the individual mandate is a constitutional exercise of Congress' Taxing Power.

Chief Justice John Roberts's opinion, portions of which the four more liberal justices joined to form a majority, thus leaves the individual mandate intact, and with it virtually the entire ACA. Although both the Chief Justice and the four conservative dissenting justices found that the individual mandate and its associated penalty is not a constitutional exercise of the Commerce Clause power, the ACA survives that ruling since a majority of the Court found the mandate constitutional under the Taxing Power.

The only ACA provision the Court struck down was the threat to withhold all Medicaid funding from states that refuse to join the Medicaid expansion, which seven justices found unconstitutionally coercive. That ruling, which permits states to opt out of the Medicaid expansion entirely, created the next front in the battle between the states and the federal government over the ACA. Of course, the political battle over the ACA will continue as well, through the November elections and perhaps beyond.

The bottom line for employers is that although portions of the ACA remain vulnerable to repeal efforts, employers should plan to implement the ACA's provisions with due dates in 2012 and 2013. These include:

- The requirement to distribute a Summary of Benefits Coverage (SBC) in conformance with requirements promulgated by the Center for Consumer Information and Insurance Oversight, for open enrollment periods beginning on or after September 23, 2012
- The Form W-2 reporting requirement for the 2012 tax year (deferred until the 2013 tax year for employers who filed fewer than 250 W-2s in 2011)
- The \$2,500 limit on employee contributions to health flexible spending accounts (FSAs) for plan years beginning in 2013
- The increased Medicare payroll tax on high wage workers; the Medicare tax rate increases by 0.9% on wages over \$200,000 for an individual (\$250,000 for married couples filing jointly) for the 2013 tax year
- The expansion of FICA tax to include an additional 3.8% tax on net investment income in the case of taxpayers earning over \$200,000 (\$250,000 for joint returns) for the 2013 tax year
- The requirement to provide written notice to employees of coverage options and consequences, effective March 1, 2013

As far as the employer "pay or play" initiative scheduled to take effect along with the individual mandate in 2014, employers should continue to evaluate whether to offer benefits complying with the law as of 2014.

For better or for worse, the fate of the mandate, its associated provisions, and even the ACA as a whole, may not be decided until after the November elections. In the meantime, employers with questions or concerns should contact their Wimberly Lawson attorney for guidance.

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Regarding the nature of the job held or sought, an individualized assessment should begin with a factual inquiry identifying the job title, the nature of the job’s duties, the circumstances under which the job is performed (e.g., the level of supervision, oversight, and interaction with co-workers or vulnerable individuals), and the environment in which the job’s duties are performed (e.g., outdoors, in a warehouse, in a private home). Linking the criminal conduct to the essential functions of the position in question may assist the employer in demonstrating that its policy or practice is job related and consistent with business necessity because it bears a demonstrable relationship to successful performance of the jobs for which it was used.

The Guidance notes that some employers exclude individuals from particular positions for specified criminal conduct within a defined time period, as guided by the *Green* factors, and calls such a policy a “targeted exclusion.” The Guidance indicates that targeted exclusions should be tailored to the rationale for their adoption, in light of the particular criminal conduct and jobs involved taking into consideration fact-based evidence, legal requirements, and/or relevant and available studies.

Other Considerations

The Guidance goes on to note that in some industries, employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations. As is generally the case with discrimination laws, such federal statutory and regulatory requirements take precedence over Title VII. Similarly, federal statutes and regulations that govern eligibility for occupational licenses and registrations take precedence over Title VII. Importantly, state and local laws and regulations that restrict or prohibit the employment of individuals with records of certain criminal conduct do *not* preempt Title VII.

The EEOC Guidance Provides Employers with Best Practices

In summary, the EEOC Guidance recommends best practices for employers, including that they:

1. Eliminate policies or practices that automatically exclude people from employment based on any criminal record.
2. Train managers, hiring officials, and decision makers about Title VII and its prohibition on employment discrimination.

Employers should also develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct. The policy and procedure should include:

- An identification of the essential job requirements and the actual circumstances under which the jobs are performed.
- A determination of the specific offenses that may demonstrate unfitness for performing such jobs, considering all available evidence.
- A determination of the duration of exclusions for criminal conduct based on all available evidence.
- An opportunity for an individualized assessment.
- Record the justification for the policy and procedures.
- Note and keep a record of consultations and research considered in drafting the policy and procedures.
- Train managers and hiring officials on the policies and procedures to be followed and the requirements of Title VII.

The EEOC also notes that when asking questions and obtaining information about criminal records, inquiries should be limited to records for which an exclusion would be job-related for the position in question and consistent with business necessity.

Lastly, employers must keep information about applicants’ and employees’ criminal records confidential and only disclose and/or use it for the purpose for which it was intended.

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