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WHAT'S NEW AT THE EEOC?

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EXPAND YOUR EXPECTATIONSSM

Roadmap

1. New Guidance on Criminal Background Checks
2. Protection for Transgender Individuals
3. New Regulations on Reasonable Factors Other Than Age
4. Questions

Criminal Background Checks

- What happened?
 - On April 25, 2012, the EEOC issued Enforcement Guidance on the use of criminal background checks for employees and job applicants.
- Why is this important?
 - The guidance is the most comprehensive analysis of this issue by the EEOC since 1987. The guidance tells employers what the EEOC will consider unlawful in the use of criminal background checks, as well as best practices that the EEOC will consider lawful. The guidance is intended for use by EEOC staff in the investigation of charges based on criminal background checks.

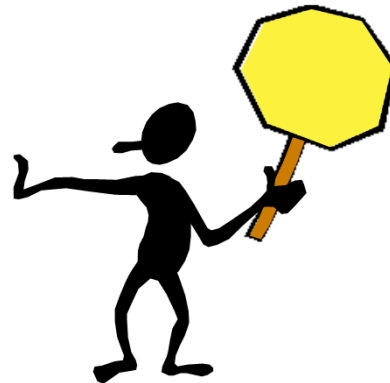


Criminal Background Checks

- What does a criminal background check have to do with discrimination?
 - By some estimates, 90+% of employers conduct criminal background checks for some positions.
 - African-Americans and Hispanics are arrested and incarcerated at much higher rates than non-minorities (by some estimates 2 or 3 times higher rate).
 - In the last decade the number of people in the workforce with criminal records has significantly increased.

Criminal Background Checks

- Two theories of liability:
 - Disparate treatment: Intentional discrimination. *E.g.*, offering white job applicants the ability to explain criminal record but not Hispanics.
 - Disparate impact: A facially neutral policy that causes a disproportionate impact on a protected group. *E.g.*, an otherwise neutral policy disproportionately screens out a protected group.



Disparate Impact

- Disparate treatment cases are far more common. In disparate treatment, the plaintiff alleges that the defendant intended to discriminate. In other words, the protected characteristic motivated the adverse action.
- Disparate impact occurs when there is no discriminatory intent. If a facility neutral employment practice has an unjustified adverse impact on members of a protected group, it is still a violation of the law. Examples: Height and weight requirements, written tests, educational background that are not discriminatory on their face, but have the effect of “weeding out” a protected group.



Disparate Impact in Practice

- The plaintiff must identify a specific policy or practice and then proves his or her case with statistics. Generally, if the practice (*e.g.* test) causes a protected group to be selected at a rate of less than 4/5 (80 percent) of a non-protected group, the practice has a disparate impact.
- The defendant can rebut the plaintiff's statistical proof by showing that the challenged practice is "job-related for the position in question and consistent with business necessity."
- Even if the defendant proves that the practice is job related/consistent with business necessity, the plaintiff may still recover if he/she proves that the defendant failed to adopt an alternative practice which would satisfy the employer's interests without the disparate impact.

What Does the EEOC Guidance Say?

- The EEOC has determined that national data showing greater incarceration rates for African Americans and Hispanics “supports” a showing of disparate impact from the use of criminal background checks. This data provides a basis for the EEOC to further investigate disparate impact charges based on criminal background checks.
- The employer will have the opportunity to rebut this data by using its own applicant data to show that no impact occurred. This means that the employer can show that the national trend is not true in its location.
- An employer’s evidence of a racially balanced workforce is not enough to disprove disparate impact.
- Once a finding of disparate impact is made, the burden shifts to the employer to show job-related/business necessity.

Job-Related and Consistent With Business Necessity

- The policy bears a demonstrable relationship to the successful performance of the position.
- The policy measures the person for the job and not the person in the abstract.
- The policy is necessary for safe and efficient job performance.
- The policy accurately distinguishes between those who pose an acceptable level of risk and those who do not.
- Example: A blanket criminal exclusion that excludes an applicant with any conviction from any job will not meet this standard.

Arrests versus Convictions

- Arrests are not accurate indicators of whether criminal activity has occurred.
- Many arrests do not result in criminal charges or the charges are dismissed.
- Convictions are usually sufficient evidence that a person engaged in certain conduct.
- The facts underlying an arrest may, in some instances, be used to justify an adverse employment action.



Determining if a Criminal Check Meets the Job-Related/Business Necessity Standard

The EEOC provides two ways to do this:

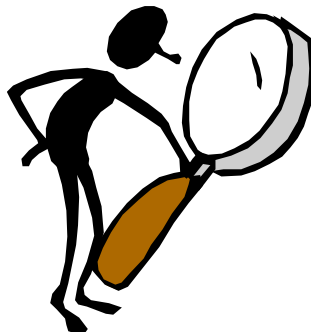
- 1) The employer validates the criminal screen per the Uniform Guidelines on Employee Selection Procedures, or
- 2) By developing a targeted screen based on the nature of the crime, the time elapsed since the crime and the nature of the job.

Validation

- The Uniform Guidelines provide different acceptable methods for validating an employment screen.
- Generally, this requires evidence from a social science study that assesses whether criminal convictions are linked to future behaviors or traits, which thereby allows a framework to evaluate the screen.
- Such studies are rare and the EEOC Guidance concedes that this method of proving job-relatedness and business necessity is not likely for most employers.

Targeted Screen

- To create a targeted screen, the employer must analyze how specific criminal conduct may be linked to specific positions, considering three factors.
- First, consider the nature and gravity of the offense or conduct.
- Second, consider the time that has passed since the offense and conduct and/or completion of the sentence.
- Third, consider the nature of the job sought or held.



Individualized Assessment

- In some cases, analysis of the three factors on the previous slide may be enough to justify a criminal records screen.
- However, the EEOC makes clear in the Guidance that an individualized assessment is preferable.
- An individualized assessment generally requires notice to any individual screened out by the policy, an opportunity for the individual to demonstrate that the exclusion should not apply, and consideration by the employer of whether any information provided by the individual shows a lack of job-relatedness/inconsistency with business necessity.
- If the individual does not respond to notice of his/her exclusion, the employer may make its decision based on evidence it has.

Individualized Assessment Factors

- The facts or circumstances of the offense/conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction or release from prison;
- Evidence that the individual performed the same work, post-conviction, with no known incidents of criminal behavior;
- The length and consistency of employment before and after the offense or conduct;
- Rehabilitation efforts/education or training;
- Employment or character references or other fitness information;
- Whether the individual is bonded.



Interaction With State and Federal Law

- Federal law prohibiting applicants/employees with certain criminal records from holding certain positions will be a defense to a charge of discrimination.
- Title VII does not preempt federal licensing requirements and does not affect the requirement for a federal security clearance.
- State and local laws are preempted. In other words, if an employer's policy is not job-related and consistent with business necessity, the fact that it was adopted to comply with a state or local law is not a defense to a Title VII charge.

Employer Best Practices

- Eliminate policies or practices that exclude people from employment based on any criminal record.
- Train managers and others responsible for hiring about Title VII.
- When asking about criminal records, limit inquiries to records for which exclusion would be job related for the position and consistent with business necessity.
- Keep information about applicant/employee criminal records confidential. Only use for its intended purpose.



Employer Best Practices: Drafting a Policy

- Develop a narrowly-tailored written policy and procedure for screening applicants and employees for criminal conduct.
- Identify essential job requirements and the actual circumstances under which the jobs are performed.
- Determine the specific offenses that show unfitness for the particular position. Identify criminal offenses based on all available evidence.
- Determine the duration of exclusions for criminal conduct based on all available evidence.

Employer Best Practices: Drafting a Policy

- Include an individualized assessment for screened applicants.
- Record justification for policy and procedures.
- Note and keep a record of consultations and research considered in crafting the policy and procedures.
- Train managers and those responsible for hiring on the policies and procedures.



What Does the Guidance Mean to You?

1. The EEOC will effectively presume that your use of a criminal background check will cause a disparate impact and is unlawful unless you can prove job-related/business necessity. Evidence of a racially balanced workplace will not be enough to disprove disparate impact.
2. If you use a criminal background check, you will have to prove it is job-related and consistent with business necessity by developing a targeted screen and, in most cases, conducting an individualized assessment of anyone excluded. The individualized assessment includes notice to anyone screened out, the opportunity to show what he/she should not be screened out, and consideration of whether any exception to the policy should be made.
3. Arrests without conviction should not be used to weed out applicants.
4. Title VII trumps state and local laws/regulations.

Protections for Transgender Employees

- What happened: On April 20, 2012, the EEOC determined that discrimination against a transgender individual because that person is transgender is sex discrimination and violates Title VII.
- The Case: Mia Macy, a transgender woman (man to woman), was denied a job with the ATF. Macy applied for the job as a male and was told it was “virtually guaranteed,” based on her military and police background and experience with the ATF’s ballistics system. After disclosing his gender transition, Macy was told the job’s funding was cut. She found out someone else was hired and she sued. The EEOC initially refused to consider her claim for sex-stereotyping/discrimination based on gender identity/sex change. She appealed to the EEOC, which held transgender discrimination equals sex discrimination.

What the EEOC Decided

- Title VII prohibits discrimination based on “sex.” the courts have interpreted this to mean both sex - - the biological differences between men and women – and gender.
- Example: In *Price Waterhouse*, a female manager was denied partnership because she did not act how some of the partners thought a woman should act (*e.g.*, she should walk more femininely, wear make-up, have her hair styled, etc.). The court held that such sex stereotyping, or failing to conform with gender norms, was sex discrimination.
- Sex stereotyping claims have been recognized here in Tennessee. In *Smith v. City of Salem*, the Sixth Circuit held that a biological male, who presented at work as a female and was suspended, could state a claim of sex discrimination. The Court held that punishing an employee for her gender non-conforming behavior was sex-stereotyping.

What the EEOC Decided

- The EEOC went even beyond *Smith*:
 - [G]ender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people’s prejudices or discomfort. . . . [Such claims] are simply different ways of describing sex discrimination.



What the EEOC's Decision Means to You

1. The EEOC will consider discrimination against a transgender sex discrimination even if it is not based on a sex stereotyping theory.
2. EEOC enforcement will be consistent with this decision throughout the country. Courts in different jurisdictions may disagree, but the EEOC will use this to guide them in investigations.
3. The EEOC's decision does not address sexual orientation (gay vs. straight), but such claims may overlap.
4. Review your policies and train managers consistent with this guidance.

New ADEA Regulations

- The EEOC issued final regulations under the Age Discrimination in Employment Act (“ADEA”) on the reasonable factor other than age (“RFOA”) defense to disparate impact claims.
- In two Supreme Court decisions, the Court held that disparate impact claims were available under the ADEA but held that an employer did not have to prove the challenged practice was a “business necessity,” but only that the practice was based on a RFOA.
- The final rule makes the EEOC’s regulation consistent with Supreme Court and explains how the EEOC interprets the RFOA defense.

What Does the Rule Say?

- It only applies to disparate impact claims -- claims based on a facially neutral policy that disproportionately affects older workers.
- If the employee identifies a specific employment practice or policy and establishes that the policy harms older workers substantially more than younger workers, the employer can defend the claim by showing that its practice is based on a RFOA.
- A practice is based on a RFOA when it is reasonably designed and administered to achieve a legitimate business purpose.

RFOA Factors

- The extent to which the factor is related to the employer's stated business purpose;
- The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;
- The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;

RFOA Factors

- The extent to which the employer assessed the adverse impact of its employment practice on older workers; and
- The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

Example 1

If a police department decided to require applicants for patrol positions to pass a physical fitness test to be sure that the officers were physically able to pursue and apprehend suspects, it should know that such a test might exclude older workers more than younger ones. Nevertheless, the department's actions would likely be based on an RFOA if it reasonably believed that the test measured the speed and strength appropriate to the job, and if it did not know, or should not have known, of steps that it could have taken to reduce harm to older workers without unduly burdening the department.



Example 2

A nursing home decided to reduce costs by terminating its highest paid and least productive employees. To ensure that supervisors accurately assessed productivity and did not base evaluations on stereotypes, the employer instructed supervisors to evaluate productivity in light of objective factors such as the number of patients served, errors attributed to the employee, and patient outcomes. Even if the practice did have a disparate impact on older employees, the employer could show that the practice was based on an RFOA because it was reasonably designed and administered to serve the goal of accurately assessing productivity while decreasing the potential impact on older workers.



Example 3

The same employer asked managers to identify the least productive employees without providing any guidance about how to do so. As a result, older workers were disproportionately rated as least productive. The design and administration of the practice was not reasonable because it decreased the likelihood that the employer's stated goal would be achieved and increased the likelihood that older workers would be disadvantaged. Moreover, accuracy could have been improved and unfair harm decreased by taking a few steps, such as those discussed in Example 2.



What the New ADEA Regulations Mean to You

- The new regulations clarify that the RFOA is the defense to disparate impact claims under the ADEA.
- The new regulations provide the factors that EEOC will rely on in determining if your policy or practice was based on a RFOA.
- The new regulations emphasize that training of managers and those applying the factor will be crucial.
- The new regulations emphasize limiting subjectivity is crucial.

Questions?

