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EEOC Issues Updated Enforcement Guidance that Opposes Employer Use of Blanket Criminal Record Exclusions When Making Employment Decisions

On April 25, 2012, the U.S. Equal Employment Opportunity Commission issued updated enforcement guidance on employer use of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964.¹ The updated Guidance supersedes the Commission's previous guidance on the issue and discusses how employer use of criminal background information may subject employers to Title VII liability. Although Title VII does not regulate employer's use of criminal records, the Commission finds that the misuse of criminal records may violate Title VII's prohibition against discrimination based on race or national origin. (Click [here](#) for the enforcement guidance.)

A covered employer is subject to Title VII liability for intentional discrimination or disparate impact discrimination. An employer can be found liable for intentional discrimination, for example, if it denies an African American employment based on his or her criminal record, yet hires a similarly situated Caucasian applicant with a comparable criminal record. Similarly, an employer can be found liable for disparate impact liability if it adopts a neutral policy or practice that excludes all applicants that have been arrested for drug offenses in the last 10 years because a policy of this nature will disproportionately exclude certain minority groups.²

A significant amount of the Guidance addresses the standard used to defend a challenged criminal conduct exclusion policy by showing the policy is job related for the job in question and consistent with business necessity. First, the Commission takes the position that employers should not solely rely on arrest records when making employment decisions because "arrests are not proof of criminal conduct."³ Employers may, however, "make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question."⁴ By contrast, criminal conviction records are more likely indicative of a person engaging in the conduct underlying the offense. Yet, the Commission recommends that employers not ask about convictions on job applications. Should employers decide to inquire about convictions, the Commission recommends that employers limit their inquiries to convictions for which the exclusion would be job related for the position in question and consistent with business necessity.

Next, to show that a policy or practice is job related for the position in question and consistent with business necessity, the Commission believes employers will "consistently meet" this standard if employers: (1) statistically validate the criminal conduct screen or provide data about criminal conduct as it relates to subsequent work performance; or (2) develop a targeted screen⁵ considering the nature and gravity of the offense or conduct, the time that has passed since the offense or conduct and/or completion

¹ Available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (Guidance).

² *Id.* at 9 (citing Human Rights Watch, *Decades of Disparity: Drug Arrests and Race in the United States* 1 (2009), http://www.hrw.org/sites/default/files/reports/us0309web_1.pdf; Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Human Servs., *Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings* 21 (2011), <http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.pdf>; Harry Levine & Deborah Small, N.Y. Civil Liberties Union, *Marijuana Arrest Crusade: Racial Bias and Police Policy in New York City, 1997-2007*, at 13-16 (2008), www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf).

³ Guidance at 12.

⁴ *Id.*

⁵ A targeted screen is a policy or practice that excludes individuals from particular positions for specified criminal conduct within a defined period of time, considering the nature and gravity of the offense or conduct, the time that has passed since the offense or conduct and/or the nature of the job held or sought and perform individualized assessment prior to making an employment decision.

of the sentence, the nature of the job held or sought (*Green* factors)⁶ and perform individualized assessment prior to making an employment decision.

The individualized assessment specified by the Commission consists of “notice to the individual that has been screened out because of criminal conviction; an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances; and consideration by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity.”⁷ The Commission indicates that should the applicant not respond when given the opportunity to explain his or her record, the employer may make the employment decision without the additional information.

The Commission also cautions employers to avoid the rationale that “we only hire the best of the best” to support a particular policy or practice. The Commission believes that a defense of this nature does not meet the business necessity standard because it lacks factual support for its assertion that having a conviction is indicative of poor job performance; and it fails to show that all convictions create a risk in all of the employer’s jobs at any time.

In general, the Commission disapproves of blanket criminal conduct exclusions because it believes they discriminate on the basis of race and national origin. And the Commission is of the view that even if an employer can show its policy or practice is job related for the position in question and consistent with business necessity, a plaintiff’s claim of discrimination may still prevail if he or she can show that there is a less discriminatory alternative employment practice that serves the employer’s legitimate business needs, and that, the employer did not adopt that practice.

The Commission recognizes a few exceptions to the Guidance on the use of criminal conduct exclusion policies. First, the Commission states that compliance with federal law or regulations that establish specific criminal conduct exclusions for certain jobs serves as a defense to a charge of discrimination under Title VII. But the Commission also states that any policy or practice that exceeds the scope of the federal law or regulation is subject to Title VII, and employers can be found liable for going beyond the scope of the federal requirement. Second, Title VII provides for a national security exception, which the Commission indicates would apply if the position in question is subject to national security requirements that are imposed by federal statute or Executive Order, and the adverse employment action resulted because of a denial or revocation of a security clearance. The Commission also states, however, that compliance with state or local laws that require criminal conduct exclusions in conflict with Title VII will not serve as a defense.

Finally, the Guidance encourages employers to adopt the following best practices when considering criminal background information in employment decisions:

- Eliminate blanket criminal conduct exclusion policies;
- Develop narrowly tailored written policies and practices to screen applicants and employees for criminal conduct;
- Train management on Title VII’s prohibition against employment discrimination and how to implement new policies and procedures in compliance with Title VII;
- Identify the essential job requirements and the circumstances under which all jobs are performed;

⁶ The three *Green* factors endorsed by the Commission to determine whether a criminal record exclusion is job related to the job in question and consistent with business necessity were established in the U.S. Court of Appeals for the Eighth Circuit case, *Green v. Missouri Pacific Railroad*, 549 F.2d 1158, 1160 (1977).

⁷ Guidance at 14.

- Identify specific criminal conduct that may show an applicant is unfit for the position;
- Identify the appropriate duration of the exclusion based on available evidence (using the “individualized assessment” discussed above); and
- Record the justification for the policies and procedures and keep records of all consultations and research considered in creating policies and procedures consistent with Title VII.

In light of the updated Guidance from the Commission, employers will want to review their job applications and criminal conduct exclusion policies, as well as their training relating to such matters.



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Thomas R. Bundy III	202.383.0716	thomas.bundy@sutherland.com
Peter N. Farley	404.853.8187	peter.farley@sutherland.com
Allegra J. Lawrence-Hardy	404.853.8497	allegra.lawrence-hardy@sutherland.com
Gail L. Westover	202.383.0353	gail.westover@sutherland.com
Jade A. Logan	404.853.8120	jade.logan@sutherland.com