

EEOC CREATES ADDITIONAL HURDLES TO USE OF CRIMINAL BACKGROUND CHECKS BY EMPLOYERS

By *Scott J. Wenner*

In late April, the Equal Employment Opportunity Commission (“EEOC” or “Commission”) approved its “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions” (the “Guidance”). The Guidance became effective immediately and supersedes the EEOC’s “Policy Statement on the Issue of Conviction Records” dated February 4, 1987. Its publication caps a nearly four-year period since the Commission first signaled its renewed interest in the use of criminal background checks as a screening device for employers, holding open meetings on the subject in November 2008 and again in July 2011. The Commission’s adoption of a new enforcement policy on background checks is a part of its “E-RACE Initiative” that it announced several years ago. “E-RACE,” which stands for “Eradicating Racism And Colorism from Employment,” is an EEOC effort to “identify issues, criteria and barriers that contribute to race and color discrimination,” among other goals. The Commission has identified the broad use of criminal background checks as one such barrier.

The EEOC suggests in the Guidance that it does not represent a significant departure from the Commission’s long-standing approach to criminal background checks dating to its 1987 Policy Statement and before. A realistic assessment of its 52 pages yields a contrary conclusion: that while the EEOC could have more radically upset the existing order, the Guidance will force all prudent employers to reevaluate their policies and will require many to alter their use of criminal background checks as screening devices and to rethink their pre-employment screening practices in general.

1. One example cited is that while 1 in 17 white males are expected to serve prison time at some point in their lifetimes, the odds are dramatically higher for Latino males (1 in 6) and black males (1 in 3).

The Guidance

EEOC’s Findings Supporting the Enforcement Guidance

The Guidance emphatically states that the EEOC considers employers’ use of criminal background checks to screen applicants to have an adverse impact on black and Latino applicants. Under existing law, the use of device or criterion that has a disparate impact on a protected group places a burden on the employer to justify its use of that device or criterion by proving that it is specifically job-related and consistent with business necessity. Thus, the Guidance concludes, an employer that uses criminal background checks to screen out applicants must be able to make both showings in order to avoid liability, regardless of whether its use of background checks was intended to screen out blacks and Latinos.

To buttress its conclusion that criminal background screens have an adverse impact on protected groups, the Guidance references an array of national statistics that appear to demonstrate powerfully the comparative disparities among black, Latino and white males in arrest and imprisonment rates¹ and related measurements. The Guidance also takes note of the widespread use of criminal histories as a screening tool — which one study pegged at 92 percent of employers for at least some positions — and also points to the “significant” incidence of inaccurate and incomplete data in criminal histories compiled by both public and private entities. These observations — the broad use of an oftentimes flawed tool that has a disproportionate exclusionary effect on minorities — set the stage for the hostility towards criminal background checks demonstrated by the Guidance.

(continued on page 2)

(continued from page 1)

Key Guidelines on Using Background Checks from the EEOC

1. To defend the use of criminal background checks as a screening device as job-related and consistent with business necessity employers must employ *targeted screening*,² which tailors exclusions based on criminal conduct to each specific job, and must conduct an *individualized assessment* of each person screened out because of criminal background.
 - a. **Targeted Screening.** A targeted screen considers at least the following three factors³ in determining whether past criminal activity is job-related and justified by business necessity:
 - i. nature and gravity of the offense or offenses committed;
 - ii. time that has elapsed since the conviction and/or completion of the sentence; and
 - iii. nature of job sought or held.
 - b. **Individualized Assessment.** Even after the targeted screening has supported the job-relatedness and business necessity of the exclusion of a person based on criminal background information, the employer should assess each person screened out on an individual basis, including by giving each an opportunity to explain why the criminal information should not exclude
2. The Commission acknowledged that existing law also would permit an employer to establish the lawfulness of its use of background checks by presenting a formal validation study using the EEOC's *Uniform Guidelines on Employee Selection Procedures*. However, it observed that the requisite social science studies on links between convictions and future workplace behavior do not presently exist.
3. These are referred to as the "Green factors" as they were first articulated by the Court of Appeals for the Eighth Circuit in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (1975).
4. Data suggests chances for recidivism decrease with age.
5. This rule proceeds directly from Title VII. 42 U.S.C. §2000e-2(k)(1)(A)(ii) and (C). The Guidance offered no comments or illustrations on its application, however.

him or her. The factors to assess in undertaking the Individualized Assessment should include:

- i. facts or circumstances surrounding the offense committed or conduct;
 - ii. number of offenses for which convicted;
 - iii. older age at time of conviction or release from prison;⁴
 - iv. evidence that individual performed similar work post-conviction with no known incidences if criminal conduct;
 - v. length and consistency of employment history before and after offense or conduct at issue;
 - vi. rehabilitation efforts (*e.g.*, training, education);
 - vii. employment or character references and any other information concerning fitness for position at issue; and
 - viii. whether individual is bonded under a federal, state or local bonding program.
2. Even where a targeted screening and an individualized assessment justify an employer's refusal to hire an applicant because of a conviction, if the unsuccessful applicant can show that a *less discriminatory alternative* would have as effectively served the employer's legitimate purposes but was not adopted, the applicant can prevail under Title VII.⁵
 3. An exclusion of an applicant based on an arrest record is neither job-related nor consistent with business necessity and an employer should not base employment decisions solely on an applicant's arrest records.
 4. Certain employers are subject to federal laws or regulations that require them to exclude from employment in certain positions applicants having a criminal record, and the Guidance does not interfere with an employer's obligation to follow those requirements.
 - a. Compliance with other federal laws or regulations that conflict with Title VI is a defense to a claim under Title VII.

(continued on page 3)

(continued from page 2)

- b. Employers required by federal law to exclude certain applicants with criminal records may not screen applicants more rigorously than is required under the federal requirement without risking liability under Title VII.
5. State and local laws and regulations that require employers to exclude persons with criminal records from positions are preempted by Title VII.
- a. An employer that excludes one or more applicants from a position because of having a criminal record under a state or local law requirement may not rely on that state or local requirement as a defense to a Title VII claim based on the assertion that those exclusions have a disparate impact on minority applicants.

Application of Guidelines

A significant part of the Guidance presents hypothetical fact patterns and an explanation of how each would be resolved by the Commission using the principles announced in the Guidance. A review of these hypotheticals not only helps to understand the principles announced in the Guidance, but also yields some useful information on the Commission's enforcement intentions. The following are among the corollaries to the principles announced in the Guidance that can be gleaned from the hypotheticals:

1. A blanket exclusion of applicants having a criminal record will be the basis for a "reasonable cause" determination against the employer at the conclusion of an EEOC investigation, unless
- a. the employer has maintained a record docu-

6. In this hypothetical, the Guidance cited the excluded employee's reasoning that he had worked for the business's prior owner for the five years after his conviction for insurance fraud without incident. It is not clear whether the Commission's conclusion that the employee's exclusion could not be found job-related and consistent with business necessity strictly because it was not considered, or because the Commission would have found it sufficient to overcome the targeted exclusion of the employer despite the contact its employees had with sensitive information of its customers.

menting why it adopted the blanket exclusion, and

- b. the employer presents information showing that convictions for any criminal offenses make any and all applicants an unacceptable risk for any position with the employer.
2. An exclusion of all applicants having a criminal record because of corporate image concerns will not be sufficient to defeat a claim based on the disparate impact on minorities of a blanket exclusion. In other words, the Commission does not view as legitimate any disqualifying factor that is not based on ability to do the job.
3. Even where an employer has an exclusion policy targeted at persons having a theft or fraud conviction within five years and is in a business that exposes its employees to sensitive information, its failure to perform an individualized assessment before excluding a person with a five-year-old fraud conviction will lead the EEOC to deem the targeted exclusion as not job-related nor consistent with business necessity.
- a. In this, the most troubling of the hypotheticals, the EEOC places employers on notice that it will challenge the most rational of exclusions by an employer that cannot afford employing anyone who presents an above average risk of stealing information if the employer fails to consider an individual's evidence that he does not present a risk.
 - b. The Guidance does not explain whether "consideration" of the mitigating factors offered by an individual means simply giving them consideration or deferring to them instead. While the plain meaning of the word suggests the former, the hypothetical's context implies the latter.
 - c. The Guidance likewise does not suggest how the EEOC will act where the employer excludes a person after "considering" the mitigating factors offered but the EEOC disagrees with the employer's individualized assessment.⁶ It would be prudent to anticipate that the Commission

(continued on page 4)

(continued from page 3)

would challenge the employer's exclusion if it disagreed with the employer's assessment.

Best Practices Proposed by the Guidance

General Practices

The Guidance proposed a series of best practices for employers that consider criminal background information when making employment decisions.

- Do not exclude people from employment based on any criminal record.
- Train those involved in hiring about the requirements of Title VII.
- Keep information about criminal records confidential.

Developing 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 jobs are performed.
 - Determine specific offenses that may demonstrate unfitness to perform each job.
 - The criminal offenses should be identified based on all available evidence.
 - Determine the length of time to exclude for criminal conduct.
 - Length of exclusion should be based on all available evidence.
 - Include individualized assessment in procedure adopted.
 - Document the justification for adopting the policy and procedures.
 - Document the discussions and research considered in developing the policy and procedures.

7. The Guidance does not formally mandate recordkeeping. However, as discussed earlier, it cautions employers on the adverse effect of a failure to maintain all relevant documentation.

-
- Train those involved in hiring and promotions on implementing the policy and procedures in a manner consistent with Title VII.

Questions About Criminal Records

- Limit inquiries about criminal records to those for which exclusion would be job-related for the position in question and consistent with business necessity.

Practical Meaning of Guidance for the Prudent Employer

It is impossible to paint the Guidance as good news for employers. Indeed, the conspicuous absence of any acknowledgment of the threat to employers, and their customers, employees and assets posed by workplace violence and theft yields a position statement that lacks balance and, more importantly, lacks practicality in several respects, including the potential cost of compliance. Individualized assessments and the EEOC's expectations on recordkeeping associated with every assessment, and also with determining job-relatedness and business necessity for every position, will be expensive in time and money.⁷ Yet as the expression of the EEOC's views and intentions in an area on which it has focused in recent years, employers are better off with publication of the Guidance so they can make adjustments to existing practices as appropriate.

In view of the EEOC's evident interest in curbing the routine use of criminal background checks prudent employers should pay attention. As a practical matter, this means considering and taking some of the following steps promptly:

- Review current job application forms.
 - Consider removing any questions on criminal convictions, addressing that subject in a more focused way at a later stage of the hiring process.
 - Remove all questions concerning criminal convictions that are not job-related.
- Review all positions in the organization individually to determine whether criminal convictions are

(continued on page 5)

(continued from page 4)

- job-related and if the exclusion of candidates with a criminal record is consistent with business necessity and which therefore ordinarily disqualify candidates from holding the position.
- Carefully document decisions on positions for which criminal convictions are job-related and include (i) the reasons supporting the decision; (ii) the kind of crime deemed disqualifying and basis for designation; and (iii) the period after conviction or completion of incarceration during which the exclusion will apply. The EEOC has served notice in the Guidance that failure to document decisions on these matters will be harmful to the employer's defense.
 - Consider obtaining or developing evidence, including statistical data, establishing or supporting the need to use criminal background checks as a screening device (i) for the position in question; (ii) for the nature of the business at issue; and/or (iii) for the location in which the position will be filled.
 - For those positions for which exclusion based on criminal convictions has been deemed job-related, individualized assessments must be built into the decision-making process for filling positions by providing a vehicle for candidates to provide further information to show why a particular criminal conviction should not disqualify them from being awarded the position in question.
 - While it might be a good idea to provide space on an application form for positions for which criminal convictions have been deemed job-related, the employer should be prepared to discuss the candidate's written comments with him or her.
 - An applicant's failure to provide further information after being given the opportunity may permit the employer to disqualify the applicant based on the conviction without further discussion.

-
- Employers should coordinate Fair Credit Reporting Act ("FCRA") compliance with Title VII compliance on criminal background checks. It is as important as ever to ensure that the FCRA is being strictly complied with to avoid becoming a target of the class action bar, and FCRA "adverse action" communications can be utilized to elicit information needed to perform the individualized assessments now expected by the EEOC.
 - Review and give consideration to the "best practices" identified by EEOC in the Guidance. While none of the best practices are statutorily mandated, the fact that they have been identified by the enforcement authority as preferred practices is a strong inducement to consider adopting some of them if they otherwise make sense for an organization. ♦

This summary of legal issues is published for informational purposes only. It does not dispense legal advice or create an attorney-client relationship with those who read it. Readers should obtain professional legal advice before taking any legal action.

For more information about Schnader's Labor and Employment Practices Group or to speak with a member of the Firm at a particular Schnader office location, please contact:

*Scott J. Wenner
212-973-8115; 415-364-6705
swenner@schnader.com*

*Michael J. Wietrzykowski
856-482-5723; 215-751-2823
mwietrzykowski@schnader.com*

www.schnader.com
©2012 Schnader Harrison Segal & Lewis LLP