Labor Letter

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By The Way, Are You A Criminal?

The EEOC's Version Of "Don't Ask, Don't Tell"

By Matthew Korn (Columbia)

You've probably heard the news by now – the EEOC seems to want all employers to discontinue, or at least significantly curtail, their use of criminal-background checks. The EEOC's Guidance outlines the agency's position on criminal-background-check policies, but leaves many important questions unanswered. Understanding that the Guidance is not law, but only the EEOC's interpretation of the law, you should keep several issues in mind when hiring.

Can I ask about criminal history on my application?

The EEOC recommends that employers not ask about convictions on job applications. But, if employers do ask, the Commission recommends asking only about convictions that are job related and consistent with business necessity. Your approach should include language indicating that not all convictions will bar employment and you should consider providing a space for the applicant to explain the conviction. Additionally, many states have required language for applications and some may prohibit such inquiries.

When should I run a criminal-background check?

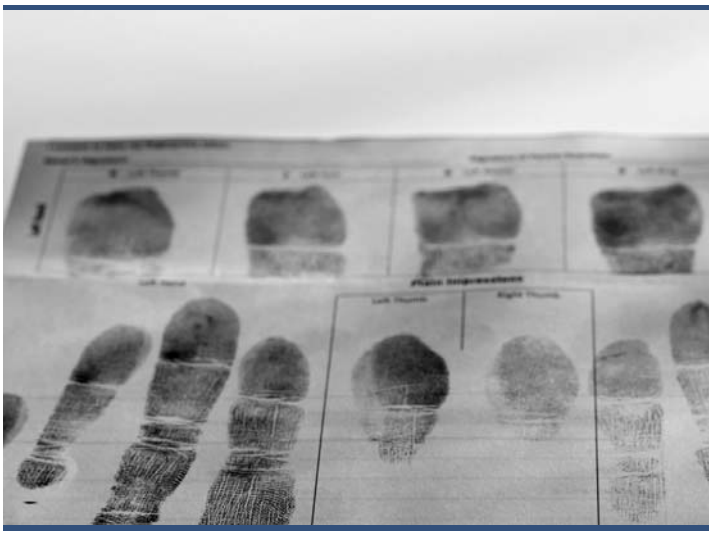
It depends. As noted above, the EEOC would probably prefer that employers eliminate criminal background policies altogether. Recognizing that this is impractical for many employers, due to the risk of negligent hiring, retention, or supervision claims, among other related issues, you should consider at what stage of your hiring process to run criminal-background checks.

The most conservative approach would be to make a contingent offer of employment based on successful completion of the background check, which will impact the least number of applicants. You may also consider waiting until you have identified interviewees, or running the check after excluding applicants who are not minimally qualified or have negative references. Be aware that the earlier in the process you use the background check policy, the number of applicants affected will increase, along with your potential liability.

Can I exclude an applicant based on an arrest?

Probably not. The Guidance is clear that exclusion based solely on an arrest record (without further inquiry) is not acceptable. Many employers are understandably concerned about pending arrests. To consider any arrest, including those pending, requires an independent investigation of the facts.

However, if you perform an independent investigation that confirms the conduct underlying the arrest, and if exclusion of persons committing such acts is job related and consistent with business necessity, you may permissibly exclude the applicant. This may be impractical for many employers – but if you cannot perform the investigation, you should not consider the arrest, at least according to the EEOC.



What does it mean to be "job related and consistent with business necessity?"

It's more complicated than it seems. To determine whether a particular criminal history is job related and consistent with business necessity, you need to consider three factors: 1) the nature and gravity of the offense or conduct, including the harm caused, the specific elements of the crime, and whether it was a felony or misdemeanor; 2) the time that has passed since the offense or conduct and/or completion of the sentence; and 3) the nature of the job held or sought.

How old can a conviction be in order to be considered relevant?

The EEOC did not provide specific guidance on this question, but instead recommended that employers consider studies and recidivism data to determine the relevance of a particular conviction. Essentially, if an applicant was convicted for petty theft 15 years ago, but has not been convicted of a crime since, that individual may not be statistically more likely to steal than any other applicants. Obviously, the shorter the period of time considered, the more relevant the conviction. But, this must be balanced against your ability to protect your company against theft and negligent hiring, retention, or supervision claims.

How do I evaluate the nature of the job held or sought?

By reviewing your job descriptions. To determine whether a certain offense is job related, you should review the essential functions of each job or classification you use. If you are hiring a delivery driver for your restaurant, you may want to exclude those convicted for driving under the influence. However, if you are hiring a cashier for the same restaurant, a conviction for DUI may not be relevant. Blanket polices for all job descriptions are likely unlawful according to the Guidance.

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Are You Enforcing Your Cell Phone Policy?

You Do Have One, Don't You?

By Grace Y. Horoupian and Matthew C. Sgnilek (Irvine)

Recently, the National Transportation Safety Board (NTSB) proposed a ban on all cell phone calls and texting while driving. The first ever proposed nationwide ban on driver use of mobile devices while driving certainly has a significant impact on employers given employees' increasing reliance on mobile devices.

More and more employees are using cell phones to stay connected to their work while out of the office. With this technology, employees are always accessible to their employers and clients. Employees can now consult clients, close deals, and engage in a variety of other work-related activities all while driving.

Employees are often encouraged to multi-task at the office but that same expectation should not exist for employees who are driving 70 miles per hour on the freeway. Recent studies have indicated drivers distracted by emails, texts, and phone calls are just as dangerous on the road as those impaired by drugs or alcohol. Distracted driving causes close to 8,000 accidents everyday, according to some reports.

For employers, the concern is what happens when of your employees causes an accident because his driving is distracted by a client phone call or an email response to his boss? Can the employer be liable for the accident? Yes. Under the doctrine of "respondeat superior," employers have traditionally been held liable for the tortious conduct of their employees upon a finding that the conduct was within the course and scope of employment.

In the context of employee automobile accidents, courts look at whether the purpose of a given drive was for a business, or merely a personal purpose. Yet, given the proliferation of cell phones, the line between personal and business activity is becoming increasingly blurred. It is a challenge to define the course and scope of employment for an employee who uses a cell phone 24-7 as an extension of the office.

The NTSB's proposal is a fresh reminder that employers need a policy defining when and how employees may use a cell phone for work while driving. Cell phones have become a business necessity and a policy addressing their use can help limit liability in the event an employer is faced with a vicarious liability lawsuit. In fact, employers could be found negligent if they fail to adopt a policy for the safe use of cell phones.

At a minimum, your cell phone policy should require compliance with state and local regulations governing cell phone usage while driving. If the NTSB proposal were adopted the policy would need to reflect a complete ban on cell phone use for work while driving.

As with any policy, you need to ensure it is enforced. If you know that your employees continue to send emails or conduct calls while driving and an accident were to occur, a plaintiff's attorney could argue that the company knew that the employee was utilizing a cell phone for business purposes, giving rise to vicarious liability.

In the event of cell-phone-related litigation, a reasonable and enforced cell phone policy is the only way to potentially insulate your company from exposure to liability. A reasonable and enforced policy allows employers to assert that employees making work-related cell phone calls while driving are acting outside of the course and scope of their authority, so the company should not be vicariously liable.

While certainly not a ban to a potential lawsuit, the employer's cell phone policy is its best defense. If you'd like help drafting such a policy, contact your regular Fisher & Phillips lawyer.

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Should I be writing this down?

Yes. We recommend that you document your efforts to make the considerations described above. If you rely on a particular study or statistic, you should keep a copy with your revised policy. Documenting your efforts will better prepare your company in the event of an investigation or litigation.

Do I have to consider information the applicant provides?

Yes. In almost all cases, you should provide an opportunity for the applicant to provide information that may mitigate the applicant's criminal history and consider such information. Examples of information you may receive include employment references, job history subsequent to the conviction, or facts surrounding the offense.

But be cautious to ensure that your consideration is not different based on race, or any other protected category, as this can lead to a claim of disparate treatment discrimination.

Are there any less discriminatory alternatives to my policy?

This is a question you should ask once you have revised your policy. Your policy, even though revised to be consistent with the Guidance, may still have an adverse impact on minorities. Therefore, you should always consider alternative policies or practices that may reduce this impact. An example may be allowing applicants more time to provide individual information.

What if I must do a check to comply with federal or state law?

Compliance with *federal* law is a defense, but the EEOC takes the position that Title VII preempts state law and compliance with *state* requirements is not a defense to liability. If there are federal requirements for your employees, you should consider whether your policy excludes applicants beyond the federal requirement. To the extent you exclude applicants that you are not required to exclude, you may be liable. The EEOC does not provide any answers for employers that are subject to state laws or regulations. If you have more stringent state requirements that apply to your applicants and/or employees, you may wish to seek legal counsel.

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Did Your DUI Lawyer Draft Your Employee Handbook?

By Tillman Coffey (Atlanta)

Of course not. I just wanted to get your attention. The real question is when is the last time you reviewed your employee handbook to ensure, not only that it is legally compliant, but also to ensure that it accurately reflects your current policies and practices? That long, huh? If your handbook (along with your sense of fashion and hairstyle) is stuck in the 80s, 90s or early 2000s, it may be time for an update. An outdated handbook can create potential risks for employers and convert what should be your best friend into your worst enemy.

How do you know if your handbook is outdated? Well, if any of the following are true, it may be time for an update:

- your DUI lawyer really did draft it;
- the clip art looks like a first grade art project;
- it has a Y2K policy and makes several references to pagers;
- it has more volumes than a Time-Life collection;
- its handheld-device policy references pagers only;
- there is carbon-copy residue on the pages;
- your company's name is written over white-out throughout the handbook.

Seriously, many handbooks suffer from the same problems. For example, one common problem is the failure to have adequate EEOC and no harassment policies that address all types of illegal harassment and discrimination, including that covered by applicable state law.

Another related problem is the failure to have a procedure that provides employees with alternative avenues to report concerns about discrimination and harassment to ensure that proper management receives notice of the concern so that it can properly respond. Simply requiring an employee to report concerns to the direct supervisor leaves the company vulnerable. What if that supervisor is the problem? What if that supervisor fails to respond to the complaint? Or worse, chastises the employee for bringing it up?

Many handbooks lack social media and electronic communications policies at all, or have policies that are inconsistent with the rapidly changing world and legal requirements. Do the policies address the use of devices while driving? Does the policy allow the company to view personal e-mail accounts accessed through company equipment? Other handbook policies fail to take into account the changes to the leave laws or have leave provisions that may be inconsistent with the ADA's requirement and the EEOC's enforcement position regarding unpaid leave as a reasonable accommodation.

In addition to legal compliance issues, some handbooks simply do not reflect the employer's current policies, rules, and culture. Handbooks that include policies and practices that have not been followed since the disco era should be revised to reflect current practices. For example, if you have a reporting off procedure that requires employees to personally call their supervisors but your company allows employees to report off by email or text, what is your real policy?

Finally, one mistake many employers make in drafting an employee handbook is that they want the handbook to be all things to all people. This approach generally fails on both accounts. For example, many handbooks have multiple paragraphs explaining exempt versus non-exempt status, and some try to explain the morass related to compensable time for travel. Others include detailed explanations of the health and medical benefits that often are inconsistent with the actual plan documents governing the benefit.

Bottom line: handbooks should not be viewed or drafted to be the "answer book" for all questions and should not be used as a replacement for actually managing employees and making decisions.

If your handbook has these and other "issues," you're not alone – we see many handbooks that lag behind the ever changing world of technology, culture, and the law. Even those employers that realize that an out-of-date or poorly drafted handbook greatly diminishes its value oftentimes don't get around to making the needed changes. Other more pressing problems, including lack of available funds, often relegate the handbook project to back burner status, thereby leaving you vulnerable. Many times the "I'll get to it" time never comes.

It's never too late to make the changes and to update your handbook. You may want to consider including a handbook review on your to-do list. By the way, if you decide to do it and need help reviewing your handbook, it probably isn't the best idea to contact your DUI lawyer.

For more information, contact the author at tcoffey@laborlawyers.com or 404.231.1400.

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I heard that Congress defunded the Guidance, so do I still need to comply?

Yes. A Congressional Committee recently voted to defund the Guidance. This action demonstrates that many groups believe the Guidance may be detrimental to employers. However, even if the Guidance is defunded, the EEOC will likely continue its investigations of criminal-background policies through its enforcement of Title VII. Therefore, we recommend that you still take the time to review your policy, consider revisions, and to be sure you understand the risks if you choose not to follow the Guidance.

More To Come

As you can tell, there are numerous questions left unanswered by the Guidance. Drafting a background check policy that is both consistent with the Guidance and that adequately protects your business can be a frustrating process. Nevertheless, the EEOC intends to increase its enforcement of systemic discrimination over the next few years, and revising your policy now may help minimize your risks if the EEOC decides to investigate your company.

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Dress For Success, Even In The Summer

By Shayna Balch (Phoenix)

Summer officially arrives this month, but in many parts of the country it's been blazingly hot for weeks. In much of the deep South and the desert Southwest, it's easy to break a sweat walking from door to door, and the AC in our cars always takes too long to kick in. On the weekends, it's all about sundresses and bathing suits, but what about Monday through Friday? How *hot* is too hot? When are you supposed to ditch the hot pants and switch to a more conservative look while still trying to keep your cool?

This may not be an issue in some states, but here in Arizona and elsewhere in the Sunbelt, it certainly is. Sure, you are told by your HR department or supervisors to just use your best judgment when deciding on what to wear, but when the temps far exceed 100 degrees on a daily basis, sometimes your best judgment goes missing.

If your employees are not required to wear a uniform to the office, and there is no official dress code, how do employees decide how to dress for success? Most of us want to appear professional, and we want to be taken seriously. But with these high temperatures, most of us just want to be cool and comfortable. Can your company have it both ways?

The following suggestions should help with your decision making during these scorching summer months. Because at the end of the day, heat or no heat, the bottom-line is staying prosperous in business.

Some Questions To Ask Yourself

1. What kind of working environment are you hoping to achieve? Based on this answer, perhaps a "summer casual" dress code is in order.
2. What has been the practice within your area and industry? Don't reinvent the wheel – what works for others in your industry will most likely work for your business.
3. Is there any risk of implementing a policy that alienates employees? Always be respectful of employees to ensure that they, in turn, respect the policies of the organization.
4. How big an issue is this among employees to begin with?
5. Where are you prepared to draw the line, and what steps are you prepared to take to enforce it? Always make a plan before jumping into any new policy. A policy that isn't enforced is no policy at all.
6. What is the most effective way to communicate company standards to employees? Have fun with this. Try to get away from an inter-office memo and call for a summer breakfast meeting or mid-day iced coffee talk to communicate any new policy.
7. Are you prepared to live with your dress code guidelines?

Answering honestly to these questions can save your employees from some embarrassment and awkward looks at the water cooler. Try to implement a look that is comfortable, but meets your business needs. For example, would your casually dressed employees still be presentable if a client were to make a surprise appearance at the office. If you can successfully follow these guidelines, you are well on your way to keeping your cool while still looking stylish and professional this summer.

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