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EEOC Locks Down Employers' Use of Arrest and Conviction Information

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On April 25, 2012, the Equal Employment Opportunity Commission ("EEOC") issued an extensive document titled "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (the "April 2012 Guidance"). Although the EEOC describes the April 2012 Guidance as an update, the accompanying EEOC Questions and Answers indicate that the Guidance actually expands the EEOC's review of employers' use of arrest/conviction information when EEOC Charges are brought alleging that an employer's use of the information had a discriminatory effect (http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm).

Title VII and Employers' Use of Arrest and Conviction Information

Title VII of the Civil Rights Act does not regulate an employer's ability to gather applicant/employee criminal history background. Nevertheless, the EEOC takes the position that employers' use of arrest or conviction information may be discriminatory, in two potential ways:

- *Disparate Treatment Discrimination:* An employer may violate Title VII by "treating job applicants with the same criminal records differently because of their race, color, religion, sex or national origin"[1]; or
- *Disparate Impact Discrimination*: An employer may violate Title VII when a company-wide policy about criminal records, applied in a non-discriminatory manner, unjustifiably or disproportionately excludes applicants of a particular race or national origin. To avoid liability, employers must then show that specific applications of the policy, to actual individuals, were job-related and consistent with business necessity for the job positions sought.

How EEOC Guidance Materials Are Used

The EEOC uses Guidance materials to assess and investigate Charges of Discrimination. While Guidance materials are not controlling on federal courts, they are often viewed as persuasive, particularly when the Guidance materials are thorough and are statistically validated. In 2007, the Third Circuit Court of Appeals stated that the EEOC's then-existing Guidance regarding employers' use of conviction/arrest information was "**not** entitled to great deference," because the Guidance did not substantively analyze the Civil Rights Act of 1991, and did not provide statistical analysis. *El v. Southeastern Pennsylvania Transp. Auth.*, 479 F.3d 232 (3d Cir. 2007). The newly-issued April 2012 Guidance is clearly designed to address the *El* Court's criticisms. Significant portions of the April 2012 Guidance are discussed below.

[1] EEOC Questions and Answers regarding Guidance, located at http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.

Key Points of the April 2012 Guidance

The April 2012 Guidance specifically states that it is "intended for use by employers considering the use of criminal records in their selection and retention processes." *April 2012 Guidance*, p. 3.

- ***Statistical Citations***: Overall, the EEOC paints background check information as a less than reliable source of information. The EEOC cites statistics indicating that African-Americans and Hispanics are statistically and disproportionately more likely to have criminal history records. The EEOC further claims that while employers' use of criminal history information is increasing, studies indicate that the criminal history databases most employers use are not as reliable or accurate as one would anticipate.
- ***Disparate Treatment Analysis***: The EEOC will assess the following kinds of evidence to determine whether an employer's use of criminal records resulted in disparate treatment:
    - biased statements by the employer or decision maker that are derogatory or express "group-related stereotypes about criminality";
    - inconsistencies in the hiring process, including allowing white applicants to explain criminal history, while not allowing non-white applicants to do so;
    - evidence that an applicant who had a similar criminal background history was treated differently than similar applicants or employees who were not members of the applicant's protected category (e.g. white applicant treated more favorably than black applicant, when both had similar criminal background history);
    - the use of "matched-pair testers" - individuals who are similar except for race/national origin, who are sent specifically to apply for a position to see if they are treated differently; and
    - statistical evidence based on the employer's own applicant and workforce data.
- ***Disparate Impact Analysis***: The EEOC provides a step-by-step explanation of what it will review when assessing criminal record disparate impact claims:

  1. **Policy Assessment**: The EEOC will examine the types of offenses covered by an employer's policy; whether the policy includes arrests and charges, not just convictions; how far back in time the records check extends; the jobs to which the policy is applied; and training provided by the employer to its hiring managers/decision makers.

  2. **Statistical Analysis**: The EEOC will use national data regarding incarceration rates, as well as labor market statistics, and applicant flow information that employers maintain regarding accepted/rejected applicants, and will compare an employer's data to any validated data for the job/industry. An employer's evidence of a racially balanced workforce *will not be enough to disprove disparate impact*. The EEOC also indicated skepticism regarding employers' applicant data, stating that the EEOC will closely consider the employer's "reputation" for hiring/excluding based on criminal records.

3. **Determining Job-Related/Consistent with Business Necessity**: According to the EEOC, an employer's policy regarding criminal records must:

- have a "demonstrable relationship" to the jobs for which the policy is applied;
- measure the person for the job "and not the person in the abstract," meaning that a policy which excludes all felonies, regardless of the timeframe in which they occurred, probably will not pass EEOC scrutiny; and
- have measures in place to distinguish between "applicants who pose an unacceptable level of risk and those [who] do not." *April 2012 Guidance*, p. 11.

When employers use arrest records for screening: *The EEOC firmly states that arrest records, standing alone, are not going to be viewed as justifiable grounds for an employer to exclude applicants*. When an employer's use of arrest records is challenged, the EEOC will require a showing of job-relatedness, and will also require the employer to give arrested applicants the opportunity to explain the circumstances surrounding the arrest, and to make a credibility assessment regarding the applicant's explanation.

When employers use conviction records for screening: The EEOC recommends that employers not ask about convictions on actual job applications, but wait until the interview process. There are two methods employers can use to establish that exclusions based on conviction records are non-discriminatory:

(1) the employer can validate its policy for the position in question using an actual validation study, which connects the criminal activity to specific behaviors that are not permissible for the position in question (a step many employers would not be equipped to undertake, or for which data does not exist); or

(2) the employer can develop a targeted screen for each applicant with a criminal history record to whom the policy is applied, which considers the nature of the crime (felony vs. misdemeanor), the time elapsed since the crime (blanket exclusions without time limits will not pass EEOC muster), and the nature of the job (the location of the job, or the level of oversight/supervision, which justifies the exclusion of the individual based on the criminal history). Moreover, the EEOC strongly recommends giving the individual the opportunity to explain the circumstances surrounding the criminal history and why application of the employer's policy to him/her is not justified.

Although the EEOC concedes that the individualized analysis is not required by Title VII in all circumstances, it strongly suggests that such assessments can help employers avoid Title VII liability "by allowing [employers] to consider more complete information on individual applicants or employees." *April 2012 Guidance*, p. 14.

Federal Restrictions on Employing Individuals with Criminal Conduct Records

While conceding that Title VII does not pre-empt federal restrictions on the employment of individuals with specific convictions in certain industries or professions, the April 2012 Guidance indicates that the EEOC still will review decisions based on federal laws, as follows:

- The EEOC will investigate Charges claiming that an employer's policy is more stringent than what is federally required (e.g. screening certain bank employees for a 20-year period vs. the 10-year period required by law);

- The EEOC will encourage employers and/or applicants to apply for waivers of federal regulations where the applicable statutes allow (e.g. the FDIC can grant certain waivers); and
- Although the denial of federal security clearances required for positions with the federal government or federal government contractors is a sufficient reason to reject applicants/end employment, the EEOC will still assess an individual denial to ensure that the position sought actually needs security clearance, and that the denial of clearance was the true reason for the employment decision.

Employers should also be wary of the **Fair Credit Reporting Act** and similar state laws, which place further restrictions on the way certain types of criminal history background information is gathered, and may require applicant consent, and follow-up notification. These laws are not the subject of our Alert, but warrant consideration whenever an employer is considering the use of criminal background history in making employment decisions.

State/Local Restrictions on Employing Individuals with Criminal Conduct Records

In contrast, the EEOC makes no concessions regarding state laws governing employment of individuals with criminal conduct records, stating that these laws are pre-empted by Title VII if they require or permit any act that would violate Title VII. In other words, the EEOC will examine an employer's application of state/local laws to determine whether or not the exclusion of an individual from a position is job related and consistent with business necessity.

There are numerous state laws, which vary widely in the degree to which use of criminal conduct records is allowed or prohibited. Some states allow the use of misdemeanor or even arrest information, areas of inquiry that are largely disapproved of by the April 2012 Guidance. Other states disallow consideration of a broad range of criminal history information. A summary of the laws of states in which many of our clients do business is appended. [Click here to jump to state summary]. Employers should consult with counsel to navigate state law and the EEOC Guidance in assessing and developing policies and practices regarding use of criminal history information.

EEOC's Best Practices – Take-Aways for Employers

The EEOC then concludes the April 2012 Guidance by summarizing what it terms "best practices" which include: (1) eliminating policies that exclude employment based on any criminal record; (2) training hiring managers/decision-makers about Title VII and how to legally apply your particular policy; (3) developing a narrowly-tailored policy that identifies essential job requirements, determines specific offenses that may demonstrate lack of fitness for a job, sets a time limit for consideration of criminal history and allows individuals to respond to criminal history reports; (4) recording and justifying the policy; (5) recording "consultations" and research used to craft the policy; and (6) maintaining record confidentiality.

From our perspective, developing a narrowly-tailored policy for each position would be the most difficult for employers to implement, and potentially, the most costly. Again, while these steps are not legally required, employers should be prepared for an increase in EEOC investigations in this area, and would be well-advised to review their current policies with an eye toward making revisions to policies where issues have been raised by the April 2012 Guidance.

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State by State Summary of Use of Arrest and Conviction Information Law

Alabama

Alabama has no state laws restricting employers' use of convictions/arrests in employment practices.

California

The California Labor Code generally prohibits employers from asking about or considering records of arrest or detention that did not result in conviction, as well as from asking about or considering information concerning a referral to or participation in any pre-trial or post-trial diversion program. However, an employer is permitted to ask an employee or applicant about an arrest for which the employee or applicant is out on bail or on his or her own recognizance pending trial.

Employers in California may not ask about or consider certain misdemeanor marijuana convictions which are more than 2 years old.

The prohibitions mentioned above do not apply to cities, counties, districts and other public entities when screening prospective concessionaires. In addition, the prohibitions do not apply to peace officers, certain other criminal justice employees and health facility employees with regular access to patients. Further, health care facility employers which have or dispense certain controlled substances may ask about arrests pertaining to particular drug-related offenses.

Employers in California who violate these restrictions are liable to aggrieved employees and applicants for actual damages or in the amount of $200 (whichever is greater), plus attorneys' fees and costs. If violations are deemed intentional, the employer is liable for treble damages or $500 (whichever is greater), plus attorneys' fees and costs. Further, violation of these restrictions is considered a misdemeanor, and where the violation is intentional, the misdemeanor is punishable by a fine not to exceed $500.

Further still, employers who violate these Labor Code provisions may also be subject to a California Labor Code Private Attorneys General Act ("PAGA") lawsuit. Under PAGA, one or more aggrieved employees or applicants may sue on behalf of themselves and any other person similarly situated. Successful plaintiffs in such a PAGA case alleging violations of Labor Code section 432.7 may be able to recover a civil penalty, 25% of which is paid to the plaintiffs, and 75% of which is paid to a state agency (the Labor and Workforce Development Agency). The penalty is generally $100 per aggrieved employee per pay period for an initial violation, and $200 per aggrieved employee per pay period for any subsequent violations. In addition, the plaintiffs may recover their attorneys' fees and costs of a PAGA lawsuit.

Colorado

Generally speaking, an employer may obtain certain state criminal records and use those records for employment screening. An employer is prohibited from asking applicants about arrests (except employers providing care or care placement services may determine whether a prospective employee is under pending indictment for a crime that relates to the safety of those to whom care will be given), but may ask about convictions that have a direct bearing on an applicant's ability to perform a given job if all applicants for that position are asked about convictions. An employer may not inquire about sealed criminal records, and a job applicant can legally deny that such records exist.

Florida

In Florida, certain statutory support exists for conducting criminal background checks. In a civil action for the death of, or injury or damage to, a third person caused by the intentional tort of an employee, the employee's employer is presumed not to have been negligent in hiring such employee if, before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general. A background investigation must include: (a) obtaining a criminal background investigation on the prospective employee; (b) making a reasonable effort to contact references and former employers of the prospective employee concerning the suitability of the prospective employee for employment; (c) requiring the prospective employee to complete a job application form that includes questions concerning whether he or she has ever been convicted of a crime, including details concerning the type of crime, the date of conviction and the penalty imposed, and whether the prospective employee has ever been a defendant in a civil action for intentional tort, including the nature of the intentional tort and the disposition of the action; (d) obtaining, with written authorization from the prospective employee, a check of the driver's license record of the prospective employee if such a check is relevant to the work the employee will be performing and if the record can reasonably be obtained; or (e) interviewing the prospective employee.

To satisfy the criminal-background-investigation requirement, an employer must request and obtain from the Department of Law Enforcement a check of the information as reported and reflected in the Florida Crime Information Center system as of the date of the request.

The election by an employer not to conduct the investigation specified does not raise any presumption that the employer failed to use reasonable care in hiring an employee.

Georgia

Georgia has no state laws restricting employers' use of convictions/arrests in employment practices, except that a discharge under Georgia's First Offender Program is not a conviction and cannot be used to disqualify a person for employment.

Illinois

Generally, it is considered a civil rights violation for any employer to inquire into or to use: (1) the fact of an arrest; or (2) criminal history record information ordered expunged, sealed or impounded, as a basis to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment.

The prohibition against the use of the fact of an arrest shall not be construed to prohibit an employer from obtaining or using other information which indicates that a person actually engaged in the conduct for which he or she was arrested.

Massachusetts

Under the Criminal Offender Record Information ("CORI") Reform Act, employers are prohibited from asking questions on "an initial written application form" regarding an applicant's criminal background, including queries concerning arrests, charges or incarceration. Employers who use a single employment application on a nationwide basis are exempt from this prohibition so long as the

application contains the following disclaimer: "Under Massachusetts law, an employer is prohibited from making written pre-employment inquiries of an applicant about his or her criminal history. MASSACHUSETTS APPLICANTS SHOULD NOT RESPOND TO ANY QUESTIONS SEEKING CRIMINAL RECORD INFORMATION." Limited exceptions apply to the ban.

Other changes to the CORI process that went into effect on May 4, 2012 include the fact that employers requesting CORI information from the Department of Criminal Justice Information's ("Department") CORI database are no longer able to make anonymous requests for CORI records and that individuals who are the subjects of CORI requests are entitled to obtain information about those persons or entities that have made such requests, including the certified purpose of the requests. The revisions also reduce the time before which a record of certain offenses will be sealed for CORI purposes. Further, employers who request information from the Department must only share such information with those "that have a need to know the contents of the criminal offender record information to serve the purpose for which the information was obtained." The employer must also maintain a secondary dissemination log for a period of one year following the dissemination of a subject's criminal offender records information that contains various information about the subject and the dissemination, and is subject to audit by the Department.

Additional changes to the Massachusetts criminal background checking or CORI procedures effective May 4, 2012 are similar to certain requirements of the Fair Credit Reporting Act. First, employers utilizing the Department's CORI database must obtain a written authorization from the applicant or employee prior to obtaining the report and verify the individual's identity. The Massachusetts criminal background checking system provides a safe harbor from negligent hiring claims for employers who rely solely on information received from the Department's CORI database, so long as: (1) the employment decision at issue was made within 90 days of obtaining the information; (2) the employer followed and maintained policies and procedures for verification of the subject's identity; and (3) other law does not require the employer to conduct further background checks.

Second, under Massachusetts law an employer is similarly not liable for discriminatory employment practices for deciding not to hire an applicant on the basis of criminal background information gained from the Department's CORI database that is ultimately found to be incorrect, assuming the employer would not have been liable had the information been correct. This safe harbor provision also requires that the employment decision was made within 90 days of receiving the information from the Department and that the employer verified the individuals' identity. Employers who gain CORI information from other sources are unable to receive the benefits of either safe harbor provision.

Finally, under Massachusetts law, when an employer conducts five or more criminal background investigations per year, regardless of the sources used during such investigation, the employer must maintain and comply with a written criminal offender record information policy. Such a policy must state that the employer will: (i) notify the applicant of the potential adverse decision based on the criminal offender record information; (ii) provide a copy of the criminal offender record information and the policy to the applicant; and (iii) provide the applicant with information concerning the process for correcting a criminal record.

The CORI Reform Act did not change the fact that an employer can still question an applicant or employee about, or make an employment decision based on, his or her criminal history information, so long as such action complies with the aforementioned regulations, and other state and federal laws. However, the Act does require that the employer disclose the information to the applicant or employee before either questioning the subject about the information or making an adverse decision based on the information. If the employer has already given the information to the applicant or employee before

questioning the person about such information, it need not be provided a second time if an adverse decision is made based on the information.

New Jersey

The New Jersey Law Against Discrimination does not expressly prohibit discrimination against applicants or employees who possess a criminal record. Rather, the law regulates the method in which employers may request a criminal history from the State Bureau of Identification and the extent to which that information may be utilized.

Employers must make their request for criminal history record information on prescribed forms and certify that they are authorized to receive criminal history information; the records will be used by the employer solely for the purpose of determining the subject's qualifications for employment, volunteer work or other performance of services; the records will not be shared with persons for unauthorized purposes; subjects of the criminal history inquiry will be provided adequate notice to complete or challenge the accuracy of the records provided and will be afforded a reasonable period in which to correct or complete records; and employers cannot presume guilt for pending arrests or charges indicated on records for which there are no final dispositions indicated on the record. A subject who is disqualified for employment based on his or her criminal record must be given adequate notice and a reasonable time to confirm or deny the accuracy of information prior to a final determination concerning the subject's eligibility for the position, employment or license.

The New Jersey Division on Civil Rights has long taken the position that the use of arrest records in employment decisions is discriminatory.

New York

No application for employment, and no employment held by an individual, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless: (1) there is a direct relationship between one or more of the previous criminal offenses and the specific employment sought or held by the individual; or (2) the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. In making this determination, the employer shall consider the following factors: (a) the public policy of New York to encourage the employment of persons previously convicted of one or more criminal offenses; (b) the specific duties and responsibilities necessarily related to the employment sought or held by the person; (c) the bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities; (d) the time which has elapsed since the occurrence of the criminal offense or offenses; (e) The age of the person at the time of occurrence of the criminal offense or offenses; (f) the seriousness of the offense or offenses; (g) any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; and (h) the legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public. At the request of any person previously convicted of one or more criminal offenses who has been denied a license or employment, a public agency or private employer shall provide, within thirty days of a request, a written statement setting forth the reasons for such denial.

Moreover, it is generally an unlawful discriminatory practice to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or

criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, or by a youthful offender adjudication, or by a conviction for a violation that is sealed in connection with the employment of such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, or by a youthful offender adjudication, or by a conviction for a violation sealed. These provisions do not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer, or to any application for employment or membership in any law enforcement agency in certain circumstances.

North Carolina

North Carolina has no state laws restricting employers' use of convictions/arrests in employment practices.

Ohio

There is no state law barring the use of conviction records in employment decisions. Indeed, for some positions (e.g., school bus drivers, mortgage loan officers), background checks are required. The Ohio Civil Rights Commission has stated that it is discriminatory to ask job applicants about arrests that did not result in a conviction, unless a bona fide occupational qualification is certified in advance. Employers may not inquire of applicants about criminal records that have been sealed, unless there is a direct and substantial relationship to the position sought, nor may employers inquire about convictions that have been expunged.

Pennsylvania

Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied. The employer shall notify in writing the applicant if the decision not to hire the applicant is based in whole or in part on criminal history record information.

Certain cities have additional restrictions. See, e.g., the Philadelphia Fair Criminal Record Screening Standards Ordinance, which prohibits employers from inquiring about criminal convictions during the application process and in the first interview, and from making personnel decisions based on arrests or criminal accusations that do not result in a conviction.

South Carolina

South Carolina has no state laws restricting employers' use of convictions/arrests in employment practices.

Tennessee

Tennessee has no state laws restricting employers' use of convictions/arrests in employment practices.

Texas

Although Texas law provides no limitations on an employer's ability to utilize background checks, there are protections provided to applicants regarding the information they are required to report. If an

applicant accepts deferred adjudication and satisfies the probation term, then no final conviction is entered on the applicant's record and the applicant can claim never to have been "convicted" of the offense. In addition, an applicant whose juvenile record is sealed is not required to admit that the applicant has been the subject of a juvenile court proceeding.

Texas requires in-home and residential delivery companies to perform a background check on employees sent into customers' homes. If the company completes the background check and the person has not been convicted of, or sentenced to deferred adjudication for, an offense against a person or property, or for public indecency, then the company is entitled to a rebuttable presumption that the employer did not act negligently in hiring the person. Texas law also requires certain health care companies serving the elderly, persons with disabilities, or persons with terminal illnesses to conduct background checks and bars individuals convicted of violent, sexual or other specified felonies from employment.

Washington

Washington law limits preemployment inquiries regarding arrests and convictions (or imprisonment), including inquiries made via job application forms, preemployment interviews, or any other type of inquiry made of job applicants. The limitations also apply to inquiries made to persons other than the applicant and to inquiries made by third parties, such as credit reporting services. Arrest and conviction inquiries are permissible only if they are limited to arrests or convictions (or a release from prison) occurring within the last ten years. Inquiries regarding arrests must also include whether charges are still pending, have been dismissed, or led to a conviction involving a behavior that would adversely affect job performance. Inquiries regarding convictions (or imprisonment) must also reasonably relate to the duties of the job in question in order to be considered justified by business necessity. Certain types of employers, such as law enforcement agencies, state agencies, school districts, and other organizations that have direct responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, or other vulnerable adults are exempt from these restrictions.

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