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Labor & Employment Update

NEW EEOC GUIDANCE REQUIRES GREATER CAUTION BY EMPLOYERS IN CONSIDERING CRIMINAL RECORDS OF JOB APPLICANTS AND EMPLOYEES

On April 25, 2012, the federal Equal Employment Opportunity Commission (EEOC) issued new guidance about use of arrest and conviction records in making employment decisions. This guidance, combined with existing state statutes in Massachusetts and Connecticut, requires that employers act with care in seeking information about or considering applicants' or employees' criminal records.

The guidance, while not a regulation, reinforces the agency's longstanding views and limits an employer's use of criminal history information in two ways. First, employers cannot treat job applicants with the same criminal records differently because of their race, national origin or other protected category. Second, because excluding individuals from employment due to their criminal records has a greater effect or "disparate impact" on certain minorities with statistically higher arrest and conviction rates, employers cannot avoid discrimination simply by adopting a policy or practice barring everyone with a criminal record (or with a record of certain criminal conduct) from employment. The EEOC has stepped up enforcement efforts to address discrimination based on criminal history.

Employers often have legitimate, non-discriminatory reasons for refusing to hire a person with a criminal history for a particular job. Aside from the fact that federal or state law may disqualify the person from holding that position, employers may have a duty to keep other employees and the public safe and to prevent theft from their businesses. So what can an employer do?

The EEOC recognizes that Title VII does not prohibit employers from obtaining criminal background reports about applicants or employees, although employers must comply with the federal Fair Credit Reporting Act when they obtain such information from consumer reporting agencies. Nevertheless, the EEOC cautions that an arrest (as opposed to a conviction) does not establish that criminal conduct has occurred, that disqualifying criminal conduct should be relatively recent and serious, and that there must be a job-related reason and business necessity for refusing to place an individual in a particular position. Further, the EEOC recommends that job applications no longer include requests for criminal history and applicants be given the opportunity to explain or refute in person the findings in a background check about their criminal record.

Employers doing business in Massachusetts are already legally required to take some of the steps the EEOC recommends. For example, job applications can no longer include any questions about criminal history (unless federal or state law disqualifies a person for the position because of one or more types of convictions).



If you have any questions about the issues addressed here, or any other matters involving Labor & Employment law issues, please feel free to contact:

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While employers are permitted to ask applicants questions about criminal offender record information (CORI) in an interview, subject to the limitations described below, the employer must first provide the applicant with a copy of the information. Likewise, if an employer makes an adverse employment decision based upon CORI, the employer must provide the information to the affected individual. The employer cannot base its decision on or ask about an arrest that did not result in a conviction; a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace; a conviction for a misdemeanor more than five years old (providing that there have been no intervening convictions); or a sealed record. Employers who conduct five or more criminal background checks a year must establish a written CORI policy. Employers can choose between conducting criminal background checks through the new state CORI database or using third party vendors.

Connecticut law prohibits the State and its agencies from inquiring about a prospective employee's past convictions until the prospective employee has been deemed otherwise qualified for the position (unless a statute specifically disqualifies a person from a position because of a prior conviction). Significantly, Connecticut law prohibits all employers from considering records of arrest not followed by a conviction, or records of conviction that have been erased.

The bottom line: An employer can usually take an individual's prior criminal conduct into consideration in determining whether to hire or place that person in a particular position, but an employer must follow proper procedures and have solid, job-related grounds for denying employment.

Call Jamie Radke at 617.457.4130 or Susan Baronoff at 617.457.4031 for questions about Massachusetts law, or Lissa Paris at 860.240.6032 or Hugh Murray at 860.240.6077 for Connecticut questions.

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