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Criminal Background Checks

Preventing or Creating Liability?

By Veena A. Iyer

In January 2012, Pepsi agreed to enter into a settlement agreement with the Equal Employment Opportunity Commission (EEOC) to resolve a sweeping charge of race discrimination. The alleged discriminatory practice? The company's criminal background check policy. According to the EEOC, the policy disproportionately excluded African-Americans from employment. Facing the threat of litigation by the EEOC, Pepsi agreed to pay $3.13 million, change its policy, and extend job offers to the alleged victims.

The charge against Pepsi is likely a harbinger of charges to come.

Criminal background checks are ubiquitous in an age in which most criminal records are computerized and easily accessible. According to a 2010 survey by the Society for Human Resource Management, 73% of employers conducted criminal background checks on all applicants, and another 19% performed criminal background checks on selected applicants.

However, systemic discrimination is now the EEOC's main target in the fight against discrimination. Since 2006, the EEOC has focused its investigative and enforcement efforts on cases that have a broad impact on an industry, profession, company, or geographic location. Because criminal background check policies often screen out large categories of prospective employees and often have a disparate impact on racial minorities, they fall squarely within the EEOC's enforcement focus.

Federal Developments

Recently, the EEOC issued updated guidelines regarding the use of criminal records in employment decisions under Title VII. The guidelines build upon judicial opinions that address the circumstances under which employers may use criminal records to reject an applicant or terminate an employee without running afoul of Title VII. (*See* article on page 1, *infra*). But the guidelines also establish new requirements that have never been mandated by Congress or the courts.

Initially, the guidelines advise that arrest and conviction records should be treated differently. Because an arrest does not establish that criminal conduct occurred, employers should not make employment decisions based on arrest records alone. An employer would be required to conduct some investigation to confirm that a current or prospective employee engaged in the conduct at issue. But, because a conviction requires an adjudication of guilt, employers may make employment decisions based on conviction records alone.

More importantly, the guidelines reiterate that employers' use of criminal records may violate Title VII of the Civil Rights Act of 1964 under disparate treatment and disparate impact theories of discrimination. Under the disparate treatment theory, an employer would be liable if it treated the criminal backgrounds of applicants or employees differently based on a protected characteristic, such as race or national origin. Under the disparate impact theory, an employer would be liable if its neutral policy has a disparate impact on current or prospective employees who are members of a protected class and the policy is not job-related and consistent with business necessity.

According to the EEOC, there are two circumstances under which an employer will be able to establish that its policy fits with the "job-related and consistent with business necessity" definition:

> First, the employer can validate its policy by using one of the approaches outlined in the Uniform Guidelines on Employee Selection Procedures (UGESP). Essentially, a validation study requires the employer to show that a history of disqualifying criminal conduct correlates with future problems with job performance and behavior.
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> Next, the employer can develop a two-stage screening procedure for determining whether a criminal record is job-related and consistent with business necessity. The employer initially examines: the nature of the crime; the time elapsed since the offense, conviction, or completion of the sentence;

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and the nature of the job. The applicant or employee subsequently has the opportunity to show that the policy is inapplicable under the circumstances. For example, the employee or applicant could provide evidence that: s/he is not the subject of the criminal record; s/he has performed the same type of work since the conviction at issue and has had no additional incidents of criminal conduct; s/he has a long and consistent employment history; s/he has engaged in rehabilitation efforts; and/or the facts or circumstances of the underlying conduct demonstrate that the conviction is not job-related.

Notably, courts have held that the nature of the crime, the time elapsed, and the nature of the job are relevant in determining whether a criminal background check policy is job-related and consistent with business necessity. But no court has ever suggested that an employer should validate a criminal background policy under the UGESP. In fact, even the EEOC guidelines recognize that validation studies of criminal background check policies will be difficult, if not impossible, to conduct.

Additionally, no court has held that an employer must provide applicants or employees with an opportunity to rebut the presumption that his or her criminal conduct is disqualifying. It is clear from the guidelines, however, that if an employer omits an individualized assessment from its criminal background check policy, it will be more likely to attract the EEOC's attention and be challenged as not being job-related or consistent with business necessity.

State and Local Developments

During the last several years, state governments have also targeted the use of criminal background checks for employment purposes. In some cases, these state-specific statutes echo the requirements outlined in the EEOC guidelines. But in other instances, states have imposed even more stringent limitations on employers' ability to perform and use criminal background checks for employment purposes.

In many jurisdictions, administrative agencies have simply issued regulations or guidance clarifying that their anti-discrimination laws — like Title VII — prohibit the use of criminal background checks in a way that disparately treats or impacts protected groups. But other jurisdictions have gone farther and passed statutes and regulations that specifically restrict employers' ability to inquire into and use criminal records in making employment decisions.

Recently, Massachusetts passed legislation imposing some of the nation's most demanding requirements regarding the use of criminal background checks for employment purposes. In Massachusetts, employers are prohibited from inquiring into:

- Criminal history information on an initial written application form, except in certain limited circumstances, Mass. Ann. Laws ch. 151B, § 4(9½);
- An arrest, detention, or disposition that did not result in a conviction, *Id*. § 4(9)(i);
- A first conviction for the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace, *Id*. § 4(9)(iii); or
- Any misdemeanor convictions occurring five or more years before the date of the application or interview or the last day of incarceration — whichever is later — unless the applicant has been convicted of any offense within five years preceding the inquiry. *Id*.

No other state has adopted restrictions that are quite as strict as those in Massachusetts — although Hawaii prohibits employers from inquiring into an applicant's convictions until it has extended a conditional offer of employment. Haw. Rev. Stat. § 378-2.5(b). But several states have passed statutes or adopted administrative guidance that limit an employer's ability to inquire into and rely upon arrest or conviction records in making employment decisions.

Arrest Records

Six states — California, Illinois, Michigan, New York, Rhode Island, and Wisconsin — have passed statutes that largely prohibit an employer from inquiring into arrests that have not resulted in convictions. Cal. Lab. Code § 432.7(a); 775 Ill. Comp. Stat. § 5/2-103(A); Mich. Comp. Laws § 37.2205a.; N.Y. Exec. Law § 296(16); N.Y. Crim. Proc. L. § 160.60; R.I. Gen. Laws § 28-5-7(7); Wis. Stat. §§ 111.321; 111.322. Hawaii has passed legislation prohibiting employers from using arrests as the basis for an employment decision unless the arrest bears a "substantial relationship to the prospective or current employee's job functions and responsibilities." Haw. Rev. Stat. § 378 2(1). Several states — including Arizona, Colorado, Idaho, Maine, Maryland, Minnesota, Montana, Nevada, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Utah, and Washington — have also issued administrative guidance that advises employers to refrain from inquiring into arrest records or to limit those inquiries to arrests for criminal conduct that is job related.

Conviction Records

No state prohibits employer inquiries into all convictions, but several states have passed laws or issued administrative guidance that limits inquiries into and the use of certain conviction records for employment purposes. Six states — Hawaii, Kansas, Missouri, New York, Pennsylvania, and Wisconsin — have passed stat-

utes prohibiting employers from rejecting an applicant or terminating an employee on the basis of a conviction unless the conviction is job related. Haw. Rev. Stat. § 378-2.5(a); Kansas Stat. Ann. § 22-4710(f); Mo. Rev. Stat. § 561.016; N.Y. Correct. Law § 752; 18 Pa. Cons.Stat. § 9125(a) & (b); Wis. Stat. §§ 111.321; 111.322. Additionally, 12 states — Arizona, California Colorado, Idaho, Maine, Maryland, Minnesota, Rhode Island, South Dakota, Tennessee, Utah, and Washington — have issued administrative guidance advising employers to refrain from relying on conviction records unless they are job related.

Three states have adopted statutes requiring employers to consider the age of certain convictions when they are used as a basis for an employment decision. California bars the consideration of certain marijuana-related convictions that are more than two years old. Cal. Lab. Code § 432.8. Hawaii bars the consideration of convictions that are older than 10 years, excluding periods of incarceration. Haw. Rev. Stat. § 378-2.5(c). And New York requires that an employer consider the time that has elapsed since the offense occurred and the age of the applicant or employee when the offense was committed. N.Y. Correct. Law § 753. New York also requires that an employer consider evidence regarding the applicant or employee's rehabilitation or good conduct. *Id*. Other states — including Minnesota and Washington — have adopted administrative guidance requiring that employers consider the recency of a conviction when making an employment decision.

What's more, these limitations don't only emanate from federal and state authorities, but also can occur on the local level. Cities like Boston, New York City and Philadelphia have also passed local ordinances limiting the employers' abilities to use criminal background checks in the hiring process.

Best Practices

Employers — particularly those with workers in multiple states and cities — obviously have a complex and confusing legal environment if they choose to make employment decisions based on criminal background checks. They must ensure that their policies conform not only to the EEOC's guidelines, but also to the requirements of each state in which they have employees. Local laws further complicate employers' efforts to develop legally compliant criminal background check policies. Given the complex terrain, here are four best practices that employers can adopt to limit their risk exposure:

Make a conditional offer before requesting criminal background information and performing a criminal background check. Some employers begin the selection process by disqualifying applicants with convictions. This approach creates two problems. First, it generates a larger pool of disgruntled applicants to challenge your criminal background policy. Second, it enables otherwise unqualified applicants to argue that they were in fact rejected because of their criminal background. To avoid these problems, extend a conditional offer before performing a criminal background check.

Ask about convictions only. Employment decisions based on arrests are likely to come under more scrutiny than those based on convictions. Therefore, employers should refrain from inquiring into arrests that did not result in convictions.

Develop a criminal background policy that complies with legal requirements and meets your business needs. For all but the largest employers, validating a criminal background policy will be cost-prohibitive. Therefore, most employers will be left with the task of developing a policy that takes into account: the types of positions available; various categories of criminal convictions; time elapsed since a conviction; and although it has never been required by statute or by the courts, factors demonstrating that an applicant whose conviction would otherwise be disqualifying should nonetheless be hired or retained. Depending on the size of your company and its workforce, the policy could be extremely detailed or could provide broad brushstrokes. What is important, however, is that the policy document the basic reasons that, if an applicant had certain convictions within a specified period of time and did not show present evidence of certain extenuating factors, s/he would be disqualified from a class of positions within your company.

Document the reasons for rejecting and accepting applicants with criminal backgrounds. In applying your criminal records policy, be sure to document the reason why a specific applicant with a criminal conviction was rejected, hired, terminated, or retained. In particular, maintain thorough documentation of reasons why an applicant or employee who otherwise would have been rejected or terminated under the policy was hired or retained based on an individualized assessment of his circumstances. This will help avoid disparate treatment claims by those who were disqualified for the same or similar offense or those who contend that a conviction cannot be job related if an applicant or employee who has been convicted of that offense has been hired or retained.