



Hagan Davis Mangum Barrett & Langley PLLC

Update on the EEOC Guidance on Consideration of Arrest & Conviction Records in Employment Decisions

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What We Will Discuss Today:

- The EEOC's Guidance on Background Screening
- How Title VII Comes into Play
- Fair Credit Reporting Act ("FCRA") Issues in Employee Background Screening



Title VII's Protections

- Race, color, religion, sex and national origin.



Title VII Basics

Two Theories of Discrimination

- Disparate Treatment Discrimination
 - Direct
 - Intentionaland
- **Disparate Impact Discrimination**
 - Indirect
 - A policy or practice has an adverse impact on a protected group.



Disparate Impact Discrimination

1991 Amendment to Title VII:

A particular employment practice that causes a **disparate impact** on the basis of race, color, religion, sex or national origin **and** the employer fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity ... (emphasis added).



Disparate Impact Discrimination and Criminal Background Screenings

Example:

- Security guard standards requiring applicants to be at least 6 feet tall and 180 pounds.



Disparate Treatment Discrimination

An individual is treated differently in the terms and conditions of employment on the basis of race, color, religion, sex or national origin.

Example:

Employer rejected an African American candidate with a non-violent misdemeanor offense that occurred more than 10 years ago, but has a history of hiring white candidates with comparable criminal records.



Disparate Impact Discrimination

Prior to April 25, 2012, the EEOC had generalized Enforcement Guidance that:

- Discouraged employers from inquiring about arrests in employment decisions due to the risk of disparate treatment (adverse impact) on certain minorities; and
- Encouraged employers to look at the circumstances underlying a record of a criminal conviction in relation to the employer's job prior to making an adverse employment decision.



The EEOC's Concern with Criminal Background Screening

- Disproportionately high incarceration rates of African Americans and Hispanics, particularly men.
- Per the EEOC, use of criminal background screening by Employers causes a “Disparate Impact” of discrimination against African American and Hispanic males.



Disparate Impact Discrimination

The bulk of the 2012 EEOC Guidance addresses the EEOC's concerns of Disparate Impact Discrimination of African American and Hispanic males as a result of criminal background screening.



Disparate Impact Discrimination and Criminal Background Screenings

Per the EEOC Guidance:

- In 2010, 28% of all arrests were of African Americans, even though African Americans comprised approximately 14% of the general population.
- In 2008, Hispanics were arrested for federal drug charges at approximately 3 times the rate of the general population.
- African Americans and Hispanics are incarcerated at rates disproportionate to their numbers in the general population.



Disparate Impact Discrimination and Criminal Background Screenings

Based upon the statistics cited by the EEOC in its Guidance, the EEOC has concluded that criminal record exclusions have a disparate impact based on race and national origin, particularly as to African Americans and Hispanics.



Disparate Impact Discrimination

How is “Disproportionate Negative Impact” established?

- Facially neutral policy.
- Has a disproportionately negative impact on a protected class.
- Established by statistical/scientific evidence.



Disparate Impact Discrimination

How is “Disparate Negative Impact” established?

- Employer’s inconsistent hiring/employment practices.
- Comparisons of similarly situated employees.
 - Protected category vs. non-protected category.



Disparate Impact Discrimination

To Avoid Title VII Liability:

- If a facially neutral policy has a disproportionate effect of screening out a Title VII protected group (e.g., a particular race), the Employer has the burden of establishing that the employment policy/practice is job-related for the position in question and consistent with business necessity.



What is the Effect on Employers?

The proverbial

“Catch 22.”



What is the Effect on Businesses/Employees?

EEOC Guidance does not shield liability from:

- Negligent hiring/retention;
- Workplace violence;
 - Homicide is the 4th leading cause of death in the workplace (U.S. Department of Labor, 2011).



What is the Effect on Businesses/Employees?

Neither does the Guidance shield liability from:

- Theft and fraud.
- Failure to comply with licensure requirements.



Employer Best Practices in light of EEOC Guidance

Arrests:

- An arrest should not be grounds for adverse action.
- The facts underlying the arrest can be the basis for an adverse action.



Employer Best Practices in light of EEOC Guidance

Convictions:

- “No Convictions/No Job” is no longer acceptable.
- Inquire about criminal history when conditional offer is made, and not on job application.
- Don’t assume all information in background reports is accurate. Follow FCRA procedures.



Employer Best Practices in light of EEOC Guidance

Convictions:

- Engage in a case-by-case analysis for each applicant/employee:
 - Nature and gravity of offense or conduct;
 - Time that has passed since the offense or conduct occurred/sentence was completed;
 - Nature of the job held or sought.
- Provide applicant/employee an opportunity to explain circumstances.



Employer Best Practices in light of EEOC Guidance

Update job descriptions so it is apparent why background screening is job-related and consistent with business.

Examples:

- Handles money.
- Serves alcoholic beverages.
- Has access to sensitive financial information.
- Has access to patrons' valuables.



Employer Best Practices in light of EEOC Guidance

Examples, continued:

- Works in close proximity to small children or the elderly.
- Security position.
- Inventory control position.
- Mobile workplace (e.g., shuttle drivers).



Employer Best Practices in light of EEOC Guidance

Examples, continued:

- Works in stressful work environment.
- Delivers passengers, goods or services.
- Works in high crime area.
- Has access to medical supplies and pharmaceuticals.



Employer Best Practices in light of EEOC Guidance

Examples, continued:

- Works at night.
- Works alone.



Employer Best Practices in light of EEOC Guidance

- Document objective factors for employment decision-making.
- If background screening results are a factor in adverse decision, document why.



Employer Best Practices in light of EEOC Guidance

- Review prior employment decisions for consistency.
- Centralize employment decisions as much as possible to ensure consistency.



Recent Developments

- Update on EEOC's lawsuits against BMW and Dollar General Stores.
- Letter from eight Attorneys General.
- “Ban the Box” laws.
- *EEOC v. Kaplan-Higher Education* – 6th Circuit Case.
- *EEOC v. Freeman Companies* – Maryland District Court



Fair Credit Reporting Act – For Employers

This is overlay to EEOC Guidance

- Special requirements for “Consumer Reports” for Employment Purposes.
- Criminal background screens obtained from a third party are “Consumer Reports.”
- Make sure background screening company provides complete and up-to-date consent forms and notices as part of contract/service.



Fair Credit Reporting Act – For Employers

- Clear and conspicuous written disclosure, that consists solely of the disclosure, that a consumer report may be used for employment purposes.
 - The disclosure cannot be part of the application, of employee handbooks, or other document.
- Employee’s authorization/consent for the consumer report.
 - “Evergreen” consents are permissible.
 - **Separate consents and disclosures are advisable.**
- FTC Notice of Rights



Fair Credit Reporting Act – For Employers

- **Pre-Adverse Action Notices**
 - Provided to employee prior to making any adverse employment decision based in whole or in part on “consumer report.”
 - Includes FTC Notice of Rights.



Fair Credit Reporting Act – For Employers

- **Pre-Adverse Action Notices**
 - Includes copy of “Consumer Report,” contact information for “Consumer Reporting Agency,” (“CRA”) but state CRA did not make decision.
 - Designed to provide applicant/employee an opportunity to correct inaccurate information in consumer report and notify employer of misinformation.



Fair Credit Reporting Act – For Employers

- **Adverse Action Notice:**
 - Employer must wait a “reasonable time” to send notice of Adverse Action after pre-adverse action letter has been sent.
 - Letter/notice must state that adverse employment action is based in whole or in part on information provided in consumer report, and CRA did not make employment decision.



Fair Credit Reporting Act – For Employers

- **Adverse Action Notice:**
 - Include name/address of CRA.
 - Inform employee/applicant of right to obtain free copy of consumer report within the next 60 days.



Fair Credit Reporting Act – For Employers

- **Fair Credit Reporting Act and EEOC Checklist**
 - Remove arrest/conviction questions for applications and pre-offer inquiries.
 - Don't base decisions on arrests, except when the underlying facts of the situation are pertinent. Then, call your employment lawyer.



Fair Credit Reporting Act – For Employers

- **Fair Credit Reporting Act and EEOC Checklist**
 - Revise job descriptions to reflect business necessity for criminal background screening.
 - Review each situation on a case-by-case basis to determine if a particular conviction warrants taking adverse action.



Fair Credit Reporting Act and EEOC Checklist

- **Fair Credit Reporting Act and EEOC Checklist**
 - Review employment decisions to ensure consistency and no disparate impact.
 - Conduct background screening consistently (*e.g.*, rehiring, promotion, cause, accident, random, by job category).
 - Implement processes to ensure compliance with FCRA.
 - Conduct due diligence of background company.



Questions?