CLIENT ALERT: EEOC Rescinds Guidance on the Use of Arrest and Conviction Records in Hiring

On October 28, 2026, the United States Equal Employment Opportunity Commission (the "EEOC") voted to immediately rescind its 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act (the "Guidance"). In its announcement, the EEOC emphasized that Title VII continues to prohibit discrimination based on protected categories, including employment practices or criteria that serve as proxies for intentional discrimination, but that the Guidance is no longer applicable. Employers should not interpret the EEOC's position as authorization to categorically reject all candidates with a criminal history. It is important to remain mindful of state and local laws that govern the use of such information in employment decisions.

Rescission of the Obama-Era Guidance

During President Barack Obama's first term, the EEOC issued the Guidance, which cautioned that criminal history screening may constitute unlawful race or national origin discrimination because data reflected that people of color were arrested and convicted at disproportionately higher rates. While Title VII does not prohibit discrimination based solely on having a criminal record, the EEOC explained that blanket exclusions of applicants with criminal records may disproportionately screen out people of color and, accordingly, trigger Title VII scrutiny on the basis of national origin and/or race. The Guidance encouraged employers to do an "individualized assessment" of a candidate's criminal history, including by evaluating whether an exclusion based on a criminal record is job-related and consistent with business need.

In rescinding the Guidance, the EEOC noted that the rescission has two important limitations: it does not reinstate prior EEOC policy statements that were displaced by the 2012 Guidance, and it does not compel employers to discontinue lawful practices implemented pursuant to the Guidance. In light of these limitations, employers may continue to conduct an individualized inquiry into the relevance of an applicant's criminal history under federal law.

Employers Must Still Comply with State and Local Laws

Many states and localities have laws that impose requirements with respect to the use of criminal records in hiring. For example, Massachusetts' "Ban the Box" laws prohibit most employers from asking candidates about their criminal records on job applications. Massachusetts employers are also never permitted to ask applicants about:

- Arrests or detentions that did not result in conviction;
- First convictions for drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbing the peace;

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- Misdemeanor convictions that occurred more than three years prior (unless the applicant had a subsequent conviction within the last three years); and
- Juvenile, sealed, or expunged cases.

When it comes to using criminal history information in employment decisions, Massachusetts law (as set out in CORI reform) requires employers to take certain steps before any adverse action, including notifying the applicant of the potential adverse decision before making the decision, providing the applicant with a copy of the criminal history information, and other specified notice requirements. Employers in other jurisdictions may have different and/or additional obligations.

The EEOC's rescission of its Guidance does not undo an employer's obligation to comply with state and local laws on criminal background checks and the use of criminal records in employment decisions. Employers with questions about their state and local requirements should contact their MBJ attorney.

Melanie Stallone is an attorney with Morgan, Brown & Joy, LLP and may be reached at (617) 523-6666 or at mstallone@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

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