

CLIENT ALERT: EEOC Updates Guidance on Use of Applicant's Arrest and Conviction Records

On April 25, 2012, the United States Equal Employment Opportunity Commission ("EEOC") issued updated Enforcement Guidance, and accompanying Questions and Answers, regarding when and how employers may inquire into an applicant's arrest and conviction history. The materials clarify the Commission's position on the use of criminal histories in making hiring decisions.

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination based on race, color, religion, sex, or national origin. Although Title VII does not directly regulate criminal history information, the guidance notes that employers use of criminal history information may violate Title VII if the employer either: (1) treats job applicants with the same criminal records differently based on their race, color, religion, sex or national origin (disparate treatment discrimination); or (2) disproportionately excludes certain job applicants or employees with criminal histories even where the employer applies criminal record exclusions uniformly (disparate impact discrimination).

With respect to disparate treatment claims, the guidance explains that Title VII is violated when an "employer treats criminal history information differently for different applicants or employees, based on their race or national origin." Examples of evidence that may be used to establish that protected characteristics motivated an employer's use of criminal records in a selection decision, include, but are not limited to biased statements; inconsistencies in the hiring process; similarly situated comparators (individuals who are similar to the charging party in relevant respects, except for membership in the protected group); employment testing, and statistical evidence that demonstrates that the employer weighs criminal history information more heavily against members of a protected group.

The EEOC then spends considerable time addressing the disparate impact theory of liability. Disparate impact violations occur when "[a]n employer's neutral policy (e.g., excluding applications from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity." The EEOC explains that denying jobs solely on the basis of criminal convictions may be illegal, because it would disproportionately affect African-Americans and Hispanics, who are arrested at a rate that is two to three times the proportion of the general population. For example, if current incarceration rates continue, one in seventeen white males are likely to go to prison at some point in their lives, compared with one in six Hispanic males and one in three African-American males. The EEOC concludes that these statistics support a finding that criminal record exclusions have a disparate impact based on race and national origin.

The EEOC makes clear that if disparate impact is demonstrated, a policy excluding all applicants or employees with any criminal history violates Title VII. Instead of a blanket exclusion, the policy should consider 1) the nature and gravity of the offense or conduct; 2) the time that has passed since the offense or conduct; and 3) the nature of the job held or sought. In addition, the policy should provide for an individualized assessment. An individualized assessment includes informing the applicant about the background check and giving that applicant a chance to show how it would not affect his or her ability to do the job at hand. Some factors that would indicate that an individual would be able to perform the essential functions of the position despite a criminal conviction include: evidence that the individual performed the same type of work, post conviction, with the same or a different employer with no known incidents of criminal conduct; rehabilitation efforts, e.g., education or training; and employment or character references and other information regarding fitness for the particular position.

The guidance provides "Employer Best Practices" for employers considering criminal record

information when making employment decisions. Among the Commission's suggestions:

- Eliminate policies or practices that exclude people from employment based on any criminal record.
- Train managers, hiring officials, and decision makers about Title VII and its prohibition on employment discrimination.
- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
- Determine the duration of exclusions for criminal conduct based on all available evidence.
- Record the justification for the policy and procedures.
- Train managers, hiring officials, and decision makers on how to implement the policy and procedures consistent with Title VII.
- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

The [Enforcement Guidance](#) and [Q&A document](#) is available on the EEOC's website at www.eeoc.gov.

The EEOC notes that an employer may be found liable under the law if it refuses to adopt a less discriminatory policy that would allow the employer to achieve its stated goal, even if the employer successfully proves that its current policy is job related and consistent with business necessity. As such, employers should carefully analyze their policies and practices of using criminal background checks when making hiring decisions.

For more information on best practices, please contact your MBJ attorney.

Martha Lipchitz O'Connor is an associate with Morgan, Brown & Joy, LLP. Martha may be reached at moconnor@morganbrown.com or by calling (617) 523-6666. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This alert was prepared on April 30, 2012.

This publication, which may be considered advertising under the ethical rules of certain jurisdictions, should not be construed as legal advice or a legal opinion on any specific facts or circumstances by Morgan, Brown & Joy, LLP and its attorneys. This newsletter is intended for general information purposes only and you should consult an attorney concerning any specific legal questions you may have.