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CLIENT BULLETIN

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EEOC BREAKS OUT NEW GUIDANCE ON USE OF CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT DECISIONS

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On April 25, 2012, the Equal Employment Opportunity Commission announced its much-anticipated new **Enforcement Guidance** on employers' use of criminal background information in making employment decisions. The new guidance came in a bit of a rush as the EEOC was about to lose its Democratic majority with the resignation of Commissioner Stuart Ishimaru, which becomes effective at the end of April.

The EEOC has long expressed concern that the use of criminal records in employment decisions can have a disparate impact based on race and national origin, potentially violating Title VII. Disparate impact claims rely on statistics to show that an otherwise neutral screening criterion has a disparate, negative impact on one or more protected classifications of applicants or employees. Higher arrest and conviction rates for certain minority males – particularly African-American and Hispanic males – are primarily the reason that the EEOC frowns on employers' use of criminal background information.

The Recent Legal Landscape

In recent years, the EEOC has brought numerous class action lawsuits claiming that an employer's use of criminal background screening in employment decisions was unlawful because of a racially disparate impact. These cases were generally consistent with prior EEOC guidance given in 1987 and 1990. **A settlement with Pepsi Beverages in excess of $3 million in such a case** made headlines in the press early this year. There are no signs that the EEOC is backing away from aggressive enforcement of Title VII based on its theory of the law as applied to employers' use of criminal background information – use the EEOC considers suspect. Use of *arrest* history has long been discouraged by the EEOC, as well as broad exclusions of applicants based on the mere fact of a conviction. However, employers could justify exclusions based on criminal convictions by showing that the exclusions were job-related and consistent with business necessity. For example, the EEOC would generally not quibble with an employer who rejected an applicant for a finance position who had a recent dishonesty-related conviction.

The New Guidance

The new Enforcement Guidance essentially assumes that a broad exclusion for any

conviction (*i.e.*, checking the "conviction box" on an application results in exclusion) is unlawful and focuses on what an employer can do to show that the criminal background information is job-related and consistent with business necessity.

According to the EEOC, there are two ways:

> * The employer validates the exclusion criterion in light of the EEOC's own Uniform Guidelines on Employee Selection Procedures (apparently by proving statistically that past criminal conduct is related to future work performance or behaviors); *or*
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> * The employer develops a "targeted screen" considering at least the nature of the conviction, the time elapsed since the conviction, and the nature of the job (factors from **a 1977 decision** of the U.S. Court of Appeals for the Eighth Circuit). "The employer's policy then provides an opportunity for an individual assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity."

The "individualized assessment" is described generally by the EEOC as a process in which the individual has an opportunity to show that the exclusion should not apply to him. The EEOC lists evidence the employer should consider, including (1) the facts and circumstances surrounding the offense, (2) the number of convictions, (3) the age of the applicant at the time of the conviction/release from incarceration, (4) evidence of related incidents, if any, (5) rehabilitation, (6) employment or character references, (7) fitness for the position, and (8) bonding. If an applicant fails to supply additional information the employer may make a decision without any additional evidence (apparently giving some reasonable time for submission of the evidence).

However, even after the employer jumps through all of these hoops, a Title VII plaintiff may still prevail by showing that the employer refused to use a less discriminatory alternative employment practice that would have served the employer's legitimate interests as effectively as the challenged practice.

"Best Practices"

To its credit, the EEOC provides a list of "best practices" for employers. The agency recommends eliminating broad policies excluding applicants based on "any criminal record" and management training on the law, conducting individualized assessments, good record-keeping and confidentiality.

The EEOC recommends that employers *not* ask about criminal convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be "job related for the position in question and consistent with business necessity." This is essentially a recommendation to "ban the box" or at least customize it based on the position applied for. Whether this would be realistic for an employer who typically uses one application form for all applicants remains to be seen.

The complete list of "best practices" is in the appendix to the Enforcement Guidance document linked in the first paragraph of this Bulletin.

Employer's Legal Limbo

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Employers can find some solace in the fact that the EEOC stayed on course with its past guidance and did not, through interpretation and guidance, essentially outlaw use of criminal records as a factor in employment decisions. It may have done this in part because, as the EEOC recognized in the guidance, some employers are subject to other federal laws and federal regulations (1) that prohibit the employment of individuals with certain criminal records in certain positions and in certain industries and (2) that have licensing and/or security clearance requirements that prohibit employment of individuals with certain criminal records.

On the other hand, compliance with state or local law as a reason for an employment decision offers no safe harbor. According to the EEOC, the employer cannot disqualify an applicant or employee based on a requirement of state or local law unless the exclusion is job-related and consistent with business necessity.

The upshot of all this is that the EEOC has put a heavy burden on employers either to validate statistically their use of criminal conviction information as a factor in employment decisions or conduct detailed individualized assessments for all people screened out by use of a criminal record criterion. The individualized assessments are sure to take time and money and present more opportunity for lawsuits claiming that the assessments were themselves somehow tainted with unlawful discrimination and use of subjectivity. And even after the employer makes a persuasive justification for a practice, the plaintiff can attempt to show that a less discriminatory practice should have been used.

Employers are left carrying more burden and risk of discrimination claims on the one hand and negligent hiring or retention claims on the other. We can only hope that state courts will find that compliance with the federal requirements is a defense to a negligence claim.

If you have any questions about criminal background checks or compliance with the new Enforcement Guidance, please contact any member of Constangy's **Litigation Practice Group**, or the Constangy attorney of your choice.