

EEOC ISSUES GUIDANCE REGARDING THE USE OF CRIMINAL BACKGROUND CHECKS

By: [James Bucci, Esq.](#) and [Lauren J. Marcus, Esq.](#)

The federal Equal Employment Opportunity Commission (“EEOC”) recently issued enforcement guidance (“Guidance”) on employers' use of criminal records in making hiring and employment decisions. Prudent employers should be aware of the EEOC’s position and how it affects their applications, interviews, background checks and employment decision-making process.

By way of brief background, Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits employers from discriminating on the basis of race, color, religion, sex or national origin, and this prohibition includes facially-neutral employment practices that have a disparate impact on a protected category. Since its 2006 adoption of the “Systemic Initiative,” the EEOC has increased its enforcement efforts on systemic discrimination, which is defined as a “pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company or geographic location.” In this context, the use of criminal background information in making employment decisions may draw the attention of the EEOC’s investigators.

In the Guidance the EEOC sets forth its position, based on its own statistical study, that an across-the-board ban on hiring persons with criminal records results in a disparate impact on the bases of race and national origin. The EEOC has thus determined that in order for an employer to be able to properly consider an applicant’s criminal history in making a hiring/employment decision, the employer needs to be able to demonstrate that: (1) the inquiry is job related; and (2) the decision not to hire someone with a criminal record is based on a business necessity. Although not required, the EEOC strongly recommends in the Guidance that employers engage in an “individual assessment” for candidates screened out by background checks, and afford the applicant an opportunity to provide additional information about his or her criminal history.

Regarding the type of information that an employer may utilize, the EEOC has determined that, with rare exception, arrest records should not be considered in making

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employment decisions. While recognizing that conviction records may be considered by an employer, the EEOC cautions that conviction records can often be erroneous or outdated, and thus it advises that employers verify all information before screening out candidates or taking adverse action based on conviction records. The EEOC also recommends that employment applications no longer ask about criminal history, in order to prevent screening out candidates. Employers are permitted to ask about criminal backgrounds later in the application process; the EEOC suggests waiting until at least the first interview. The EEOC's position is based upon its belief that employers are more likely to engage in an individual assessment if they already have begun assessing a candidate's qualifications.

Once an employer becomes aware of an applicant or employee's criminal history, the Guidance suggests an individual assessment to determine employability. According to the EEOC, the following factors, among others, should be considered when making an employment decision based upon past criminal conduct:

- the nature and gravity of the offense;
- the amount of time that has elapsed since the offense;
- the nature of the job;
- rehabilitation;
- the number of offenses; and
- employment or character references.

If not adopting a policy of individual assessment, the EEOC suggests that employers at least have a "targeted screen," which considers the offense, the job, and the time elapsed since conviction or sentence, rather than disqualifying all candidates with a criminal record. While the EEOC provides some examples, there is little guidance to assist employers in determining how to apply the above factors in accordance with Title VII.

The Guidance also directs employers to "note and keep a record of consultations and research considered in crafting the policy and procedures" for using criminal record information to make employment decisions. Finally, the Guidance specifically directs employers to review and rewrite their policies and to retrain their staff on conducting interviews and making employment decisions.

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While not legally binding *per se*, courts frequently follow the EEOC's guidelines and thus, employers should be aware of the Guidance.

State, Local and Other Laws Regulating the Use of Criminal History Records

In addition to familiarizing themselves with the Guidance, employers in New Jersey, New York and Pennsylvania should be aware of the various laws in effect on state and local levels, which may impact how they advertise for applicants and make hiring and employment decisions. Below is a brief overview of the applicable laws and ordinances in the tri-state area.

Section 9125 of Pennsylvania's Criminal History Record Information Act ("CHRIA"), 18 Pa.C.S.A. § 9101, et seq., governs an employer's use of criminal histories. Similar to the EEOC's Guidance, Pennsylvania law does not permit employers to consider arrests when making employment decisions. However, Pennsylvania law expressly permits employers to consider certain felony and misdemeanor convictions when making employment decisions, though employers are required to engage in an individual assessment of the criminal offense and the employment sought, limiting consideration of criminal histories to the extent they relate to an applicant's "suitability for employment" in the position for which he or she has applied. Under CHRIA, employers are also required to notify job applicants, in writing, if a hiring decision is made based, in whole or in part, on criminal history record information.

In addition to the Pennsylvania state law, Philadelphia has amended Title 9 of the Philadelphia Code and enacted the Fair Criminal Record Screening Standards, § 9-3000, et seq., commonly referenced as the "Ban the Box" Ordinance. The Ordinance, which applies to businesses with 10 or more employees (excluding various criminal justice agencies), limits an employer's ability to consider convictions in early stages of application process and requires employers to remove questions about criminal convictions from applications. Specifically, employers may not ask job applicants about their criminal history until after the first interview; if there is no interview, an employer cannot conduct an investigation or otherwise ask about an applicant's criminal background. Employers may ask applicants about their criminal background after the first interview, and may only conduct criminal record checks after a candidate is determined to be otherwise qualified for the position.

New York has its own law governing an employer's use of criminal histories. New York's Correction Law, Article 23-A ("Article 23-A"), N.Y. Correct. L. §§ 750-755, expressly

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permits employers to use information of past criminal convictions, so long as employers engage in an individual assessment. However, like the EEOC's Guidance and Pennsylvania law, New York law bans an employer's use of prior arrest records.

In 2009, relevant portions of New York's Article 23-A were amended to encourage the employment of persons with criminal histories by increasing awareness of the restrictions placed on considering criminal history. Employers should note that New York law now requires employers to post a copy of Article 23-A in a conspicuous place and manner, as well as to notify all individuals who are subject to potential background checks. Article 23-A provides employers with an incentive to make reasonable efforts to hire individuals with criminal records in accordance with the law. If they do so, the employee's criminal records will be inadmissible in any subsequent negligent hiring or retention cases against the employer.

There is currently no prohibition on an employer's use of criminal records in New Jersey. However, New Jersey employers are likely to be covered by Title VII, and thus subject to EEOC investigations. Moreover, because the Guidance is largely based on a federal court decision from New Jersey's Circuit, it is possible that New Jersey state agencies and courts will follow the Guidance in cases brought under New Jersey's Law Against Discrimination.

In addition to state and local laws, employers must comply with another federal law when making employment decisions based on an applicant's or employee's criminal record. The federal Fair Credit Reporting Act ("FCRA") governs the manner in which an employer may access investigative consumer reports, which includes criminal background checks, and requires employer disclosures as well as applicant and employee authorizations. In accordance with the FCRA, an employer must obtain the written consent of an applicant or an employee prior to conducting a criminal background check, and must notify the applicant/employee when an employment action is about to be taken based on the results of the background check.

In light of the Guidance, and its interplay with other federal and state/local laws as mentioned above, employers are strongly encouraged to check their application forms and hiring policies and processes as a whole. Additionally, all personnel who have a role in the hiring process or are charged with making employment decisions should be trained on the Guidance and its implications, as well as the other laws mentioned above. Ultimately, employers with questions or concerns about their policies and the applicable laws should seek assistance to

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ensure compliance. If you have any questions regarding the use of criminal background checks, please contact James Bucci at jbucci@genovaburns.com or at (856) 968-0686.