Use of Background Checks in Hiring: Avoiding Landmines and How to Deal With Recent EEOC Enforcement Guidance

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Businesses, community associations, and nonprofits frequently use credit and/or criminal background checks as part of their employee selection process, particularly where the position requires a high degree of trust and confidence, access to cash or sensitive records, or where there are integrity or safety concerns (for example, where a construction contractor's employee, or a maintenance person at an apartment or condominium, may enter customers' or residents' homes). Depending upon the jurisdiction, employers may have concerns regarding "negligent hiring" liability for damages caused by an employee while acting within the scope of his/her employment.

Further, some statutes or regulations either require criminal background checks for certain positions or prohibit the employment of persons with certain criminal records from specific types of jobs. For example, in Virginia, Department of Social Services regulations require criminal background checks for most employees of licensed child day centers and foster homes.[1] For businesses with a liquor license, the Virginia ABC may suspend or revoke a license if a licensee knowingly employs persons in certain jobs (e.g., serving alcoholic beverages, or creating or maintaining records required by ABC) who have been convicted of certain offenses.[2]

WHAT IS THE PROBLEM?

One may ask why there are any constraints on an employer's ability to use criminal background, or credit, check information in deciding who to hire or retain? Particularly in a tight labor market, why can't employers simply determine that there are enough qualified applicants without criminal records that it's not necessary to even address the issue? The answer is that courts have held that certain credit or criminal background screenings could violate Title VII of the Civil Rights Act of 1964. More recently, the U.S. Equal Employment Opportunity Commission (the "EEOC") has issued Enforcement Guidance which pushes the boundaries of this issue, and has made this issue a priority.

The starting point is Title VII of the Civil Rights Act of 1964. Employers with 15 or more employees are subject to Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.[3] Generally speaking, there are two approaches under which unlawful discrimination may be shown. The first is "disparate treatment". As the name suggests, disparate treatment exists when one person or group of persons is treated differently than other persons on the basis of their membership in a protected class. The other is "disparate impact", where a facially-neutral criteria is applied that disproportionately

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[1] 22 VAC 40-191-40

[2] 3 VAC 5-50-40

[3] 42 U.S.C. §2000e et seq.

excludes people in a given protected class, but is not "job related for the position in question and consistent with business necessity."[4] Intent to discriminate is irrelevant in a disparate impact case. The important point is that in a disparate impact case, the plaintiff (whether the EEOC or a private plaintiff) has the burden of first proving, typically by statistics, that the facially neutral practice has a disparate impact on minorities, and if that burden is met, the defendant then must then show that the practice is question is job related for the position in question and consistent with business necessity.

Certainly, it would be a violation of Title VII to conduct background checks only on applicants or employees of a particular race, sex, national origin, etc., and not on other similarly situated applicants or employees. It would also be a violation of Title VII to set different standards for applicants or employees of different races, genders, etc. The issue is what about performing credit and/or criminal records checks on all applicants for a particular position, without regard to the applicant's protected classification, i.e., solely on the basis of the relevant job? Prior to the issuance of the recent EEOC guidance, courts have held that criminal background/credit checks may be evaluated under a "disparate impact" analysis. Courts have generally permitted employers to refuse to hire persons convicted of felonies, notwithstanding any purported disparate impact on minorities, particularly in the area of transportation.[5]

On April 25, 2012, the EEOC issued Enforcement Guidance, titled *Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (the "Enforcement Guidance"). The EEOC does not have the statutory authority to issue binding rules, however their policy guidelines serve a similar function. While not having the force of law, the Enforcement Guidance clarifies the EEOC's thinking on certain topics, and may spell out "safe harbors" to avoid action by the EEOC. "Ex-offenders" are not a protected class under Title VII, but race and national origin are. The essence of the Enforcement Guidance is that, according to the EEOC, Blacks and Hispanics are more likely to be incarcerated than whites. Therefore, even a facially neutral policy against hiring ex-offenders will screen out more blacks and Hispanics than whites, which may constitute "disparate impact" discrimination on the basis of race or national origin, prohibited under Title VII.

The EEOC Enforcement Guidance states that once disparate impact is shown, "the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position." One way that the employer can meet this burden is if it develops "a targeted screen considering the nature of the crime, the time elapsed, and the nature of the job . . . and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity."

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[4] 42 U.S.C. §2000e-2(k)(1)(A)(i).

[5] *EEOC v. Carolina Freight Carriers Corp.*, 723 F.Supp 734 (S.D. Fla. 1989); *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232 (3rd Cir. 2007); *Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP*, 537 F.Supp.2d 1028 (W.D. Mo. 2008).

The Enforcement Guidance further states that an employer could justify a targeted criminal records screen, but that the screen "would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question." While an individualized assessment is not necessarily required in all circumstances, under the Enforcement Guidance, it is highly recommended. That individualized assessment of individuals who are screened should consider (i) the facts and circumstances surrounding the offense or conduct, (ii) the number of offenses for which the individual was convicted, (iii) older age at the time of conviction, or release from prison, (iv) 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, (v) the length and consistency of employment history before and after the offense or conduct, (vi) rehabilitation efforts (e.g., education/training), (vii) employment or character references, and (viii) whether the individual is bonded under a federal, state, or local bonding program.[6]

A controversial aspect of the EEOC Enforcement Guidance is in the relationship between Title VII, and other federal or state laws and regulations. The Enforcement Guidance states that, with respect to federally imposed occupational restrictions, those restrictions supersede the Enforcement Guidance. Also, the Enforcement Guidance has no effect upon the requirements for federal security clearances. A significant issue exists in the area of state laws and regulations. There is no deference to state laws or regulations, so that if the state laws are deemed by the EEOC to be overbroad with respect to criminal inquiries or records, then EEOC will take the position that they are not job related and consistent with business necessity, regardless of the consequences of non-compliance with state law that could be faced by the employer.

Certainly, prior to the EEOC Enforcement Guidance, there was legal authority for the proposition that compliance with state law is not necessarily a defense to Title VII liability.[7] For example, in *Waldon v. Cincinnati Public Schools*[8], a long-standing African American employee was discharged in 2008 as a result of a 1977 felony conviction, and subsequent two year incarceration, because of an Ohio law that banned employment of people with felony convictions from being employed by the school district, no matter how far in the past they occurred, or whether they related to the employee's current employment. After the law was passed, the school district discharged ten employees, nine of whom were African American. While not dispositive on the ultimate issue, the court denied the school district's motion to dismiss – that is, whether or not the complaint even states a legal claim – because the court could not conclude as a matter of law that the policy constituted a business necessity. It should be noted that the court applied traditional disparate impact analysis, and did not discuss the EEOC Enforcement

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[6] The EEOC issued a clarification to the Enforcement Guidance by letter to states' attorney general dated August 29, 2013, from Jacqueline A. Berrien, Chair of the EEOC. In response to criticism, she stated, in part "I want to make clear that it is not illegal for employers to conduct or use the results of criminal background checks, and the EEOC never has suggested that it is." However, there was no substantive change in the Enforcement Guidance.

[7] *Gulino v. New York State Educ. Dept.*, 460 F.3d 361 (2nd Cir. 2006).

[8] 941 F.Supp.2d 884 (S.D. Ohio 2013), motion for interlocutory review denied, 2013 U.S. Dist. LEXIS 58689 (S.D. Ohio, Apr. 24, 2013).

Guidance. This leaves for another day how the EEOC Enforcement Guidance itself will be applied where it conflicts with state law.

Again, it should be emphasized that the EEOC Enforcement Guidance is not law – it is the EEOC's view of the law, and guidance to employers as to how EEOC will seek to apply Title VII in this area. The EEOC Enforcement Guidance is not binding on the courts.[9] It has been criticized as a bit of social engineering, hoping to help solve the problem of increasing incarceration rates and recidivism by forcing open the doors to employment for persons released from prison.[10]

Nevertheless, employers should not have a "per se" policy on criminal background checks or hiring persons with criminal records – that is, people with criminal records would be absolutely barred from employment, no matter what or when. I believe that it is unwise to do that. Even if the EEOC fails to prove disparate impact using statistical evidence, the cost of getting that that point can be significant. It should be noted that as of this writing (August 2014), the EEOC's focus on criminal background/credit checks has done poorly in the courts. It would be a mistake to conclude that courts have approved an employer's "per se" or poorly thought-out policy – they have not. So far, the EEOC has failed to achieve traction in the courts because, for whatever reason, they have brought cases against employers with well-reasoned and well-drafted policies, and have been sloppy in statistical proof of disparate impact.

Two recent cases demonstrate how the EEOC has fared so far in its approach to use of credit and/or criminal background checks. Even though each case was decided on narrow grounds, without deciding whether or not the particular employer policy was job related and consistent with business necessity, the language used by the courts is instructive. In *EEOC v. Freeman*[11], the US District Court for the District of Maryland granted the defendant employer summary judgment (meaning that after discovery has been completed, the court rules that there are no issues of material fact and that the moving party is entitled to judgment as a matter of law), dismissing the EEOC's case. The Court noted:

> For many employers, conducting a criminal history or credit record background check on a potential employee is a rational and legitimate component of a reasonable hiring process. The reasons for conducting such checks are obvious.

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[9] *See Foreman v. Five Star Food Service, Inc.*, 950 F.Supp.2d 958 (M.D. Tenn. 2013), subsequent proceedings at 2013 U.S. Dist. LEXIS 150182 (M.D. Tenn. Oct. 18, 2013). "Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant [enhanced] deference . . . these documents are entitled to respect in proportion to their power to persuade." Court rejected Dept. of Labor opinion letters. See also *Nelson v. City of New York et al*, 2013 U.S. Dist. LEXIS 117742 (S.D. NY 2013). "While courts are "not bound by [the EEOC's] enforcement guidelines, they are entitled to respect to the extent that they are persuasive". Court applied other EEOC enforcement guidelines pertaining to the ADA.

[10] Conner, Terrence G. and White, Jevin J. (2013) "The Consideration of Arrest and Conviction Records in Employment Decisions: A Critique of the EEOC Guidance", *Seton Hall Law Review*: Vol. 43, Iss. 3, Article 3.

[11] 961 F.Supp.2d 783 (2013). The case is currently being appealed by the EEOC to the Fourth Circuit Court of Appeals.

> Employers have a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their employers, engage in workplace violence, or who otherwise appear to be untrustworthy and unreliable. However, under Title VII of the Civil Rights Act of 1964, a specific hiring policy may constitute an unlawful employment practice if it has 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.

The Court further pointed out the "even the EEOC conducts criminal background investigations as a condition of employment for all employees, and conducts credit background checks on approximately 90 percent of its positions." While not dispositive because of the scope of the ruling, the Court noted at length the reasons developed by the employer for the type of checks it conducted, the standards actually applied by the employer, and how credit and criminal background information was considered. In a disparate impact case, the plaintiff (in this case, the EEOC) needs to prove the actual disparate impact. The plaintiff must identify the specific policy or policies causing the alleged disparate impact, and then prove the disparate impact caused by those policies – only then does the court get to the issue of job-related and business necessity.

The Court rejected the EEOC's attempt to use national statistics to prove disparate impact in a particular case. The Court further noted:

> With neither national statistics nor expert analysis to support its allegations of disparate impact, the EEOC's case cannot survive. The EEOC bears the burden of establishing a prima facie case, through the use of statistics or other evidence, of disparate impact because of a prohibited factor. The burden is not on the Defendant to conduct its own analysis to rebut the results produced by the EEOC's flawed report. It is sufficient for Defendant to point out the numerous fallacies in [the EEOC's expert's] report, which raise the specter of unreliability.

Again, it should be emphasized that employers should not simply rely upon the difficulty that the EEOC may have in showing disparate impact – the Court in *Freeman* discussed at length the policies that the employer actually did have.

A recent case decided in the Sixth Circuit Court of Appeals demonstrates how seriously the EEOC takes this issue, and how far the EEOC is willing to go in order to make a case. In *EEOC v. Kaplan Higher Education Corporation*[12], the EEOC asserted that the company's credit check policy created a disparate impact in violation of Title VII. In upholding the grant of summary judgment in favor of the defendant employer, the Court's decision was scathing:

> In this case the EEOC sued the defendants for using the same type of background check that the EEOC itself uses. The EEOC's personnel handbook recites that "[o]verdue just debts increase the temptation to commit illegal or unethical acts as

[12] 2013 U.S. Dist. LEXIS 64353; 118 Fair Empl. Prac. Cas. (BNA) 492 (6th Cir. 2014)

> a means of gaining funds to meet financial obligations." Because of that concern, the EEOC runs credit checks on applicants for 84 of the agency's 97 positions. The defendants . . . have the same concern; and thus Kaplan runs credit checks on applicants for positions that provide access to students' financial-loan information, among other positions. For that practice, the EEOC sued Kaplan.

What was problematic for the EEOC was the means by which it attempted to prove disparate impact. The essence of disparate impact is that a facially neutral policy produces different results for minorities. What happens, however, if there is a large number of persons involved and there is no racial data to begin with? The EEOC attempted to be creative. The EEOC obtained data for a large number of applicants. "That data . . . did not include the applicant's race, so the EEOC subpoenaed records from the departments of motor vehicles. Thirty-six states and the District of Columbia provided color copies of drivers' license photos for approximately 900 applicants."

Once the EEOC had these photographs, it still needed to come up with a way of classifying them by race. The Court described the process:

> In any event, Murphy [the EEOC's expert] assembled a team of five "race raters", each of which has experience in what the EEOC calls "multicultural, multiracial, treatment outcome research" – a term undefined by the EEOC here. But that term assuredly does not refer to the raters' experience with methodologies to identify race by visual means – since, undisputedly, they have none. Murphy directed each rater separately to review each applicant's drivers' license photograph and then classify the person's race . . . If four of five raters agreed upon a particular applicant's race, the applicant was so classified for purposes of Murphy's statistics. For 11.7% of the photographs, the raters failed to reach that consensus. For some reason Murphy also provided the raters with each applicant's name – which, the EEOC concedes, the raters were supposed to disregard when classifying an applicant's race.

The Court's ruling was narrow – it upheld the District Court's ruling that Murphy did not meet the legal standard for expert testimony[13], and, without that evidence, the EEOC could not establish disparate impact. The Court noted "[h]ere, the district court considered every one of the *Daubert* factors – and found that Murphy's methodology flunked them all." Because the EEOC never got out of the gate to prove disparate impact, the issue of job related and business necessity did not need to be addressed.

There is a secondary message in the *Kaplan* case. One may ask why, after losing at the district court on a narrow issue, with facts unique to that case, and which did not actually rule on whether the company's credit check policy was proper, did the EEOC decide to appeal to the circuit court? In my opinion, this case illustrates the attitude of some currently at the EEOC – that this is a priority issue, and that they are willing to "push the envelope" in the courts.

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[13] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 500 U.S. 579 (1993). The case describes certain criteria by which a court determines what kind of testimony can be admitted in court as expert testimony.

WHAT SHOULD EMPLOYERS DO?

It would be easy to be dismissive of the EEOC's efforts in *Freeman* and *Kaplan*, but that would be a mistake. First, both employers had good policies for credit and/or criminal background checks, in some ways not much different from those of the EEOC itself, which subjectively left the court wondering why the EEOC was pursuing these cases. Second, sooner or later the EEOC will get its statistical act together, and in the case of smaller businesses, creating a statistical case may be easier. Third, winning a disparate impact case on summary judgment may be costly, so a true "win" is being in the best posture in the first place, thereby not being everyone's "test case". If the EEOC has its expert, even if it's Mr. Murphy and his "race raters", you need to have your expert! Even if the employer wins, the employer will most often have to pay for its own attorneys' fees and costs. [14]

Employers should do the following:

1. On application forms, do not ask about arrest records. You may ask if a person has ever been convicted of a crime, other than minor motor vehicle matters, and, if so, to give details. Applications should contain language that the failure to disclose facts which are requested, or providing false or misleading answers, may be grounds for denial of an application, or termination of employment.

2. Understand what other laws (federal, state, or local) may require background checks. For example, background checks may be required for certain employees of a licensed day care center. If federal, state, or local laws or regulations require either background checks, or prohibit the employment of persons with certain criminal records, you have no choice but to comply with that law (e.g., a restaurant or bar can't afford to lose its liquor license!). You can't control what position the EEOC will take, but you can put yourself in the best position possible to rebut potential claims, by making sure that the applicable aspects of those laws are incorporated in the company's policy, and their nexus to the relevant positions is evident.

3. Based upon the regulatory and risk environment of your business, decide whether to obtain criminal background and/or credit checks, and for whom.

4. There needs to be a written policy stating if and when criminal background and/or credit checks will be ordered, and how the information will be evaluated. You do not want to have different managers stating to everyone what they think the policy is!

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[14] A prevailing party may recover attorneys' fees under §706(k) of Title VII, 42 U.S.C. §200e-5(k). The standard for awarding fees to defendants is more stringent than to prevailing plaintiffs. Fees may be awarded to defendants where the plaintiff's action was frivolous, unreasonable, or without foundation. See *EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013), rehearing denied *EEOC v. Peoplemark, Inc.* 2014 U.S. App. LEXIS 4881 (6th Cir. Mar. 10, 2014). The EEOC had alleged that the company had a "companywide policy of denying employment opportunities to person with felony records and that this companywide policy had a disparate impact on African Americans. As it turned out, the alleged companywide policy didn't exist."

5. If results of the background check show convictions, you must give the applicant the chance to show that the information is incorrect or incomplete, or there is a case of mistaken identity. There may be lots of people named "John Smith"!

6. Positive results of criminal background checks should be supplemented by looking at public data bases, if available.

7. Criminal offenses should be evaluated in the context of the applicable position.

8. There may be some offenses that are so serious that they would bar a person from being hired (such as murder, rape, sexual assault, drug trafficking, or offenses absolutely barred by other laws). Crimes should be rated, with lesser offenses being treated differently

9. In the *Freeman* case, Freeman only considered convictions or releases from prison occurring within the last seven years. For offenses which are not an absolute bar (e.g., murder), a reasonable time should be selected.

10. Credit checks should be limited to those in executive positions, or those handling sensitive data, consumer credit cards, money, or customer property of value.

11. If background checks (credit and/or criminal) are used, you must follow the Fair Credit Reporting Act (the "FCRA") requirements completely. For example, under the FCRA, applicants must have sufficient time to contest erroneous information upon which a rejection may be based.

12. In the *Freeman* case, upper HR officials reviewed recommendations "not to hire". A decision not to hire or to grant a waiver based upon an individualized determination, should be made by someone above the line manager.

13. If you receive a communication from the EEOC (or a state or local human rights agency) treat it as if you've just been served with a lawsuit. If an EEOC complaint has been filed with your company, you will receive a letter, with a charge form enclosed.

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