

Labor Law Update

Criminal Background Checks and Hiring

The Equal Employment Opportunity Commission (“EEOC”) recently released guidance on the use of criminal records in hiring. While this guidance does not carry the same rule of law as a regulation, courts will consider the guidance as persuasive, and it will dictate the EEOC’s investigations into discrimination charges. Accordingly, employers need to be aware of the guidance.



By Serena L. Lipski

Background

The EEOC’s reasoning behind issuing this guidance is that employers’ use of criminal background checks has a disparate impact on members of

protected classes, meaning that they are more likely to be screened out based on criminal background checks. In cases where plaintiffs can demonstrate such a disparate impact, employers then must demonstrate that the practice in question—the criminal background check—is job related and consistent with business necessity.

The use of criminal background checks can also be discriminatory under a disparate treatment theory, which occurs where an employer screens out a member of a protected class based on the results of a criminal background check, but does not screen out similarly situated candidates based on similar results.

Targeted Screens Required

The EEOC’s guidance, therefore, is aimed at preventing these types of discrimination. Employers are urged to develop a targeted screen that considers the following factors before using criminal background checks to exclude candidates:

- The nature and the gravity of the offense or conduct;
- The time that has passed since the offense or the conduct and/or the completion of the sentence; and
- The nature of the job held or sought.

Employers Must Follow Up With Individualized Assessments

Even after candidates are excluded based on the targeted screen, the EEOC guidance requires the employer to perform an individualized assessment of each of the excluded candidates to further analyze whether the exclusion of that candidate based on his or her criminal history is consistent with business necessity and that the exclusion is job related.

To perform an individualized assessment, the EEOC guidance recommends that the employer consider the following information, including contacting the candidate to confirm the accuracy of the criminal history report or to provide additional information where necessary:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Age at the time of conviction, or release from prison;
- 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;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

Focus on Convictions and Not Arrests

The EEOC guidance cautions employers from considering arrest records in making employment decisions: “The fact of an arrest does not establish that criminal conduct has occurred, and an exclusion based on an arrest, in itself, is not job

related and consistent with business necessity. However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question.”

Best Practices

Employers are urged to train managers, hiring officials, and other decision makers in employment discrimination laws, including this new guidance. The EEOC’s guidance provides additional “best practices” that employers should follow. First and foremost, employers should not have a blanket exclusion eliminating candidates for consideration based solely on the results of a criminal background check. Instead, employers should develop a new, narrowly tailored, written policy incorporating the targeted screen and individualized assessment as follows:

- Identify essential job requirements and the actual circumstances under which the jobs are performed.
- Determine the specific offenses that may demonstrate unfitness for performing such jobs.
 - Identify the criminal offenses based on all available evidence.
- Determine the duration of exclusions for criminal conduct based on all available evidence.
 - Include an individualized assessment.
- Record the justification for the policy and procedures.
- Note and keep a record of consultations and research considered in crafting the policy and procedures.

Employers are urged to train managers, hiring officials, and other decision makers in employment discrimination laws, including this new guidance.



Exceptions

Note that this process does not apply to industries where a federal law requires criminal history checks, such as banking.

Next Steps

If you have any questions on what type of policy your business should have for conducting criminal history checks on applicants, please contact us.

Update to NLRB Posting Rule

By Serena L. Lipski

The D.C. Circuit Court of Appeals recently issued an injunction against the National Labor Relations Board (“NLRB”) posting rule, meaning employers do not have to comply with the rule.

Last fall, the NLRB issued a final rule requiring employers to post a notice informing employees of their rights under the National Labor Relations Act (“NLRA”). Under the rule, both unionized and non-unionized employers were required to post the notice beginning April 30, 2012, several months later than the rule originally provided. An employer’s failure to post the notice is an unfair labor practice under the rule, and results in the extension of the statute of limitations governing all unfair labor practices against the employer. Thanks to the injunction, however, the NLRB cannot enforce the rule.

The injunction stems from an action that the National Association of Manufacturers (“NAM”) filed against the NLRB in the U.S. District Court for the District of Columbia. The NAM claims that the NLRB exceeded its authority under the NLRA in promulgating this new rule and is seeking an injunction against the implementation of the rule. The district court issued a ruling partially overturning the rule. The court upheld the posting requirement, but found that the rule’s penalty provisions exceeded the NLRB’s rulemaking authority. The NLRB has filed an appeal of the district court’s order in the D.C. Circuit Court of Appeals, and the Court of Appeals issued the injunction pending appeal. The appeal is set for hearing in September.

Meanwhile, in a separate action, the U.S. and South Carolina Chambers of Commerce sued the NLRB in the District of South Carolina. The district judge in that case held that the NLRB overstepped its authority and invalidated the posting rule.

We will continue to watch these two cases closely. While employers are not currently required to comply with the posting rule, you should stay informed of any future developments.