PUBLICATION

Are You A Criminal Or A Deadbeat? Uncle Sam Wants You (As a Potential Class Member)

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Employers that prohibit or limit the hire of persons with felony convictions may be unknowingly in the cross hairs of the EEOC for violating Title VII of the Civil Rights Act of 1964 (Title VII) on the theory that failing to hire felons has a disparate impact on African Americans and Hispanics. The EEOC is currently in the process of revising its regulations regarding felony convictions.

The Commission's current stance is that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on African Americans and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population. The Bureau of Justice Statistics showed that at the end of 2005, African Americans and Hispanics combined to make up 60% of state and federal inmates. Similarly, sociologists retained by the EEOC to investigate conviction trends have determined that in 2004, 1 in 33 black men – compared to 1 in 166 white men – received a felony conviction, leading to a racial disparity ratio (black to white males) of 5.07. In other words, black men in 2004 were more than five times more likely to receive a felony conviction than white men.

Under disparate impact analysis, the EEOC has the burden of establishing a prima facie case of discrimination through statistical evidence that an employer's policy of refusing to hire felons has an adverse impact on a protected class. In cases challenging hiring practices discriminatory toward African Americans, for example, one compares the percentage of African Americans in the job to the percentage of African Americans in the total qualified labor force, or if labor force data is unavailable, to the percentage of otherwise-qualified African Americans in the applicant pool. One then contrasts this ratio with the corresponding ratio for non-protected group members. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989). An EEOC regulation provides, as a general rule, that if the percentage selected from the pool comprises 80% or less of the percentage selected from the non-protected group, a discriminatory effect exists. *See* 29 C.F.R. 1607.4(d).

If the EEOC is able to show that a policy does in fact have a disparate impact, the employer may avoid liability only if it is able to establish that its policy is consistent with business necessity. The EEOC's Policy Statement provides that a Respondent employer must show that it considered the following three factors to determine whether its decision was justified by business necessity:

1. The nature and gravity of the offense or offenses;

2. The time that has passed since the conviction and/or completion of the sentence; and

3. The nature of the job held or sought.

See Commission Decision No. 78-03, CCH EEOC Decision (1983).

In light of the potential that the EEOC will tighten regulations in this area, employers should consider two additional precautions:

1. First (subject to the exemptions for specific industries), a blanket policy prohibiting the hire of felons will likely be found to be unlawful under Title VII in light of available statistics on felony convictions and should be revised to account for the factors outlined above.

2. Second, employers should be mindful of the language they use in job advertisements. Avoid using language (e.g., "No felons need apply") that could be construed as discouraging felons from applying. Doing so may possibly affect the calculation of damages if an employer's policy is found to be discriminatory. The EEOC could possibly collect damages both for felons who applied and were rejected, as well as those who did not apply because they were arguably discouraged by the employer's advertised policy.

Similarly, the Commission is now applying the same theory with regard to credit checks, claiming that African Americans, Hispanics, and men, as opposed to women, tend to be adversely affected by credit checks and that they are unlawful unless an employer can demonstrate a "business necessity" for its policy.

Baker Donelson stands ready to assist you with these and other labor and employment-related challenges. Contact any one of our nearly 70 Labor & Employment attorneys located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville* and *New Orleans, Louisiana; Jackson, Mississippi;* and *Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee*.

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