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Justice System to Workforce: The Finer Points of Title VII's Implications on Criminal Background Checks

Authors: Jennifer G. Hall

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It is estimated that the "American criminal justice system holds almost 2.3 million people in 1,719 state prisons, 102 federal prisons, 1,852 juvenile correctional facilities, 3,163 local jails, and 80 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories." (Source: Wagner and Sawyer, *Mass Incarceration: The Whole Pie 2018*) Once these individuals serve their sentences, they enter the workforce. Finding employment after incarceration is a key factor in preventing recidivism; however, criminal background checks can make finding a job impossible. Are there laws to protect these individuals from discriminatory hiring decisions?

In 2012, the EEOC issued its "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq." The EEOC's Guidance provides:

An employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended. ...

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.

In contrast, a conviction record will usually serve as sufficient evidence that a person engaged in particular conduct. In certain circumstances, however, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision.

In addition to the EEOC's guidance, 31 states, the District of Columbia, and 150 cities and counties have "ban the box" or "fair chance employment" laws. These laws prevent prospective employers from inquiring into criminal histories on employment applications. Eleven of these states – California, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, and Washington – apply ban the box laws to private employers.

What should employers do? First and foremost, now is the time to look at facially neutral policies to determine whether any of those policies have a disparate impact on a protected class. Does your application for employment inquire into past arrests? Does your company have a per se exclusion of candidates with felony convictions regardless of the nature of the crime or when the crime was committed? Are you in a "ban the box" jurisdiction? If so, your company may be on the EEOC's enforcement radar for disparate impact claims in your hiring procedures.

Consider implementing the EEOC's Best Practices:

General

- Eliminate policies or practices that exclude people from employment based on any criminal record. Train managers, hiring officials, and decisionmakers about Title VII and its prohibition on employment discrimination.

Developing a Policy

- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
- 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.
- Train managers, hiring officials, and decision makers on how to implement the policy and procedures consistent with Title VII.

Questions about Criminal Records

- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

Confidentiality

- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.