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FEBRUARY 11-13, 2013 • HOUSTON, TEXAS

IS YOUR CRIMINAL BACKGROUND CHECK POLICY CONSISTENT WITH THE EEOC'S UPDATED GUIDANCE



PRESENTER



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- She spends much of her time counseling employers in day to day employment and labor decisions
- She is a frequent speaker to industry groups and human resources professionals on such topics as avoiding harassment in the workplace, avoiding discrimination claims, proper interviewing, and effective discipline and discharge techniques

OVERVIEW

- **Primer On The EEOC**
- **EEOC Initiatives Involving Criminal Background Checks**
- **Analysis of EEOC Enforcement Guidance on Criminal Background Checks**
- **Developing A Compliant Policy and Procedure**

EEOC AT A GLANCE

- Federal agency entrusted with the responsibility of enforcing various fair employment laws:
 - Title VII, ADEA, ADA and Equal Pay Act.
- Investigates predominantly claims of discrimination, harassment and retaliation.



EEOC AT A GLANCE



- Nearly 100,000 Charges filed in 2011.
- Approximately 300 lawsuits filed on behalf of individuals.
- EEOC can investigate charges, facilitate resolution of charges, file lawsuits on behalf of employees and provide employees a notice permitting them the right to sue.

EEOC AT A GLANCE

- Two types of discrimination claims commonly filed by employees
- “Disparate Treatment”
- Applying different terms or conditions of employment
- “Disparate Impact”
- Maintaining a facially neutral policy that segregates out a group of individuals from a job or job benefit

EEOC INITIATIVES - SYSTEMIC DISCRIMINATION

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**EEOC *traditionally* focused on individual
discrimination charges. . .but things
are changing ...**

SYSTEMIC DISCRIMINATION

- In 2005, EEOC Chair established Systemic Discrimination Task Force and shifted the EEOC's emphasis to the investigation and litigation of *systemic discrimination*.
- The EEOC has developed systemic discrimination plans for all 15 district offices.
- “A strong systemic program is crucial to battling unlawful patterns or practices of discrimination which have a broad impact on an industry, profession, company, or geographic location.”

SYSTEMIC DISCRIMINATION AND THE “NEW” EEOC

- EEOC has prosecuted a few cases of systemic discrimination related to *criminal background checks*.
- Pepsi Beverages: In January 2012 Pepsi settled an EEOC lawsuit and agreed to pay \$3.13 million, provide job offers and training in a race discrimination case based on its criminal background check policy.



MORE ON THE PEPSI CASE

- The EEOC's investigation revealed that over 300 African American *applicants* were adversely affected by Pepsi's criminal background policy.
- Pepsi's policy - applicants were denied employment if they had pending arrests (even if they had no convictions) and applicants with certain minor convictions.
- The EEOC found Pepsi's policy unlawful because it denied employment based on records which the agency determined where not relevant to the jobs.

PRACTICAL IMPLICATIONS OF SYSTEMIC FOCUS

- “Garden-variety” individual EEOC charges often grow into EEOC systemic investigations of employer’s overall application and hiring process.
- Employer’s response to Charge is often “trigger” for systemic discrimination investigation.

“We treated Charging Party just like all other applicants pursuant to our policy” defense can open the door to a systemic focus.

E-RACE INITIATIVE

- The EEOC has recently shown renewed interest in background check policies.
- Part of the EEOC's E-RACE (Eradicating Racism and Colorism from Employment) initiative, a program dedicated to strengthening the "EEOC's efforts to ensure workplaces are free of race and color discrimination."



E-RACE INITIATIVE AND CRIMINAL BACKGROUND CHECKS

- Goal - to develop strategies for addressing “21st Century manifestations of discrimination,” which the EEOC identifies as including arrest and conviction records
- EEOC believes that an employer’s policy/practice of excluding individuals from employment because they have criminal conviction records is unlawful unless the policy or practice is justified by a business necessity

CRIMINAL BACKGROUND CHECKS

DAVID "CURLY" MORAN



DESCRIPTION

AGE: 47 born 1958 October 6th
Neptune, CA
HEIGHT: 5'11"
WEIGHT: 185
BUILD: Medium - Stocky
HAIR: Black (Bald)
EYES: Blue
COMPLEXION: Fair
RACE: White
SCARS & MARKS: Tatoo right arm - sun shape.

CRIMINAL RECORD

RI SYSTEM #: A0123 - 5612F
04-05-1982 DUI Meth.
08-23-1984 Possession w/ intent to sell. Meth.
11- 18-1986 Possession w/ intent to sell. Meth.
02-01-1997 DUI Alcohol
07-04-1997 Assault

- 93% of employers conduct background checks on some applicants
- 73% conduct criminal checks on all potential new hires

Survey - National Consumer Law Center 4/12/12

CONVICTION STATISTICS

- According to the EEOC, twice as many Americans today, compared to 20 years ago, have been incarcerated at some period of time
- African Americans and Hispanics are arrested a rate 2 to 3 times their proportion of the general population
- EEOC wanted to identify guidelines recognizing, in part, the disparity in likelihood of incarceration during lifetime
 - White male = 5.9%
 - Hispanic male = 17.2%
 - African American male = 32.2%

ENFORCEMENT GUIDANCE

- Published on April 25, 2012
- “Designed to be a resource” for:
 - Employers, Employment Agencies, Unions
 - Applicants and Employees
 - EEOC Enforcement Staff
- Outlines how the EEOC will analyze claims
- Focus is making sure that the criminal background screen is narrowly tailored to the job search



APPLICATION QUESTIONS

- Have you ever been convicted?
- Have you been convicted of a felony in the past ten years, or a misdemeanor involving theft or violence in the past five years?
- Job Related and Consistent with Business Necessity?
- No questions?



ARRESTS VS. CONVICTIONS

■ Arrests

- Independent investigation
- Underlying conduct

■ Convictions

- Validation – may not be possible
- Job related and consistent with business necessity



ARREST RECORDS



- EEOC says that an arrest by itself cannot be used to deny employment
- However, the conduct underlying the arrest may be looked at “if the conduct makes the individual unfit for the position in question.”

CONVICTIONS

- **Do not maintain a blanket “no conviction” policy**
- **EEOC Guidance:**
 - **Implement a policy for the consideration of conviction records that is “Job Related and Consistent with Business Necessity”**
 - **Conduct an “Individualized Assessment” of applicants with criminal records**
 - **Consider “Less Discriminatory Alternatives”**

JOB RELATED AND CONSISTENT WITH BUSINESS NECESSITY

- Employers must consider:
 - The nature and gravity of the offense or conduct, including:
 - Harm caused
 - Specific elements of the crime
 - Felony or misdemeanor
 - The time that has passed since the offense or conduct and/or completion of the sentence
 - The nature of the job held or sought



INDIVIDUALIZED ASSESSMENT

- Give the applicant an opportunity to provide information:
 - The facts or circumstances surrounding the offense;
 - The number of convictions;
 - Age at the time of conviction, or release from prison;
 - Evidence that the individual performed the same type of work, post conviction, with no known incidents of criminal conduct;
 - The length and consistency of employment history before and after the offense or conduct;
 - Rehabilitation efforts;
 - Employment or character references; and
 - Whether the individual is bonded under a federal, state, or local bonding program.

LESS DISCRIMINATORY ALTERNATIVE

- Determine whether there are equally effective means of reaching the same goal or business objective
 - Longer period to dispute
 - Different policies
- Difficult without validation

FEDERAL AND STATE LAWS AND REGULATIONS

- **Federal law and regulations**
 - Can shield an employer from liability
 - Can still be liable to extent exceeded

- **State law and regulations**
 - Many states have specific laws on the use of criminal convictions in hiring decisions



TO DO

- **Carefully review current policies and practices related to criminal background checks**
- **Do not adopt or maintain a blanket policy or practice where you will not hire anyone with a criminal record – felony or misdemeanor**
- **Confirm that applications have specific language that criminal history is not an absolute bar to employment**
- **Properly train individuals with hiring authority**

TO DO

- Consider conducting criminal background checks after extending contingent employment offers
- Consider running criminal background checks on applicants for particular jobs
- Build into the policy procedures:
 - to make an individualized assessment
 - to have all no-hire decisions reviewed/approved by Human Resources and/or review committee
- Document the decision to not hire any applicant because of the applicant's criminal record.