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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

equalitarian /i,kw coalitarian /i,kw DERIVATIVES equali equality on, 1 the symbolic expression equal an expression officer has

HospitalityLawy

- 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



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 <u>which the</u> <u>agency determined</u> 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 HEIGHI - 5 11 WEIGHT: 185 BUILD: Nigalum - 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 Possesion w/ intent to sell. Meth. 11- 18-1986 Possesion w/ intent to sell. Meth. 02-01-1997 DUI Alcohol 07-04-1997 Assualt 93% of employers conduct background checks on <u>some</u> applicants

73% conduct criminal checks on <u>all</u> 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?



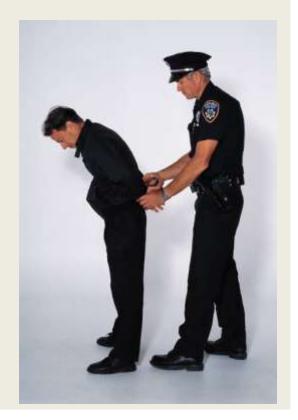
ARRESTS VS. CONVICTIONS

Arrests

Independent investigationUnderlying conduct

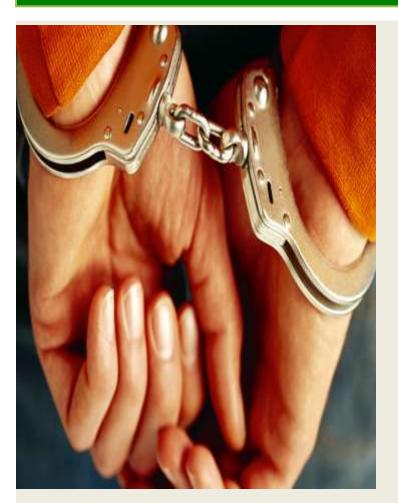
Convictions

- 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 <u>conduct</u> 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





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.

