

New EEOC Guidance Forces Employers to Strike a Delicate Balance

If ever there was a time for employers to review their hiring and retention practices, it's now. Today, employers are walking a virtual tightrope in their efforts to avoid employee-related litigation from both the government and the private sector.

In April, the Equal Employment Opportunity Commission (EEOC) released a new enforcement guidance warning employers that use of criminal background checks on potential or present employees may violate Title VII of the Civil Rights Act of 1964, and lead to an investigation and perhaps a civil enforcement action.

At the same time, employers who fail to investigate criminal backgrounds can just as easily find themselves liable for claims of negligent hiring and retention. Such suits can cost a small businesses tens of thousands of dollars to litigate – not to mention the cost of satisfying a judgment if found liable.

Striking a balance between the threat of an EEOC investigation and a negligent hiring suit isn't a simple task in today's regulatory environment. A careful review of hiring practices, however, can proactively mitigate the risk of litigation.

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The EEOC's new guidance is based upon data demonstrating disproportionate arrest and conviction records among Hispanics and African Americans. For example, according to studies cited by the EEOC, black men represent nearly 30 percent of all arrests, though they make up less than 15 percent of the population. In addition, in 2010, black men were imprisoned at a rate more than 6.5 times as high as white men, and Hispanics were imprisoned at a rate nearly three times higher than white men.

Against this statistical disparity, the EEOC reaffirmed its policy to guard against the discriminatory use of criminal background information. The new guidance does not *prohibit* employers from utilizing criminal background reports when making hiring decisions. However, it does broaden what the EEOC would consider the discriminatory use of such reports.

Discriminatory use of criminal records takes two forms: “disparate treatment” and “disparate impact” discrimination. Disparate treatment occurs when an employer disqualifies a minority applicant based on a criminal conviction, but



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In 2012 Shapiro Sher Guinot & Sandler was named the top medium-size law firm in Maryland for "Business & Transactions" by Super Lawyers, a division of Thomson Reuters. Founded by renowned sports lawyer Ronald M. Shapiro in 1972, the firm represents clients in numerous practice areas, including employment law, litigation, corporate, real estate, tax, and banking.

Shapiro Sher Guinot & Sandler's **Employment Law Group** is co-chaired by **Eric R. Harlan** and **Renée Lane-Kunz**. They are prepared to assist organizations with a wide spectrum of employment law matters, including recruiting and hiring practices, employee handbooks, discrimination matters, executive compensation, wrongful termination claims, and issues involving Title VII of the Civil Rights Act, The Family and Medical Leave Act, and The Americans with Disabilities Act. The Employment Law Group also assists with employment, severance, non-disclosure and non-compete agreements, among other matters.

Renée Lane-Kunz offers ongoing employment counsel to small and mid-sized companies as well as schools and institutions. She works closely with clients to help them anticipate and avoid litigation and regulatory complications. From handbooks to employment agreements, to general HR policies, she is ready to provide employers the tools they need in today's legal environment. As she brings to her practice extensive HR management experience in the hospitality industry, she fully appreciates the concerns of business owners.

Eric R. Harlan is a trial lawyer dedicated to the vigorous representation of clients in litigation. He has achieved favorable results in employment-related matters including claims involving violations of federal and state anti-discrimination laws, actions to enforce non-compete and non-solicitation agreements, wrongful discharge, and wage-and-hour litigation.

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hires or retains a member of a non-protected class despite the same record. Disparate impact discrimination is not so obvious. It occurs when a hiring practice is applied equally to all applicants or employees, regardless of race, national origin, etc., but members of a protected class are nonetheless disproportionately impacted despite the across-the-board, neutral hiring policy.

Although the EEOC acknowledges that a conviction record, as opposed to an arrest record, suffices as evidence that a person engaged in particular conduct, it concludes that there may be reasons for an employer not to rely on a conviction record alone when making employment decisions. Further, EEOC's guidance warns that if employers automatically exclude from consideration all applicants with criminal records, African-Americans and Hispanics will likely be disproportionately impacted.

Disparate Impact Discrimination Liability

In that case, an employer will need to demonstrate that the exclusions are "job related and consistent with business necessity" in order to avoid disparate impact discrimination liability. This may prove to be an onerous burden for some employers.

According to the guidance, to establish this defense, employers will have to develop a "targeted screen" that considers, at a minimum, the nature of the crime, the time elapsed, and the nature of the job. They will also have to conduct an individualized assessment of those individuals identified by the screen.

Moreover, the guidance enumerates no less than eight specific factors for an employer to consider when making the individualized assessment:

- The facts and 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.
- Whether the individual is bonded under a federal, state or local bonding program.

Thus, the result of a criminal background check does not end the hiring determination; it is just the beginning of what could be an expensive and time-consuming process.

Exposure to Negligent Hiring Claims

Despite the expanded burden the EEOC guidance places on employers who conduct criminal background checks, those employers simply cannot respond by abandoning background checks altogether. While doing so will minimize Title VII liability, it will also expose employers to near certain liability for negligent hiring.

Consider the guest services employee with a discoverable battery conviction who assaults and injures a patron of his employer, or the landlord's maintenance employee with a burglary record who steals from tenants' apartments. In both instances, employers would have been well-advised to have conducted a criminal-background check before hiring these individuals.

Employers facing such complaints have a losing track record, as plaintiffs prevail in the majority of negligent hiring cases that are tried to verdict. Simply put, employers can no more ignore employee criminal backgrounds than they can the EEOC guidance. An employer's solution to this new regulatory reality is to review its hiring and retention practices and determine the most efficient process by which to minimize potential tort and Title VII liabilities.

This article was originally published as "EEOC Forces Employers To Strike a Delicate Balance," by Eric R. Harlan, in SHRM Online, November 2012. Copyright 2012, Society for Human Resource Management, Alexandria, VA. Used with permission. All rights reserved. For more information about the EEOC guidelines or this article, please contact Mr. Harlan at erh@shapirosher.com or by phone at 410-385-4218.