

THE RECORDER

Use of Criminal Records in Hiring



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Employers often conduct criminal background checks during the hiring process. Advances in technology have made accessing applicants' criminal history oftentimes as easy as pressing a button. As a result, employers may discover criminal records more frequently than in the past.

Information regarding an applicant's criminal history creates a dilemma for employers who wish to hire the best people for the job while avoiding claims of discriminatory hiring practices. A protected-status applicant who is rejected from a job solely because of a criminal record may allege a disparate impact claim under Title VII of the Civil Rights Act of 1964, or the California Fair Employment and Housing Act. Disparate impact occurs when an employer's facially neutral policy, like a criminal-conduct exclusion, disproportionately impacts a protected-status group.

The danger of a discriminatory-hiring-practice claim was emphasized last month when the U.S. Equal Employment Opportunity Commission reiterated its long-standing position that categorical criminal-conduct exclusions raise disparate impact implications. Specifically, on April

25, the EEOC issued an enforcement guidance entitled "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964."

While the guidance is neither a departure from the EEOC's previous position nor a binding regulation, it is well worth serious consideration. Employers are often inclined to rely on bright-line, across-the-board exclusions, but the EEOC's guidance cautions against this approach. Instead, employers should ensure that any criminal-conduct exclusion is job related and consistent with business necessity.

UNDERLYING LAW

The enforcement guidance is not binding authority, but it is grounded in federal case law. In *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (1975), the U.S. Court of Appeals for the Eighth Circuit held that a policy excluding all job applicants with any criminal conviction other than a minor traffic offense violated Title VII. The court held that, to avoid violating Title VII, a neutral exclusion policy that disparately impacts a protected-status group must be job related and consistent with business necessity. The court identified three factors (the "Green factors") that were relevant to making this determination:

1. The nature and gravity of the offense or conduct.
2. The time that has passed since the offense or conduct and/or completion of the sentence.
3. The nature of the job sought.

In 2007, the Third Circuit elaborated on the Green factors in *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232. There, an African-American paratransit bus driver-trainee had been

terminated when his employer learned about his 40-year-old second-degree murder conviction. The employer's policy excluded anyone with a violent criminal conviction from becoming a paratransit driver, a position transporting people with physical and mental disabilities. The court held that policy did not violate Title VII because it was justified by business necessity (public-safety concerns) and that the employee failed to present evidence of an acceptable policy alternative.

THE EEOC'S RECOMMENDATIONS

The EEOC's guidance, which relies on *Green* and *El*, states that a criminal-conduct exclusion must be job related for the position in question and consistent with business necessity in order to withstand a disparate impact challenge.

According to the EEOC, an exclusion based on an arrest alone is never job related and consistent with business necessity. Rather, the exclusion must be based on the underlying conduct, which can generally be demonstrated by a conviction. This position is consistent with California law, which prohibits employers from considering — or even asking about — most arrests. (Labor Code §432.7).

To ensure that a criminal-conduct exclusion is job related and consistent with business necessity, the EEOC suggests that employers follow a two-step process. (The EEOC suggests that, alternatively, employers may validate criminal-conduct exclusions per the Uniform Guidelines on Employee Selection Procedures, a model policy used by federal government agencies. We do not discuss these guidelines in this article.)

Under the EEOC's two-step process, employers should first apply a targeted exclusion based on the three Green factors (the nature of the crime, the time elapsed, and

the nature of the job). Second, after applying the Green factors, employers should conduct an individualized assessment to determine whether each specific application of the exclusion remains job related and consistent with business necessity.

When conducting an individualized assessment, the employer should (1) notify any applicant deemed subject to the exclusion, (2) provide the applicant an opportunity to show the exclusion does not apply to his or her circumstances, and (3) consider the additional information provided by the applicant. If the applicant fails to respond to an employer's attempt to obtain further information, the employer may proceed to make its employment decision.

The EEOC warns that even if an exclusion policy is job related and consistent with business necessity, a plaintiff may still prevail by showing the existence of a less discriminatory "alternative employment practice" that serves the employer's legitimate goals as effectively as the employer's current policy but that the employer has refused to adopt.

CALIFORNIA IMPACT

California case law is relatively silent regarding disparate impact claims based on criminal-conduct exclusions. The Green decision has been cited only once on this point by a California court, which held that Title VII did not invalidate California Government Code §1029's blanket exclusion of ex-felons from peace officer positions. *Hetherington v. State Personnel Board*, 82 Cal.App.3d 582 (1978). For its part, *El* has never been cited by a California court.

Nevertheless, even though no California case has found that a criminal-conduct exclusion is discriminatory under Title VII or FEHA, employers are well advised to consider the EEOC's guidance. The general concept of a disparate impact claim is unquestionably viable under the FEHA, and California courts look to pertinent federal precedent when applying equivalent state statutes. For example, the Fair Employment and Housing Commission has relied on Green to hold under FEHA that "a record of convictions should not operate to bar a person from employ-

ment unless there is some direct relationship between the offense committed and the responsibilities of the employment." Dept. of Fair Employment and Housing v. Housing Authorities of the City and County of Fresno, FEHC Dec. No. 80-20 (1980).

Additionally, aside from disparate impact concerns, California law regulates employers' ability to rely on certain criminal records and conduct when making hiring decisions. For example, Labor Code §432.7 prohibits employers from considering or even asking about certain criminal records, including arrests that did not result in a conviction. The prohibition extends to certain marijuana-related convictions that are more than two years old. California employers should know the consequences of violating these regulations. Section 432.7 permits an aggrieved party to recover the greater of actual damages or \$200, and reasonable attorney fees.

THE SHADOW OF PRE-EMPTION

In its guidance, the EEOC acknowledges that federally imposed hiring employment restrictions or licensing requirements will trump a Title VII claim. The EEOC does not, however, take this position with respect to state-imposed restrictions. On the contrary, the EEOC concludes that state-imposed restrictions are pre-empted to the extent they are not job related and consistent with business necessity.

The threat of pre-emption may sound troubling for employers, especially for public-sector employers who often must work under state-imposed criminal-conduct exclusions. Government Code §1029, for example, prohibits ex-felons from obtaining employment as peace officers. Similarly, Education Code §45122.1 prohibits certain ex-felons from being employed by school districts.

Nevertheless, a pre-emption challenge against provisions such as these is unlikely to gain traction. In *Hetherington v. State Personnel Board*, for example, the court rejected a Title VII challenge to Government Code §1029 and found a "a reasonably foreseeable specific connection" between the felony prohibition and

the responsibility of a peace officer position. Assuming that other state-imposed restrictions were enacted based on a similar nexus, the restrictions are likely to be upheld.

THE FUTURE OF THE GUIDANCE

Several weeks after the EEOC guidance was released, the U.S. House of Representatives approved a bill (H.R. 5326) that funds a variety of agencies including the EEOC for FY 2013. The current version of the House bill contains an amendment prohibiting the use of its funds to "implement, administer or enforce" the EEOC's enforcement guidance. It remains to be seen what effect, if any, this amendment will have on the final appropriations bill passed by Congress for FY 2013.

Regardless of its fate, the guidance still offers much in the way of employer best practices. Ensuring that employment decisions are based on defensible criteria will offer California employers protection from liability while enabling them to select the best workers for the job.

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