A Risk Management Bulletin

Resort to Safety

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EEOC’s enforcement guidance for arrest and conviction records in employment decisions

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued new guidance for employers on using arrest and conviction records when making employment decisions. The new enforcement guidance supersedes the EEOC’s prior policies on this topic and reminds employers that inquiring about arrest and/or conviction records — while not per se unlawful — can potentially lead to discrimination issues if not handled properly by the employer. The enforcement guidance does not prohibit employers from making inquiries on a job application about criminal history (though some states do limit or restrict this kind of inquiry), nor does it preclude employers from conducting background checks (which are governed by the Fair Credit and Reporting Act). It does, however, emphasize that blanket policies adversely affecting any employee or applicant with a criminal history can have a discriminatory affect based on prohibited characteristics. Employers are instructed to differentiate between arrests and convictions in connection with employment decisions. And while any decisions based on arrests or convictions that are not “job-related and consistent with business necessity” are generally prohibited, the EEOC provides extensive guidance to assist employers in determining whether their criminal record policies are properly related to a job necessity to meet this standard.

Arrests

Generally and historically employers have had limited ability to consider arrests in making employment decisions, and per the new guidance, exclusions based on arrests only continue to be risky and likely to result in findings of discrimination. The EEOC’s guidance states that “an exclusion based on an arrest, in itself, is not job related and consistent with business necessity.” That said, not all employment decisions based upon an arrest are improper. An investigation of the facts underlying the arrest may be lawful when the conduct underlying the arrest is “relevant to the particular job at issue, and the exclusion is made based upon an arrest are improper. An investigation of the facts underlying the arrest may be lawful when the conduct underlying the arrest is "relevant to the particular job at issue, and the exclusion is made based on descriptions of the underlying conduct, not the fact of the arrest.” Proceed with caution.

Constitutions

There is somewhat greater latitude for employers to consider convictions in making employment decisions, but blanket employment exclusions (whether for new or continued employment) due to criminal convictions can still expose the employer to statutory violations. The EEOC’s guidance asserts that employers can typically meet the “job-related and consistent with business necessity” standard relative to convictions when the employer takes into consideration:

• The nature of the crime
• The time elapsed since it occurred
• Its relevance to the nature of the job had or sought

Employers that consider criminal convictions in employment decisions must assess them individually on a case by case basis. This means the employer needs to:

• Give notice to the affected applicant or employee that he or she has been screened out because of a criminal conviction
• Provide him or her with an opportunity to demonstrate that the exclusion should not be applied due to his or her particular circumstances
• Consider whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity

Ultimately, employers are well advised to avoid broad-based criminal record exclusions and if such exclusions exist all, they should be specifically targeted to certain types of crimes for specific positions (i.e., not broadly for all crimes or for all positions, etc.), and still each of the above factors should be analyzed. Of course, some employers are subject federal (and perhaps state) laws or regulations governing criminal backgrounds and when employment decisions are made consistent with compliance with such laws and/or regulations, this would generally be a valid defense to a charge of discrimination, if made. The EEOC warns, however, that “Title VII preempts state and local regulations that are not job related and consistent with business necessity, so employers relying on such laws and regulations to deny employment opportunity to individuals with a criminal record must ensure these criteria are satisfied.

Employers, and particularly those that wish (or are required) to consider criminal records in making employment decisions, should carefully review the EEOC’s guidance, available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. Further, we recommend that employers evaluate their job applications and any exclusion policies or procedures to ensure compliance, especially if employer policies lack language that expressly contemplates the targeted and individualized analysis the EEOC requires (summarized above). Hiring managers and supervisors should be trained on the EEOC’s requirements as well. The EEOC’s enforcement guidance includes a section of “best practices” that will assist employers in this regard but ideally employers should have their attorneys review application and policy language to ensure compliance.

Source: Wells Fargo Employment Help Line

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