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CRIMINAL BACKGROUND CHECKS— NEW RULES FOR AN OLD GAME

By Donald C. Zavala, Jr., Esq.

Employers often use criminal background checks as part of the hiring process. In April of 2012, the Equal Employment Opportunity Commission (EEOC) issued new guidance on Considering the Use of Arrest and Conviction Records in Making Employment Decisions (“Guidance”). This Guidance can be found at

http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. The Guidance states that using criminal history to make hiring decisions can, in some cases, violate Title VII. Although the Guidance is not “law”, it is important for employers to understand the EEOC’s new standards on criminal background checks and change their practices accordingly.

The EEOC expressed two primary concerns regarding the potential negative impact of criminal background checks. First, the Guidance raises concerns regarding disparate treatment, which is treating applicants with the same criminal background differently based on race or national origin. Second, background checks can also lead to disparate impact. Disparate impact occurs when a criminal background check disproportionately or unjustifiably excludes people of certain race or national origin. The EEOC provides the following example: It has been shown that African-Americans and Hispanics are convicted at a disproportionately greater rate than the general public. Therefore, uniformly excluding people with convictions can disparately impact these groups.

The EEOC has stated that an across-the-board policy that excludes all individuals from employment because of any conviction is not job-related or consistent with business necessity.

So how can an employer perform criminal background checks and not violate Title VII? The Guidance provides some answers, but leaves a lot to be desired. The Guidance makes it clear that a criminal arrest record alone cannot be used to deny employment. However, an employer can use the arrest to make an employment decision if the conduct underlying the arrest makes the individual unfit for the specific position available.

An employer also needs to ensure that the background check is job-related and consistent with business necessity. This justification can be established if the company’s policy on background checks is narrowly tailored with targeted screening based on: 1) the nature of the crime, 2) the time elapsed since the crime, and 3) the nature of the job. The EEOC also suggests allowing individuals to explain the arrest.

This Guidance does not preempt federal laws that prohibit employing people with certain criminal records for specific positions (i.e., criminal backgrounds on bank employees and child care providers). It is important to note, however, that this limited exception DOES NOT apply to state or local laws. If an employment decision is made based on state or local laws, then the employer must still demonstrate that the criminal background is job-related and consistent with business necessity. The Guidance also provides insight on the timing for performing a background check. The EEOC also recommends waiting to perform a background check until after a conditional offer of employment has been made.

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“Do Not Discuss” is a “Do Not Do”

Employers routinely ask that employees not discuss internal investigations with co-workers. Recently the National Labor Relations Board ruled that this practice violates an employee’s Section 7 rights to engage in protected concerted activity. Employers can only impose this restriction if the individual circumstances dictate that a witness needs protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is danger of a cover up. Be sure that your investigation policy conforms to this new decision.