Coates' Canons Blog: “Hey, Job Applicant: Have You Ever Been Arrested or Convicted?”

By Robert Joyce

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Is it lawful for a governmental employer in North Carolina to ask a job applicant about arrests and convictions? Is it lawful for the employer to do a criminal background check on job applicants? The answer to both questions is Yes, but the potential exists for liability under Title VII of the Civil Rights Act of 1964.

New guidance from the EEOC

In 2012, the Equal Employment Opportunity Commission issued a new Guidance on the use of criminal history information in employment decisions. You can find it here.

The Guidance does, at root, one simple thing. It provides a path to a defense against a charge of unlawful employment discrimination filed with the EEOC under Title VII based on the use of criminal history information and alleging discrimination on account of race or national origin. The Guidance tells employers how they can collect and use criminal history information in a way that would likely lead the EEOC to a finding “no reasonable cause” to believe that such a charge is true.

The Guidance acts more broadly, however, to incorporate the EEOC’s view of the law as it has developed on the question and, presumably, to provide a groundwork for courts to use in adjudicating these kinds of employment discrimination claims.

Getting criminal history on applicants

Employers get criminal history information about job applicants in two chief ways.

First, they often ask the applicants directly, sometimes right on the face of the application form. The Guidance does not prohibit such question:

- “Have you ever been convicted of or pleaded nolo contendere (no contest) to any violation of the law other than minor traffic tickets?”
- “Do you have any criminal charges or procedures pending?”

Second, employers contract with commercial vendors that acquire, package, and sell criminal history information. The Guidance does not prohibit this practice either, but employers using these companies must comply with the requirements of the Fair Credit Reporting Act.

Disparate impact discrimination

Title VII does not prevent an employer from getting criminal history information about applicants. But the careless use of that information can lead to liability under Title VII.

A 1971 U.S. Supreme Court decision (in the early days of Title VII litigation) arising from North Carolina created a kind of employment discrimination claim under Title VII—the “disparate impact”—that, unlike the most common kinds of Title VII claims, does not require a showing that the employer intended to discriminate. *Griggs v. Duke Power Company*, 401 U.S. 424. The mere fact that a practice screens out one group identifiable by race, color, religion, sex or national origin can lead to liability. In 1991, Congress amended Title VII to codify the disparate impact claim originated in *Griggs*.

There are many examples of disparate impact resulting from facially neutral practices. In the *Griggs* case, the employer

required a high school diploma for applicants for all jobs. At that time at that place in North Carolina, a greater proportion of black North Carolinians were without their high school diploma than were whites. The NC highway patrol enforced a minimum height requirement for troopers. A much small proportion of women met the requirement than did men. Employers sometimes require the ability to lift a certain weight, with a disparate impact on women.

The use of arrest and conviction information to screen out applicants for employment can similarly have a disparate impact by race and national origin. Statistics cited in the Guidance show that African American and Hispanic people are arrested and convicted at much higher rates than are white people. For example, the Guidance says that while African Americans make up 14% of the U.S. population, in 2010 28% of all arrests were of African Americans. Thus, a ban on hiring individuals who have ever been arrested would screen out African American people at twice the rate that it would screen out white people.

So, does the mere fact that an employer's practice (such as an educational requirement, a physical requirement, or a criminal record requirement) has a disparate impact mean that the employer is liable under Title VII for unlawful discrimination?

No.

The key is whether the practice is "job related" and "consistent with business necessity." If it is, then the employer is not liable. If it is not, the employer is liable. Here's how Title VII phrases it:

> An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin ***and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. . .***42 U.S.C. § 2000e-2(k)(1)(A)(i)

The main thrust of the Guidance is to provide the EEOC's view of how an employer demonstrates that its use of criminal history information to screen out an applicant (or adversely treat a current employee) is job related and consistent with business necessity.

Use of arrest information vs. use of conviction information

When an employer uses a commercial vendor to supply criminal history information, the employer is virtually certain to obtain not merely records of convictions for crimes but also records of arrests. Most times the record of arrest will be accompanied with a record of some sort of disposition—dismissal or something else—but sometimes the arrest will stand alone, with no record of disposition. That may happen because the arrest was recent enough that no disposition has yet taken place. But it also may happen because the database is incomplete—the disposition information was simply never matched up with the arrest information.

The Guidance emphasizes the difference between arrest and conviction information: the fact of a criminal *conviction* can generally be taken as a firm indication that the underlying criminal conduct did in fact occur. The individual really did steal the car or commit the assault or sell the drugs. The fact of an arrest, however, does not establish that any underlying criminal conduct has occurred. Many arrests do not result in criminal prosecutions and even in the case of a prosecution, the accused is presumed innocent until proven guilty.

Where there is arrest information but no indication of conviction, the employer may, in the words of the Guidance, "make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes."

So, before an employer uses arrest information to disqualify an applicant, the employer should investigate the circumstances behind the arrest and make a determination as to what conduct actually occurred. It can then use its reasonable belief as to the conduct to make an employment decision, with the same considerations related to disparate impact that accompany the use of conviction information.

Defensible use of criminal history information

Since the use of criminal history information likely has a disparate impact on African Americans and Hispanics, an employer must be concerned about the possibility of disparate impact liability under Title VII if the employer uses such information to screen out applicants (or adversely treat employees). The employer can avoid disparate impact liability if it can show that its use of the information was "job related" and "consistent with business necessity."

According to the Guidance, an employer makes that showing if it can "effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position."

To make that link, the Guidance says, the employer must develop a "targeted screen." A targeted screen considers, with respect to any particular criminal conduct and any particular job, three factors, based largely on the 1977 Eighth Circuit decision in *Green v. Missouri Pacific Railroad*, 549 F. 2ds 1158:

- the nature of the crime
- the time that has elapsed since the crime or the end of the sentence
- the nature of the job

plus a fourth:

- individualized assessment

With respect to the first three, the Guidance says this: "An employer policy or practice of excluding individuals from particular positions for specified criminal conduct within a defined time period, as guided by the *Green* factors, is a targeted exclusion. Targeted exclusions are tailored to the rationale for their adoption, in light of the particular criminal conduct and jobs involved, taking into consideration fact-based evidence, legal requirements, and/or relevant and available studies."

With respect to the fourth, the Guidance says this: "Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity."

When to ask about criminal history

The Guidance does not prohibit asking, on a job application, whether the applicant has been convicted of crimes. There is no prohibition. The greatest risk is the risk of a challenge under the disparate impact theory of liability under Title VII. In light of the Guidance, however, and no doubt for other considerations, many employers have stopped asking this kind of question on the job application, but are waiting until later in the selection process before asking. That is consistent with the EEOC's recommendation in the Guidance:

> "As a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity."

Links

- www.eeoc.gov/laws/guidance/arrest_conviction.cfm