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Advocate's VIEW

When employers can use 'the Box'

Current laws on employer use of criminal background information

A campaign to "ban the box" – seeking to prohibit employers from including a "checkbox" asking about criminal records on hiring applications – is currently making national news headlines.

There are existing laws that employers should be aware of with respect to seeking and using criminal background information when hiring and making other employment decisions.

Title VII

At the federal level, the U.S. Equal Employment Opportunity Commission has determined that an employer's use of criminal records in employment decisions, including hiring, promoting and firing, may constitute unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

By STACEY E. TRIEN
Daily Record Columnist

The EEOC's guidelines state that, because a disproportionate number of minorities are arrested and convicted in the United States, even a seemingly neutral policy utilizing criminal records may constitute employment discrimination on the basis of race under Title VII. Generally, a business is subject to race discrimination claims under Title VII if it has 15 or more employees.

There are two types of employment discrimination under Title VII – disparate treatment discrimination and disparate impact discrimination. Disparate treatment discrimination occurs when an employer treats an employee or prospective employee differently because of his or her race, color, religion, sex or national origin. For example, an employer cannot reject an African-American employee based on a criminal record but hire a white employee who is similarly situated with a comparable criminal record.

Disparate impact discrimination occurs when the employer's seemingly neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group. The EEOC's guidelines state that, because African Americans and Hispanics are arrested, convicted and incarcerated in numbers disproportionate to the general population, an employer's blanket policy excluding all persons who have been arrested or convicted from employment, without limitation, would generally constitute disparate impact discrimination in violation of Title VII.

Per the EEOC, an employer may still use criminal records in employment decisions if its policy for use of the records is "job-related for the position in question and consistent with business necessity."

Generally, the use of arrest records is not considered to be "consistent with business necessity," because arrest records do not establish that any criminal conduct has occurred. The EEOC acknowledges that, in some limited circumstances, an arrest may trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action. The EEOC provides an example wherein it would be appropriate for a school to suspend a teacher arrested for inappropriate conduct with a minor in order to conduct its own investigation of the allegations, and to terminate the teacher if the school ultimately determined the allegations to be true.

A record of a conviction will usually serve as sufficient evidence that a person engaged in particular conduct. Nevertheless, the EEOC provides that an employer may only use conviction records in employment decisions when the exclusion is "job-related and consistent with business necessity." This means that the policy must operate to link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.

The EEOC has indicated that an employer may use criminal convictions in employment determinations if it develops a targeted policy with the following two step procedure. First, the employer conducts an analysis of the following three factors, referred to as the Green factors, identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977): (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; and (3) the nature of the job held or sought.

Second, the employer conducts an "individualized assessment," which means that the employer informs the individual

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that he or she may be excluded because of past criminal conduct, provides the individual with an opportunity to demonstrate that the exclusion does not properly apply to him or her, and considers whether the individual's additional information shows that the policy as applied is not job-related and consistent with business necessity.

New York State Human Rights Law and Correction Law

New York's Human Rights Law, Executive Law § 296(16) (which generally applies to employers with four or more employees) prohibits an employer from asking an applicant or employee whether he or she: has ever been arrested; had a criminal accusation filed against him or her; has been adjudicated as a youthful offender; or has a conviction which was sealed.

The statute states that these prohibitions do not apply where the inquiry is "specifically required or permitted by statute;" for example, when one is applying to work as a police officer. Additionally, the statute does not prohibit any employer from asking an applicant or employee if he or she has any currently pending arrests or criminal accusations, or whether he or she has ever been convicted of a crime (other than a conviction resulting in a youthful offender adjudication or sealed record).

New York statute also prohibits an employer from basing employment decisions upon a previous criminal conviction unless the employer complies with the procedure set forth in Correction Law, Article 23-A, see also Executive Law § 296(15). The Correction Law states that an employer may not refuse to hire, terminate or take an adverse employment action because an individual has been previously convicted of a crime, or because of a finding of "lack of 'good moral character'" based upon the fact that one was previously convicted of a crime, unless: (1) there is a direct relationship between one or more of the previous criminal offenses and the specific employment at issue; or (2) the hiring or continuation of employment would involve "an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."

The statute provides that, in order to determine whether there is either a direct relationship or unreasonable risk, the employer must consider the factors delineated in Correction Law § 753, which include the public policy of the state to encourage employment of persons previously convicted of a crime, the specific duties and responsibilities of the subject position, the time which has elapsed since the occurrence of the offense, the age of the person at the time of the offense, the seriousness of the offense, and the legitimate interest of the employer in protecting property and the safety and welfare of individuals or the general public (see Correction Law § 753 for a complete list of the factors that must be considered).

New York City Fair Chance Act

New York City recently enacted the Fair Chance Act, a city ordinance which went into effect on Oct. 27. The ordinance generally prohibits employers with at least four employees from asking job applicants about their criminal records, or performing a criminal background search, until after a conditional offer of employment has been extended.

This means that most employers in New York City cannot ask applicants about their criminal history in job application forms, during interviews or during any other stage of the hiring process prior to making a conditional job offer to the prospective employee. After making a conditional offer of employment, the employer may request information regarding the applicant's pending arrests or prior criminal conviction (as long as the conviction is not sealed or resulted in a youthful offender conviction) and/or run a criminal background check, and analyze that information pursuant to the procedure set forth in New York's Correction Law, Article 23-A, cited above.

If, after evaluating the applicant according to Article 23-A, an employer wishes to decline employment, the Fair Chance Act requires the following three-step process: (1) disclose a written copy of any inquiry it conducted into the applicant's criminal history; (2) share a written copy of its Article 23-A analysis with the applicant; and (3) allow the applicant at least three business days from receipt of the above items to respond to the employer's concerns.

There are several types of positions that are exempt from the Fair Chance Act, such as positions wherein a federal, state, or local law requires a criminal background check or bars employment based on certain criminal convictions.

For practitioners advising employers, it is good practice to set up a narrowly-tailored employment policy limiting the extent and nature of any inquiries made into criminal histories and the use of employees' and applicants' criminal background information.

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