Using Conviction Records As A Screening Tool

Insights
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The retail industry is beset by shrink both from internal and external sources. A store with shelves loaded with merchandise is a ripe target for shoplifting. Cash transactions at registers present multiple opportunities for a dishonest employee to steal from the company. Retailers invest millions in preventing these behaviors, but even the most sophisticated security systems cannot stop 100% of theft.

Many retailers believe, rightfully so, that the best means of preventing internal theft is to hire honest employees who do not steal. Yet identifying applicants who are honest and will not steal is not an exact science. Common sense dictates that applicants who have been convicted of crimes are less likely to be honest and more likely to steal. As a result, retailers have conducted criminal-background checks on applicants for many years and turned away applicants who have been convicted of crimes.

Because a significantly greater percentage of African-Americans and Hispanics than whites have been convicted of a crime, it follows that a significantly larger percentage of African-Americans and Hispanics will be rejected because of criminal history. Even though such a policy is facially race neutral, the resulting "adverse impact" makes the practice unlawful under Title VII – unless the employer can prove the practice is job related and "consistent with business necessity."

In the retail industry, that job relatedness has been premised on the aforementioned common sense notion that convicted criminals are more likely to steal. This common sense may no longer be sufficient grounds for protecting the use of criminal history as a disqualifier for employment against claims of disparate impact discrimination.

The EEOC's New Spin

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued updated guidance on the use of criminal background checks in employment titled, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. The EEOC will use its enforcement authority to investigate cases of disparate impact related to criminal background check policies

The overarching theme of the guidance is that the *assumption* that criminals are more likely to commit crimes is not enough to prove that employment exclusions based on a criminal history are

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job related and consistent with business necessity. Instead, the guidance suggests employers should individually analyze each hiring decision based on an individual's criminal history.

The authority for this position is *Green v. Mo. Pac. RR,* a 1977 decision in which the U.S. Court of Appeals for the 8th Circuit noted, "[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed."

The court held that in every case where an employer intends to deny employment based on a criminal history, the individualized assessment must consider: 1) the nature and gravity of the offense or conduct; 2) the time that has passed since the offense, conduct or completion of the sentence; and 3) the nature of the job held or sought. These are the so-called *Green* factors.

In the retail world, individually assessing the criminal history of every applicant would be a difficult task. On top of often high turnover rates, the number of individuals who hire for many retail establishments is large. Crimes with the same name cover different conduct in different locales. The possibility that this individualized assessment would result in inconsistency of application generating potential disparate treatment discrimination claims is significant.

The guidance does recognize, with some skepticism, that there might be situations where a carefully constructed screening tool that does not involve individual assessment could pass muster. "[A]n employer may be able to justify a targeted criminal records screen solely under the *Green* factors. Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question. Title VII thus does not necessarily require individualized assessment in all circumstances." But this statement begs the question of how an employer might go about showing particular crimes have "a demonstrably tight nexus to the position in question."

The guidance offers little in that regard. It notes a lack of studies linking convictions to future behavior patterns. It cites other studies suggesting that after being crime free for seven years, an individual with a criminal history is no more likely to commit a crime than an individual with no criminal history. The only "guidance" it offers on demonstrating a nexus between a conviction and a particular job are found in hypothetical examples. The facts of these examples leave a grey area a mile wide.

In one, the Commission would concede an 18 month old conviction for credit card fraud is adequate to deny an applicant a job involving credit cards. In others, the Commission would conclude 5, 15 and 20 year old convictions for crimes of insurance fraud, misrepresentations on a loan application, and assault are not sufficient basis for denying employment for the positions of document shredder, customer service representative at a bank, and account executive at a PR firm respectively. Of course, real life is rarely as straightforward as the examples.

So What's A Company To Do?

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Currently, most companies are not looking at each applicant's criminal history individually. Instead, they choose a category of crimes such as felonies, a time period, such as in the last 20 years, and make failing these requirements an absolute bar to employment. Taking a conservative approach to the guidance in order to ensure compliance requires significantly more time and effort than this. The following steps would place a company's criminal background check program on firm footing with the EEOC's guidance.

1. Your application should not ask questions about criminal history. Rather, don't inquire into criminal history until a conditional decision to hire has been made.

2. Limit criminal background checks to seeking information only on crimes that you have identified as job related and consistent with business necessity.

3. Prior to making a decision to not hire based on a criminal history, interview the applicant about the circumstances to determine if there are mitigating factors or mistakes in the information. Allow the applicant to provide information on the following:

- the facts or circumstances surrounding the offense or conduct;
- the number of offenses for which the individual was convicted;
- older age at the time of conviction, or release from prison;
- evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- the length and consistency of employment history before and after the offense or conduct;
- rehabilitation efforts, e.g., education/training;
- employment or character references and any other information regarding fitness for the particular position; and
- whether the individual is bonded under a federal, state, or local bonding program.

4. Do not use records of arrests that did not result in conviction unless you independently verify the underlying circumstances suggest guilt and are closely tied to the job in question.

5. In determining the crimes that will likely result in refusal of employment, analyze a) the nature and gravity of the offense or conduct, including the harm caused, the specific elements of the crime, and whether it was a felony or misdemeanor; b) the time that has passed since the offense or conduct and/or completion of the sentence; and c) the nature of the job held or sought. When considering these factors, you should review the job description and essential functions of each position.

6. Document the reasons you considered certain convictions to be job related and consistent with business necessity for each position. This can be time-consuming and tedious (especially if your

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Company has a large number of different positions), but will strengthen your case if the Commission decides to investigate your Company's policy.

7. If federal laws prohibit hiring for particular positions based on a criminal history, do not have a policy that is more restrictive for those positions. For example, if federal law prohibits hiring an individual with a conviction in the last ten years, do not have a policy based on convictions in the last fifteen years.

The Risk-Benefit Tradeoff

Ultimately, regardless of whether these steps are followed, each employer using criminal history as a disqualifier must be prepared to either show that it does not have an adverse impact on minority applicants or if it does, that the disqualification is job related and consistent with business necessity. There is currently no authority setting hard-and-fast rules for what evidence will or will not suffice to prove this. If the EEOC continues on its current course, we anticipate courts beginning to grapple with these issues and starting to narrow the gray areas.

In the meantime, given the enormous vulnerability of retailers to theft, each will have to make a decision as to whether the risks of lawsuits and defending a common sense understanding of human behavior is outweighed by the risks of increased theft from hiring more convicted criminals.

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