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Using Criminal Convictions in the Hire Process: A Hobson's Choice for Employers?

By: Aimee E. Delaney

Is the government really telling employers that they are not allowed to disqualify an applicant because of past criminal activity? In a word, yes. That is increasingly becoming the case on the state level and has been the focus of federal enforcement efforts over the past several years, ever since the EEOC updated its guidance on this topic in 2012. This flurry of activity has made what was historically a simple hiring practice into a legal minefield.

For decades, companies have managed their hire process relying on a few simple requirements— an application or résumé, reference checks and, more often than not, a background check. In fact, the norm was to have a bright line policy disqualifying any candidate with a conviction. Further, a background check has often been run regardless of the nature of the position being filled or the industry within which the company operates. The only limitations on this practice comes in the form of the Fair Credit Reporting Act (FCRA) which, though replete with technical requirements that in and of themselves cause employers difficulty, does not strictly prohibit an employer from disqualifying an applicant because of a conviction. In fact, that essentially is still the case—apart from the technical requirements of the FCRA, there currently is no federal law that prohibits an employer from using conviction information in the hiring decision or maintaining a ban on hiring anyone with convictions. What is becoming increasingly clear, however, is that if the EEOC has its way, those days are behind us. Additionally, given the number of states taking action in this area each year, companies cannot rely on the lack of an outright federal ban as

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protection for a process increasingly coming under attack by stricter state regulations.

By the Numbers

So why is the EEOC (or state or local governments, for that matter) concerned with whether your company disqualifies applicants because of convictions? To be clear, the EEOC's interest is not new. In 1987 and 1991 the EEOC issued three policy statements on this issue. In April of 2012, the EEOC updated its guidance and in doing so, noted that in the twenty years since it last addressed the issue, there had been a significant increase in the number of Americans who had contact with the criminal justice system. Specifically, in 1991, roughly 1.8% of the population served time in prison (estimated at 4.6 million people). Ten years later, in 2001, that number jumped to 2.7%, roughly 7.7 million people or 1 in 37 adults. Those numbers have continued to rise, with 3.2% or roughly 9.6 million people being under some form of correctional control by 2007. Based on statistics projected by the Department of Justice's Bureau of Justice Statistics, it is expected that an estimated 6.6% of those born in 2001 will serve time in state or federal prison.

Employers may think that these statistics should actually bolster the need for background checks and "no convictions" hire policies. (And, for any company that has faced a negligent hiring claim, that may be right.) A problem arises, however, when these same statistics are viewed through a racial lens. In 2010, 28% of arrests reported involved African-Americans when African-Americans were 14% of the overall population. The EEOC reported that if current incarceration trends continue, 1 in 3 African Americans will serve time in prison, with that same statistic impacting 1 in 6 Hispanics and 1 in 17 Caucasians. If these statistics are accurate, the answer to why the EEOC is concerned with corporate America's use of background checks and convictions in hire becomes clear: doing so may have a greater negative impact (or "disparate impact") on minorities, particularly African-Americans. This is particularly concerning for the EEOC, as 92% of employers responding to Society for Human Resources survey confirmed the use of background checks in their hire process for candidates. Without ever intending to discriminate, utilizing background check information in a bright line "no convictions" hire policy may expose an employer to a disparate impact claim. The updated EEOC Guidance broadcasts that fact.

Lay of the Land

Though there is currently no federal statute which prohibits basing a hire decision on a candidate's criminal conviction, it is clear that the EEOC intends to challenge such policies pursuant to the agency's strategic plan to eliminate barriers in hiring. Since 2009, the EEOC has filed three separate federal suits against companies for their use of background checks/convictions, asserting that the policies in question discriminated against minorities. Two of those cases (filed in 2013) remain pending, and the third resulted in a victory for the employer. While these cases are proving to be hard fought battles for the EEOC, there is no sign the agency intends to retreat.

But where the federal government has remained legislatively silent, states and municipalities have been on the move. As of the preparation of this article, there are 18 states that have enacted "ban the box" or fair chance statutes, with seven of those laws applying to both public and private employers. Additionally, 100 cities and counties have enacted some form of fair chance laws. "Ban the box" or other similar fair chance statutes typically do not prohibit an employer from running background checks or using the information obtained in a hire decision, but seek to delay when in the hire process the information can be obtained. For example, in Illinois, a covered employer must first identify a potential candidate for an interview or make a conditional offer of employment before being allowed to inquire into and consider conviction records. Beyond just delaying when the information can be obtained, however, New York City employers are subject to restrictions that dictate when employment decisions can be based on convictions at all, and failure to meet these restrictions can be discrimination under the city's Human Rights Ordinance. By varying degrees, these statutes seek to have employers assess candidates' substantive credentials for a position before (if ever) having the door closed due to a criminal conviction.

This trend places employers in a difficult position—deciding between compliance with the law and increasing the company's exposure to claims that may arise if criminal records are not considered. When employers do not screen for criminal records or do not utilize the information obtained therein, they may risk claims such as negligent hiring, negligent supervision or face vicarious liability if an employee with a criminal record injures others in the scope of their employment. Of course, if the employer obtains and uses conviction information in the hire process, the company may now face increased risk of discrimination claims, statutory or other penalties if provided for under the fair chance laws. Whether this is a Hobson's Choice, Morton's Fork, or Catch 22, the choice spells trouble. It will be critical for human resources staff or

any other professionals involved in the hire process to be familiar with the laws that exist in each of the jurisdictions (state and local) in which companies operate.

Best Practices

Though the current state of affairs may be panic-inducing, there are steps that companies can take that should permit the continued use of criminal convictions while staying within the bounds of the law. First and foremost, those involved in the hire process need to **be aware of the specific limitations which exist in the states in which you operate**. If you use a third-party vendor or internet service to post and screen applicants, make sure their process complies with any state specific requirement you may have.

Setting those state and local requirements aside, there are other ways in which employers can manage their process that will also help to keep the company out of the EEOC's cross-hairs. Specifically, employers can **eliminate any bright light policy that prohibits anyone with a criminal conviction from being hired.** Such policies should be replaced with an individualized assessment of

each candidate's background check/conviction history. The EEOC Guidance confirms that the desired approach is to have employers considering the duties and responsibilities of the specific position at issue, along with the nature and gravity of any criminal convictions, and the time since any conviction occurred. Employers should be looking to determine whether the conviction and conduct implicated pose a real concern with the duties the candidate would be performing, ideally as supported by the written job description. As part of this process, if a candidate's background check turns up a conviction, the candidate should be given an opportunity to explain the record and provide any other information that he or she thinks is relevant before making a final decision.

Next, employers should **designate an individual who will be the gate keeper of this process** and the documentation generated, and should retain documents pertaining to the company's process and decision-making. The EEOC has recently sought to enforce hiring document retention requirements under Title VII against one employer in this context, marking perhaps a new type of attack by the EEOC on background check policies. Relatedly, employers should train these gate keepers and decision makers in the hire process about Title VII and state and local requirements applicable to your operations. Additionally, and this may be a given, employers should not reject candidates absent a conviction—arrests are not proof of criminal conduct and most jurisdictions prohibit the consideration of arrests, as well as expunged or sealed records.

In short, restrictions on the use of criminal convictions are here to stay and likely will become even more restrictive over time. There is no sure-fire way to avoid a claim of discrimination. By putting the above practices into place, however, companies will stand a far better chance in defending the practice when such a claim does arise.

NLRB Overturns 30 Years of Precedent on Joint Employers

By: Evan J. Bonnett

In a dramatic departure from over 30 years of precedent, the National Labor Relations Board has modified the standard by which it determines whether two entities are "joint employers." The 3-2 ruling in *Browning-Ferris Industries of California* has serious implications for companies that utilize staffing agencies and temporary employees, and for the staffing agencies themselves. Its scope is likely to expand to franchise relationships as well. The ruling greatly increases the ability of workers to bargain with both their employer and the company that hires their employer, and to hold both companies responsible for various wrongs.

In the case—which involved a group of temporary employees who sought to compel bargaining with both their staffing agency and the company to which they were temporarily assigned—the Board chose to "revisit and revise" its joint-employer standard in order "to better effectuate the purposes of the [National Labor Relations Act], in the current economic landscape." Under the new standard, entities are joint employers if they are both employers within the meaning prescribed by "common law" and if they "share or codetermine" essential terms and conditions of employment. The Board will also evaluate whether an employer *possesses* control over the terms and conditions of employment—not, as previously, whether the employer actually *exercises* direct and immediate control over matters such as hiring; firing; discipline; supervision and direction; and wages and compensation. Indirect control (such as through an intermediary) and

reserved authority are now sufficient for joint-employer status. The overarching principle now is whether bargaining over certain terms and conditions will be "meaningful" without both employers.

The decision undermines predictability that has been in the law for 30 years. The Board indicates that its "nuanced" approach makes clear prospective guidance difficult. The ruling also does not detail which factors will be used to determine joint-employer status in the future, or even which factors will preclude joint-employer status. The closest the decision comes to clear guidance is its use of an independent contractor definition to outline when joint-employer status is non-existent: "service under an agreement to accomplish results or to use care and skill in accomplishing results is not evidence of an employment, or joint employment, relationship."

In light of the NLRB's decision in *Browning-Ferris*, any entity that utilizes staffing agencies, temporary employees, contractors, or franchising should review its agreements to determine what level of responsibility it has over such decisions as hiring, firing, discipline, oversight, working conditions, scheduling, assignments, and many other subjects.

NLRB Holds Employee Acting Alone Engages in Concerted Activity

By: Susan M. Baker

The NLRB, and courts interpreting the National Labor Relations Act ("NLRA"), consistently have held that to engage in concerted activity protected by Section 7, two or more employees must take action for their mutual aid or protection regarding terms and conditions of employment. In late July, however, the NLRB generously expanded the definition of "concerted" when it held a *single* employee, acting alone and without the consent of his peers, engaged in protected activity. In the case, *200 East 81st Restaurant Corp.*, a discharged waiter, claimed his former restaurant employer engaged in wage and hour violations under to the Fair Labor Standards Act ("FLSA"). The suit was filed as a collective action, which required class members to affirmatively "opt in" to the action. The plaintiff was the only named party, and he apparently did not plan or discuss the complaint with other employees. Despite this, and despite the fact that the NLRB has no jurisdiction over FLSA claims, the Board held that in filing the complaint, the plaintiff was seeking to initiate or induce group action and, therefore, engaged in protected concerted activity.

The Board's opinion suggests that any collective or class action could implicate Section 7 protection. Employers need to be very aware of this potentially significant trend: employers must now consider potential liability under the NLRA even in circumstances where the NLRB has no jurisdiction over the claim at issue and even when a single employee is involved.

D.C. Circuit Revives DOL's Expanded Overtime and Wage Rules for Home Health Care Workers

By: Evan J. Bonnett

The U.S. Court of Appeals for the District of Columbia has upheld the U.S. Department of Labor's (DOL) 2013 regulatory change regarding domestic service workers who provide companionship services or live-in care to the elderly, sick, or disabled. The D.C. Circuit's decision came in a case called *Home Care Association of America v. Weil*. Under the rule change upheld in *Weil*, home health care workers are entitled under the federal Fair Labor Standards Act to minimum wage and overtime pay when they are employed by a third-party agency, such as home health care agencies or personal care agencies. These employees previously fell under a "general companionship" or "live-in domestic service" exemption that previously applied regardless of whether the workers were directly employed by the consumer or were employees of a third party agency.

This regulatory change will affect approximately two million workers. The DOL estimates that these workers, as currently calculated, work an average of 31-34 hours per week, that very few of them work overtime, and that the national average wage is $9.67. Despite the DOL's statistics, there will be additional costs and considerations that may greatly increase the costs associated with this change: issues like 24-hour live-in schedules, on-call procedures, and time spent traveling between consumers, all of which may contribute to hours quickly exceeding 40 per week and necessitating overtime payment when it was not required before. Added up, the DOL estimates a total potential cost in the hundreds of millions of dollars.

Seventh Circuit Clarifies "Constructive Discharge" Standard

By: Elizabeth A. Odian

The Seventh Circuit Court of Appeals has clarified the standard for assessing employees' claims of "constructive discharge" where the employer is alleged to have behaved in a manner that effectively communicated to the employee that she would be terminated. In a case called *Wright v. Illinois Dep't of Children & Family Serv*s., the plaintiff was forced to undergo a fitness-for-duty evaluation after a series of behavior issues, but she refused. She retired and sued for constructive discharge, claiming that the she believed the Department was going to terminate her. Her case went to the Seventh Circuit, giving that court an opportunity to clarify the appropriate test: the proper inquiry, the court said, is whether a reasonable employee in the plaintiff's position would believe, based on her employer's actions, that termination was imminent and inevitable. The plaintiff's subjective belief about what her employer was going to do was not relevant.

The takeaway here is to let disciplinary proceedings play out. The Seventh Circuit's decision signals to litigants that, because it is possible for employers to change their mind, courts will not speculate as to whether the employee would have been fired at the conclusion of those proceedings. In the interim, employers shoud not take any actions that would communicate to the employee a present intent to fire him or her, even if termination is the expected result.

Four Big Takeaways from Illinois' Proposed Pregnancy Accommodation Rules

By: Brett A. Strand

Illinois' Department of Human Rights recently published proposed rules implementing the State's new pregnancy discrimination law. Simply stated, the new law requires that any pregnant employee or job applicant (including those with "conditions related to pregnancy or childbirth") must be accommodated in the same way that disabled employees are accommodated under the Americans with Disabilities Act. The new rules provide additional details for Illinois employers. The following are some of the takeaways:

1. *Covered conditions broadly defined* - In the proposed rules, the Department for the first time defines two key terms: "common condition related to pregnancy or childbirth" and "medical condition related to pregnancy or childbirth." The definitions are quite broad and clearly are intended to comprise a wide variety of conditions. "Common conditions," for example, include any "physiological change that accompanies pregnancy or childbirth," including backaches, cramping, morning sickness or nausea, frequent urination, and swollen extremities.
2. *A mixed bag on required accommodations* - The proposed rules make clear that accommodation of one of these pregnancy conditions may require the employer to modify the application process, adjust the work environment or the circumstances under which work is performed, or temporarily change an employee's full or part-time employment status, work schedule, or job assignment. Employers are not, however, required to create a new job, discharge any employee to open up a spot as part of an accommodation, or transfer an employee to a job for which she is not qualified.
3. *The interactive process* - Employers will find the interactive process laid out in the proposed rules quite familiar. Employers and employees must meet to explore what accommodations may be available for a pregnancy condition, with the goal being to allow the employee to keep their current job; if that is not possible, the parties are to explore options for temporarily placing the employee in a different position.
4. *Careful when requesting medical documentation* - Under the new law, employers may request a medical provider's documentation of a pregnancy condition only when the request is "job-related or consistent with business necessity." The proposed rules further clarify that a request might not meet the "job-related" standard if the individual is "able to explain the relationship between the requested accommodation and her pregnancy condition."

OSHA Inspection Guidance for Inpatient Healthcare Settings

The Occupational Safety & Health Administration ("OSHA") recently published a memorandum addressed to its Regional Administrators entitled "Inspection Guidance for Inpatient Healthcare Settings". The Inspection Guidance identifies hazards that will be the focus of OSHA inspections of healthcare facilities. Please click here for an infographic summarizing this memorandum.