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DISCRIMINATION

Equal Employment Opportunity Commission guidance issued in 2012 sets out new considerations for employers screening job candidates for criminal history. In this Bloomberg BNA Insights article, Morgan, Lewis & Bockius LLP attorneys Emily A. Glunz, Gregory P. Abrams and Charles C. Jackson examine the wording of the guidance and the case law that has evolved to date.

Concluding that the EEOC is not likely to alter its stance on the issue, they suggest that, while the courts consider the issue, employers put in place a ''thoughtful'' criminal record policy that balances their legitimate business interests with the requirements of Title VII of the 1964 Civil Rights Act.

EEOC's Updated Enforcement Guidance on the Use of Arrest and Conviction Records in Employment Decisions: Developments in Year One

By Emily A. Glunz, Gregory P. Abrams and Charles C. Jackson

Approximately 30 percent of adults in the United States have a criminal record, ranging from arrests with no charges, to convictions, to other types of dispositions, according to the Attorney General's Report on Criminal History Background Checks from June 2006. Many such individuals may be qualified for employment, while many may not. It has been over a year since the Equal Employment Opportunity Commission issued its 2012 Guidance on employers' use of arrest and conviction records. *See* EEOC Enforcement Guidance No. 915.002 on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 et seq. (Apr. 25, 2012) (80 DLR A-1, 4/25/12). The EEOC characterized its updated Guidance as building on long-standing court decisions and its earlier guidance from the 1980s and 1990s, not as a departure from the prevailing legal framework governing the use of criminal background checks in employment decisions. However, the updated Guidance's discussion of disparate impact discrimination has since raised new questions for employers that will only be answered with the passage of time.

It remains unclear whether courts will adopt the EEOC's approach and generally assume that excluding job applicants with criminal convictions automatically has a disparate, adverse impact on certain minorities. It is also unclear to what extent the EEOC will challenge employers that do not use its recommended ''individualized assessments'' approach, or how courts will address the EEOC's position that an employer's compliance with state or local laws requiring the exclusion of job candidates based on their criminal background will not necessarily ''shield the employer from Title VII liability.''

The EEOC has continued aggressively to pursue criminal background exclusions as violations of Title VII. Indeed, at the end of 2012, the EEOC approved its strategic enforcement plan (SEP) for years 2013 to 2016, which states that the EEOC will specifically target employment screening tools, including background checks (243 DLR A-1, 12/18/12). But what types of criminal background policies the EEOC would challenge and how the open issues from the EEOC's Guidance would factor into litigation remained unanswered. As time has passed, this picture has become clearer. The EEOC has filed some of its first lawsuits involving

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criminal background checks since issuing the updated Guidance, and courts have started to issue opinions. We are learning how the EEOC will seek to apply its updated Guidance, and how successfully it will do so (in the courts' judgment).

Issue No. 1: Can Disparate Impact Discrimination Be Established Based Solely on a Policy to Exclude Individuals With a Criminal Record?

The EEOC's Approach. Title VII proscribes not only intentional discrimination, but also what the statute describes as ''disparate impact'' discrimination. That is, Title VII provides that seemingly neutral employment practices may violate Title VII if they cause a disproportionate impact on the basis of a protected category without sufficient business justification. The EEOC has long maintained the position that the use of criminal background information in employment decisions can result in just such a Title VII violation. A policy that excludes applicants with criminal backgrounds may disproportionately affect African Americans and Hispanics, who have statistically higher contact with the criminal justice system as compared to their representation in the general population.

Consequently, under this ''disparate impact'' theory of race discrimination, an employer's facially neutral criminal background policy might, in operation, have the effect of discriminating on the basis of race or national origin. Proof of a discriminatory motive is not required for a plaintiff to succeed on a disparate impact theory of discrimination. Likewise, lack of discriminatory animus is not a defense. Rather, if there is a disparate impact, the employer is required to show that the exclusion is ''job related for the position in question and consistent with business necessity.'' 42 U.S.C. § 2000e-2(k)(1)(A)(i). Even then, the employer may still be liable if there is a less discriminatory alternative that the employer refuses to adopt.

As set forth in the updated Guidance, the EEOC's approach is that, barring convincing evidence to the contrary, it *assumes* a criminal background policy results in a disparate impact. This effectively puts the onus on the employer to justify any criminal record exclusion. In particular, the updated Guidance states that ''national data . . . supports a finding that criminal record exclusions have a disparate impact based on race and national origin,'' and that ''[d]uring an EEOC investigation, *the employer . . . has an opportunity to show . . .* that its employment policy or practice does not cause a disparate impact.'' (emphasis added.) Therefore, despite Title VII's language stating unlawful discrimination is established if ''*a complaining party demonstrates*'' a challenged practice causes a disparate impact, the Guidance suggests that during EEOC investigations, employers will have to justify a presumed disparate impact. (emphasis added.)

The Guidance further states that evidence of a racially balanced workforce will not disprove disparate impact. Nor will data showing that the employer hires African Americans and Hispanics in proportion with the rate at which they apply. The EEOC will consider whether individuals may have been discouraged from applying by the employer's use of criminal background checks. And, although the EEOC will consider evidence that African Americans and Hispanics are not convicted at disproportionately higher rates in the particular geographic area, it could be costly or otherwise not feasible for employers to gather the data needed to make this case.

Therefore, when employers defend an EEOC charge, practically speaking, they should expect the EEOC to limit them to demonstrating that their use of criminal background information is job-related for the position in question and consistent with business necessity. Employers should not expect the EEOC to entertain the antecedent question of whether a disparate impact exists in the first place. The EEOC's approach, which assumes disparate impact for purposes of establishing discrimination, essentially shifts the burden of proof, requiring employers to *disprove* disparate impact.

Court Decisions Rejecting the EEOC's Presumptive Disparate Impact Assumption. Three court decisions provide an encouraging sign for the employer community. In two of the decisions, the courts considered how a plaintiff must plead a disparate impact discrimination claim. In the third decision, the court considered what type of evidence a plaintiff must present to show a disparate impact. In all three cases, the courts refused to presume a disparate impact based on nationwide statistical disparities in arrest and conviction rates.

In *Adams v. Vivo, Inc.*, No. C 12-01854 DMR, 2012 BL 196174 (N.D. Cal. Aug. 3, 2012), Adams sued Vivo Inc., a placement agency, and Genomic Health Inc., with which he had a short term contract as a project manager. Adams claimed (among other things) that Vivo and GHI discriminated against him by inquiring about his arrest record, which had not resulted in a charge or conviction. Adams alleged that GHI had a practice of refusing to hire anyone arrested or convicted of a crime other than a minor traffic violation. He contended that this practice had ''a greater adverse consequence and effect on African-Americans seeking employment than on whites since a disproportionately greater percentage of African-Americans are arrested and convicted of a criminal offense than are whites.''

On the defendants' motion, the U.S. District Court for the Northern District of California dismissed the disparate impact claim. Specifically, the court held that Adams had not sufficiently alleged ''a disparity to show that the consequences of the challenged policy in fact fall more harshly on one group than another.'' Adams was allowed an opportunity to amend the complaint, but the court dismissed the claim again because he again failed to sufficiently allege a disparate impact. *Adams v. Vivo, Inc.*, No. C 12-01854, 2012 BL 297349 (N.D. Cal. Nov. 14, 2012).

Similarly, in *Welch v. Ikon Office Solutions, Inc.*, No. 12-13417, 2012 BL 228204 (E.D. Mich. Sept. 5, 2012), a federal court in Michigan dismissed the plaintiff's disparate impact claim based on Ikon Office Solutions' use of criminal background checks. Ikon had allegedly revoked plaintiff-Welch's contingent job offer after Welch failed a criminal background check. The complaint alleged that Ikon's criminal background screening policy ''worked to cause a 'disparate impact' on African-American applicants, particularly males that would be hired within its company; due to the higher than normal rate of African American males with criminal records.'' *Welch v. Ikon Office Solutions, Inc.*, No. 12-13417 (com-

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plaint filed Aug. 3, 2012). The court dismissed Welch's claim on the pleadings on the ground that Welch had not adequately alleged that Ikon's practice had an adverse impact on a protected group.

It remains to be seen whether other courts will refuse to adopt the EEOC's presumption of disparate impact. However, there is no reason to believe that these adverse decisions will lead the EEOC to deviate from its position.

In *EEOC v. Freeman*, No. 09-cv-2573, 119 FEP Cases 861 (D. Md. Aug. 9, 2013) (154 DLR AA-1, 8/9/13), the U.S. District Court for the District of Maryland granted summary judgment to Freeman, an event promotion company, in the EEOC's disparate impact suit. The EEOC challenged Freeman's use of criminal background checks (and credit checks) to screen applicants, alleging that the practice disparately impacted African-American and male applicants.

The court emphasized that it is the plaintiff's burden to prove disparate impact through ''reliable and accurate statistical analysis,'' and that the court would not presume a disparate impact simply because criminal history information had been used. Nor was a mere statistical disparity in the employer's workforce sufficient evidence of a disparate impact; rather, the plaintiff must show that the challenged practice caused the disparity. Only then does the burden shift to the employer to prove that the challenged practice is job related for the position in question and consistent with business necessity.

The court also excluded the EEOC's expert reports, which were based on what the court considered faulty data pools, as both unreliable and untimely. The court then rejected the EEOC's argument that national statistics are sufficient evidence of a disparate impact, reasoning that the general population is not representative of the relevant applicant pool.

Moreover, the court noted how Freeman's criminal background screening process involved numerous steps, including consideration of (i) whether an applicant had truthfully disclosed his criminal conviction history, (ii) whether the applicant had any outstanding warrants that he was unable to resolve after a reasonable opportunity, (iii) whether the applicant had any convictions or was released from confinement within the last seven years, and finally, (iv) the nature of the underlying conviction. The EEOC, however, had failed to break down the multi-step policy and identify which steps allegedly resulted in a disparate impact, if any. For this reason and because the EEOC had failed to produce evidence of a disparate impact, the court granted summary judgment to Freeman.

It remains to be seen whether other courts will refuse to adopt the EEOC's presumption of disparate impact. However, there is no reason to believe that these adverse decisions will lead the EEOC to deviate from its position. It therefore remains prudent for employers that use criminal background information in making employment decisions to be prepared to explain why the resulting exclusions are job related for the position and consistent with business necessity. These recent decisions at least demonstrate that employers should not expect courts to simply presume a disparate impact without sufficient allegations or evidence.

Issue No. 2: How Individualized Must Assessments of Job Relatedness and Business Necessity Be?

The EEOC's updated Guidance describes the job related and business necessity defense to a disparate impact claim as requiring a showing that the policy ''link[s] specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.'' Thus, to meet the business necessity defense, it is the EEOC's position that employers must develop targeted screening that considers, at a minimum: (i) the nature and gravity of the crime, (ii) time elapsed since commission of the crime or completion of the sentence, and (iii) nature of the job.

Under this targeted approach, companywide exclusions, even when limited to certain types of crimes or convictions, may not pass muster if they are not tailored to the nature of the specific job in question. For example, if a company's criminal background policy excluded from all positions anyone with a driving under the influence conviction less than five years old, the exclusion might be job related and consistent with business necessity for that company's delivery driver position, but might not be for an administrative assistant position. Moreover, it is the EEOC's position that excluding someone on the basis of an arrest that did not result in a conviction is never job related and consistent with business necessity.

The EEOC recommends that, *in addition to* developing targeted screening based on the above factors, employers individually assess each candidate. Even if exclusions are tailored pursuant to the above factors, when they would exclude an applicant, an employer is advised to consider any relevant individual circumstances. The updated Guidance suggests that the employer send the candidate a notice that he or she is at risk of being screened out because of a conviction. The employer would then consider whether any additional information provided, including errors on the background check or mitigating factors, warrants an exception. Mitigating factors might include rehabilitation, jobs held since the conviction, circumstances surrounding the offense, the number of convictions, etc. The Guidance reasons that individualized assessments are valuable, as they allow a candidate the opportunity to demonstrate that the exclusion does not properly apply or would not be job related and consistent with business necessity in his or her specific case.

If employers use both targeted screens and individual assessments, the EEOC believes ''employers will consistently meet the 'job related and consistent with business necessity defense.' '' According to the updated Guidance, depending on the facts, an employer may be able to justify a targeted criminal records screen without an individualized assessment if the screen is ''narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question.'' Still, two recent lawsuits brought by the EEOC specifi-

cally address the employers' alleged failure to conduct individualized assessments as part of their criminal background policies.

Dollar General Corp. previously disclosed in its public filings that since 2004, the EEOC had been investigating its use of criminal background information in making hiring decisions. Conciliation failed in July of 2012 and on June 11, 2013, the EEOC filed suit against the company in the U.S. District Court for the Northern District of Illinois (113 DLR A-11, 6/12/13). The EEOC alleges that since at least 2004, Dollar General has used criminal background information to screen job candidates nationwide, resulting in an unlawful disparate impact on black candidates in violation of Title VII. The complaint is based on Dollar General's purported use of criminal conviction information, and does not allege that Dollar General disqualifies candidates with an arrest record. According to the EEOC, Dollar General's criminal background policy resulted in the exclusion of 10 percent of black candidates, as compared to 7 percent of non-black candidates.

Notably, Dollar General is not alleged to employ a blanket prohibition on hiring candidates with criminal convictions. Rather, according to both the complaint and Dollar General's response, Dollar General excludes candidates based on specific felony and misdemeanor convictions and the amount of time that has elapsed since the convictions. The parties agree that the screening is conducted only after a candidate receives a job offer. However, according to the EEOC's complaint, the alleged policy fails to provide for individualized assessments of candidates with potentially preclusionary convictions.

The EEOC specifically alleges the policy fails to consider the age of the offender, the nexus between the crime and the job duties, employee safety, other matters necessary to the operation of Dollar General's business, or the time or events that have transpired since the conviction. The EEOC also claims that the policy is not job related and consistent with business necessity, but it is unclear from the complaint whether this charge is being levied against the policy as a whole, or specific categories of exclusions.

Dollar General asserts the EEOC has failed to show disparate impact and states the elements of the policy as well as the policy itself are job related and consistent with business necessity. Dollar General further asserts that the EEOC has never identified the components that allegedly cause the disparate impact and has failed to conciliate.

The EEOC also filed suit against BMW Manufacturing Co. on June 11, 2013, alleging that the company has a criminal background policy that has an unlawful disparate impact on black applicants. According to the complaint, BMW had contracted with UTi Integrated Logistics, Inc. to provide logistics services at BMW's South Carolina manufacturing facility. UTi was required to use BMW's criminal background check policy for any UTi employee that would be working at the BMW facility. In July 2008, BMW replaced UTi with a new logistics contractor and allegedly also required this new contractor to conduct background checks using BMW's criminal background policy for all applicants who would work at the BMW facility. This purportedly resulted in the new contractor running background checks on former UTi employees who had already worked at the BMW facility.

As with Dollar General, the EEOC does not allege that BMW's policy requires exclusion of all persons with a criminal conviction. Rather, BMW's criminal record policy excludes people convicted of ''Murder, Assault & Battery, Rape, Child Abuse, Spousal Abuse (Domestic Violence), Manufacturing of drugs, Distribution of drugs (and) Weapons Violation.'' The complaint alleges that the company also excludes those convicted of ''theft, dishonesty, and moral turpitude.'' Application of BMW's policy purportedly resulted in the new contractor refusing to hire some former UTi employees who were not in compliance with the BMW policy. According to the complaint, 80 percent of the excluded former UTi employees are black, as compared to 55 percent of all former UTi employees. Further, the EEOC alleged that no individualized assessment of the excluded applicants was conducted. BMW filed an answer denying most of the EEOC's allegations, including the allegation that BMW's policy violated Title VII.

The EEOC's recent lawsuits against Dollar General and BMW greatly concerned nine states' Attorneys General, who on July 24, 2013, sent a joint letter to the EEOC criticizing these lawsuits and the EEOC's interpretation of the law as ''misguided and a quintessential example of gross federal overreach'' (144 DLR A-1, 7/26/13). The letter—sent by the Attorneys General of Alabama, Colorado, Georgia, Kansas, Montana, Nebraska, South Carolina, Utah and West Virginia—particularly takes umbrage with the EEOC's push for individualized assessments and the EEOC's view that bright-line rules will rarely satisfy the job related and business necessity test. Noting that the Guidance does not rule out the possibility that a bright-line exclusion might sometimes be appropriate, the Attorneys General believe that the ''document makes (it) clear that it would be the rare exception.'' They view the EEOC as improperly applying Title VII and express concern at the practical consequences, such as additional expense, that the EEOC's position could have on businesses.

On August 29, 2013, the EEOC responded to the Attorneys General letter, beginning by stating that ''it is not illegal for employers to conduct or use the results of criminal background checks, and the EEOC has never suggested it is.'' However, it reiterated its position that applying the disparate impact analysis to criminal background checks to prevent and remedy prohibited employment discrimination is ''squarely within [the EEOC's] mission.'' The EEOC interpreted the objection to the Guidance's encouragement of the use of individualized assessments by the Attorneys General as ''misunderstanding'' the Guidance to require an individual assessment of every applicant and employee. The EEOC explained that it recommends a two step approach whereby employers first use targeted screens that consider at least the nature of the crime, the time elapsed and the nature of the job, followed by an individualized assessment of those who are screened out. The benefit of an individualized assessment is, according to the EEOC, that it prevents employers from mistakenly screening out qualified applicants based on inaccurate, incomplete or irrelevant information. Because the Guidance recommends individualized assessments only for those screened out, the EEOC does not believe conducting such assessments will result in significant costs to employers. The EEOC's letter did clarify one point; the EEOC believes individualized assessments are necessary unless an employer can demonstrate that ''its tar-

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geted screen is *always* job related and consistent with business necessity.'' (emphasis added.) The EEOC would not comment on its lawsuits against Dollar General or BMW except to say that the suits challenge criminal screening processes that the EEOC alleges have a disparate impact on African Americans and are not job related and consistent with business necessity.

Additionally, the EEOC announced on June 28, 2013, that J.B. Hunt Transportation, Inc. had agreed to settle a race discrimination charge filed by the EEOC (126 DLR A-8, 7/1/13). The charge alleged that, based on a conviction record, an African American candidate was denied a position as a truck driver in 2009. The EEOC reviewed not only that candidate's exclusion, but also J.B. Hunt's broader criminal background policy. Although the details of J.B. Hunt's policy were not disclosed, as part of the conciliation agreement, J.B. Hunt agreed to review and, if necessary, revise its policy to comply with the EEOC's Guidance. While we do not know what the EEOC found problematic about J.B. Hunt's criminal background policy, it is clear that the EEOC expects employers to narrowly tailor their exclusions based on the nature of the specific job at issue. As demonstrated by the lawsuits against Dollar General and BMW, even a tailored criminal background policy that limits exclusions to specified crimes may not be enough to avoid a suit by the EEOC.

Issue No. 3: Does Compliance With State Law Constitute a Defense to Title VII Liability?

The EEOC's updated Guidance states that although the EEOC considers compliance with federal laws and regulations a defense to a charge of disparate impact discrimination, the same is not true for state and local laws. Instead, the EEOC considers state and local laws preempted to the extent they require an employer to do anything that would violate Title VII. Therefore, according to the updated Guidance, ''if an employer's exclusionary policy or practice is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability.''

When a state or local law bars the employment of individuals with certain convictions, the EEOC's position seems to create a catch-22. If employers abide by the state or local law, they risk a Title VII disparate impact lawsuit if they cannot separately show that the exclusion is job related and consistent with business necessity. Alternatively, if they disregard the state and local laws, they face the penalties of noncompliance. That is, to the extent state or local laws could be considered overbroad and/or do not provide for individualized assessments, the EEOC's approach appears to place employers in the untenable position of choosing between potentially violating Title VII or violating state and local laws.

At least one member of Congress has noted this dilemma. During the May 22, 2013, meeting of the House Committee on Education and the Workforce, Subcommittee on Workforce Protections, Indiana Representative Susan W. Brooks (R) questioned EEOC Chair Jacqueline Berrien on the issue (99 DLR AA-1, 5/22/13). Brooks questioned Berrien about how the EEOC ''can assure employers that are faced with the EEOC guidance or with the state and local law that they're not going to be subject to litigation?'' Berrien responded that the existence of a state law requiring the exclusion of all people with a particular conviction ''would obviously be relevant to a determination that the commission would make about what steps would need to be taken next.'' Berrien's response may provide some comfort to employers concerned that they will be the target of the EEOC's scrutiny because of their compliance with state or local laws. But Berrien's statement is far from a representation that the EEOC is willing to retreat from its position that compliance with state and local laws is not a defense to a Title VII disparate impact charge.

Further, at least one court has agreed with the EEOC that compliance with state or local laws does not shield an employer from Title VII liability. In *Waldon v. Cincinnati Public Schools*, 118 FEP Cases 188, 2013 BL 108120 (S.D. Ohio 2013) (80 DLR A-3, 4/25/13), the U.S. District Court for the Southern District of Ohio became the first federal court since the release of the 2012 Guidance to issue an opinion on whether Title VII preempts state and local criminal background check laws. In 2007, Ohio enacted a law requiring criminal background checks for current school employees, even if their duties did not involve the care of children. If an employee had been convicted of specified crimes, regardless of how long ago, the law required that the employee be terminated. (This law has subsequently been amended to allow for consideration of rehabilitation.) The two plaintiffs were employed by the Cincinnati public schools for a number of years before they and eight others were terminated under this law. Nine of the ten employees terminated were African-American.

The defendant moved to dismiss the plaintiffs' subsequent Title VII disparate impact suit on the grounds that it was complying with a state mandate and that it was a business necessity for the Cincinnati public schools to follow Ohio law. The court refused to dismiss the suit, rejecting defendant's argument that Title VII does not trump facially neutral state laws, noting that such an approach would ''gut the purpose of Title VII.'' The court rejected defendant's argument that compliance with the law was itself a business necessity, reasoning that business necessity is a narrow concept normally requiring that the employment practice have a ''manifest relationship to the employment in question.'' Analyzed under this standard, the court found the policy at issue a ''close call'' due to the employees' proximity to children. However, the court concluded that because employment was barred even when offenses were remote in time, insubstantial, or when there had been a subsequent long history of good performance, the exclusions were not job related and consistent with business necessity.

Whether other courts if confronted with the question would disagree with the conclusion reached in *Waldon* and hold that compliance with state or local laws is itself a business necessity remains unanswered. However, there is little reason to believe that the EEOC will not continue to maintain the positions set forth in its Guidance—leaving it to future litigation and the courts to determine whether the EEOC's position is sustainable.

With roughly one-third of Americans having a criminal record, employers need to determine how to address the criminal pasts of job candidates. Employers' best option for navigating between protecting their legitimate business interests and complying with the re-

quirements of Title VII is the execution of a thoughtful criminal record policy. The shape of such a policy depends on each employer's unique business concerns and how the courts continue to wrestle with the EEOC's positions.

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