



EEOC Issues New Criminal Background Check Guidance

In a 4-1 vote, the U.S. Equal Employment Opportunity Commission (EEOC) approved new Enforcement Guidance regarding the use of arrest and conviction records in employment decisions (Guidance). The Guidance is dated April 25, 2012. While the EEOC has previously issued guidance and other policy statement on this issue, this new Guidance is intended to supersede all previous statements from the EEOC regarding this topic.

According to the EEOC, arrest and conviction records present unique challenges to employers because of their enhanced potential for disparate impact discrimination. Unlike intentional discrimination, disparate treatment discrimination addresses unintentional discrimination that generally stems from employer policies that seem, on their face, to be neutral. Instead, when employers rely on these policies, they have an adverse impact on a disproportionate number of protected employees.

The EEOC is concerned about employer policies that automatically disqualify certain individuals from employment based on results from criminal background checks. While this may seem like a facially -neutral policy, the EEOC believes that this can have an adverse impact on African-American and Hispanic employees. According to arrest and incarceration rates cited by the EEOC, African-American and Hispanic individuals “are arrested at a rate that is 2 to 3 times their proportion to the general population.” In addition, incarceration rates are equally skewed for this demographic. As a result, any policy which makes employment decisions based on arrest or conviction records will, more likely than not, have a disparate impact on African-American and/or Hispanic individuals.

The EEOC Guidance provides best practices to avoid disparate impact claims, and it also lays-out scenarios in which use of this data may result in an EEOC finding of “reasonable cause” to believe that an employer violated federal discrimination law.

To defend against disparate impact claims, an employer must show that the applicable policy is “job-related and consistent with business necessity.” The Guidance provides two methods to meet this defense. First, the EEOC notes that employers should validate their policy in light of the Uniform Guidelines on Employee Selection Procedures (if applicable data is available and “such validation is possible”). Second, the EEOC states that, where a criminal background check reveals arrest and/or

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conviction issues, employers should consider at least three factors before making an employment decision: 1) nature of the crime; 2) amount of time elapsed since the conviction occurred; and 3) the requirements of the specific job position. Further, the EEOC encourages an individualized assessment prior to any employment action to ensure that the action is job-related and consistent with business necessity (although the EEOC notes that Title VII does not require this in every instance.)

Regarding arrest records, the EEOC states that an employer's use of arrest records that do not include a subsequent conviction is generally improper, as such records "do not establish that criminal conduct occurred." Further, the EEOC states that such records are often inaccurate. The Guidance states that an "arrest record is not grounds for exclusion," and that if someone were to file a charge of discrimination regarding their denial of a job position based on an arrest record without a conviction, the EEOC would issue a reasonable cause finding that the employer violated Title VII.

The EEOC ends the Guidance with its best practices in this area, which include: avoid using criminal records to exclude people from employment; narrowly tailor any policies for screening applicants based on past criminal conduct by identifying essential job requirements and any specific offenses that may show "unfitness" for the applicable tasks; allow for individual assessments regarding background check results; and maintain confidentiality of records regarding criminal background check status.

The Guidance is available [here](#).

Upcoming Events

Contingent Employees, Independent Contractors and Labor Outsourcing

Date: May 23, 2012

Time: 11:30 a.m. – 1:00 p.m.

Location: Online Webinar

Cost: \$49.00 per listening site

Join us for a webinar presented by Jeff Roth and Leah Green focusing on contingent employees, independent contractors, and labor outsourcing. In this webinar we will discuss various issues including misconceptions and facts surrounding contingent employees; types of contingent employees; who is an employee; specific laws and treatment of the contingent worker relationship; Family and Medical Leave Act; Occupational Safety and Health Act; and Labor Relations/National Labor Relations Act.

The cost is \$49.00 per listening site. Any FEES & BURGESS, P.C., coupon can be used towards attendance for this webinar. This program has been submitted for HRCI credit.

Upcoming Events, *continued from page 2*

Contracting Under the UCC: A Basic Primer to Articles 1, 2, and 2A

Date: July 30 – August 1, 2012

Location: Boston, Massachusetts

Session number 318, will be July 30, 2012, from 4:00 p.m. – 5:15 p.m.

Session number 418, will be July 31, 2012, from 11:15 am – 12:30 p.m.

Session number 517, will be July 31, 2012, from 2:30 p.m. – 3:45 p.m.

Session number 617, will be July 31, 2012, from 4:00 p.m. – 5:15 p.m.

These four sessions, presented by Allen Anderson and Ryan Blount of FEES & BURGESS, P.C., and in conjunction with the [2012 NCMA World Congress](#), provide a practical introduction to the foundations of domestic commercial contracting. The classes will feature discussion of risk management in several areas key to those buying or selling under the Uniform Commercial Code (UCC), including formation of commercial agreements and determination of applicable contract terms; performance issues under those agreements or terms, including risk of loss and delivery, acceptance, repudiation, warranties, and disclaimers; and, of course, disputes, remedies, and dispute resolution.

Customizable Seminars and Training Sessions

The lawyers of FEES & BURGESS, P.C., combined, have many years experience working in various fields, as both in-house and private counsel, representing a diverse clientele. This wide field of knowledge enables us to provide quality training on various topics, including, but are not limited to:

Americans with Disabilities Act	International Contracting
Conducting Effective Workplace Investigations	Limiting Liability for Sexual Harassment
Construction Contracting	Managing Employee Use of Internet and E-mail in the Workplace
Diversity Training	Managing Gender Identity Issues in the Workplace
Electrical Manufacturing Services Contract	Reducing Employee Benefits Costs
Employment Law Survival Training for Managers	Reducing Risk in Purchasing Terms and Conditions
Ethics, Business Conduct and Compliance in Government Contracting	Reduction in Workforce Strategies
Immigration Compliance	Retaliation and Whistleblowers
Incoterms® 2010	Violence in the Workplace
Indemnity and Limitation of Liability Clauses	

For more information on these and other programs, please visit us online at www.feesburgess.com; contact us by e-mail at seminars@feesburgess.com; or by phone at (256) 536-0095.



SPEAKERS

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