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On Tuesday, July 26, 2011, the EEOC held its latest meeting focusing on Title VII protections for job applicants with a criminal record, and encouraged additional input prior to reaching any final decision whether it will update its corresponding Policy Statement from 1987.

The EEOC's Priorities Still Include Regulating the Use of Criminal Records by Employers

By Rod Fliegel and Barry Hartstein

On Tuesday, July 26, 2011, the Equal Employment Opportunity Commission (EEOC) held its latest meeting on the topic of protections for job applicants with arrest and conviction records under Title VII of the Civil Rights Act of 1964. The full Commission heard remarks from the panelists related to three areas: "Best Practices From Employers," "An Overview of Local, State and Federal Programs and Policies" and "Legal Standards Governing Employers' Consideration of Criminal Arrest and Conviction Records."

Although for the past few years the EEOC has renewed its focus on the hiring process, including Title VII protections for ex-offenders, the current Commissioners (Jaqueline Berrien, Stuart Ishimaru, Constance Barker, Chai Feldblum and Victoria Lipnic) have not indicated whether the EEOC will update its 1987 Policy Statement on the Issue of Conviction Records under Title VII, and did not do so at the July 26 meeting. As a result, it remains important for employers who may be the target of disparate impact claims or charges challenging their conviction-based screening policies to: (1) understand the current state of the case law; and (2) continue to closely monitor developments at the federal, state and local levels in this dynamic area of the law.

Backdrop for the July 26 Meeting

In the past few years, the EEOC has reaffirmed its long-standing position that, upon a showing of disparate impact, employers must be able to justify their conviction-based screening policies under Title VII's business necessity standard. The EEOC also has been focusing on the hiring process as part of its "E-RACE initiative."¹ In November 2008, the EEOC conducted a meeting on Title VII protections for job applicants with a criminal record and heard testimony from criminologists and stakeholders. More recent EEOC proceedings have included meetings: (1) regarding the use by employers of credit history information (October 2010); (2) to examine the treatment of unemployed job seekers (February 2011); (3) and regarding disparate treatment in 21st century hiring decisions (June 2011). The EEOC also is currently prosecuting a disparate impact lawsuit against at least one employer based on its conviction-based screening policy, and has initiated dozens of "systemic discrimination" investigations.²

The EEOC's interest in Title VII protections for job applicants with a criminal record

was sparked at least in part by the Third Circuit Court of Appeals' opinion in *EI v. South Eastern Pennsylvania Transportation Authority (SEPTA)*.³ In *EI*, the plaintiff was rejected for a job as a paratransit driver based on his homicide conviction. The court of appeals affirmed judgment as a matter of law for SEPTA, but ruled that, if an employer's conviction-based screening policy in fact causes a disparate impact, the employer must produce "empirical evidence" justifying its screening policy in order to establish business necessity. The court of appeals ruled that an employer must show specifically that its screening policy "accurately" distinguishes between job applicants posing an "unacceptable level of risk" and those who do not. The court of appeals seemed very skeptical of testimony from SEPTA's expert – leading criminologist Dr. Alfred Blumstein – that the plaintiff actually posed a greater crime-risk than a non-offender job applicant even though the plaintiff's conviction was from the 1960s, but explained that it had to rule for SEPTA because the plaintiff failed to offer any evidence to refute Dr. Blumstein's testimony. The court of appeals noted that, if the plaintiff had provided such evidence, it would have been a "different case."

The Third Circuit's analysis is markedly different from, and in fact criticized, the EEOC's historical enforcement guidance. Since 1987, the EEOC has taken the position that, if an employer's conviction-based screening policy causes a disparate impact, the employer must show that it considered: (1) the "nature and gravity" of the applicant's offense; (2) the "time that has passed since the conviction and/or completion of sentence;" and (3) the "nature of the job held or sought." The distinction between the EEOC's historical enforcement guidance and *EI* is material because the Third Circuit looked beyond the elements of SEPTA's screening policy to whether the results of SEPTA's screening process could be squared with the recidivism statistics, and particularly with the statistics suggesting that the risk of recidivism declines as the time "clean" since release from incarceration increases.

The July 26 Meeting

Against this backdrop, the attendees at the July 26 meeting with the EEOC were waiting to see if the Commissioners would signal whether they will continue to rely on the EEOC's Policy Statement from 1987 or adopt the Third Circuit's analysis in *EI*. Although Commissioner Ishimaru appears to support promptly issuing updated guidance, it is less clear whether Chair Berrien and the other Commissioners share this same view. As a practical matter, this means that for the time being it is at best uncertain whether the EEOC will hold employers to the standard the Commission articulated in its 1987 Policy Statement or to the Third Circuit's empirical evidence standard. That said, the remarks from the Commissioners during the meeting offer some insight into their perspective on the overall issues and some subsidiary ones.

- The Commissioners all appear to acknowledge that the EEOC is grappling with "complex" and "difficult" questions that impact a wide range of stakeholders. Chair Berrien noted in her opening remarks that employers may "legitimately consider" criminal records "under certain circumstances." (Less clear is whether all of the Commissioners agree on whether the need to wrestle with these questions should delay the EEOC's decision on updating its enforcement guidance. Commissioner Ishimaru was particularly vocal about not waiting too long. Other Commissioners implied that, pending further study and coordination with other federal agencies, it may be enough for the EEOC to focus on providing more education to employers on this topic.)
- All of the Commissioners appear to view the challenge for the EEOC through the lens of the legal standards under Title VII. For example, Commissioner Feldblum noted in her opening remarks that the EEOC is "not a legislature," but a federal agency tasked with enforcing civil rights. Commissioner Lipnic raised the issue of whether the EEOC legally can take a position that a conviction record may not be considered after a certain amount of time has passed (*e.g.*, seven years).
- Several of the Commissioners had a reasonably strong reaction to the statistics presented by the witnesses concerning significant disparities in the arrest and conviction rates for African Americans and Latinos. (Less clear is whether all of the Commissioners agree that these statistics justify incorporating a presumption of disparate impact into any updated enforcement guidance.)
- Several of the Commissioners asked questions about whether employers truly have access to accurate criminal records. Commissioner Ishimaru referred to the problem of "garbage in, garbage out."
- Chair Berrien seemed to suggest through her questions that the overall issue is not confined to the hiring process, but extends to decisions impacting current employees (*e.g.*, an employer's response to information about the arrest of a current employee). Her remarks also suggest the need to consider the implications for both records of arrest and records of conviction.

- Finally, Commissioner Ishimaru repeatedly expressed concern about “overbroad” screening policies. Commissioner Feldblum described as the “easy case” an employer’s blanket policy against hiring any ex-offenders. She noted that the EEOC knows some employers have such policies, and said: “We often sue them.”

Action Steps for Employers

- Employers with conviction-based screening policies should continue to monitor further developments not only with respect to the EEOC’s enforcement guidance, but also at the state level. The state legislatures have been fairly active in this area and the related area of restrictions on using credit history information.
- Employers who want to assess disparate impact risks should consider conducting a privileged review of their conviction-based screening policy to help identify any areas of potential concern.
- Employers should continue to be mindful of, and comply with, the various laws that impact the use of criminal records in addition to Title VII, including state fair employment laws and the federal and state fair credit reporting laws, such as the Fair Credit Reporting Act (FCRA). The fair credit reporting laws in particular have become a fertile source of class action litigation against employers, not just credit bureaus/consumer reporting agencies.

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Rod Fliegel is a Shareholder in Littler Mendelson’s San Francisco office. Barry Hartstein, a Shareholder in the Chicago office, was invited by the Commissioners to present on the third panel and encouraged the EEOC to consider focusing on outreach and education rather than updating the 1987 Policy Statement. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Fliegel at rfliegel@littler.com, or Mr. Hartstein at bhartstein@littler.com.

¹ E-RACE stands for Eradicating Racism and Colorism from Employment.

² See *EEOC v Freeman*, No. 09-CV-02573 (D. Md.). The EEOC also suffered a significant loss in a conviction-records case in Michigan and was ordered to pay attorneys’ fees in excess of \$750,000. *EEOC v. Peoplemark*, No. 08-CV-00907 (W.D. Mich.). The EEOC’s intensive focus on investigations can be explained at least in part by this loss.

³ 479 F.3d 232 (3rd Cir. 2007).