EEOC Raises the Bar on Employers to Show that Employment Actions Are Job-Related

by Julia E. Judish and Darcy L. Muilenburg

The U.S. Equal Employment Opportunity Commission ("EEOC") recently issued an Enforcement Guidance on employers' use of arrest and conviction records in hiring, as well as published a final rule clarifying the "reasonable factors other than age"("RFOA") defense under the Age Discrimination in Employment Act ("ADEA"). Both the Guidance and the new regulations demonstrate the EEOC's focus on requiring employers to demonstrate the legitimate, job-related basis for employment actions.

Guidance on Consideration of Criminal History in Hiring

On April 25, 2012, the EEOC issued an Enforcement Guidance on an employer's use of an individual's criminal history in making employment decisions under Title VII of the Civil Rights Act of 1964 (the "Guidance").[1] Title VII prohibits employment discrimination based on race, color, religion, sex or national origin. Illegal discrimination can take the form of intentional disparate treatment, or it can be established by showing that a policy or practice has an unjustified disproportionate adverse impact on a protected group. Because national data shows that certain minority groups have higher arrest and conviction rates than non-minorities, an employer's use of an individual's criminal history could give rise to a discrimination claim. Specifically, a covered employer would be liable under Title VII when either (1) race, national origin or another protected characteristic motivates the employer's use of an applicant's criminal record in making a hiring decision, or (2) the employer's policy or practice of screening out applicants based on their criminal record has the effect of disproportionately excluding a protected group of applicants, and the employer fails to demonstrate that the policy or practice is job-related and consistent with business necessity.

With respect to disparate impact liability, the EEOC's new Guidance addresses four key areas. First, because an arrest that does not result in conviction cannot establish that criminal conduct has occurred, an arrest record standing alone may not be used to deny an employment opportunity. An employer may,

[1] *See* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

however, make an inquiry into the circumstances leading to the arrest and determine that an individual is unfit for a position based on the conduct underlying the arrest.

Second, the EEOC takes the position that national data on the disproportionate arrest and conviction rates of African Americans and Hispanics is sufficient to support a finding that an employer's exclusionary policy based on an applicant's criminal history has a disparate impact based on race and national origin. The Guidance specifies that the EEOC can rely on national data alone to investigate an employer's actions further. Although the employer would have an opportunity to show that its policy does not disparately impact the protected group(s), such as through local data on arrest and/or conviction rates or applicant data that differs from the national data, an employer's evidence that it employs a racially balanced workforce would not constitute a defense to a disparate impact in hiring claim. The burden would then be on the employer to show that its use of criminal histories as an employment screening device was job-related and consistent with business necessity.

Third, the EEOC's Guidance prohibits an employer from treating a criminal record as an automatic disqualifier for applicants, unless the employer has validated the job-related nature of that screen per the Uniform Guidelines on Employee Selection Procedures standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible). Given that most employers are unlikely to be able to validate a criminal history screening practice, the EEOC recommends (but does not require) that employers refrain from asking about criminal history on job applications. If employers do inquire about an individual's criminal history, to avoid potential liability they must consider the circumstances of a conviction, including (i) the nature of the crime, (ii) the time elapsed, and (iii) the nature of the job, followed by an "individualized assessment" of people excluded. The "individualized assessment" should include (a) informing the individual that he may be excluded because of past criminal conduct, (b) providing the individual an opportunity to demonstrate that the exclusion does not properly apply to him, and (c) considering whether the individual's additional information shows that the policy as applied is not job-related or consistent with business necessity.

The Guidance clarifies that evidence submitted by an individual that is relevant to this individualized assessment includes:

- Information that the individual was not correctly identified in the criminal record, or that the record is otherwise inaccurate;
- 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.

If the applicant does not respond to the employer's attempt to gather additional information about his background, the employer may make its employment decision without the information.

Finally, the Guidance recommends that employers who consider criminal record information as part of their hiring process adopt the following best practices:

1. Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
   - Identify essential job requirements and the actual circumstances under which the jobs are performed.
   - Determine the specific offenses that may demonstrate unfitness for performing such jobs.
   - Identify the criminal offenses based on all available evidence.
   - Determine the duration of exclusions for criminal conduct based on all available evidence.
   - Include an individualized assessment.
   - Record the justification for the policy and procedures.
   - Note and keep a record of consultations and research considered in crafting the policy and procedures.
2. Train managers, hiring officials, and decision makers on how to implement the policy and procedures consistent with Title VII.
3. Keep information about applicants' and employees' criminal records confidential and only use it for the purpose for which it was intended.

Most employers will not stop asking applicants about criminal histories or performing criminal background checks for at least some new hires. The Guidance notes that, according to one study, 92% of employers use criminal background checks in at least some aspect of their hiring procedures. The new EEOC Enforcement Guidance serves as an important reminder, however, that this information must be used in a narrowly tailored fashion. Employers who make broad-brush use of criminal histories to exclude applicants from employment opportunities do so at their legal peril. Moreover, employers should also be mindful that some states and localities have enacted restrictions on inquiring about an applicant's arrest or conviction history or setting limitations on how an employer may lawfully use such information in employment decisions. Before considering an applicant's criminal record, therefore, employers should verify that they are meeting both the new standards set by the EEOC Enforcement Guidance and the legal requirements in the applicable jurisdiction.

Regulations Clarifying Affirmative Defense under ADEA

The EEOC also recently published new regulations under the ADEA. The regulations, which became effective April 30, 2012, clarify the "reasonable factors other than age" ("RFOA") defense under the ADEA. The EEOC designed the final rule to conform existing regulations to recent Supreme Court decisions and to provide guidance about the application of the RFOA defense.[2] Available at 29 CFR Part 1625, the final rule provides that once a plaintiff has identified an employment practice that disproportionately harms older workers (those over age 40), the burden shifts to employers to prove as an affirmative defense that such practice is based on reasonable factors other than age.

[2] Some states' age discrimination statutes may impose a stricter standard than the federal RFOA defense to age claims. As with any analysis of potential employment-related liability, employers should ensure that their actions comply with both federal and state law.

As with the Enforcement Guidance on use of criminal history, the new ADEA regulations push employers to demonstrate the legitimate, non-discriminatory basis for employment decisions. Simply articulating a non-discriminatory justification for an employment practice that has an adverse effect on older workers will not constitute a sufficient defense. The new regulations require employers also to show that the employment action was "administered in a way that reasonably achieves . . . [a legitimate] purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer." In other words, it is not enough to have a reduction in force ("RIF") plan that sets business-based considerations as the selection criteria, if top managers don't also supervise and review the ways those criteria are applied and give guidance or training to lower-level supervisors involved in the RIF implementation process. Notably, the EEOC states in the preamble to the final rule that, in a RIF, a "cost-cutting goal alone would not be sufficient to establish the RFOA defense." Similarly, the final rule provides that it is unlawful to differentiate among employees based on "the average cost of employing older employees as a group," except as specifically authorized under the ADEA for certain employee benefit plans. *See* 29 C.F.R. § 1625.7(f).

Second, the final rule lays out several considerations that the EEOC deems "relevant" to determining whether a practice is based on a RFOA. One key consideration is "the extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes." According to the preamble to the final rule, such stereotypes may include, for example, the misperception that older workers are less productive than younger workers, even though "studies show a nonexistent or slightly positive relationship between job performance and older age." Unreviewed subjective assessments of employees are therefore *per se* suspect under the final rule. This position had not previously been a part of the ADEA regulations, but the Supreme Court and Courts of Appeal have allowed employment plaintiffs to challenge unchecked subjectivity as a practice with a discriminatory impact.

The standards articulated in the final rule likely will make it more difficult for employers to establish the RFOA defense, especially at an early stage in the proceedings. In fact, in a footnote to the preamble, the EEOC notes that whether an employer establishes the RFOA defense "is a jury question." This standard is not good news for employers, as it will increase the likelihood that courts will allow even baseless claims to proceed to trial. Nonetheless, the final rule provides a good roadmap for employers to consider in developing policies and procedures. Specifically, the regulations enumerate five factors as relevant to an employer's attempt to establish a RFOA defense:

(i) The extent to which the factor is related to the employer's stated business purpose;

(ii) The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;

(iii) The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;

(iv) The extent to which the employer assessed the adverse impact of its employment practice on older workers; and

(v) The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

29 C.F.R. § 1625.7(e).

The lesson to employers is clear: ignoring the impact of a RIF on older workers is an invitation to legal liability. Moreover, employers must carefully design, review and document the selection criteria for a RIF from the beginning of the process in order to mount an effective defense against an age discrimination suit.

If you have questions, please contact the Pillsbury attorney with whom you regularly work or the authors:

Julia E. Judish (bio)
Washington, DC
+1.202.663.9266
julia.judish@pillsburylaw.com

Darcy L. Muilenburg (bio)
Sacramento
+1.916.329.4779
darcy.muilenburg@pillsburylaw.com