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## Caught Between Laws: Challenges for Health Care Providers in Using Criminal History Information in Employment Decisions

By Julia Judish and Erica Kraus

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*In an effort to increase protection for vulnerable patient populations, the Affordable Care Act (ACA) creates incentives for states to strengthen the employment background check programs available to long-term care providers. Many states have responded to these incentives by creating or enhancing background check programs, increasing the ability of long-term care providers to screen for individuals with certain types of criminal convictions and exclude them from employment. Although these programs may help long-term care providers to protect their patients and to select a qualified workforce, employment policies based on criminal record information may be in tension with recent Equal Employment Opportunity Commission (EEOC) guidance, even when such policies are based on exclusions mandated by state law. Employers, therefore, should carefully evaluate employment policies based on criminal history for the possibility of both state law consequences and federal civil rights liability.*

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### **I. The Affordable Care Act and the National Background Check Program**

Section 6201 of the ACA directs the Department of Health and Human Services (HHS) to create a national program to “identify efficient, effective, and economical procedures for long term care facilities and providers to conduct background checks on a statewide basis for all potential direct access employees.” Based on this mandate, HHS created the National Background Check Program (NBCP), which provides grants to states to implement statewide background check programs that require FBI fingerprint checks for direct access workers in long term care facilities and include “rap back” systems to notify long-term care providers of post-background check criminal convictions. Under the NBCP, HHS has awarded more than

\$50 million to 24 states to develop background check programs.<sup>1</sup> In its 2015 Work Plan, the HHS Office of the Inspector General (OIG) announced plans to review the procedures implemented by participating states to determine the outcomes of the states' programs and whether the programs have led to any unintended consequences.<sup>2</sup>

The vast majority of long-term care facilities conduct background checks for at least some of their prospective employees.<sup>3</sup> As more states expand their background check systems under the NBCP, these facilities may receive more thorough information about the conviction records of their prospective and current employees. This information will need to be applied effectively and in compliance with applicable legal requirements in making employment decisions.<sup>4</sup>

The NBCP is voluntary, and Federal law does not require long-term care facilities to conduct background checks or exclude individuals from employment based on background check results.<sup>5</sup> State laws, on the other hand, require many long-term care providers to conduct background checks and to exclude from employment individuals with certain specified criminal convictions.<sup>6</sup> For example, 41 states require home health agencies to conduct background checks on prospective employees, and 35 states specify convictions that disqualify individuals from certain types of home health agency employment.<sup>7</sup> As long-term care providers use improved data to comply with state laws and protect their patients, however, they must also contend with new, more stringent EEOC guidance *limiting* the use of criminal background checks in employment decisions.

## II. 2012 EEOC Guidance and State Background Check Requirements

### A. Title VII and Employment Decisions Based on Criminal History

On April 25, 2012, the EEOC published updated enforcement guidance on the use of arrest or conviction records in employment decisions under Title VII of the Civil Rights Act of 1964.<sup>8</sup> (See [May 8, 2012 Client Advisory](#).) Under Title VII, employers are prohibited from discriminating against employees or applicants based on race, color, religion, sex or national origin. An employer may be liable for discrimination based on either of two theories—disparate treatment or disparate impact. Liability under the disparate treatment theory requires that an employer treat an individual differently because of the individual's protected status (e.g., race). Under a disparate impact theory, however, an employer may be liable for adopting a racially neutral employment policy if that policy has an adverse impact that disproportionately affects individuals in a protected class and that is not justified as job-related and consistent with business necessity. For

<sup>1</sup> "CMS National Background Check Program" (last modified Nov. 3, 2014), [available here](#).

<sup>2</sup> OIG Work Plan – Fiscal Year 2015, at 8.

<sup>3</sup> Wright, Stuart, HHS Deputy Inspector General for Evaluation and Inspections, "Memorandum Report: Nationwide Program for National and State Background Checks for Long-Term Care Employees – Results of Long-Term-Care Provider Administrator Survey, OEI-07-10-00421" (Jan. 19, 2012), [available online](#).

<sup>4</sup> In addition, employers need to ensure that the background checks they perform comply with both the notification and authorization requirements of the federal Fair Credit Reporting Act and, if applicable, state and local "ban the box" legislation prohibiting inquiries into criminal records prior to extension of a conditional offer. (See [August 13, 2014 Client Alert](#).)

<sup>5</sup> The OIG has authority to exclude individuals and entities from Federally funded health care programs based on conviction of certain offenses; excluded individuals are added to the OIG's List of Excluded Individuals and Entities (LEIE). Health care entities have a responsibility to routinely check the LEIE, and to avoid hiring excluded individuals or billing for items or services furnished, ordered, or prescribed by excluded individuals, but are not required to independently conduct background checks or to exclude employees based on the results of background checks separate from the LEIE.

<sup>6</sup> Ritchie, Brian P., Acting Deputy Inspector General for Evaluations and Inspections, "Memorandum Report: State Requirements for Conducting Background Checks on Home Health Agency Employees, OEI-07-14-00131" (May 29, 2014), [available online](#).

<sup>7</sup> *Id.*

<sup>8</sup> EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, Number 915.002 (April 25, 2012).

instance, in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-432 (1971), the Supreme Court found that an employer's policy limiting certain entry-level positions to candidates with a high school diploma violated Title VII because, given the demographics of the applicant pool, the policy disproportionately excluded African-American applicants from jobs, and the employer could not demonstrate that a high school diploma was actually needed to perform the job duties.

The EEOC takes the position that, because national data supports a finding that criminal record exclusions have a disparate impact based on race and national origin, such exclusions may violate Title VII if they are not job-related and consistent with business necessity.<sup>9</sup> Generally, establishing that an individual's exclusion is job-related and consistent with business necessity requires individualized consideration of the nature and gravity of the individual's offense or conduct, the time that has passed since the offense or conduct occurred or the individual's sentence was completed, and the nature of the job held or sought.<sup>10</sup>

### B. EEOC Position on Laws Requiring Criminal History Based Exclusions

The EEOC's makes an exception to its individualized determination requirement if a federal law or regulation prohibits an employer from hiring an individual with a conviction record.<sup>11</sup> For instance, a health care provider that submits claims to federally funded health care programs can permissibly adopt a policy excluding from employment individuals on the OIG's List of Excluded Individuals and Entities (LEIE). The health care provider could enforce this policy without running afoul of Title VII, regardless of the particular circumstances of each individual's offense giving rise to the exclusion or the nature of the particular job sought.

The EEOC takes a very different position, however, regarding employer policies based on state and local laws restricting employment based on criminal history.<sup>12</sup> Because state and local laws are preempted by Title VII, the EEOC asserts that "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."<sup>13</sup> Based on this view, a home health agency policy excluding individuals with convictions that disqualify them under state law from holding certain positions *could* run afoul of Title VII if the employer could not show that—for every individual excluded—the exclusion was job-related and consistent with business necessity.

Establishing that exclusionary policies mandated by state law are job-related and consistent with business necessity may not be difficult. For instance, a policy excluding individuals with elder abuse convictions within the past seven years from working as home health aides would seem justified for any individual excluded. Other exclusionary policies, however, might be more difficult to justify under the standard created by the EEOC. For instance, a state law mandating a blanket exclusion of individuals convicted of felonies from positions in long-term care facilities might be too broad to satisfy the EEOC's standards if adopted as an employer policy—it might be difficult to show that *every* felony conviction is relevant to working at *any* job with a long-term care provider. For example, Washington State law classifies commercial fishing without a license as a felony in certain circumstances,<sup>14</sup> but the underlying fishing violation would seem to have no bearing on an individual's skill or trustworthiness in caring for geriatric

<sup>9</sup> *Id.* at 1-2.

<sup>10</sup> *Id.* at 11.

<sup>11</sup> *Id.* at 20.

<sup>12</sup> *Id.* at 24.

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> RCW 77.15.500.

patients. Long-term care providers operating in states with broader exclusionary mandates could find themselves between a rock and a hard place: violate state law or risk federal Title VII liability.

### C. *Waldon v. Cincinnati Public Schools*

At least one federal district court has adopted the EEOC's position on employer policies adopted to comply with state law, even though the state law at issue was intended to protect a vulnerable population. In *Waldon v. Cincinnati Public Schools*, 941 F. Supp. 2d 884 (S.D. Ohio 2013), plaintiffs were long-standing public school employees whose employment was terminated in 2008 pursuant to a new Ohio law requiring background checks for all current school employees. The law specifically required that public schools terminate the employment of school employees with certain types of convictions that the state had determined were relevant to working in an environment with children. Based on this law, Cincinnati Public Schools fired ten employees, nine of whom were African American.

Although the school system asserted that it had taken this action in order to comply with the new state law, the *Waldon* court denied the employer's motion to dismiss the case. In response to the employer's principal argument—that it was a business necessity to comply with state law—the Court announced that it was unable to “conclude that Defendant was compelled to implement the policy, when it saw that nine of the ten it was terminating were African Americans.”<sup>15</sup> The Court noted that “Title VII trumps state mandates, and Defendant could have raised questions with the state board of education regarding the stark disparity it confronted.”<sup>16</sup>

The *Waldon* court does not wholly condemn the use of criminal background checks in employment decisions; the Court notes that “[o]bviously the policy as applied to serious recent crimes addressed a level of risk that the Defendant was justified in managing due to the nature of its employees' proximity to children.”<sup>17</sup> Further, the case is ongoing and the final outcome therefore still undetermined. Nevertheless, the Court's assertion that compliance with state law—even a state law intended to protect a vulnerable population—is no defense to a Title VII disparate impact allegation is jarring, particularly for employers widely subject to state laws requiring exclusion based on criminal history.

## III. Conclusion

Although the EEOC's recent litigation efforts challenging the use of criminal background checks have failed more often than succeeded,<sup>18</sup> its focus in this area and its position on policies adopted to comply with state laws may create compliance challenges for health care providers, especially long-term and home health care providers that are most likely to be subject to laws restricting employment decisions based on conviction history. In drafting and implementing policies excluding current or prospective employees based on criminal history, employers should consider whether they are able to assess the qualifications of each individual for an open position consistent with the mandates of state and local law. To the extent possible, employers should consider adopting the best practices identified in the EEOC's guidance. These measures include developing a narrowly tailored written policy for screening applicants and employees, identifying essential job requirements for open positions, determining specific offenses that may demonstrate unfitness for performing a job, evaluating the time period in which criminal convictions will be

<sup>15</sup> *Waldon v. Cincinnati Public Schools*, 941 F. Supp. 2d 884, 890 (S.D. Ohio 2013).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 889.

<sup>18</sup> See *EEOC v. Kaplan*, No. 13-3408, 2014 U.S. App. LEXIS 6490 (6th Cir. April 9, 2014); *EEOC v. Freeman*, No. 09-CV-2573, 2013 U.S. Dist. LEXIS 112368 (D. Md. Aug. 9, 2013).

considered, conducting an individualized assessment of each employee or applicant's fitness for a position, and documenting the justification for all policies, procedures and determinations. An employer should also consider consulting counsel to determine the risks involved in developing and implementing—or failing to develop and implement—a mandated exclusion policy or procedure.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Julia E. Judish [\(bio\)](#)  
Washington, DC  
+1.202.663.9266  
[julia.judish@pillsburylaw.com](mailto:julia.judish@pillsburylaw.com)

Erica J. Kraus [\(bio\)](#)  
Washington, DC  
+1.202.663.8049  
[erica.kraus@pillsburylaw.com](mailto:erica.kraus@pillsburylaw.com)

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