Re-Examine Your Criminal Background Check Policies
By Gary Siniscalco, Erin M. Connell and Alexandra Stathopoulos

For many employers, criminal background checks are necessary to prevent employee theft in the workplace; to avoid lawsuits from employees, customers or clients based on the conduct of a worker who was formerly incarcerated; and to ensure compliance with laws that bar people with criminal records from certain occupations. Yet as the unemployment rate for people with criminal records skyrockets, particularly among minorities, the U.S. Equal Employment Opportunity Commission (EEOC), state administrative agencies and employee advocacy groups have increased pressure on employers to re-examine their criminal background check policies. On April 25, 2012, the EEOC released new enforcement guidance for employers that emphasizes the Agency's presumption that consideration of a criminal history is unlawful unless the employer can prove its policy is narrowly tailored, job-related and consistent with business necessity. Employers thus face the difficult task of ensuring that their policies satisfy business needs while remaining consistent with applicable law.

Demographics
At odds with employers' need to conduct criminal background checks is the astronomical unemployment rate in the United States today for people with criminal convictions. Recent statistics show that more than 700,000 people are being released from prison each year. Of those released, minorities are systematically overrepresented, and are thus especially impacted by the barriers to employment. For example, according to the U.S. Bureau of Justice Statistics, black individuals accounted for 39.4 percent of the prison and jail population in 2009, even though they represented only 12.6 percent of the U.S. population. Hispanics made up 20.6 percent of the total jail and prison population in 2009, but they represented only 16.3 percent of the U.S. population.

A 2010 Massachusetts Institute of Technology study confirms that the disproportionate number of minorities being incarcerated has become even more notable over the last few decades: Incarceration rates of young black males without high school diplomas surged from 10 percent in 1980 to 35 percent in 2008.

Additionally, a new report by the Community Service Society found that only 8 percent of young black males in the 16-24 age group were employed from January 2009 until June 2010.

Recent Legal Action
Employers' reliance on criminal background checks to deny employment to people with criminal convictions has resulted in a wave of lawsuits challenging the practice.
For example, in *Arroyo v. Accenture*, Case No. 1:10-cv-03013 (S.D.N.Y., filed April 8, 2010), the plaintiff challenged Accenture's policy of allegedly rejecting job applicants and terminating employees with criminal records, even where the criminal history had no bearing on the applicant's fitness or ability to perform the job. Although the plaintiff ultimately dismissed his claims prior to adjudication of their merits, the case demonstrates the trend of challenging criminal background check policies that allegedly include blanket prohibitions.

Similarly, in *Hudson v. First Transit Inc.*, Case No. 3:10-cv-03158 (N.D.Cal., filed July 20, 2010), the plaintiff sued First Transit over an alleged blanket policy excluding applicants who have been convicted of a felony or who have served jail time. Although a hearing on the plaintiff's motion for

class certification was scheduled for mid-August 2010, the plaintiff dismissed her claims following a settlement conference just prior to the class certification hearing.

In yet another lawsuit on this subject, *Mays v. Burlington Northern Santa Fe Railroad Co. (BNSF)*, Case No. 1:10-cv-00153 (N.D.Ill., filed Jan. 11, 2010), the plaintiff sued BNSF for allegedly applying a blanket policy that excludes from employment consideration any person with a felony conviction in the previous seven years. This case is still pending.

Applicable Enforcement Framework

On Wednesday, April 25, 2012, the EEOC issued new enforcement guidance entitled "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964," which outlines the framework under which the EEOC determines the legality of an employer's criminal background check policy. Technically, the new guidelines do not establish new rules, but instead aim to clarify the guidance first issued by the EEOC in 1987. The new guidance makes clear that there is a presumed Title VII disparate impact on black and Latino job applicants whenever an employer excludes applicants on the basis of conviction records, because those groups are overrepresented in the criminal justice system.

Unless an employer rebuts this presumption with contrary local demographic data or data on specific crimes, it must be able to show valid business necessity to justify the policy.

The EEOC's enforcement guidance reiterates three factors that an employer must consider while evaluating applicants' conviction records in order to demonstrate business necessity:

- The nature and gravity of the offense or offenses.
- The amount of time that has passed since the conviction and/or completion of the sentence.
- The nature of the job held or sought.

Additionally, even when an employer has a narrowly tailored policy that takes these three factors into consideration, the EEOC nevertheless advocates engaging in "individualized assessments," meaning that in cases where an individual's criminal history does not pass scrutiny under the employer's policy, the EEOC still expects the employer to "inform[] the individual that he may be excluded because of past criminal conduct," to "provide[] an opportunity to the individual to demonstrate that the exclusion does not properly apply to him," and to "consider[] whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity." Although the EEOC states that individualized assessments are not required in every case, the EEOC nevertheless emphasizes that they can "help employers avoid Title VII liability."

It's important to note that many states have enacted statutes that specifically address criminal background check policies and, in some cases, that impose specific restrictions beyond those set out in the EEOC's enforcement guidance. For example, New York Corrections Law Section 753 specifically lists the factors employers should consider when evaluating an applicant's previous convictions, including:

- Public policy.
- Specific duties of the employment sought.

- The bearing of the past criminal offense on the applicant's ability to perform his or her job duties.
- The time that has elapsed since the past offense.
- The age of the applicant at the time of the past offense.
- The seriousness of the offense.
- Evidence of rehabilitation.
- The legitimate interests of the employer in protecting property and the public safety.

Although the EEOC enforcement guidance recognizes that compliance with federal laws or regulations that bar employers in certain industries from hiring people with particular criminal convictions constitutes a defense to a charge of discrimination, the EEOC takes the bold position that compliance with similar state laws will not shield an employer from liability because they are preempted. The only legal authority to which EEOC cites to support this position is the preemption clause in Title VII itself (42 U.S.C. § 2000e-7). Historically, this clause has been used to strike down state laws that on their face mandate discrimination contrary to Title VII, such as limitations on the number of hours women are permitted to work, or weight-lifting restrictions that apply only to women. *See, e.g.*, *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225-1227 (9th Cir. 1971) (finding that Title VII preempts California legislation imposing maximum work and weight lifting restrictions for women). EEOC's current position that Title VII's preemptory reach now also extends to state legislation that is not discriminatory on its face, but instead may have a discriminatory impact that EEOC believes is not justified by business necessity, is questionable at best, and forces employers to make an unfair choice. For example, Nebraska has a state law providing that in order to be licensed, a pharmacy technician cannot have been convicted of any drug-related felony or misdemeanor (*see* Neb. Rev. Stat. § 38-2890; 175 Neb. Admin. Code § 8-002). The statute does not consider the time that has passed since the conviction, nor does it allow for individualized consideration. Nevertheless, Nebraska pharmacies do not have the choice of ignoring this law when employing individuals to work as pharmacy technicians, and EEOC offers no suggestions for employers faced with this type of dilemma.

The EEOC also makes clear that "an arrest does not establish that criminal conduct has occurred," and the Agency does not distinguish between arrests that did not lead to convictions and arrests pending prosecution.

Considerations Supporting Business Necessity

Where employers have leeway to balance their business needs in considering specific prior criminal conduct, the courts have offered varied advice. Case law is still in flux, and the Supreme Court has yet to weigh in on the issue. Yet many federal and state courts have demonstrated a consistent trend toward invalidating blanket policies that exclude applicants on the basis of any past offense and upholding policies that are narrowly tailored to satisfy specific employer needs. Moreover, courts have been fairly lenient in finding business necessity: Employers must offer more than "common sense" as a justification for not hiring people with criminal convictions, but they need not show that a policy of refusing to hire such individuals is indispensable to business needs.

The two leading cases in this area are *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975), and *El v. Southeastern Pennsylvania Transportation Authority (SEPTA)*, 479 F.3d 232 (3rd Cir. 2007). In *Green*, the 8th U.S. Circuit Court of Appeals denounced blanket policies when it held that an employer's "absolute policy of refusing consideration for employment to any person

convicted of a crime other than a minor traffic offense" had a disparate impact on black applicants and was not justified by business necessity.

Building on this decision by clarifying what constitutes valid business necessity, the 3rd U.S. Circuit Court of Appeals held in *El v. SEPTA* that common sense was not enough to justify a criminal background check policy, although other considerations—such as nature of the past offense, specific duties of the job applied for and empirical data demonstrating the likelihood of recidivism—are acceptable bases for showing business necessity. The court upheld SEPTA's policy of excluding all job candidates with a prior conviction for a violent crime, although it did so with a degree of hesitancy, noting that the case might have proceeded to trial had the plaintiff brought forth an expert who could testify that at some point following a conviction, people are no more likely to commit a crime than average citizens.

Risks of Employing Ex-Offenders

As indicated by the 3rd Circuit in *El v. SEPTA*, recidivism data can help employers determine which potential hires may pose a risk in the workplace. Employers can then use this information to craft policies that are narrowly tailored to address business needs—such as the need to prevent workplace theft, which currently costs businesses $200 billion annually in the United States alone, or the need to avoid negligent hiring lawsuits, where an employer may be liable for an injury caused by an employee if the employer knew or should have known the employee's propensity for the conduct that caused the injury. *See, e.g., Ponticas v. K.M.S. Investments Inc.*, 331 N.W.2d 907 (Minn. 1983) (upholding a jury verdict of negligent hiring, finding that defendant apartment owners should have known that the manager they hired had dangerous propensities because—had they conducted a criminal background check—they likely would have discovered the manager's prior convictions for receiving stolen property, armed robbery and burglary); *Cramer v. Housing Opportunities Comm'n*, 501 A.2d 35, 40 (Md. 1985) (reversing the trial court's decision to exclude evidence that showed the Housing Opportunities Commission failed to check a housing inspector's criminal background, where the housing inspector had multiple past convictions and later raped a tenant, noting that "where the work involves a serious risk of harm if the employee is unfit … there may well exist a duty to conduct a criminal record investigation").

Unfortunately, there is little research analyzing the likelihood of recidivism in the workplace. As a result, employers must turn to either private data from the employer's own experience or general recidivism data that is not specific to the workplace. General data reflects that the rate of recidivism is extremely high: Approximately 66 percent of released prisoners are re-arrested and 50 percent are reincarcerated within three years of release from prison. For many people who were incarcerated, particularly young men between the ages of 20 and 40, prison is a revolving door: 56 percent of state prisoners released in 1999 had one or more prior convictions, and 25 percent had three or more convictions.

Predictive Value

Yet as employers craft criminal background check policies designed to limit workplace risk, courts and the EEOC may require that they look beyond general recidivism statistics and consider the nuances presented by an extremely diverse body of people with criminal convictions. Several recent studies show that criminal background checks are a valuable predictor of future employee behavior

in certain circumstances, but the relationship between past crime and future behavior declines significantly with time and varies by age, number of crimes and type of past offenses.

In a 2011 study, "The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?," professors Shawn D. Bushway, Paul Nieuwbeerta, and Arjan Blokland found that it takes approximately 10 years before offenders ages 12 to 26 with no prior convictions start to resemble their never-convicted counterparts, while older offenders with no prior crimes begin to look like nonoffenders within two to six years. People with four or more offenses either never resemble nonoffenders or only begin to do so after a minimum of 23 years.

The risk of re-offending also varies depending on the type of offense. For example, Professor Alfred Blumstein of Carnegie Mellon University has found that it takes 3.8 years before an 18-year-old arrested for burglary resembles a same-age nonoffender in terms of risk of re-arrest. For aggravated assault, it was 4.3 years; for robbery, it was 7.7 years.

Conclusion

Given current trends in unemployment, as well as pressure from the EEOC, state administrative agencies and private lawsuits, employers are faced with a dilemma: How can they craft criminal background check policies that satisfy business needs while acting in a manner consistent with the EEOC's guidance and applicable law?

Finding the right balance is not easy. Employers cannot maintain blanket policies or rely on "common sense" as a justification for their use of criminal background checks in hiring. Key data on recidivism is still being developed, and the legal landscape in this area is subject to change.

Thus, employers would be best advised to re-examine their criminal background check policies sooner rather than later, and to consult with counsel on ways they can narrowly tailor their policies to meet business needs while remaining mindful of related legal risks, state laws and positions taken by the EEOC.

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