Enforcement Guidance and EEOC Litigation on Arrest and Conviction Records Under Title VII and The Americans with Disabilities Act

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AGENDA:

- EEOC Laws Overview
- EEOC Process
- EEOC SEP Priorities
- Criminal Background Checks
- EEOC Arrest and Conviction Guidance
- American with Disabilities Act
- Domestic Violence and Employment Discrimination

EEOC Overview:

- Laws EEOC enforces:
  - Title VII of the Civil Rights Act of 1964 (race, national origin, color, sex, and religion)
  - Equal Pay Act (including Lilly Ledbetter Fair Pay Act of 2009)
  - Americans with Disabilities Act (ADA) (including Amendments)
  - Genetic Information Nondiscrimination Act (GINA)
  - Age Discrimination in Employment Act (40+)
  - Rehabilitation Act of 1973
The Equal Pay Act
Sex based wage discrimination
(1.5% of charges – 95 charges)
Lilly Ledbetter Fair Pay Act of 2009

The Americans With Disabilities Act
Amendments Act (ADAAA) – 31.6% (1,950 charges)
Genetic Information Nondiscrimination Act (GINA) of 2008 – 3% (18)
LAWS ENFORCED

Age Discrimination in Employment Act
26.9% (1,664 charges)

Who Is protected under Title VII and ADA?

- Employee
- Temporary worker
- Job applicant
- Former employee
- Undocumented workers too!

Entitles with 15 or more employees

- Employee can file
- Third party can file
- Commissioner’s charge

WHAT EEOC DOES:

- Enforce Federal Employment Discrimination Statutes
- Issue Regulations and Guidance Interpreting Those Statutes
- Receive and Investigate Charges of Discrimination
- Enforce Statutes through Conciliation and Litigation
- Engage in Outreach and Education Efforts to Constituent Groups
JURISDICTION and TIMELINESS:
- Employer/Employee
- >15 Employees--Title VII, ADA, GINA
- >20 Employees--ADEA
- 300 days to file charge from last act of discrimination
- 180 days for ACRD
- 1 or more employees for sexual harassment under the ACRA

EEOC PROCESS:
- Intake Questionnaire, Walk-Ins, Mail-Ins...
- MOU between ACRD and EEOC--Geography
- Intake Interview
- Charge drafted
- Charge served on Employer within 10 days
- EEOC Requests Position Statement from Employer or ADR
- Mediation?
- RFIs/ Subpoenas/ Interviews/ Investigation
- LOD/ Dismissal/ Notice of Right to Sue--90 days/Conciliation
- Litigation
- FOIA/ Section 83 Disclosure of Files

ADVICE ON INTAKE:
- Do a very detailed Intake Questionnaire
- Have witnesses names, emails, addresses, and statements
- Letters of representation from lawyers must be on file to discuss the case with the agency
- Give copies of emails, texts, audio and videotapes
- EEOC Intake interviews conducted M--T--Th--Fri from 8:00 a.m. to 3:00 p.m.
- Unperfected charges will get served. Please have CP cooperate
- ADR
- ACRD-appts, walk-ins, online

FORM 283 (Intake Questionnaire):
FORM 5 (Charge of Discrimination):

Name, Address, Phone Number of employer
Contact Information of someone we can contact other than you
Names and Job Titles of all involved officials
Comparators
Names and Contact Info of all Witnesses
Witness Statements
Names of others who are similarly situated
Employer policies and handbook

Helpful Information

What Information Will EEOC Need to File a Charge?

All documentary evidence – notices, pictures, recordings, etc.
Written Statement
Journal or outline in time sequence
What will be the employer's defense
Why discrimination and not just unfair

Helpful Information
Helpful Information – ADA

- Description or documentation of disability
- Description or documentation of what accommodation(s) you need from your employer

EEOC PRIORITY ISSUES:

SEP: SIX PRIORITY ISSUES

1. Eliminating Barriers in Recruitment and Hiring.

- The EEOC will target class–based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities.

CRIMINAL BACKGROUND CHECKS

An example of barriers in Hiring
Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination based on race, color, religion, sex, or national origin.

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Over 90% of Surveyed Companies Perform Criminal Background Checks

Companies that Perform Criminal Background Checks

- All job candidates 73%
- Selected job candidates 19%

Over 1 in 4 U.S. Adults has an Arrest or Conviction Record

Total of 232.5 Million U.S. Adults

64.6 Million U.S. Adults with Criminal Records

Equal Employment Opportunity Commission

- Updated Enforcement Guidance on Arrest and Conviction Records
Info widely available: Internet & “consumer reporting agencies”

Most employers use criminal background checks for some or all jobs

Legal & social science developments

Federal, state, and local governments foster reentry and employment

More working-age people have criminal records, especially African Americans and Hispanics

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Basics are the same as 1987 and 1990 EEOC guidance documents

Now responds to employer questions

- Federal laws requiring background checks and exclusion from jobs
- Employer best practices

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Does not prohibit employers from using or obtaining criminal background checks.

Does prohibit using that information in a discriminatory way.

Avoids bright line rules.

Provides detailed examples and best practices.

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Employers cannot treat job applicants with the same criminal records differently due to race, color, religion, sex, national origin

Proof
- biased statements
- similarly situated people treated differently
- inconsistencies in the hiring process
Which one is the convicted felon?

Disparate Impact

- Uniform, neutral policy BUT it results in disproportionate, unjustified exclusion
- DEFENSE: Unless "job related and consistent with business necessity", it's illegal.

Disparate Impact Discrimination and Criminal Records

- Particular policy or practice
- Disparate impact based on race, national origin, or another Title VII basis

El v. Southeastern Pennsylvania Transportation Authority (2007 decision) — African American 55-year-old paratransit driver-trainee, who was fired when the employer discovered a conviction for a sole, violent offense that occurred 40 years ago.

Waldon v. Cincinnati Public Schools (2013 decision) — two African Americans were fired for prior convictions after many years of excellent service (along with an additional ten employees, nine of whom were African American).

Little research on the correlation between criminal record and propensity to commit crimes at the workplace.

People who were arrested had same risk of being arrested as general population after 4–7 years of no arrests.

Alfred Blumstein and Kiminori Nakamura, "Redemption" in an Era of Widespread Criminal Background Checks, (2009)

National Employment Law Project

www.nelp.org

"Job Related and Consistent with Business Necessity"

Targeted Screen + Individualized Assessment

Targeted Screen” Factors (Green Factors):

1) **Nature** and **gravity** of the offense or conduct
2) **Time** that has passed since the offense, conduct and/or completion of the sentence
3) **Nature of the job** held or sought
“Individualized Assessment”

Employer should...
- Inform the individual that s/he may be excluded due to evidence of past criminal conduct
- Provide an opportunity for the individual to explain
- Consider whether the individual’s additional information supports or undermines the exclusion

Examples of Criminal Record Exclusions That Do Not Consider the Green Factors

- Guidance Example 5:
  - Automatic exclusion in online job application

- Guidance Example 6:
  - Automatic exclusion without individualized assessment for current employees with good record

Barriers to People with Records are Costly and Decrease Public Safety

- The cost of corrections consumed $74 billion a year in U.S., $9 billion in California. (U.S. Bureau of Justice Statistics, 2007)
- Reduced output of goods and services of people with felonies and prison records is $57–$65 billions in losses. (CEPR, 2010)
- One study showed most people recidivated within 3 years after imprisonment. (U.S. Bureau of Justice Statistics, 1994)
- Employment has been shown to significantly reduce recidivism.

Individualized Assessment

Consider...
- Inaccuracy of criminal record
- Age at conviction
- Consistency, quality, and length of employment history before and after
- Rehabilitation efforts
- Employment/character references
Best Practices

- Eliminate across-the-board policies.
- Identify essential job requirements, how jobs are performed, and target specific offenses that demonstrate unfitness for job.
- Train managers, hiring officials, & decision makers.
- Do not ask about convictions on job applications.
- Provide opportunities for explanations
- When asking questions about criminal records, limit inquiries to convictions for which exclusion would be job-related and consistent with business necessity.

Other Precautions

- Document the policy’s rationale
  - Employers may want to record justification for policies and procedures
  - Keep a record of consultations and research used to craft policy
- Keep criminal record information confidential.

Additional Information

- For additional information about the topics we discussed during the presentation, please reference the following sites:
  - Qs and As: [http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm](http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm)
2. Protecting Immigrant, Migrant and Other Vulnerable Workers.

The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.

Vulnerable Populations Cases:

- **EEOC v. Henry’s Turkeys—Iowa** jury—$240 million for a class of men with intellectual disabilities—
  - NOTE: charge filed by a third party!
- **EEOC v. Global—LA/Hawaii**—$19 million verdict for exploited Thai workers.
- **EEOC v. Spud Seller—COLO**—sexual harassment of potato workers.
- **EEOC v. Harris Farms—CA**—sexual harassment of farmworker woman
3. Addressing Emerging and Developing Issues.
   The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations.
   EXAMPLES:
   - LGBT Issues
   - ADA/Title VII Pregnancy, Reasonable Accommodation Issues
   - Issues under "Qualification Standards" under the ADA

   The EEOC will target compensation systems and practices that discriminate based on gender.

5. Preserving Access to the Legal System.
   - The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC’s investigative or enforcement efforts.

6. Preventing Harassment Through Systemic Enforcement and Targeted Outreach.
   - The EEOC will pursue systemic investigations and litigation and conduct a targeted outreach campaign to deter harassment in the workplace.
HARASSMENT CASES:

- EEOC v. Sonic–NM–$2 million
- EEOC v. IHOP–NM–$1 million
- EEOC v. Pitre Buick–NM–over $2 million
- EEOC v. Dart Energy–COLO–$1.2 million
- Holmes & Holmes–UT–statutory caps

EEOC Update:

- We took 6,176 charges, resolved about 3,000.
- Enforcement got almost $8,000,000 in monetary benefits FY 2013. Average caseloads are over 100.
- Legal got over $8,900,000 in benefits in FY 2013.
- ADR has over 78% resolution rate; 96.7% would use EEOC ADR again.
- ADR conducted over 290 mediations; R Acceptance 32%; 78% CP Acceptance.

President George Bush signing the Americans with Disabilities Act with Evan Kemp–1990
2009 Amendments

American with Disabilities Act–2009

- Many, many people covered.......(i.e. people with mental health issues, intellectual disabilities, epilepsy, diabetes, cancer.....)
- Prohibits overt discrimination–hiring, terms & conditions, firing....
- Requires Employers to provide Reasonable Accommodations for known impairments unless undue hardship!
- Medical Inquiries limited
- Confidentiality
- Anti–Retaliation Provisions
Definition of “Disability”

- A physical or mental impairment that substantially limits a major life activity;
- A record of such an impairment;
- Being regarded as having such an impairment

Definition of “Disability” (cont.)

- Definition of “disability” construed broadly
- Mitigating measures (other than ordinary corrective lenses) would not be considered
- Impairment can be disability even if episodic or in remission

Mitigating Measures

Mitigating measures include:
1. Medication, medical supplies and equipment, low vision and hearing devices, prosthetics, mobility devices, etc.
2. Use of assistive technology
3. Reasonable accommodations
4. Learned behavioral or adaptive neurological modifications

Major Life Activities

- Include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
Major Life Activities

- The term “major life activities” also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

“Regarded As” Disabled

- Broader definition of “regarded as” disabled that would cover anyone subjected to an action “prohibited by this Act” because of a real or perceived physical or mental impairment
- “Regarded as” would exclude impairments that are transitory (less than six months) and minor
- Individuals “regarded as” disabled not entitled to reasonable accommodation
ADA – Disparate Treatment or Harassment or Failure to Provide a Reasonable Accommodation:

- ADA prohibits different treatment or harassment at work based on an actual or perceived impairment.
- Could include impairments resulting from domestic or dating violence, sexual assault or stalking.
- Employer has to provide reasonable accommodations for disabilities.

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ADA – Retaliation and Interference

- The ADA prohibits retaliation for protected activity.
- The ADA also prohibits interference with an employee’s exercise of his or her rights under the statute.
- Breach of confidentiality under ADA.

Why Report workplace discrimination & harassment?

- EEOC can investigate, find a solution in court or out of it, and try to make sure it doesn’t happen again to anyone else. Do it for yourself, but also for your friends and co-workers, your family and children.
- Third Parties can file charges.
- Commissioner’s charges.
QUESTIONS???????????????????????????