Employee Background Checks:
Stopping Employee Fraud at the Point of Entry

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Agenda

- Job Application
- Interview
- Background Check
Job Application
Broad Legal Questions

• Go broad on job application
• Failure to answer
• Certification
• Interview
• Reference Checks
Address or Duration of Residence

Can Ask

• Applicant's place of residence.
• How long have you been a resident of this state or city?
Address or Duration of Residence

Cannot Ask

• How long have you lived in this country?
• In what country did you live before?
Citizenship

Can Ask

- Are you a citizen of the United States?
- If not a citizen of the United States, do you intend to become a citizen of the United States?
- If you are not a United States citizen, have you the legal right to remain permanently in the United States?
- Do you intend to remain permanently in the United States?
Citizenship

Cannot Ask

• Of what country are you a citizen?
• Inquiries as to whether an applicant or an applicant's parents or spouse are naturalized or native-born citizens
• Requirement that applicant produce naturalization papers.
Can Ask

• Do you possess a valid NYS driver's license (if a driver's license is necessary for the position applicant is seeking)?
Driver's License

Cannot Ask

• Requirement that applicant produce license prior to offer of employment.
Education

Can Ask

• Inquiry into applicant's academic, vocational or professional education and the public and private schools attended.
Education

Cannot Ask

• Year(s) of attendance.
• Date(s) of graduation.

If Hired

• Contingent on production of degree and confirmation by University.
Experience Language

Can Ask

• Inquiry into work experience.
• If the duties of the position applicant is seeking require fluency in a particular language, inquiry may be made into whether applicant speaks or writes that language fluently.
Experience Language

Cannot Ask

• What is your native language?
• Inquiry into how applicant acquired ability to read, write or speak a foreign language.
Military Experience

Can Ask

- Inquiry into applicant's military experience in the Armed Forces of the United States or in a State Militia.
- Inquiry into applicant's service in a particular branch of the United States Army, Navy, etc.
- Did you receive a dishonorable discharge?
Military Experience

Cannot Ask

- Inquiry into applicant's military experience other than in the Armed Forces of the United States or in a State Militia.
Military Experience

Cannot Ask
Did you receive an honorable, dishonorable or other type of discharge?

The problem with this question is that “other” may be a medical type discharge. This could be an indirect inquiry into whether a person has a disability.
Name

Can Ask

• Have you ever worked for this company under a different name?
• Is additional information relative to change of name, use of an assumed name or nickname necessary to enable a check on your work records? If yes, explain.
Name

Cannot Ask

- Inquiries as to original names of an applicant whose name has been changed by court order or otherwise.
- Inquiries as to the birth name of a married woman.
- If you have ever worked under another name, state name and dates.
Organizations

Can Ask

- Inquiry into applicant's membership in organizations which the applicant considers relevant to his or her ability to perform the job.
Organizations

Cannot Ask

• Requirement that applicant list all clubs, societies, and lodges to which applicant belongs.
Photograph

Can Ask

• None
Photograph

Cannot Ask

• Requirement or option that applicant affix a photograph to employment form at any time before hiring.
Relatives

Can Ask

• Inquiry as to names of applicant's relatives already employed by the company.
Relatives

Cannot Ask

• Inquiry as to names, addresses and ages of applicant's spouse, children or relatives not employed by the company.
New York State
Human Rights Law § 296(15)

It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation, or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his or her having been convicted of one of more criminal offenses, or by reason of finding of a lack of “good moral character” which is based on up on his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of Article 23-A of the NY Correction Law.
Section 752 prohibits an employer from making adverse hiring or employment decisions against applicants or employees based on a previous criminal conviction, or by reason of a finding of lack of “good moral character” based upon such past convictions, unless:

(1) There is a direct relationship between one or more of the previous criminal offenses and the specific employment sought; or

(2) The granting or continuation of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.
In making a determination pursuant to §752, the employer **SHALL** consider the following factors:

(1) The public policy of New York State to encourage the employment of persons previously convicted of one or more criminal offenses;

(2) The specific duties and responsibilities necessarily related to the employment sought or held by the person;
New York State Correction Law
Article 23-A

(3) The bearing, is any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities;

(4) The time which has elapsed since the occurrence of the criminal offense or offenses;
New York State Correction Law
Article 23-A

(5) The age of the person at the time of occurrence of the criminal offense;

(6) The seriousness of the offense;

(7) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; and
New York State Correction Law
Article 23-A

(8) The legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.
The employer shall also give consideration to a certificate of good conduct issued to the applicant or employee, which shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.
Consideration of the eight factors is often forgotten.

Consideration is required, and existence or absence of one factor is not determinative.


Review job application and questions posed by managers.
New York State Correction Law
Article 23-A

If an employer is conducting a criminal background check on an employment applicant or employee, the employer must provide such individuals with specific notice regarding their rights under Article 23-A of the New York State Correction Law.
At the request of any person previously convicted of a crime who has been denied employment, the employer shall provide, within thirty (30) days, a written statement setting forth the reason(s) for such denial.
New York State Correction Law
Article 23-A

• These requirements may change when the Federal and State Credit Reporting Acts come into play.
Job Application Criminal Conviction Questions

• Have you ever been convicted of a crime?
  – Yes
  – No
  – Not Sure
Job Application Criminal Conviction Questions

• Give directions
  – Explanation of Question
  – Disclaimer
  – Failure to Disclose Impact
Job Application Criminal Conviction Questions

• **Explanation:** “Convicted of crime” means that you pled guilty to, or were found guilty (by a judge or jury) of a felony or misdemeanor. It does not include violations or traffic tickets. This question applies to all courts, federal, state, town, village, city, etc., and it applies to any criminal conviction you may have in a foreign country. You are not required to answer “yes” if the case was adjourned in contemplation of dismissal or you were granted youthful offender status.
Disclaimer: It is the policy of X not to discriminate against applicants who have a criminal record. A criminal conviction does not result in an automatic disqualification. All applicants are examined on a case-by-case basis, taking into account a series of factors X is required to review. For example, X will take into consideration the specific duties and responsibilities of the position you are applying for, and the bearing, if any, the criminal conviction will have on your fitness or ability to perform one or more such duties or responsibilities.
Job Application Criminal Conviction Questions

• **Failure to Disclose**: If you have been convicted of a crime, and you fail to disclose the conviction, X, reserves the right to terminate your employment should you in fact be hired. X has hired many individuals with criminal convictions in the past. Please be honest about your criminal convictions so that your application can be properly assessed.
Job Application Criminal Conviction Questions

• If your answer to question 1 is “no” you are not required to answer any of the other questions in this section.

• If your answer to question 1 is “not sure” please stop and contact ________.

• If your answer to question 1 is “yes” please complete the remaining questions in this section.
Job Application Criminal Conviction Questions

• For each criminal conviction you may have, please answer the following questions. Please do not list all criminal convictions together.

• How many criminal convictions do you have? ____________
  – Each criminal conviction must be explained separately. If you have more than one criminal conviction please contact ________.
Job Application Criminal Conviction Questions

• What was the crime you were convicted of? (Please describe in as much detail as possible).

• Was the crime a felony or misdemeanor? (Check One)
  • Felony
  • Misdemeanor
Job Application Criminal Conviction Questions

• What Court did the conviction occur in? (For example, Utica City Court, Oneida County Court, United States District Court for the Northern District of New York, etc.)
Job Application Criminal Conviction Questions

• When did the criminal conviction occur? (Please provide, month and year at a minimum). Please note that X will consider how much time has elapsed since the occurrence of the criminal offense and the date of your application.
Job Application Criminal Conviction Questions

• How old were you at the time of the criminal offense? Please note X is not asking you for your date of birth.
Job Application Criminal Conviction Questions

• Do you have any information you would like to produce to X in regard to your rehabilitation and good conduct? (Check One).
  • Yes __________
  • No __________
Job Application Criminal Conviction Questions

• If yes, what information would you like X to consider. Please note that this information may be produced by you or someone on your behalf of you.
Job Application Criminal Conviction

Questions

• Have you obtained a Certificate of Relief from Disabilities? Please note that the issuance of a Certificate of Relief from Disabilities creates a presumption of rehabilitation in regard to the criminal offense or offenses specified therein.

• Yes __________

• No __________

• If yes, please produce a copy.
Job Application Criminal Conviction Questions

• Have you obtained a Certificate of Good Conduct? Please note that the issuance of a Certificate of Good Conduct creates a presumption of rehabilitation in regard to the criminal offense or offenses specified therein.

  • Yes __________
  • No __________

• If yes, please produce a copy.
Job Application Criminal Conviction Questions

• Is there anything else you would like X to consider relative to your criminal conviction? Please note you are not required to provide any answer to this question. However, if there is some other positive factor you would like X to consider, this is your opportunity to discuss.
Interviewing
General Pointers

• Establish written criteria that are objective and relate to the requirements or qualifications for the position.

• Ask all applicants for the same position the same basic set of questions. However, follow-up questions may vary.

• Create a list of questions to ask.
General Pointers

• Questions should be based on:
  – Basic Identifying Information
  – Job Qualifications
  – Ability to perform essential functions

• Take and maintain notes during interview.

• Provide any reasonable accommodation needed by the applicants with disabilities to enable their full participation in the interview process.
General Pointers

• Do not ask another person (such as a prior employer or neighbor) questions about the applicant that are not recommended or prohibited to ask the applicant themselves.  
  – If you cannot do it directly do not try the back door.

• Select the best qualified candidate: Make sure that the person selected is objectively the most qualified or at least equally qualified in comparison to the criteria you set.
General Pointers

• If the applicant volunteers “protected information” do not follow up. You may also wish to say: “That will have no impact on our determination.”
Fair Credit Reporting Acts
Federal Fair Credit Reporting Act

• Criminal background investigations for employment purposes may be subject to disclosure requirements under the federal Fair Credit Reporting Act (“FCRA”). 15 U.S.C. § 1681.

• FCRA imposes limitations on the manner in which information about “consumers” may be collected, disseminated, and used by way of “consumer reports,” and has specific application in the employment context.
Federal Fair Credit Reporting Act

• FCRA does not constrain an employer in its own direct collection of information about an applicant, but rather, only applies when the employer uses a third-party provider for this purpose.
Federal Fair Credit Reporting Act

- A “consumer report” is information (oral, written, or other communication) provided by a “consumer reporting agency” about credit matters as well as information about a person’s “character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for...employment purposes.”
Federal Fair Credit Reporting Act: Consumer Report

A criminal records check is a “consumer report” when completed by a credit reporting agency. When any consumer report is being procured for employment purposes, the employer is obliged to provide the following notices and certifications:

1. Provide the employee/applicant with a clear and conspicuous disclosure in writing, at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes.

2. Obtain the applicant’s/employee’s written authorization for the procurement of the consumer report.
Federal Fair Credit Reporting Act: Consumer Report

3. Certify, to the entity providing the report, that the company has complied with the above notice requirements and that the information from the consumer report will not be used in violation of any applicable federal or state equal employment opportunity law or regulation.
Federal Fair Credit Reporting Act: Consumer Report

4. If the report is used as the basis, in whole or in part, for any adverse employment action (such as a refusal to hire or a decision to terminate), provide the applicant/employee with a copy of both the report and a summary of rights as contained in an Consumer Financial Protection Bureau publication entitled “A Summary of Your Rights Under the Fair Credit Reporting Act” before taking the action.
5. After waiting a “reasonable” amount of time (not specified by the statute or the Consumer Financial Protection Bureau), advise the applicant/employee of the adverse employment action.
New York State Fair Credit Reporting Act

- New York has adopted its own statute analogous to the FCRA, which contains similar requirements – the New York Fair Credit Reporting Act, N.Y. Gen. Bus. Law § 380 et seq.
In addition, the New York FCRA provides, “[W]hen a consumer reporting agency provides a consumer report that contains criminal conviction information…to a user, the person, firm, corporation or other entity requesting such report shall provide the subject of such report a printed or electronic copy of article twenty-three-A of the correction law governing the licensure and employment of persons previously convicted of one or more criminal offenses.”
New York State Fair Credit Reporting Act

• If an employer undertakes a criminal background check on an applicant, it must supply the applicant with a copy of Article 23-A of the New York State Correction Law prior to the check and upon receipt of a report containing information of a criminal conviction.
Best Practices & Takeaways
Cases and Cautionary Tales

- Party City
- Richie Levine & Jeremy Zielinski
- What about arrests?
Best Practices & Takeaways

• Check your applications to ensure compliance.

• Know the law - Adhere to FCRA and other federal, state, and local requirements before conducting background checks and taking adverse action against applicants or employees based on their criminal history.

• Ensure that policies imposing a bar to employment based on any conviction are narrowly tailored and consistent with state and federal law.

• Determine whether conviction records are considered in a manner that is job-related and consistent with business necessity.
Best Practices & Takeaways

• Train hiring managers on the appropriate use of criminal history in hiring, promotion, and separation.

• Have a strategy for denials of applications and termination scenarios

• Keep information about applicants' and employees' criminal history confidential.

• Document, document, document.
Ban The Box Legislation
“Ban the Box” Legislation

• Growing number of states and individual local municipalities have begun to enact legislation to remove felony check boxes from job applications, i.e., “banning the box” on employment applications.

• Presently 12 states have some type of Ban the Box laws.
“Ban the Box” Legislation

• Some only apply to state or public employers, some to only private businesses, some to both.

• In 18 other states, including New York, approximately 60 individual cities and counties have passed legislation to remove criminal background questions from employment applications.
“Ban the Box” Legislation

• Although many of these laws apply to public employers, several local ordinances have banned the box for governmental contractors in particular.

• Six states and 11 localities have banned the box for private employers.
“Ban the Box” Legislation

• Ban the box and non-ban the box jurisdictions alike have imposed limitations on the types of criminal records that employers may ask about or otherwise consider.
Syracuse - Ban the Box Legislation

• Effective March 22, 2015, Syracuse has “banned the box” for any person that enters into a service contract or concession agreement with the city, or otherwise supplies goods or services to, or on behalf of, the City.

• Specifically prohibits contractors from making any criminal history inquiries during the application process, which ends when an employer has extended a conditional offer to the applicant.
Syracuse - Ban the Box Legislation

• The ordinance goes beyond banning the box. Before a contractor can rescind a conditional offer based on an applicant’s criminal history, it must:

1. Provide the applicant with a copy of the criminal history report, notify the applicant of the intention to revoke, and identify the conviction(s) warranting rescission;

2. Comply with Article 23-A, and afford the applicant at least 5 business days to provide information/documentation regarding the Article 23-A factors; and

3. Review all information/documentation furnished by the applicant.
Syracuse - Ban the Box Legislation

• These obligations apply whether or not the employer received the criminal history report from a consumer reporting agency.

• The ordinance does not (i) apply to inquiries or adverse actions specifically authorized by law; or (ii) affect any right a contractor may have in respect to an intentional misrepresentation made by an applicant on his/her application.
Syracuse - Ban the Box Legislation

• Enforcement and Penalty
  – City has authority to suspend and terminate any contract or agreement in violation of the ordinance.
  – Private right of action.
Syracuse - Ban the Box Legislation

– City may bring an action to restrain or prevent violations of the ordinance and seek penalties ranging from $500-$1,000.

– The Mayor may temporarily suspend the applicability of the ordinance to any prospective or current contractor when based on a “specific exigent circumstance or public emergency condition.”
New York City - Ban the Box Legislation

• 2011 Executive Order 151 (Consideration of Criminal Convictions in Hiring).

• Applies to city agencies and not private businesses, and requires that NYC government job applications remove the question that asks about criminal convictions.
New York City - Ban the Box Legislation

• Some key summarized points include:
  – Agencies shall not ask about criminal convictions on the job application (excluding the Comprehensive Personnel Document).
  – Agencies shall not ask questions about criminal convictions before the first interview.
  – After the first interview, agencies can then ask job candidates to disclose prior convictions.
  – This law does NOT prohibit consideration of a criminal conviction in hiring process.
There is an exception:

- The New York City Police Department, New York City Fire Department, New York City Department of Correction, New York City Department of Investigation, New York City Department of Probation, and the Division of Youth and Family Services of the Administration for Children's Services, may ask about any criminal records of applicants on job applications and in initial interviews.

- Further, any agency that hires for “police officer” and “peace officer positions may also ask about any criminal records of applicants for such positions on job applications and in initial interviews.
New York City - Fair Chance Act

• Proposed NYC Fair Chance Act
  – If passed, law would be applied to **ALL** employers in NYC, preventing employers from asking about convictions until after the initial stage of the application.
  – Employer would have to be interested enough in the applicant to make a conditional employment offer before inquiring about applicant’s criminal record.
New York City - Fair Chance Act

– If, after being advised of a past conviction, the employer decides not to hire the applicant, a written report on the determination would be required and the applicant could contest the decision.

– The position is then held open for seven days so the employer and applicant can engage in an interactive discussion, considering the employer’s requirements and the applicant’s evidence of good conduct. This time also allows the applicant to question any inaccuracies on the record.

– Bill has been referred to Committee and awaits further action.
Buffalo - Ban the Box Legislation

• On January 1, 2014, an amendment to the Buffalo City Code went into effect which banned employers from inquiring about an applicant’s prior convictions, at least prior to the first interview. See Buffalo City Code § 154-27(B).

• Under the City of Buffalo ordinance, if no interview is conducted, employers must inform applicants whether they intend to conduct a criminal background check before employment begins.
Buffalo - Ban the Box Legislation

Buffalo’s ordinance applies to any person, partnership, corporation, labor organization, not-for-profit, or association having 15 or more employees, except for those required under state or federal law to bar people with certain convictions from employment, police, schools, or organizations that provide direct services for children, young adults, senior citizens, or the physically or mentally disabled.
Buffalo - Ban the Box Legislation

• The ordinance provides for a private right of action for an aggrieved party to seek injunctive relief, damages, and attorneys’ fees.

• Additionally, any individual, whether aggrieved or not, may file a complaint with the Commission on Citizens’ Rights and Community Relations.

• Upon a finding of probable cause, the Director of the Commission on Citizens’ Rights and Community Relations may request that the Buffalo Corporation Counsel pursue an action against the accused employer seeking penalties of $500 for the first violation of the ordinance and $1,000 for each subsequent violation.
Rochester - Ban the Box Legislation

• Effective November 18, 2014, the City of Rochester’s Ban the Box” ordinance prohibits employers from asking applicants about criminal convictions at any time before the employer has conducted an initial employment interview or made a conditional offer of employment. It applies to all public and private employers and employment agencies that employ individuals within the City of Rochester, as well as any vendors, contractors, or suppliers of goods or services to the City of Rochester (regardless of their location).
Rochester - Ban the Box Legislation

• Exceptions include: (1) where the conviction would legally bar employment in that position or where inquiries into convictions are specifically authorized by another applicable law or by a licensing authority for licensed trades or professions; and (2) employers with less than four employees are not covered by the ordinance.

• The ordinance also does not apply to applicants for positions in the City of Rochester Police Department, the Fire Department, or any other positions as “police officers” or “peace officers.”
Rochester - Ban the Box Legislation

• The ordinance provides for a private right of action for an aggrieved party to seek injunctive relief, damages, costs, and reasonable attorneys’ fees. The City of Rochester’s Corporation Counsel may also initiate a court action seeking penalties of $500 for the first violation of the ordinance and $1,000 for each subsequent violation.

• Employers must still comply with Article 23-A after the initial interview or conditional offer made.
EEOC Enforcement Guidance
2012 EEOC Enforcement Guidance

• In April 2012, the EEOC approved, by a 4-1 vote, a revised Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964.

• The Guidance became effective immediately.
2012 EEOC Enforcement Guidance

• Before disqualifying an individual with a criminal record from employment, the Commission emphasizes, employers should engage in an individualized assessment involving a dialogue with that individual.

• While the Guidance states that employers would not violate Title VII if they disqualify an applicant based on separate federal restrictions on the employment of persons with criminal records, an employer may not defend a decision to disqualify an individual solely on state restrictions on the hiring of persons with criminal records.
The new Guidance replaces a 1987 EEOC Policy Statement regarding Conviction Records and a 1990 Policy Guidance on the Consideration of Arrest Records. The 1987 Policy recited statistics showing African-Americans and Hispanics are convicted at a rate disproportionately greater than their representation in the population imply that excluding individuals from employment on the basis of their conviction records had a disparate impact on these groups. Under Title VII, an employer may justify a practice that results in a disparate impact by demonstrating a business necessity for that practice. An employer can demonstrate business necessity under the 1987 Policy by showing it considered three factors in making its decision:

1. The nature and gravity of the criminal offense(s);

2. The time that has passed since the conviction and/or completion of the sentence; and

3. The nature of the job held or sought.
Previous EEOC Policy and Guidelines

• The EEOC refers to these as the “Green factors” (as they came from *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977), in which the court found a complete bar on employment based on any criminal activity, other than a traffic violation, unlawful under Title VII). In addition to the Green factors, where arrest records show no conviction, the EEOC’s 1990 Guidance requires the employer to evaluate whether the arrest record reflects the applicant’s conduct.

• Under the EEOC’s 1978 Uniform Guidelines on Employee Selection Procedures (“UGESP”), a selection procedure that adversely affects the members of any race, sex, or ethnic group will be considered discriminatory unless the selection procedure has been formally validated. 29 C.F.R. § 1607.3(A). The U.S. Supreme Court, however, has held that such formal validation studies are not required to demonstrate business necessity. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).
New EEOC Enforcement Guidance

The new Guidance provides examples of an applicant’s or employee’s proper or improper disqualification based on his or her criminal record.

Targeted Screens May Satisfy Business Necessity

- A common practice among large employers is to develop an internal policy regarding the types of convictions that will disqualify an individual from employment.
- The Guidance contemplates that an employer may satisfy its Title VII obligations by using an internal policy if it is “narrowly tailored.”
New EEOC Enforcement Guidance

Targeted Screens May Satisfy Business Necessity

• The Guidance explains “narrowly tailored” as a “demonstrably tight nexus to the position in question. Title VII thus does not necessarily require individualized assessment in all circumstances.”

• The Guidance refers to “targeted screens” that are based on the Green factors, i.e., the nature of the crime, the time elapsed and the nature of the job.
New EEOC Enforcement Guidance

Targeted Screens Accompanied by Individualized Assessment

• The Guidance clearly prefers that a targeted screen be accompanied by notice to the individual under scrutiny and an individualized assessment of the individual and the crime and the position in question. An individualized assessment would allow the applicant or employee to explain the circumstances of the conviction and why the conviction should not exclude him or her from employment. The Guidance lists eight possible topics of consideration in an individualized assessment, including these three:

• (1) The facts and circumstances surrounding the offense or conduct;
New EEOC Enforcement Guidance

Targeted Screens Accompanied by Individualized Assessment

(2) 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; and

(3) Employment or character references and other information regarding the individual’s fitness for the particular position.
New EEOC Enforcement Guidance

Targeted Screens Accompanied by Individualized Assessment

• The Guidance states that if the individual does not respond to the employer’s inquiries, the employer may make its decision without the information.
Validation Study May Satisfy Business Necessity

- While the Guidance allows a validation study on an employer’s use of criminal background information meeting UGESP standards to establish business necessity, the EEOC appears doubtful that data exists to allow an employer to conduct such a validation study.
New EEOC Enforcement Guidance

Validation Study May Satisfy Business Necessity

• According to the Guidance: “Although there may be social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications and thereby provide a framework for validating some employment exclusions, such studies are rare at the time of this drafting.”
New EEOC Enforcement Guidance

Arrest Record Requires Inquiry into Conduct Alleged

• Individuals are “presumed innocent unless proven guilty;” thus, the Guidance says, the “arrest record standing alone may not be used to deny an employment opportunity.”

• However, the Guidance allows an employer to make an employment decision based on the conduct underlying the arrest if the individual would be unfit for the position because of the conduct.
Arrest Record Requires Inquiry into Conduct Alleged

• As illustration, the Guidance uses the situation in which an elementary school assistant principal is arrested after several young girls reported the assistant principal of inappropriate touching.

• School policy permits terminating employees who engage in conduct that impact the health and safety of students. The assistant principal denies committing inappropriate conduct, but the school finds the denial not credible.

• The school terminates his employment.

• In this situation, the EEOC would find no violation of Title VII because the school’s policy is linked to conduct relevant to the job and the decision is based on the underlying conduct.
New EEOC Enforcement Guidance

State and Local Restrictions

• Perhaps the greatest concern raised by the Guidance is the Commission’s refusal to allow employers to establish business necessity based on compliance with state or local laws prohibiting the employment of persons with certain criminal convictions.

• According to the Guidance, an employer who takes adverse action required by state law or local regulations nonetheless must demonstrate that its policy is job-related and consistent with business necessity based on the Green factors.
New EEOC Enforcement Guidance

• The Guidance observes that persons who do not actually apply for employment may have a cause of action against an employer if the potential applicant is “discouraged from applying” because an employer has a reputation in the community for excluding individuals with criminal records.
**New EEOC Enforcement Guidance**

- As a “best practice,” the Guidance encourages employers not to ask applicants about their criminal records. According to the EEOC, not asking about criminal records early in the application process is important because an employer is more likely to assess the relevance of an applicant’s criminal records objectively when it already knows about the applicant’s qualifications and experience.

- Training managers, hiring officials and decision makers on Title VII and the non-discriminatory manner of considering criminal records is another best practice encouraged by the Guidance.
New EEOC Enforcement Guidance

- The Guidance reminds employers that the inconsistent application of their policies on criminal convictions may result in accusations of disparate treatment discrimination. The Guidance addresses disparate impact on African-Americans and Hispanics, but does not address disparate impact based on sex. While hearing testimony noted that more men than women encounter barriers to job reentry after incarceration, the Guidance is silent on this point.
New EEOC Enforcement Guidance

• The EEOC states the new Guidance is intended for employers, individuals who suspect they have been denied employment because of their criminal records and Commission staff investigating discrimination charges.

• In the past, the EEOC has cited its enforcement guidances in court as persuasive authority for the interpretation of Title VII and some courts have deferred to agency guidances seeking to impose obligations beyond those expressed in the laws.