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Recent Developments at the U.S. Equal Employment Opportunity Commission

EEOC Rules that Transgendered Employees are Protected Under Title VII's Sex Discrimination Prohibition

On April 23, 2012, in an unprecedented ruling, the EEOC announced that employment discrimination of transgendered individuals based on gender identity is covered by Title VII of the Civil Rights Act. The ruling came as a result of a complaint made by Mia Macy, an Army veteran and former police detective, whose contractor job offer with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") was rescinded after she disclosed her intent to change her gender. Macy had filed a formal EEO complaint with the ATF once she was informed of the job rescission. When the ATF failed to investigate her "gender identity" discrimination claim under Title VII, Macy appealed to the EEOC asking it to allow her claim of gender identity to be investigated under Title VII.

Before this ruling, the EEOC generally declined to pursue discrimination claims that arose from transgender status or gender identity issues. In this ruling, however, the EEOC states, "[T]he Commission hereby clarifies that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition...." While some federal courts, including the Sixth Circuit Court of Appeals, had already reached the same conclusion, the EEOC's decision sets a national standard that is a clear expansion of Title VII's coverage. The EEOC now will hear claims of gender-identity discrimination, and can even sue employers on that basis.

Previously, only 16 states (not including Michigan) and the District of Columbia specifically prohibited employment discrimination based on gender identity. The EEOC's decision, issued unanimously by the five-member, bipartisan commission, will apply to all EEOC enforcement and litigation activities at the commission and in its field offices throughout the country. It also will be binding on all federal agencies and departments.

The EEOC made clear that this ruling does not create a new cause of action, but clarifies that charges of discrimination alleging gender stereotyping are considered claims of sex discrimination under existing law. As a result, employers covered by Title VII should educate their staff on what constitutes sex discrimination based on gender identity and gender stereotyping in order to prevent that type of harassment and protect against such claims.

EEOC Updates Guidance on Employers' Consideration of Arrest and Convictions Records in Employment Decisions

On April 25, 2012, the EEOC issued an updated enforcement guidance on the use of criminal background checks for employment purposes. The Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et. seq.* (the "Guidance") consolidates all the EEOC's prior policy statements regarding Title VII and the use of criminal records in employment decisions, and therefore, supersedes the EEOC's previous policy statements on this subject.

Arrest vs. Conviction Records: In the Guidance, the EEOC distinguishes between arrest and convictions records, and takes the position that an arrest does not indicate that criminal conduct occurred, and therefore, exclusion from employment based on an arrest generally is not job-related and consistent with business necessity. However, it does provide that an employer may make an employment decision based on the conduct underlying the arrest if that conduct makes the individual unfit for the position in question. On the other hand, according to the EEOC, a conviction record generally provides sufficient evidence that the individual has engaged in the conduct in question.

Discrimination Claims: The Guidance discusses various situations in which an employer's use of criminal records in employment decisions may constitute disparate treatment or disparate impact discrimination under Title VII. Nevertheless, with respect to disparate impact claims, the Guidance preserves the employer's ability to defend its use of criminal background checks in employment by showing that such a policy is job-related for the position in question and consistent with business necessity. Importantly, the EEOC still encourages the use of the three factors set forth in *Green v. Missouri Pacific Railroad*, 523 F.2d 1158, 1160 (8th Cir. 1975) (the "Green factors") to determine whether an exclusion based on a criminal background check is job-related and consistent with business necessity. The *Green* factors are:

- The nature and gravity of the offense or conduct;
- The time passed since the offense or conduct and/or completion of the sentence; and
- The nature of the job held or sought.

Further, the Guidance suggests two circumstances in which the EEOC believes employers will consistently meet the "job related and consistent with business necessity" defense:

- When the employer validates the criminal conduct screen for the position in question per the EEOC's Uniform Guidelines on Employee Selection Procedures; or
- When the employer develops a targeted screen utilizing the Green factors, and then provides an individualized assessment for those excluded by the screen, allowing them an opportunity to provide additional information about their circumstances and consideration by the employer as to whether the additional information warrants an exception to the exclusion.

The EEOC takes the position that a blanket policy that excludes individuals from all employment opportunities because of a criminal conviction is not job-related and consistent with business necessity.

Compliance with Other Laws as a Defense: The new Guidance is clear that an employer's compliance with other federal laws or regulations that prohibit individuals with certain criminal records from holding positions is a defense to a charge of discrimination (e.g., the Federal Deposit Insurance Act bans individuals with certain criminal convictions from working at FDIC-insured financial institutions). However, because it highlights that state and local laws are preempted by Title VII in certain circumstances, it is less clear whether the Guidance conflicts with state laws that may require employers to conduct criminal background checks on certain positions.

Best Practices: The Guidance provides examples of best practices for employers who consider criminal history when making employment decisions. These best practices include: developing a narrowly tailored policy; training managers, hiring officials, and decision-makers on how to implement the policy consistently with Title VII; properly limiting questions about criminal records; and maintaining confidentiality of criminal record search results.

A complete copy of the new Guidance can be accessed at:
http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

Employers who use criminal background checks for employment purposes should familiarize themselves with the new Guidance and revise their background check policies and procedures to ensure conformity with the EEOC's best practices.

If you have any questions about steps to take to mitigate risks of challenges under Title VII, in light of these recent EEOC developments, please contact your Butzel Long attorney or the authors of this Client Alert.

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