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EEOC Proposes Parole of Criminal Background Check Guidance

Sorry about the title—I just tried to go beyond the drab "EEOC to rescind…." Anyway, the EEOC is seeking to rescind its 2012 Guidance regarding employer use of conviction and arrest records. The premise for the 2012 Guidance was the statistical disparity of arrests and incarceration of African American and Hispanic males compared to the greater population. The EEOC's proposed recission is pending before the Office of Management and Budget.

I think the Guidance is reasonable and expect most employers to still consider it. The Guidance states that rather than a *per se* exclusion based on convictions, employers should consider the nature of the crime(s), how recently the crime was committed or when the applicant was released from prison, how or if the conduct may be job-related, and the applicant's post-conviction/post-sentence accomplishments. The Guidance also recommends discussing the conviction with the applicant and providing the applicant the opportunity to provide information about the specifics of the crime and their efforts to grow and change since then. For example, a single DUI conviction, even if recent, may not be relevant when hiring for a work from home position; but the same conviction, especially if recent, may justifiably result in removing an applicant from consideration for a position whose duties include driving. However, an applicant with a DUI conviction 5+ years old *and* who completed rehabilitation and has served as a sponsor for Alcoholics Anonymous since his last conviction may be an excellent hire, even for a position with substantial driving responsibilities.

It is a common misconception that employers—like jurors—must presume an applicant's or employee's innocence if that individual has charges pending. Not so. Employers generally have the right to consider pending charges negatively for an employee or applicant, unless a collective bargaining agreement or state/local law requires otherwise. In these situations, the same factors of recency, severity, and job-relatedness are relevant, but so is the disruption to attendance and the potential negative impact on the employer's reputation, which cannot always wait for a criminal trial to conclude. Also, individuals with pending charges may have been instructed by their attorneys not to discuss the circumstances leading to their charge or arrest, which can make it difficult to assess the severity and job-relatedness of the alleged crime. In such circumstances, an employer may have no choice but to assume the worst about the job-relatedness, severity, and potential near-future jail time.

If you have any questions or would like additional information, please contact Richard Lehr at (205) 323-9260 or rlehr@lmvtlaw.com.

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