Criminal Records and Employment: Legal Update and Guidance on Compliance in a Continuously Changing Legal Environment
A Littler Webinar

presented by

Rod M. Fliegel
Shareholder
Chair, Hiring and Background Checks Practice Group
San Francisco Office

Barry A. Hartstein
Shareholder
Chair, EEO & Diversity Practice
Chicago Office

Jennifer L. Mora
Shareholder
Core Member, Hiring and Background Checks Practice Group
L.A. Century City Office
Agenda

• Setting the Stage
• EEOC Guidance and Significant Case Developments, Including Impact of *EEOC v. Freeman*
• Significant FCRA Developments
• “Ban the Box” and Other State and Local Developments
• Practical Takeaways
Setting the Stage
Setting the Stage

• On February 20, 2015, in *EEOC v. Freeman*, the U.S. Court of Appeals for the Fourth Circuit affirmed summary judgment in favor of the employer in a case involving a challenge to the employer's use of criminal background and credit history checks in the hiring process.

• EEOC currently has two pending large scale lawsuits involving criminal history, filed on June 11, 2013 by the EEOC.

• Employers also continue to face additional legal hurdles based on various legislative developments at the state and local level, such as "ban the box" restrictions and related limits on the use of criminal history.

• Employers also have been battling against a massive surge in class action litigation under the Fair Credit Reporting Act (FCRA) based on gathering criminal history and other records through third parties when conducting background checks on applicants and/or employees.
• Rejected a constitutional challenge to the collection of certain background information by the U.S. Government as part of the process of credentialing federal contractors
• Acknowledges the legitimate interest the U.S. Government has as an employer in "employing a competent, reliable workforce" and "separating strong candidates from weak ones"
For many employers, conducting a criminal history or credit record background check on a potential employee is a rational and legitimate component of a reasonable hiring process. The reasons for conducting such checks are obvious. Employers have a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their employers, engage in workplace violence, or who otherwise appear to be untrustworthy and unreliable.
Multi-Dimensional Challenges: Criminal History

• The risk-tolerance “pie chart”
  – EEO claims
  – FCRA claims
  – Negligence claims
  – State law compliance issues
  – Reputational risks
  – Regulatory requirements
  – Business risks
    • Examples: Loss prevention, contract requirements
• Private Conciliation Agreement with Beverage Company (Settled: 1/11/12) - $3.13 million settlement potentially impacting 300 African American applicants. Focus on not hiring based on arrests pending prosecution and barred from hire based on arrest and/or conviction for certain offenses.

• Private Conciliation (Settled: FY 2012) - $450,000 paid to the CP and class of 81 African-Americans who were denied employment due to the employer's blanket "no felony" conviction record policy.

• Private Conciliation with Trucking Company (Settled: 6/28/13) - Truck driver applicant denied employment based on criminal record resulted in nationwide investigation and 5-year conciliation agreement that included revisions of policy and required training impacting 14,000 employees nationwide.
Practical Questions (EEOC)

• **Q1:**
  – With three successive high-profile losses, will the EEOC drop these claims?

• **Q2:**
  – Will the plaintiff’s bar take over for the EEOC?

• **Q3:**
  – If the answer to either question is “No,” is *my* company at risk?

• **Q4:**
  – If the answer to question 4 is “Maybe,” can we mitigate risk?
Dollars and Cents (FCRA)

- $6.8M FCRA class action settlement for grocery chain
- $5.5M FCRA class action settlement for transit provider
- $5M FCRA class action settlement for staffing company
- $4M FCRA class action settlement for a retailer
- $3M FCRA class action settlement for restaurant chain
- $3M FCRA class action settlement for retailer
- $3M FCRA class action settlement for motor carrier
- $2.7M FCRA class action settlement for motor carrier
Practical Questions (FCRA)

• Question #1
  – Are we a target for a FCRA class action?

• Question #2
  – How do we assess FCRA class action risk?

• Question #3
  – How do we mitigate risk?
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EEOC Related Developments/Timeline
EXECUTIVE SUMMARY

USE OF CRIMINAL RECORD CHECKS IN EMPLOYMENT
- Use of Criminal Record Checks by Employers
- Role of Title VII in Use of Criminal Records

THE EEOC’S APRIL 2012 UPDATED GUIDANCE ON CRIMINAL RECORDS
- Overview
- Disparate Treatment
- Disparate Impact Claims
- Relationship to Federal and State Laws and Regulations
- The EEOC’s Employer Best Practices
Title VII & Criminal History Record: Setting the Stage

TITLE VII-CRIMINAL HISTORY RECORD

DISPARATE TREATMENT

TREATED DIFFERENT BASED ON EEO STATUS

NO PROTECTED STATUS

DISPARATE IMPACT

POLICY UNFAIRLY IMPACTS ON PROTECTED GROUP
EEOC Guidance and Initiatives

- **EEOC Policy Statement** on Use of Statistics in Charges Involving Exclusion from Employment Based on Criminal Conviction Records (July 29, 1987)
  - EEOC Guidance Dealing with Arrest Records (9/7/90)
  - EEOC Compliance Manual-Chapter on Race and Color (4/19/06)
  - E-Race Initiative-Strategies for Addressing 21st Century Manifestations of Discrimination (2/27/09)

- **El v. SEPTA**, 523 F. 2d 1209 (3rd Cir. 2007) - Criticized EEOC guidance for lack of clarity

  - EEOC Meeting — Arrest and Conviction Records as a Hiring Barrier (7/26/11)
  - EEOC Meeting, Employment Discrimination Faced by Individuals with Arrest and Conviction Records (11/20/08)
  - Guidance was 26 pages of text, plus additional 26 pages of footnotes

- **EEOC Strategic Enforcement Plan** (Dec. 17, 2012). Priorities Include “failure to hire” claims, which includes exclusion based on criminal history
Updated Enforcement Guidance on Arrest and Conviction Records (4/25/12):

- Two Prong Attack
  - Disparate Treatment
  - Disparate Impact (Arrests and Convictions)
- Focus on Disparate Impact- National data supports finding that criminal record exclusions have a disparate impact based on race and national origin and may require employers to demonstrate “job related and consistent with business necessity” and focused on 3 factors in a “targeted screen” below to support business necessity:
  1. Nature and gravity of the offense
  2. Time passed since the offense and/or completion of the sentence
  3. Nature of the job held or sought
- Addition of individualized assessment
- Unique issue of “targeted exclusions”
- Potential defense based on compliance with other Federal laws or regulations / cf. state law –general compliance standards apply

EEOC Criminal History Guidelines (Cont.)

• **Individualized Assessment:**
  – Facts or circumstances surrounding offense
  – Number of offenses for which convicted
  – Older age at time of conviction or release
  – Performed same type of work, post conviction with no incidents of criminal conduct
  – Length and consistency of employment before and after offense
  – Rehabilitation efforts
  – Character references
  – Whether individual is bonded under state, federal or local bonding program
EEOC Recommended “Best Practices”

EEOC’s View of “Employer Best Practices”

- Eliminate blanket exclusions “based on any criminal record”
- Develop narrowly tailored written policy/procedures excluding individuals from particular jobs based on a criminal history record
  1. Identify essential job requirements
  2. Identify specific offenses tied to “unfitness” for job
  3. Identify time limits applicable to exclusion
  4. Document research/consultations to support policy/procedures
  5. Provide for individualized assessment before final hiring decision
- When asking questions about criminal records, limit inquiries to records job related/consistent with business necessity
- Make inquiries of criminal record – post application (e.g. “ban the box” approach)
- Train managers, hiring officials, and decision-makers on how to implement the policy and procedures consistent with Title VII.
- Maintain confidentiality of criminal records
Updated EEOC Enforcement Guidance (Approved 4/25/12)

Guidance cites three noteworthy cases:

- **Griggs v. Duke Power** (U.S. Supreme Court, 1971)
- **Green v. Missouri Pac. RR** (8th Cir. 1977)
- **EL v. SEPTA** (3rd Cir. 2007)


Facts: H.S. education and general intelligence test adopted imposed as hiring requirement for unskilled jobs. African Americans isolated in one dept. pre-Title VII and highest pay was lower than any other dept.

Held:
- Policies, practice and tests “even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”
- “The touchstone is business necessity. Employment practice must “bear a demonstrable relationship to successful performance on the job.”
- The employer has the burden of showing that the selection procedure has “a manifest relationship” to the employment in question.
Green v. Missouri Pacific Railroad, 523 F. 2d 1290, rehearing denied, 523 F. 2d 1290 (8th Cir. 1975), 549 F.2d 118 (8th Cir. 1977).

**Facts:** Broad policy of not hiring anyone with criminal conviction other than minor traffic violation. Conviction was refusing induction in military service. Applied for clerk job and performed similar job while in prison.

**Held:** Applied disparate impact theory and viewed “sweeping disqualification” as improper, “which overstates what is necessary for competent performance.

- **Adopted standard used by district court judge on remand, that employer must take into account, “the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied.”**
**Key Cases Cited by EEOC**

*El v. Southeastern Pennsylvania Transportation Authority (SEPTA)*, 479 F.3d 232 (3d Cir. 2007)

**Facts:** El applied to be a para transit bus driver. Hired by subcontractor, but terminated based on SEPTA policy following background check prohibiting hiring anyone with convictions for moral turpitude or violence. Had been convicted of 2d degree murder in 40 years earlier when 15 years of age. Individual filed lawsuit. Not EEOC suit. SJ and 3rd Cir. gaffs.

- “(W)e have held that hiring criteria must effectively measure the “minimum qualifications for successful performance of the job in question.”
- **Title VII requires employers to justify criminal record exclusions by demonstrating that they “accurately distinguish between applicants [who] pose an unacceptable level of risk and those [who] do not.”**
- Third Circuit relied on SEPTA’s expert, Dr. Alfred Blumstein, expert on recidivism: “We must take him at his word that former violent criminals who have been crime free for many years are at least somewhat more likely than members of the general population to commit a future violent act.” {Plaintiff did not produce an expert.}
EEOC Litigation Involving Background Checks
EEOC Litigation Involving Background Checks

• *EEOC v. People Mark* (Filed 9/29/08, W. D. Mach) – Pattern or practice lawsuit alleging race discrimination and focus was criminal history policy. Lawsuit voluntarily dropped after employer filed SJ motion and EEOC failed to produce expert. Court awarded attorneys’ and expert’s fees totaling $751,942 to employer and decision gaffs by 6th Cir. Petition for rehearing denied by 6th Cir. in 2014.

• *EEOC v. Kaplan Higher Education Corp.* (Filed: 12/21/10, Northern District of Ohio) - Pattern or practice lawsuit based on denial of employment to African Americans based on credit history). Summary judgment granted to employer based on rejection of expert report and affirmed by 6th Cir. in 2014 based on flawed methodology of expert.

• *EEOC v. Freeman* (Filed: 9/30/09, District of Maryland) – Pattern or practice of alleged race discrimination against African Americans based on using credit history as a hiring criterion and alleged discrimination against African American, Hispanic and male applicants based on use of criminal history. Claims involving Hispanics dropped based on lack of expert support. Summary judgment on remaining claims based on exclusion of expert reports and affirmed by 4th Cir. on Feb. 20, 2015.
EEOC v. Freeman
Freeman – An Illustration of Issues involving Criminal and Credit History Investigations and Litigation by EEOC

Key Issues:

• Scope of Investigations by EEOC
• Applicable Limitations Period
• Impact of EEOC’s Own Reliance on Criminal History in Background Checks
• Critical Role of Statistics In Proving Disparate Impact Discrimination
EEOC v. FREEMAN

1/17/08  Individual race discrimination charge based on credit history.
9/25/08  Investigation expanded to cover criminal history.
3/27/09  Reasonable cause finding against employer.
9/30/09  Complaint filed in District of Maryland alleging pattern or practice of unlawful discrimination against (1) African American applicants by using credit history as a hiring criterion; and (2) African American, Hispanic and white male applicants by using criminal history as a hiring criterion.
4/27/10  Based on employer motion, court barred any claims on behalf of any purported victims whose claims did not arise within 300 days of charge.
1/31/11  Based on employer motion, court barred any claims based on criminal history whose claims did not arise within 300 days of expanded charge.
8/9/13  Summary judgment granted based on fatal flaws of EEOC’s statistical expert.
2/20/15  Fourth Circuit affirmed summary judgment ruling, noting that “district court found a ‘mind boggling’ number of errors and unexplained discrepancies.”
Key Query with Statistics - What is the Relevant Pool in Proving Disparate Impact?

- **EEOC View**: Comparing percentage of African American applicants not hired because of criminal or credit background check with percentage of non-African Americans not hired because of the check.
- **Employer View**: EEOC is required to demonstrate the specific employment practice having a disparate impact, such as demonstrating that excluding applicants based on particular offenses, such as theft, sex offenses, and/or drug trafficking had a disparate impact.

Appeals Court did not decide issue because court ruled that expert opinion was inadmissible based on unreliable data that included skewed statistics, material errors and unexplained discrepancies.
EEOC v. Freeman

- Scope of investigations by EEOC
- Applicable limitations periods - key rulings
- Discovery of EEOC’s own practices regarding background checks

*Issues not addressed by 4th Circuit – Opinion solely focuses on disregarding expert opinion on statistics and thus affirming summary judgment ruling.*
PENDING EEOC LAWSUITS
Two Pending EEOC Lawsuits:


- *EEOC v. Dolgencorp LLC d/b/a Dollar General* (N.D. IL, Filed: June 11, 2013)
Pending EEOC Lawsuits

Lawsuit Against Auto Manufacturer:

• Alleged disproportionately screened out African American job applicants

• Written background check policy allegedly excluded individuals convicted of certain crimes: Murder, Assault & Battery, Rape, Spousal Abuse, Manufacturing of Drugs and Weapons Violations, plus convictions involving “theft, dishonesty and moral turpitude

• Allegedly no distinction whether misdemeanor or felony and no individualized assessment
Pending EEOC Lawsuits

Lawsuit against Retail Operation:

• Alleged disproportionately screened out African American job applicants

• Withdrew applicant’s job offer after began work as stocker and cashier due to six-year old felony conviction for possession of controlled substance

• Individual allegedly fired despite background check being erroneous

• Pattern or practice lawsuit alleged that failed to make individualized assessment
PRELIMINARY CONCLUSIONS RE EEO ISSUES
Key Takeaways Based on EEOC Guidance

• “Blanket exclusions” based on criminal record will leave an employer open to potential exposure
• There are no “safe harbors” provided by EEOC or sample policies to follow that will insulate an employer
• Employers that do not “ban the box” in applications will be more closely scrutinized by the EEOC
• Employers that do not engage in an individualized assessment for applicants based on criminal history most likely will be challenged by the EEOC
• An employer subject to an individual discrimination charge by the EEOC should anticipate that the charge may be expanded into a systemic investigation
Open EEOC-Related Questions

- How closely past criminal conduct must relate to duties of particular job to deny job to an applicant?
- What time limitations can be applied based on certain offenses?
- In what circumstances can an employer apply a blanket exclusion based on certain offenses?

The EEOC Guidance states:

“An employer or policy or practice of excluding individuals from particular positions for particular specified criminal conduct within a defined time period, as guided by the Green factors, is a targeted exclusion.”

“Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question.”
THE (UN)FAIR CREDIT REPORTING ACT
Willful FCRA Violations

• Remedies
  – Actual damages or statutory damages ($100-$1,000)
  – Punitive damages
  – Attorneys’ fees and costs
No Harm, No Foul?

• 9th Cir. and others: injury “in law” is good enough, injury “in fact” unnecessary
• U.S. Supreme Court may take up this issue in Spokeo
  – Solicitor General asked to submit brief
FCRA BASICS
Step One

• Disclosure and Authorization
  – Disclose intent to order background check in writing
    • Stand-alone, clear and conspicuous disclosure
  – Obtain authorization in writing for the background check
Step Two

- Pre-Adverse Action Notice
  - Copy of background report
  - Summary of Rights
Step Three

• **Adverse Action Notice**
  – CRA contact information
  – Statement the CRA is not the decision-maker and cannot explain the reason for the decision
  – Right to obtain a free copy of the report
  – Right to dispute with the CRA information in the report
Motor Carrier Provisions

• Allows disclosure, authorization for remote applicants “by mail, telephone, computer”
• Authorization can be oral, written, electronic
• No pre-adverse action notice required, but adverse action notice (within 3 days)
State, Local Laws

• State Specific Disclosures in Consent Form and Adverse Action Notices
  – California, New York, Massachusetts, etc.

• Check-Box Requirements
Ban The Box – Not just job applications

• Specific state, local law *ex-offender* protections
  – Workplace **posting** obligations
  – **Notice** obligations
  – **Policy** requirements
  – **Sequencing** restrictions
  – **Inquiry** restrictions
  – **Source** restrictions
  – “**Job-relatedness**” requirements
Ban The Box

• **States**

• **Local**
  ✓ Philadelphia, PA
  ✓ Buffalo & Rochester, NY
  ✓ Seattle, WA
  ✓ Newark, NJ
  ✓ Baltimore, MD
  ✓ Newark, NJ
  ✓ San Francisco, CA
Ban The Box – What’s Next?

• More laws restricting the use of credit reports
• More laws restricting the use of criminal records early in the hiring process or at all
• More laws protecting the privacy of personal identifiers, like Social Security numbers
TAKEAWAYS
Practical Questions (EEOC)

• Q1:
  – With three successive high-profile losses, will the EEOC drop this?

• Q2:
  – Will the plaintiff’s bar take over for the EEOC?

• Q3:
  – If the answer to either question is “No,” is my company at risk?

• Q4:
  – If the answer to question 4 is “Maybe,” can we mitigate risk?
Mitigation – Baseline Measures

• Step 1:
  – Form a “working group”
    • Designate one or more “SMEs”

• Step 2:
  – Consider a privileged program audit
    • Objective: identify opportunities to fortify compliance

• Step 3:
  – Evaluate whether the identified opportunities “make sense” for your company
Mitigation – Baseline Measures

• Example: centralized adjudication
• Example: program documentation
  – Optics (EEO statement, confidentiality, criminal records ignored)
  – Consistent standard (ineligible, unacceptable safety risk)
  – Sequencing strategy
  – Standards for measuring against the standard (EEOC factors)
    ▪ Variation by position groupings
    ▪ Age-graded
  – Worksheets to document no-hire decisions
Practical Questions (FCRA)

• Question #1
  – Are we a target for a FCRA class action?
• Question #2
  – How do we assess FCRA class action risk?
• Question #3
  – How do we mitigate risk?
Hallmarks of Recent Targets

- Ongoing employment litigation
- On-line job application with background check verbiage
- Personnel file requests
- Social media
Most Common *Alleged* Deficiencies

- Disclosure not stand-alone
  - Liability release, commingled
- Insufficient pre-adverse disclosure
  - Wrong, outdated enclosures
- Insufficient pre-adverse process
  - Insufficient waiting period
  - Pre-determined final outcome
  - Contact ahead of pre-adverse notice
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THANK YOU

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