

Labor & Employment ADVISORY

May 7, 2012

EEOC Provides Updated Guidance on Use of Criminal Records in Employment Decisions and Finds that Title VII Protects Transgender Workers

Two recent actions by the Equal Employment Opportunity Commission (EEOC or the “Commission”) are likely to have a significant impact on the Commission’s enforcement of Title VII of the Civil Rights Act of 1964 (“Title VII”). First, the Commission approved updated enforcement guidance on employers’ use of arrest or conviction records to make hiring or other employment decisions. Second, the EEOC issued a landmark decision extending Title VII protection to transgender individuals.

EEOC Provides Updated Guidance on Use of Criminal Records in Employment Decisions

Title VII of the Civil Rights Act of 1964 does not prohibit employers from requiring applicants or employees to provide information about arrests, convictions or incarceration. However, to the extent that such employer practices result in disparate treatment of individuals on the basis of race, national origin or other characteristics protected under Title VII, they are unlawful under the statute. Moreover, if an employer’s neutral policies or practices have a disparate impact on individuals of a particular race or national origin, the employer must demonstrate that such policies or practices are “job-related and consistent with business necessity” in order to avoid a violation of Title VII—even if the policies and practices in this regard do not result in any intentional disparate treatment. The EEOC has explained that its updated enforcement guidance is intended to consolidate and update the Commission’s previous guidance on these issues into one document.

The bulk of the new guidance focuses on when an employer’s policy or practice of excluding applicants from employment based on certain criminal conduct is job-related and consistent with business necessity, such that any potential disparate impact resulting from the policy does not run afoul of Title VII. While this issue by its nature requires a case-by-case analysis, the guidance explains the EEOC’s position that there are two circumstances in which the Commission believes that employers will consistently meet this requirement. First, use of criminal history will usually be considered job-related and consistent with business necessity if the employer first validates its policy of using criminal history in accordance with the Uniform Guidelines on Employee Selection Procedures standards. Second, employers will typically be able to demonstrate that a particular criminal conduct exclusion is job-related and consistent with business necessity by developing a “targeted screen”—rather than an absolute bar to employment—

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

through which the employer considers at least the nature of the crime, the amount of time elapsed and the nature of the job sought, and then provides an opportunity for an individualized assessment by giving the potentially excluded individual a chance to explain why the exclusion should not be applied in his or her particular case.

The guidance also discusses several other issues, including the difference between the use of arrest records and conviction records, as well as the Commission's position that while compliance with other *federal* laws is a defense to a claim of discrimination under Title VII, efforts to comply with *state* or *local* laws do not provide such a defense, because such laws are preempted by federal law to the extent that they that purport to require or permit an employer to violate Title VII.

The issuance of the new guidance provides a good opportunity for employers to revisit policies and practices regarding the use of criminal history records in making employment decisions. Some of the best practices recommended by the EEOC at the conclusion of the recent guidance are developing a narrowly tailored written policy for screening applicants based on criminal conduct, limiting inquiries about criminal records to those that would be job-related for the position, and keeping information about criminal records confidential and only using it for the purpose intended. Employers should consult counsel to determine if existing policies are in compliance with the EEOC's updated guidance or to develop new policies.

The EEOC's updated enforcement guidance, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, is available online [here](#).

EEOC Takes Position that Transgender Workers Are Protected Under Title VII

Discrimination against a transgender person is now actionable as sex discrimination under Title VII, according to the EEOC. The EEOC decision was made in a case where a transgender woman alleged she was discriminatorily denied a position with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The transgender woman, Mia Macy, worked for ATF in Phoenix, and applied for an available position in Walnut Creek, California. Initially, the director of the Walnut Creek office informed Macy that she would not face difficulty obtaining the position as long as no issues arose during the background check. At the time that Macy applied for the position, she was still known as a man and presented herself as a man. However, after Macy informed the Walnut Creek director that she was in the process of transitioning from male to female, she was told that the position was no longer available because funding for it had been cut. Macy later discovered that the position had not been eliminated and in fact it had been filled by another person. Macy then filed a complaint with the EEOC alleging discrimination on the basis of "sex, gender identity (transgender woman) and on the basis of sex stereotyping."

Although the EEOC initially did not consider gender identity to be covered by Title VII, the Commission unanimously decided on appeal that Title VII prohibits any discrimination on the basis of gender stereotyping, explaining "consideration of gender stereotypes will inherently be part of what drives discrimination against a transgender individual." This decision was based on the Supreme Court's 1989

opinion in *Price Waterhouse v. Hopkins*, where the Court held that Title VII applied to discrimination based on biological sex *and* gender. Thus, whether ATF chose not to hire Macy because they wanted to hire a male and not a female or whether they chose not to hire her because she did not conform to gender norms, Macy had an actionable Title VII claim.

Even though the context of this case involved an employee of a federal agency, over which the EEOC has direct regulatory authority, the EEOC is very likely to take the same position when considering actions taken by private employers. Ultimately, federal courts will have to decide the issue. Notably, some courts, including the Court of Appeals for the Eleventh Circuit (which covers Georgia, Florida and Alabama) have already indicated an inclination to extend Title VII protection to transgender individuals, and other courts may give deference to the EEOC decision.

In light of this recent decision from the EEOC, as well as other recent decisions from federal courts, employers should consult counsel to determine if their workplace policies are appropriate for protecting transgender employees and to consider some of the unique aspects involved in ensuring that transgender employees are not subject to discrimination or harassment in the workplace.

If you would like to receive future *Labor & Employment Advisories* electronically, please forward your contact information including e-mail address to labor.advisory@alston.com. Please be sure to put “**subscribe**” in the subject line.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Alston & Bird's Labor & Employment Group

ATLANTA

Shama Barday
404.881.7437
shama.barday@alston.com

Ashley D. Brightwell
404.881.7767
ashley.brightwell@alston.com

Lisa H. Cassilly
404.881.7945
lisa.cassilly@alston.com

Brett E. Coburn
404.881.4990
brett.coburn@alston.com

Patrick L. Coyle
404.881.4367
patrick.coyle@alston.com

Clare H. Draper IV
404.881.7191
clare.draper@alston.com

R. Steve Ensor
404.881.7448
steve.ensor@alston.com

Kimberly L. Fogarty
404.881.4502
kim.fogarty@alston.com

Alexandra V. Garrison
404.881.7190
alex.garrison@alston.com

Marilee Fiebig Holmes
404.881.4374
marilee.holmes@alston.com

Molly M. Jones
404.881.4993
molly.jones@alston.com

J. Thomas Kilpatrick
404.881.7819
tom.kilpatrick@alston.com

Christopher C. Marquardt
404.881.7827
chris.marquardt@alston.com

Wes R. McCart
404.881.7653
wes.mccart@alston.com

Charles H. Morgan
404.881.7187
charlie.morgan@alston.com

Edmund M. Morrell
404.881.7953
edmund.morrell@alston.com

Glenn G. Patton
404.881.7785
glenn.patton@alston.com

Robert P. Riordan
404.881.7682
bob.riordan@alston.com

Eileen M. Scofield
404.881.7375
eileen.scofield@alston.com

Alicia P. Starkman
404.881.4994
alicia.starkman@alston.com

CHARLOTTE

Susan B. Molony
704.444.1121
susan.molony@alston.com

DALLAS

Jon G. Shepherd
214.922.3418
jon.shepherd@alston.com

NEW YORK

Erin L. Connolly
212.210.9461
erin.connolly@alston.com

Stephen S. Hart
212.210.9463
stephen.hart@alston.com

James F. Moyle
212.210.9454
james.moyle@alston.com

LOS ANGELES

Lindsay G. Carlson
213.576.1038
lindsay.carlson@alston.com

Martha S. Doty
213.576.1145
martha.doty@alston.com

Jesse M. Jauregui
213.576.1157
jesse.jauregui@alston.com

Deborah Yoon Jones
213.576.1084
debbie.jones@alston.com

Sayaka Karitani
213.576.1026
sayaka.karitani@alston.com

Claire Lucy Readhead
213.576.1181
claire.readhead@alston.com

Nicole C. Rivas
213.576.1021
nicole.rivas@alston.com

Casondra K. Ruga
213.576.1133
casondra.ruga@alston.com

WASHINGTON, D.C.

Emily Seymour Costin
202.239.3695
emily.costin@alston.com

Charles A. Gartland II
202.239.3978
chuck.gartland@alston.com

Jonathan G. Rose
202.239.3693
jonathan.rose@alston.com

Leslie Wood Bradenham
202.239.3636
leslie.bradenham@alston.com

ATLANTA

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404.881.7000

BRUSSELS

Level 20 Bastion Tower
Place du Champ de Mars
B-1050 Brussels, BE
Phone: +32 2 550 3700

CHARLOTTE

Bank of America Plaza
Suite 4000
101 South Tryon Street
Charlotte, NC 28280-4000
704.444.1000

DALLAS

2828 N. Harwood St.
Suite 1800
Dallas, TX 75201
214.922.3400

LOS ANGELES

333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
213.576.1000

NEW YORK

90 Park Avenue
New York, NY 10016-1387
212.210.9400

RESEARCH TRIANGLE

4721 Emperor Boulevard
Suite 400
Durham, NC 27703-8580
919.862.2200

SILICON VALLEY

275 Middlefield Road
Suite 150
Menlo Park, CA 94025-4004
650.838.2000

VENTURA COUNTY

Suite 215
2801 Townsgate Road
Westlake Village, CA 91361
805.497.9474

WASHINGTON, D.C.

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202.239.3300

www.alston.com

© Alston & Bird LLP 2012