EEOC Considers Use of Criminal Records in Employment Screening

This week the Equal Employment Opportunity Commission ("EEOC" or "Commission") held a Commission meeting in Washington, DC entitled "Arrest and Conviction Records as a Barrier to Employment", which was attended by all five Commissioners and 250 to 300 individuals in the audience. Attendance was so high that Chairwoman Berrien noted that this was the largest audience to attend such a Commission meeting.

For context, it is important to note that there are party affiliations (hey, it's Washington) and the Chair and Commissioners Ishimaru and Feldblum are the Democrats and Commissioners Lipnic and Barker the Republicans.

There were three panels and save one witness on the third panel, all witnesses either directly or indirectly urged the Commission to revise its guidance on the use of arrest and conviction records in employment screening and it was clear that directly or implicitly, all were of the opinion that one's criminal history serves as a barrier to employment which in turn leads to higher rates of recidivism since employment is critical to successful re-entry of ex-offenders. In fact, in an EEOC Press Release issued after the meeting, the first sentence reads, "Employers often refuse to hire people with arrest and conviction records even years after they have completed their sentences, leading to recidivism and higher social services costs, experts told the U.S. Equal Employment Opportunity Commission (EEOC)…."

The first panel covered "Best Practices for Employers" and included representatives from DC Central Kitchen, Portfolio Hotels & Resorts and the U.S. Office of Personnel Management. The second panel covered "An Overview of Local, State and Federal Programs and Policies" and included witnesses from the Department of Justice, Office of Justice Program, American Bar Association (we think) and the New Jersey Institute for Social Justice. The third panel was on "Legal Standards Governing Employers' Consideration of Criminal Arrest and Conviction Records" and included Latino Justice and one attorney representing plaintiff's bar and another loosely representing the employer community.

What's This All About?

The EEOC has been exploring the issue of the use of arrest and conviction records in employment screening since at least 2008 when they held a meeting entitled "Employment Discrimination Faced by Individuals with Arrest and Conviction Records" and the Chair of the EEOC was Naomi Earp. Two holdovers from that 2008 meeting, Commissioner Ishimaru and Commissioner Barker, remain at the EEOC. Since that date, the EEOC has held a series of meetings related to employment and discrimination including "Disparate Treatment in 21st Century Hiring Decisions", "Treatment of Unemployed Job Seekers", and "Employer Use of Credit History as a Screening Tool".

The current guidance on arrest and conviction records dates back to the 1980s and was criticized in *El v. SEPTA*, 479 F 3d 232 (3rd Cir. 2007). In fact, both Commissioner Feldblum and Ishimaru pointed to this decision as a basis for updating the EEOCs guidance.

Points of Concern for the Background Screening Industry

The Commission meeting presented an incomplete picture of the industry and one would be left with the impression that employers regularly conduct background checks via Google, that job applicants have no meaningful recourse to address adverse actions, that criminal history records are inaccurate, that the background screening industry is the reason ex-offenders aren't able to find employment, that the industry prevents ex-offenders from a second chance at life and so on. Unfortunately, that's not an accurate portrayal of the industry and the meeting presented no meaningful discussion on the value of criminal records to employers.

During the Commission meeting a government witness appeared to state that the Blumstein and Nakamura studyis the final word without speaking to its limitations. One is left to wonder whether the EEOC will place a time limitation of anywhere from 3 to 7 years on the use of such records because of this study. Additionally, there was scant mention of the Fair Credit Reporting Act ("FCRA"), Summary of Rights and individual protections afforded job applicants under FCRA. There was no reference to FCRA requirements regarding maximum possible accuracy and in fact, the Commissioners may have been left with the impression that all criminal record histories are inaccurate or at the very least riddled with inaccuracies and worse, that we report those inaccurate records. At one point, Professor Saltzburg stated that CRAs should be financially responsible for inaccurate records they provide employers This is supported by a comment I received from a NAPBS member who was present who said, "There was a lot of talk regarding the incompleteness, inaccuracies of the FBI database and from listening one would assume that private industry has access to it, is using it and routinely reporting inaccurate information."

There was no real discussion about employer's due diligence in screening job applicants and the need for knowing who they are hiring, or who they have hired, in order to protect other employees, customers, company assets and those working with vulnerable populations. In fact, the Commissioners may have been left with the impression that employers use criminal records overly broadly. A few witnesses spoke about the use of social media and the Commissioners may have been left with the impression that employers frequently only run Google searches in order to conduct background checks. The government witness for OPM, which is serves in the role of Human Resources manager for the federal government, left many questions unanswered with respect to when and why the government conducts background checks and which would presumably serve as a model for others. At one point, Commissioner Feldblum spoke about the importance of self-sufficiency, and while stating the obvious that blanket prohibitions are bad, also stated the importance of individualized assessments. Which is where it may be that the EEOC is headed – requiring employers to conduct individualized assessments of each applicant and their criminal history.

Recap or you may want a Night Cap at this Point

The EEOC enforces federal laws prohibiting employment discrimination and their main concern here is whether employers are using arrest and conviction records in a manner that satisfies/violates Title VII of the Civil Rights Act of 1964. They issued a policy statement and guidance on arrest and conviction records in the late 1980s and early 1990s. Chair Berrien, who essentially runs the show at the Commission, appears to want to revise the guidance and it appears she is primarily concerned with the high rate of recidivism and the need for successful re-entry of ex-offenders. These concerns were at the heart of the meeting and the testimony of the witnesses.

The question is how the guidance will be revised. I have been hearing for some time that they will revisit the job relatedness and business necessity factors – meaning that the employer must look at the nature of

the job, the nature and seriousness of the offense, and the length of time since it occurred. It is my understanding that in fact, draft guidance has been written by the EEOC's office of legal counsel and that we may see it this year, and that it will be different from what employers operate under today. To the best of my knowledge, both Commissioner Ishimaru and Chair Berrien support immediately updating EEOCs guidance on use of these records. Commissioner Feldblum advocated educational outreach and Chairwoman Berrien stated that the EEOC isn't alone in the re-entry discussion and concerns. This leads me to a brief discussion on connecting the dots. In recent weeks there has been quite a bit of chatter from other federal agencies jumping into the discussion and who are looking at the use of criminal history records and potential discrimination in not only hiring but also housing. Thus, we've seen HUD (housing), HHS (health) and FDIC circulating word that they are looking at these issues as well. It appears at the center of this is a newly created Cabinet level council entitled the Federal Interagency Reentry Council, which held its inaugural meeting in January 2011 and is to meet every six months. One of their stated goals is to identify federal policy opportunity and barriers to improve outcomes for the reentry population. Additionally, to review federal hiring policies regarding use of arrest and conviction records to ensure they are consistent with federal laws prohibiting employment discrimination (enter EEOC) and identify and highlight model hiring policies that encourage greater access to employment opportunities.

Final analysis

On the whole this was not a balanced meeting and it was heavily slanted toward arriving at the conclusion that the use of criminal histories presents a barrier to employment and even went so far as to say it was a factor leading to the high recidivism rate we have in this country. There was no balance with the witnesses presenting the other side of the coin in terms of victims of workplace violence, theft or other crimes. There was no balance with the witnesses to fully explain the need and value of appropriately conducting criminal history checks by employers and the role the background screening industry plays.

The closest witness the "employer" community had was on the third panel, Barry Hartstein, who testified that the current EEOC guidance should not be modified at this time. His was the lone voice and the rest argued, where they could, that the EEOC's guidance should be modified and some factors floated for consideration include: (1) requirement that consideration be given toward one's rehabilitation; (2) individualized assessments; (3) placement of a timeline on length of time that criminal history records can be used.

Mind you, this whole exercise is about the EEOC's guidance and how they will re-write it and what restrictions they will place either on the use of arrest and conviction records OR on employer's ability to use such records. I would not be surprised if the guidance also requires employers to distinguish between new hires and current employees where a past criminal conviction comes to light. Remember, EEOC cannot pass laws as they are not a legislative body. However, of concern is how their guidance would be interpreted by their field offices and in that regard, I need only mention one case as an example of the EEOC gone amuck – *EEOC v. Peoplemark, Inc.*, Case No. 1:08-cv-907 (W.D. Mich. 2011).

Comment Period

There is a 15 day comment period as posted on the EEOC'swebsite, which means comments are due August 10th. We are working on an industry letter regarding the value of criminal records to employers, their customers and vulnerable populations. If you are interested in learning more about this and how you can sign on, please contact me at montserrat.miller@agg.com.