

Management Alert



EEOC Guidance On The Use Of Criminal Records In Employment Is Imminent; Seyfarth To Host Webinar On New Guidance

For employers watching the media and following the Equal Employment Opportunity Commission's (EEOC) public meeting schedule, it will come as no surprise that the EEOC announced today that it will hold a public meeting next week -- on **April 25, 2012** to vote on proposed EEOC Enforcement Guidance relating to employers' use of arrest and conviction records.

The EEOC has been interested in employers' use of criminal history in employment for the past 25 years. Illustrative of this longstanding concern, in 1987 the EEOC issued a policy statement whereby it presumed that any policy or practice that caused an adverse employment action to be taken solely because of an African American or Hispanic person's conviction record had a disparate impact on members of those protected classes because those groups were convicted at a rate disproportionately higher than the rest of the general population. See 1987 EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (available at <http://www.eeoc.gov/policy/docs/convict1.html>). Therefore, according to the EEOC, employers' selection criteria regarding criminal history information had to take into consideration the following to demonstrate business necessity:

- the nature and gravity of the offense or offenses;
- the time that has passed since the conviction and/or completion of the sentence; and
- the nature of the job held or sought.

See 1987 EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (available at <http://www.eeoc.gov/policy/docs/convict1.html>).

The EEOC also issued a 1990 policy statement on employers' use of arrest records. Pursuant to that policy statement, employers must consider the following before using arrest records to make an employment decision: (i) the likelihood that the individual engaged in the conduct arrested for; and (ii) job relatedness. See 1990 EEOC Policy Statement on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (available at http://www.eeoc.gov/policy/docs/arrest_records.html). According to the EEOC, a blanket exclusion of individuals with arrest records (without convictions) would almost never withstand scrutiny.

In 2008, the EEOC held a meeting to revisit its 1987 and 1990 guidance as it turned its focus to employment discrimination against individuals with conviction and arrest records. See November 20, 2008 Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records (available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/index.cfm>). This meeting occurred shortly before it ramped up its E-RACE Initiative.

Most recently, on July 26, 2011, the EEOC had a meeting again revisiting the use of arrest and conviction records in employment, and based on the testimony, it appeared that the EEOC was contemplating issuing revised or new guidance on the topic. See Meeting of July 26, 2011 - EEOC to Examine Arrest and Conviction Records as a Hiring Barrier (available at

Seyfarth Shaw — Management Alert

<http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm>). After hearing rumblings for the past couple of months, employer groups and other stakeholders received confirmation today that the new guidance will be issued next week. The guidance will be directed to employers as well as EEOC investigative staff and will likely impose much greater restrictions on employers using criminal history when making employment decisions.

Seyfarth Shaw will be holding a webinar on April 26 at 1:30 p.m. central to provide a comprehensive analysis of the EEOC's new guidance and steps that employers can take to mitigate their risks of challenges under Title VII. Please [click here](#) to register.



www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.) © 2012 Seyfarth Shaw LLP. All rights reserved.

Breadth. Depth. Results.