



Watch Your Step!

An emboldened EEOC is poised to trip you up in your dealings with employees and job candidates -- so tread carefully, say some of this year's most powerful employment attorneys.

By Joel Berg

A trucking company would likely stand on safe ground if it refused to hire an applicant with a string of drunk-driving convictions. But in most cases, a clear line between the crime and the job is not so easy to draw.

Even where the link is clear, complicating factors -- such as the timing of the conviction and the applicant's subsequent behavior -- can trip up employers, say some of the lawyers on this year's [Most Powerful Employment Attorneys list](http://www.hreonline.com/pdfs/130616Chart-allcharts_WatchYourStep.pdf) (http://www.hreonline.com/pdfs/130616Chart-allcharts_WatchYourStep.pdf), prepared exclusively for *Human Resource Executive*® by Lawdragon, a Los Angeles-based networking site for lawyers and clients.

Companies are more likely to withstand scrutiny if they evaluate each case on its own merits, as suggested by some of the latest guidance from the Equal Employment Opportunity Commission.

"The way that employers are most likely to get in trouble is if they have some hard-and-fast rule: 'We will consider all crimes within the last seven years as automatic disqualifiers,'" says Jeff Wray, partner in charge of the Houston employment and labor practice at the law firm Fulbright & Jaworski.

And now, to make matters even more dicey, it may not matter if that hard-and-fast rule was born in a state legislature or an HR office.

In April, a federal judge in Ohio suggested federal law may override state law when relying on past convictions as an employment screen. The case -- *Waldon et al v. Cincinnati Public Schools* -- involves a suit by two African American employees who claimed they were discriminated against after they were fired in the wake of state-mandated criminal-background checks. Of 10 employees let go by the schools, nine were African American.

The judge, in the U.S. District Court for the Southern District of Ohio, rejected the school system's motion to dismiss the case. A jury trial is tentatively scheduled for June 2014.

"The Court concludes that Plaintiffs' Complaint raises plausible allegations of disparate impact discrimination," Judge S. Arthur Spiegel wrote in his ruling. "Defendant's implementation of the state mandate, as alleged, could very well amount to a violation of Title VII."

Criminal records aren't the only minefield employers must tread carefully over, either. The recruitment and hiring process as a whole is a priority for the EEOC, as evidenced by that function's place in the agency's latest strategic enforcement plan, issued late last year and covering the next four years.

At the top of the agency's list of priorities is eliminating barriers in recruitment and hiring. "Racial, ethnic and religious groups; older workers; women; and people with disabilities continue to confront discriminatory policies and practices at the recruitment and hiring stages," the EEOC writes in its plan. "These include exclusionary policies and practices, the channeling/steering of individuals into specific jobs due to their status in a particular group, restrictive application processes and the use of screening tools."

Job applications have asked about criminal records for decades and employers have often rejected candidates based on past convictions. But the practice has come under increasing scrutiny, and the grounds for rejecting applicants have narrowed over the years.

The EEOC has argued that screening out people with convictions can be discriminatory to African Americans and other minority groups, which have higher conviction rates than white Americans. It has also said it is in a better position than individuals and private attorneys to gather evidence that might point to discrimination -- which violates Title VII of the Civil Rights Act of 1964 -- leading attorneys to expect more action in this area.

In addition to criminal convictions, the agency is examining issues around credit checks and medical tests administered after a job offer is extended, attorneys say. The use of social media is also a hot button, as is treatment of people who have been out of work for extended periods.

"The rate of joblessness and the time it takes to find a job vary by race, age, sex, disability and possibly other protected characteristics," says Justine Lisser, senior attorney-adviser and spokesperson for the EEOC, citing evidence from a 2011 commission meeting. "Thus, an individual who was denied hire due to a period of unemployment might be able to demonstrate that this selection criterion had a disparate impact on a protected group."

For large businesses, some level of screening is necessary, as it allows them to comb through hundreds of applications quickly, attorneys say. All businesses, meanwhile, are concerned about the risks of hiring someone who ends up harming co-workers or others, which can spark negligent hiring claims and liability lawsuits.

Further, employers can't always count on references, because past employers fear defamation suits. And in some cases, state and federal laws apply to the hiring of people with criminal records. For example, some states bar schools and day-care centers from employing people who have been convicted, within a specific number of years, of violent or sex-related crimes. Federal law, meanwhile, prevents people from working in financial services if they have been convicted in the past 10 years of financial or fraud-related crimes.

"This is really a catch-22 for employers," says Jonathan Segal, a partner at Duane Morris in Philadelphia who specializes in labor and employment law.

Whatever decisions they do make, HR leaders have never before been faced with as pressing a need to tread carefully and confer with counsel.

Gray Areas

The EEOC Enforcement Guidance, published in April 2012, lays out steps companies can take to avoid being squeezed. If past convictions are used to screen applicants, the convictions must be job-related, and the denial

of a job must be consistent with business necessity. Companies also should give applicants a chance to explain their past through some kind of individualized assessment.

And that's where many employers get nervous, attorneys say. Many prefer a hard-and-fast rule that takes decision-making -- and liability -- out of their hands, rather than what appears to be a time-consuming and subjective process. Employers may have to spend time tracking down applicants to ask for more details about their convictions, slowing the hiring process.

"There is undeniably more administrative burden and potential for greater inconsistency," says Segal, who recommends that companies adopt targeted exclusions based on criminal records and set up a process for conducting individualized assessments.

Even then, he says, companies may not be entirely safe. "This is an area where, in my view, employers are between the cross hairs," he says, "between the risk of a claim by the EEOC and the risk of a negligent-hire claim."

According to Segal, individualized assessments were not always required. Other attorneys are unsure.

"That's where it's not clear," says Allan H. Weitzman, partner and head of the labor and employment practice in the Boca Raton, Fla., office of the law firm Proskauer. "I know [the EEOC] would like them, and I think it would be a good idea for employers to engage in individualized assessments, if they want to stay clear of being on the wrong side of an EEOC lawsuit."

For some employers, challenges could arise in deciding what convictions are job-related. The relatively easy calls include traffic offenses for potential drivers and financial crimes for anyone who might be entrusted with money.

But there is a large gray area, says Gary D. Friedman, a senior partner in the employment litigation practice at New York-based Weil Gotshal & Manges. Domestic violence is one example, he says. A conviction could stem from an isolated argument between a husband and wife that spun out of control. Or it could be a sign of something worse.

"There's no bright line that you can draw in this area, nor does the EEOC want you to draw a bright line ... or the courts, for that matter," Friedman says.

He suggests companies set up some kind of adjudication panel composed of three members: an attorney, who would bring familiarity with Title VII and insight into what should be documented; an HR professional, who would have, or be able to get, a description of the job in question; and a security expert, who would have a better understanding of the conviction and any mitigating details.

The panel's first task would be dividing up convictions among those that would result in automatic exclusion, those that can be ignored and those that require further investigation, Friedman says. Then, as the need arose, the panel could undertake individualized assessments, remaining blind to any details about the job candidate, such as race, gender and age, to avoid any perceptions of discrimination.

Risks remain, he says. An applicant who is denied by the panel could challenge the decision, leading to claims of disparate treatment if the rejected applicant belongs to a protected category based on race, ethnicity or another characteristic.

What's more, the panel may have trouble evaluating the stories offered up by applicants. "More likely than not, they're going to come up with something compelling, and whether they do or not, how are you, the adjudication committee, supposed to really evaluate that?" Friedman says.

Aggressive Agency, Jurisdictions

No lawsuits have been filed recently over the use of criminal convictions or other screens. But EEOC investigators have been busy, attorneys say.

"I know, based upon my own docket and anecdotally from what other lawyers are telling me, that EEOC offices are conducting a lot of investigations into employer use of conviction information in hiring," says Donald R. Livingston, a partner at Akin Gump in Washington who served as the EEOC's general counsel from 1987 to 1993.

Another area under scrutiny is pre-employment testing that could uncover a disability, attorneys say.

In the past, for example, manufacturers often tested people to whom they had conditionally offered jobs to gauge whether they might develop a bad back or other physical problem. Anyone deemed at risk would not be hired, says John J. Coleman III, a partner in the labor and employment practice group at Burr & Forman in Birmingham, Ala.

Then came the 2008 Americans with Disabilities Act Amendments Act. Those amendments broadened the definition of disability, Coleman says, and prevented companies from screening out workers based solely on the likelihood of future injury.

Companies can still perform tests, Coleman says, but they can disqualify job candidates only under certain conditions, as determined by doctors. Rejected applicants, for instance, must pose a significant threat to themselves or others that cannot be reduced by accommodation, he says. The doctor also has to examine the candidates and their work and medical histories, as well as determine whether they can meet a job's requirements.

The EEOC appears to be most interested in the doctors performing the assessments and the standards they're using to make judgments, Coleman says. As a result, employers should be careful about the doctors they choose.

Agency guidelines, he says, suggest a preference for what might be called a "team doctor": one who puts a brace on a player's injured knee so he can get back on the field, delaying fuller treatment until the season's end.

"A lot of doctors, especially those outside occupational medicine, don't [practice] that way," Coleman says. They would prefer to begin treatment right away -- and keep the player on the sidelines. "What ends up happening is you can get some tension," he says. "And it's causing employers, at times, to be frustrated."

In other areas of hiring, the law and corporate practices continue to evolve. Two areas that have drawn attention recently are the use of social media, such as Facebook and Twitter, and the treatment of the long-term unemployed.

The EEOC held a hearing on the long-term unemployed in 2011, but states and cities have also been at the forefront of proactive measures. Laws banning discrimination have been put on the books in New Jersey, New York, Oregon and the District of Columbia.

Claims could be hard to prove, says Grace Speights, a partner in the labor and employment practice at Morgan Lewis in Washington.

An employer could argue that a candidate was passed over for lack of skills, not length of unemployment, Speights says. A long-unemployed person might lack the recent training of someone who has been working. Still, she adds, more laws are likely.

"It's hard to say, but once one jurisdiction passes a statute, you can imagine others are looking at it as well," she says.

Laws governing how employers treat social media also have been proliferating, says William C. Martucci, a partner at Shook Hardy & Bacon.

Nine states -- California, Delaware, Illinois, Maryland, Michigan, New Jersey, Utah, New Mexico and Arkansas -- bar employers from asking employees or applicants to unlock their personal social-media sites and open them to review, says Martucci, who focuses on employment law. Roughly a dozen more are contemplating such rules, and others are likely to follow.

Decisions based on what employers uncover online also are increasingly problematic, Martucci says. A few states, including Colorado, New York and North Dakota, protect employees from being judged by comments or actions found online, as long as the conduct is off-duty and lawful.

It's unclear how the statutes might apply to job applicants. But, Martucci says, "there is this trend to be thoughtful about protecting social-media use."

Despite the challenges, employers continue to press for better tools that help them sift through applications, Martucci adds.

"There's more and more interest in effective employee-screening programs, and there's still a lot of discretion," he says. "But if it has a disparate impact, then it's very difficult to justify it."

See also:

[Reviewing the Process \(http://www.hreonline.com/HRE/view/story.jhtml?id=534355516\)](http://www.hreonline.com/HRE/view/story.jhtml?id=534355516)

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