



# The GSH 60-Second Memo

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## Recent Activities by the EEOC Signify Potential Broadened Scope of Title VII Protections

By Bethany C. McCurdy

In the past few weeks, the Equal Employment Opportunity Commission ("EEOC") has decided two matters that will likely have a broad-reaching, significant impact on employers. First, the EEOC revised its guidelines on an employer's use of arrest and conviction information when making employment decisions. Second, the EEOC extended Title VII's prohibition on sex discrimination to transgender individuals.

### *EEOC Guidance Limits the Use of Arrest and Conviction Records in Employment Decisions*

On April 25, 2012, the EEOC [issued revised guidelines](#) detailing the limits on an employer's use of arrest or conviction information when making employment decisions. Given the prevalence of background checks, as well as the fact that 65 million Americans have a criminal record, the new guidelines directly address an issue many employers deal with regularly. The new Guidance also provides employers with information on how to avoid liability in screening applicants and considering criminal background information.

The use of arrest or conviction records is not expressly prohibited by Title VII; however, if the use of criminal background information when making employment decisions disparately impacts a certain class of people who are protected, then the practice could violate the law.

Looking to the new rules, it immediately becomes clear that

many practices that are standard for most employers may now put them at risk for a Title VII violation. The EEOC now requires employers to consider arrest or conviction information on a case-by-case basis. Employers no longer may screen out applicants without considering the applicant's background and the specific job at issue. Thus, for example, employers may not have policies that rule out an applicant based upon a felony conviction. Instead, employers will need to show through an individualized assessment that any specific exclusion from employment based upon a criminal background is job-related and consistent with business necessity.

When conducting the individualized assessment, employers must make the applicant or employee aware that he may be excluded from the position due to past criminal conduct and provide the individual an opportunity to demonstrate the exclusion does not apply. If the person does not respond to the employer's attempt to gather information, the employer may make the decision without additional information.

In making an individualized assessment, employers should consider the following factors:

- The facts and circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction or release from prison (yes the EEOC is advising you to look at age!);
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

While talking with an applicant about the details of a conviction is not that unusual, as many applicants include the "will explain" disclaimer on their job applications in the section that asks about convictions, the level of detail that is required is certainly new.

Moreover, for an employer to impose any kind of screening criteria, the company must have evidence to show the criteria is job related and consistent with business necessity. This inquiry will require employers to examine the nature and gravity of the offense or conduct, the time that has passed since the offense, completion of sentence or conduct, and the nature of the job held or sought. Employers will have to be able to justify any exclusion to employment based on criminal background. For example, if an employer wishes to exclude anyone who has a felony theft conviction in the past 10 years, the employer must demonstrate that engaging in theft shows a propensity for dishonesty - e.g., theft

results in property loss - and that the duration of 10 years is narrowly tailored to satisfy the business necessity standard.

The employer must also demonstrate that the exclusion is relevant to the particular job at issue. A broad exclusion that applies to everyone is unlikely to be sufficient. Thus, if an employer wants to screen out all applicants with theft convictions, regardless of the job at issue, the company will not be able to have a blanket exclusion. Rather, the company will have to explain why the exclusion is relevant to each position in the company, from those in shipping and receiving, to groundskeepers, to administrative staff.

The new Guidance also addresses the use of arrest records. Employers are prohibited from using arrest records as exclusion to employment; however, employers may take action based upon the underlying conduct of the arrest if the conduct makes the individual unfit for the position in question.

This new Guidance may prove to have a large impact on employers nationwide given the prevalence of background checks as a standard procedure when hiring employees. Employers should review their current policies and procedures, including any employment applications and interview guides, to ensure compliance with the Guideline. However, as will be seen with the expansion of Title VII rights to transgender individuals, these are not the only policy changes employers may need to make.

#### *EEOC Rules that Title VII's Protections Extend to Transgender Individuals*

The EEOC also recently determined, in what many are calling a landmark decision, that employment discrimination against a transgender individual because the person is transgender is discrimination based upon the person's sex and thus covered by Title VII.

[The case](#) involved Mia Macy ("Macy") a transgender woman who applied for a position as a ballistics technician with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATFE"). At the time of her application, Macy was presenting as a man. Following an interview, Macy was assured that she would be hired upon completion of a background check. Shortly thereafter, an outside agency hired by the ATFE contacted Macy to begin the background check.

Macy then notified the agency that she was in the process of transitioning from male to female and asked the information be relayed to the ATFE. Within five days of the notification, Macy was told that the job was no longer available due to budget cuts. When Macy contacted the ATFE's EEO office about the change in status of her application, she was informed that the position had not been cut, but rather had been filled by someone who was further along in the background check process.

Macy filed a formal EEO complaint with the ATFE alleging she was discriminated against on the basis of her sex (female) and included "gender identity" and "sex stereotyping" as the basis of her

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complaint. In considering whether the EEOC had jurisdiction over Macy's gender identity and sex stereotyping claims, the EEOC had to decide if such discrimination fell under Title VII's prohibition on sex discrimination.

The EEOC ultimately concluded Macy's claims were cognizable under Title VII as sex discrimination claims. In rendering its decision, the EEOC considered a prior Supreme Court decision, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989), in which the Court decided that Title VII prohibits "not just discrimination because of biological sex, but also gender stereotyping-failing to act and appear according to expectations defined by gender," which it defined as including "not only a person's biological sex, but also the cultural and social aspects associated with masculinity and femininity."

This decision is important because it is the first time there has been definitive guidance from the EEOC to allow Title VII to include transgender individuals under its umbrella of protection. Employers should be aware of the decision and revise their policies accordingly and consider additional training as appropriate.

Combined, these two developments signal a continuing trend by the current EEOC to expand the protections of Title VII. These developments also show that although the defined classes under Title VII may appear static in name, they are more fluid in definition, evolving over time to include an ever-widening number of individuals under Title VII's umbrella of protection. Indeed, given the EEOC's examination of other areas, such as perceived stigmas in hiring practices against the currently unemployed, employers should expect additional, similar developments in the future. In the meanwhile, employers should carefully review their policies and procedures and determine where they differ from these decisions. Handbooks, applications, and interview guides may need to be updated, and additional training of managerial and supervisory employees may be required. As always, while the law may change, the ways for employers to best insulate themselves from liability, such as through updated and consistently applied policies, continues to remain the same.

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