THE USE OF CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT: DARNED IF YOU DON'T DO THEM CORRECTLY. DARNED IF YOU DON'T DO THEM AT ALL[1]

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It has become standard practice for employers to perform criminal background checks on prospective employees. Indeed, one survey found that 92% of employers conducted criminal background checks on some or all of their employees. (Society for Human Resource Management, Background Checking: Conducting Criminal Background Checks, January 22, 2010.) With the increase in global communication and technology, performing a criminal background check is as easy as purchasing a 99-cent app and pushing a few keys or pads on a smart phone. Alternatively, firms can be hired to perform such investigations or, to access public criminal records regarding Minnesotans, prospective employers can simply visit county courthouses, the Minnesota Bureau of Apprehension's website, and the Public Access to Court Electronic Records ("PACER") for federal court records.

There are many reasons for employers to perform criminal background checks. Concerning certain professions, such as law enforcement, teaching and health care, to name a few, such background checks are required in Minnesota as a matter of law. See e.g. Minn. Stat. §§ 626.87, subd. 1 (law enforcement), 123B.03, subd. 1 (school employment), and 144.057 (persons with direct contact services in licensed nursing home or home care agency), respectively. Employers may also want this information to gauge character, prevent exposure from potential criminal activities conducted at the work site, or to avoid future claims by injured third parties for negligent hiring or retention. Depending on the circumstances, employers may be required to perform such checks by those they do business with.

If all that it took to disqualify an applicant was a brush with the law, a significant segment of the working-age population would be barred from employment. Studies have indicated that the number of Americans who have had contact with the criminal justice system is growing, with a concomitant increase in the number of people in the working-age population with criminal records. See e.g. Thomas P. Bonczar, Prevalence of Imprisonment in the U.S. Population, 1974-2001, Bureau of Justice Statistics Special Report (August 2003) (hereinafter "Prevalence of Imprisonment"). In 1991, 1.8% of the adult population had served prison time. *Id.* at 1. By 2001, this percentage had increased to 2.7%, or 1 in 37 adults. *Id.* By the end of 2007, 3.2% of all adults in the United States (1 in 31) were under correctional control involving probation, parole, prison, or jail. Jenifer Warren, (*One in 31 The Long Reach Of American Corrections)*, Pew Center On The States, The Pew Charitable Trusts (March 2009) at 1. According to the Department of Justice's Bureau of Justice Statistics, if the trend continues, approximately 6.6% of all persons born in the United States in 2001 will have served time in a state or federal prison at some point in their lifetimes. (Prevalence of Imprisonment at 1.)

An additional problem is evidence that African Americans and Hispanic individuals are arrested and convicted in numbers disproportionate to the Caucasian majority, suggesting that discrimination on the basis of race or national origin may be a factor. Twenty-eight percent of all arrests in 2010 were of African American men, though African Americans comprised only 14% of the population. Uniform Crime Reporting Program, Federal Bureau of Investigation, Crime in the U.S. 2010 (2011) at Table 43;

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U.S. Census Bureau, The Black Population: 2010 (2011) at 3. Another study indicated that Hispanics were arrested for federal drug charges at an approximate rate of three times their proportion of the general population. Nancy E. Walker, Francisco A. Villarruel, J. Michael Senger, Angela M. Arboleda, Nat'l Council of La Raza, Lost Opportunities: The Reality of Latinos in the U.S. Criminal Justice System (2004) at 17 (citation omitted). In light of national incarceration data, the U.S. Department of Justice estimated in 2001 that, while 1 out of every 17 white men is expected to go to prison at some point during his lifetime, for Hispanic men, the rate climbs to 1 in 6. For African American men, the rate is an astounding 1 in 3. (Prevalence of Imprisonment at 1.)

In recognition of these problems, many states, including Minnesota, have enacted laws that limit the use of arrest and conviction records in employment consideration. Minnesota, for example, has recently passed "ban the box" legislation, governing public and private employers alike, limiting inquiry regarding arrest and conviction records until the job interview or, in the event of no interview, until a conditional offer of employment has been extended. For its part, the Equal Employment Opportunity Commission (EEOC), charged with enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (Title VII), has for some time now examined employers' policies and practices regarding exclusion from employment based upon criminal history to ensure compliance with federal laws. The EEOC has stepped up its enforcement efforts as revealed by several recent high profile cases involving large employers.

The current and developing law, and increased enforcement efforts, reflect an attempt to effect a balance between the legitimate business necessity of employers in seeking to ensure the safety and efficiency of the workplace, the interests of prospective or current employees in ensuring that they are not denied employment based upon their race or national origin, incorrect records, long-past indiscretion, or for criminal history that does not implicate their honesty or ability to perform the given job, and the interests of federal and state governments in prohibiting discrimination and promoting rehabilitation.

Employer decisions to exclude applicants or terminate employment based on arrest or conviction records, if not done in accordance with current standards, may expose the employer to claims of discrimination. Depending on a given state's laws, such action can also expose the employer to claims or penalties for violation of state law.

This article will focus on federal and Minnesota requirements that impact the use of arrest and conviction records in employment decisions, recently updated federal agency guidance, a sample of cases involving claims of discrimination concerning criminal history exclusion, and practice pointers regarding the timing and use of criminal history in employment consideration.

FEDERAL LAW

To date, no federal law has been identified that specifically prohibits employers from asking employees about arrest and conviction records. But cf. *National Aeronautics and Space Admin. v. Nelson*, 131 S.Ct. 746, 756-57 (2011) (refusing to recognize, but assuming, arguendo, that a constitutional interest in the privacy of personal information exists in the context of an employer request for information, including potentially criminal activity). However, there are limitations under federal law on the access and use of such information. An example of a statute limiting access and use is the federal Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.

I. FAIR CREDIT REPORTING ACT.

The purpose of the Fair Credit Reporting Act (FCRA) is "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information . . . ." *Id.* at 1681(b). The FCRA applies to employers who use consumer reports produced by such agencies in establishing eligibility for, among other things, employment. *Id.* at 1681(a)(d)(1)(B).

Consumer reports can include a variety of information, including criminal background history. However, under the FCRA, the report cannot contain records of arrest from date of entry after seven years. *Id.* at § 1681(c)(a)(2). The reporting restrictions, however, do not apply to jobs with an annual salary of $75,000 or more. *Id.* at § 1681(c)(b)(3). Moreover, there is no limitation period for reported convictions. *Id.* at § 1681(c)(a)(5).

The following is a summary of the requirements imposed upon employers under the FCRA:

- Prior to ordering a background check, applicants must be notified in writing that the employer may obtain a consumer report for employment purposes. *Id.* at § 1681b(b)(2)(A)(i). The FCRA requires this notice to be a separate, clear and conspicuous document. *Id.*

- Employers must obtain applicants' or employees' written authorization before ordering background checks. *Id.* at § 1681b(b)(2)(A)(ii). Employers have the option to combine the authorization with the notice and disclosure. *Id.*

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- Consumer reporting agencies require employers to certify they are FCRA compliant, that they will not misuse background screening information, and that they will comply with federal and state equal employment opportunity regulations. *Id.* at § 1681b(b)(1)(A)(i) and (ii).

- If an employer is considering making an adverse or unfavorable employment decision (e.g. denying application; reassigning or terminating an employee) "based in whole or in part" on an applicant's background screening result, the FCRA requires notification to the applicant. Before taking the adverse action, the employer must:

    1. provide preliminary notice to the applicant indicating that information contained in the background screening report, if accurate, may cause employment to be denied. *Id.* at § 1681m(a)(1). The notice must contain the name and address of the person to whom such information is being reported and, what course of action the applicant can take if he or she believes the background screening results are incorrect, and provide the applicant with the opportunity to dispute and correct any inaccuracies with the furnishers of the consumer report information.

    2. provide the applicant with copies of the background screening results and a copy of the Bureau of Consumer Financial Protection's (CFPA) "Summary of Your Rights Under the FCRA" document with the adverse action disclosure. *Id.* at § 1681b(b)(3)(A)(i) and (ii).

    3. adverse action disclosures must also include:

        - the name, address and phone number of the consumer reporting agency that supplied the consumer report (*Id.* at § 1681m(3)(A));

        - a statement that the consumer reporting agency did not make the decision to take the adverse action and cannot give reasons why the employer is contemplating an adverse decision (*Id.* at § 1681m(3)(B)); and

        - a statement about the applicant's right to dispute the accuracy or completeness of his/her background screening results and his/her right to obtain a free background screening report from the consumer reporting agency upon request within 60 days (*Id.* at § 1681m(4)(A) and (B)).

- Employers who still wish to deny employment must send an adverse action notice within a reasonable period of time. Federal Trade Commission (the agency that formerly enforced the FCRA) opinions suggest sending adverse action notification within five days after the pre-adverse disclosure unless circumstances otherwise dictate.

Violation of the FCRA can result in the imposition of actual damages plus attorney's fees for negligent noncompliance. *Id.* at § 1681(o). For willful noncompliance, statutory damages ($100 to $1,000 per violation, at court's discretion) and punitive damages are also available. *Id.* at §1681(n).

II. TITLE VII.

Title VII prohibits an employer from failing or refusing to hire, to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a)(1). Title VII "prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

The United States Supreme Court has explained the distinction between the two types of claims as follows:

> *"Disparate treatment"...is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment....*
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> *Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive...is not required under a disparate-impact theory.*
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> *International Bd. Of Teamsters v. United States, 431 U.S. 324, 335-36 n. 15 (1977) (citation omitted).*

For a disparate treatment failure to hire claim, a plaintiff must prove: (1) plaintiff was a member of a protected class; (2) plaintiff was qualified for the position for which the employer was accepting application; (3) plaintiff was denied the position; and (4) the employer hired someone outside the protected class. *Arraleh v. County of Ramsey*, 461 F.3d 967, 975 (8th Cir. 2006).

An example of a claim based on disparate treatment is where, for example, an employer rejects African American applicants who have conviction records, but not Caucasian applicants with the same or similar conviction records.

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A plaintiff establishes a prima facie violation of Title VII on a disparate impact basis by showing an employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." *Ricci*, 557 U.S. at 577 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)). "An employer may defend against liability by demonstrating that the practice is 'job related for the position in question and consistent with business necessity.'" *Id.* "Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs." *Id.* (citing §§ 2000e-2(k)(1)(A)(ii) and (C)).

If a court determines that an employer intentionally engaged in or is intentionally engaging in an unlawful employment practice, the court can enjoin such practice and order affirmative relief as appropriate including, without limitation, reinstatement or hiring of employees, with or without back pay. 42 U.S.C. § 2000e-5(g)(1). Under Title VII, back pay may be awarded as far back as two years before the filing of a charge with the EEOC. *Id.* However, back pay is subject to reduction by the amount of interim earnings or the amount earnable with reasonable diligence. *Id.* Front pay may be awarded in appropriate cases. Compensatory and punitive damages are available in disparate treatment, but not disparate impact, cases. 42 U.S.C. § 1981. Punitive damages may be awarded for engaging in discriminatory practices with malice or reckless indifference. 42 U.S.C. § 1981a(b)(1). Punitive damages may not be awarded against state, local, or federal employers. *Id.*

In Title VII cases, the court, in its discretion, may allow the prevailing party reasonable attorneys fees and expert witness fees. 42 U.S.C. § 2000e-5(k). In practice, attorney fees are awarded prevailing defendants only upon a determination that plaintiff's case was frivolous, unreasonable, or without foundation. See e.g. *Chester v. St. Louis Hous. Auth.* 873 F.2d 207, 209 (8th Cir. 1989) (citation omitted).

The EEOC has taken the position that using arrest and conviction records "as an absolute measure to prevent an individual from being hired could limit the employment opportunities of some protected groups and thus cannot be used this way." U.S. Equal Employment Opportunity Commission, Pre-Employment Inquiries and Arrest & Conviction. The rationale is that African American and Hispanic populations are arrested and convicted in numbers that are disproportionate to Caucasians and that barring people from employment based on their conviction records alone will disproportionately exclude these groups. EEOC Enforcement Guidance, Number 915.002, 4/25/2011 at p. 3 (African American and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population).

The EEOC points to studies showing disproportionate arrests and convictions of African Americans and Hispanics in support of Title VII disparate impact claims against employers for exclusion based on criminal history. EEOC Enforcement Guidance No. 915.002 at 10. This position has the potential of putting employers at a disadvantage at the outset as the EEOC may seek to hold employers accountable, at least in part, for the previous actions of the various players, public and private, involved in the criminal justice system and over whom employers have no control. However, similar data have been considered by courts in past disparate impact cases. See, e.g., *Green v. Missouri Pacific R.R. Co.*, 523 F.2d 1290, 1294 (8th Cir. 1975), *as amended on Denial of Rehearing En Banc*, Sept. 15, 1975.

The EEOC has indicated that it will also consider other evidence, for example, regional or local data, showing that African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer's particular geographical area. *Id.* The Minnesota Department of Administration website is one source of data regarding arrests. http://www.mnplan.state.mn.us/cj/arrest.html (1995-2000 arrest and apprehension data broken down by race, category of offense, and location).

A. THE "JOB RELATED AND CONSISTENT WITH BUSINESS NECESSITY" DEFENSE.

The term "business necessity" has not been clearly defined. See *El v. Southeastern Pennsylvania Transp. Auth.*, 479 F.3d 232, 241 (3rd Cir. 2007) (citations omitted). However, courts have concluded that the defense must be proven by empirical evidence as opposed to a "common sense" argument. See at 240 (citation omitted).

The EEOC has indicated that there are two circumstances in which it believes employers will consistently meet the "job related and consistent with business necessity" defense to a charge or claim based upon disparate impact.

The first is for the employer to validate the criminal conduct screen for the particular position pursuant to the Uniform Guidelines on Employment Selection Procedures (Uniform Guidelines) standards created by the EEOC, the Civil Service Commission, the Department of Labor and the Department of Justice. The purpose of the Uniform Guidelines is to "incorporate a single set of principals which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin." Uniform Guidelines at Section 1B.

The topics covered in the Uniform Guidelines include the scope of their application, the relationship between use of selection procedures and discrimination, information

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on impact, general standards for validity studies, use of selection procedures that have not been validated, use of other validation studies, cooperative studies, unacceptable substitutes for evidence of validity studies and so forth. *See generally* Uniform Guidelines. *See also* 29 C.F.R. § 1607.5 (describing general standards for validity studies).

An examination of the Uniform Guidelines reveals that they are heavy on process, less than clear, and may be difficult for employers, particularly smaller ones without significant resources, to understand and successfully apply. *See Id.* Perhaps this is why the EEOC has added, in its reference to the use of the Uniform Guidelines, the qualifier, "if data about criminal conduct as related to subsequent work performance is available and such validation is possible." EEOC Enforcement Guidance No. 915.002 at 14. The EEOC acknowledges that studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications are, at present, rare. *Id.* at 15.

The alternative method to establish that a criminal conduct exclusion that has a disparate impact is job related and consistent with business necessity recognized by the EEOC is the development and use of a targeted screen considering what have been termed the "Green" factors, coupled with an opportunity for an individualized assessment for people excluded by the screen. *Id.* The Green factors are named after the 1977 Eighth Circuit Court of Appeals' decision in which they were identified as factors employers should use when considering criminal history in employment decisions. EEOC Enforcement Guidance No. 915.002 at 11 (citing *Green v. Missouri Pacific R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977) (Title VII disparate impact case in which the Eighth Circuit upheld the factors employed by the trial court as consistent with its decision).

The Green factors include:

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

Id.

The EEOC has referenced a fourth factor in its most recent enforcement guidance — the employer must also be able to justify criminal record exclusions "by demonstrating that they 'accurately distinguish between applicants [who] pose an unacceptable level of risk and those [who] do not'". *Id.* (quoting El., 479 F.3d at 244-45).

B. NATURE AND GRAVITY OF OFFENSE.

The first step in considering the "Green" factors is to examine the nature and gravity of the criminal offense. EEOC Enforcement Guidance No. 915.002 at 15. The point is to assess the risk of employing the person with a particular conviction in the position at issue. For example, was the conviction for a crime of damage to property as opposed to injury to a person? The elements of the crime such as deception, threat or intimidation may also be considered. *Id.* Concerning the gravity of the offense, a felony conviction (e.g. aggravated robbery [armed with a dangerous weapon]) is more severe than a misdemeanor offense (e.g. disorderly conduct).

C. THE TIME THAT HAS PASSED.

Is there any evidence that the time that has passed since the criminal offense shows the employee is no longer any more likely to recidivate than the average person? There are several studies that have been performed in this area. One such study found that the risk of recidivism declined for the groups with prior records and eventually converged within ten to fifteen years with the risk of non-offending comparison groups. Keith Soothill & Brian Francis, *When do Ex-Offenders Become Like Non-Offenders?*, 48 Howard J. of Crim. Just., 373, 380-81 (2009). Others have concluded that the risk of recidivism matches that of non-offending comparatives at approximately seven years. See Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predicts of Future Criminal Involvement*, 53 Crime & Delinquency 64 (2007) (analyzing juvenile police contacts and Racine, Wisconsin police contacts for an aggregate of crimes for 670 males born in 1942). *See also* Megan C. Kurlycheck, Robert Brame, Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 Criminology & Pub. Pol'y 483 (2006) (evaluating juvenile police contacts and arrest dates from Philadelphia police records for an aggregate of crimes for individuals born in 1958 and concluding that six to seven years is the period at which risk of re-arrest approximates that of individuals never arrested).

D. THE NATURE OF THE JOB.

Can the criminal conduct be linked to the essential functions of the position to demonstrate that the employer's policy or practice is job-related and consistent with business necessity? This factor considers such items as the job title, but more importantly the nature of the job duties (e.g. assembly line work, accounting, direct sales), the level of supervision or oversight (e.g. position requires working with others or vulnerable individuals), and the environment in which the job is performed (e.g. front office, in private homes). EEOC Enforcement Guidance No. 915.002 at 16.

E. INDIVIDUALIZED ASSESSMENT.

The individualized assessment, as envisioned by the EEOC, means that the employer has informed the individual that he or she may be excluded based upon criminal history, provides the individual the opportunity to demonstrate that the exclusion does not apply, and permits the individual to provide additional information to show that

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the policy as applied to him or her is not job related and consistent with business necessity. *Id.* at 18.

The individual's showing may include the following:

- The individual is not correctly identified in the criminal record or the record is otherwise inaccurate or incomplete;
- The facts or 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;
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer;
- 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;
- Whether the individual is bonded under a federal, state, or local bonding program.

Id. (citations omitted).

If the individual does not agree to engage in the individualized assessment, the employer may make its decision without the additional information. *Id.*

The EEOC has recognized that, depending on the circumstances, individualized assessment may not be warranted. In this case, employing only the Green factors may be justifiable. *Id.* at 14.

F. RECENT EEOC ENFORCEMENT EFFORTS.

The EEOC has stepped up its enforcement efforts regarding exclusion based upon criminal history alleged to be in violation of Title VII.

By press release of January 11, 2012, the EEOC announced that it had reached a settlement with Pepsi Beverages (Pepsi), formerly known as Pepsi Bottling Group, regarding Pepsi's criminal background check policy. United States Equal Employment Opportunity Commission, Press Release 1-11-12. The EEOC reported that, under Pepsi's former policy (changed during the investigation), job applicants who had been arrested pending prosecution were not hired for a permanent job even if they had never been convicted of any offense. The EEOC asserted that the former policy also denied employment to applicants who had been arrested or convicted of certain minor offenses. *Id.*

The EEOC's investigation revealed that more than 300 African Americans were adversely affected and that Pepsi's former policy disproportionately excluded black applicants from permanent employment. Based on its investigation, the EEOC found reasonable cause to believe that the criminal background check Pepsi formerly employed discriminated against African Americans in violation of Title VII of the Civil Rights Act. *Id.*

Pepsi agreed to pay $3.13 million in settlement. In addition to the monetary relief, Pepsi also agreed to offer employment opportunities to those affected by the former criminal background check policy that still desired employment at Pepsi and were qualified for the positions applied for. The company agreed to supply the EEOC with regular reports on its hiring practices under its new criminal background check policy. In addition, Pepsi agreed to conduct Title VII training for its hiring personnel and all of its managers. *Id.*

More recently, on June 11, 2013, the EEOC brought suit against BMW Manufacturing Co., LLC (BMW) in the United States District Court, District of South Carolina, Spartanburg Division. 7:13-cv-01583-HMH-JDA, Doc. 1 (Complaint). By its complaint, the EEOC alleged the following:

UTi Integrated Logistics, Inc. (UTi) provided logistic services to BMW at BMW's Spartanburg, South Carolina, manufacturing facility. UTi's logistic services included warehouse and distribution assistance, transportation services, and manufacturing support. UTi employees, including the claimants in this case, worked in a BMW-owned warehouse located on the grounds of the BMW facility.

BMW and UTi negotiated an end to their contract for logistics services; the agreed-to end date was July 27, 2008.

BMW desired to retain as many UTi employees as possible to minimize disruption at its facilities; many of the UTi employees had worked in the BMW warehouse for years. As part of the application process, BMW directed the new logistics contractor to perform criminal background checks on every UTi employee applying for employment with the new contractor. The new logistics contractor performed criminal background checks on approximately 645 UTi employees and discovered that 88 UTi employees who applied with the new contractor had criminal convictions in violation of BMW's criminal conviction policy and so informed BMW.

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BMW's written criminal conviction background check policy has been in effect since the opening of the facility in 1994. Its policy excludes individuals with convictions of the following crimes: "Murder, Assault & Battery, Rape, Child Abuse, Spousal Abuse (Domestic Violence), Manufacturing of Drugs, Distribution of Drugs, [and] Weapons Violations." The written BMW policy documents further provided that "any convictions of a violent nature are conditions for employment rejection," and "there is no statute of limitations for any of the crimes." The EEOC further alleged, "upon information and belief," that the BMW policy also excludes from employment individuals with criminal convictions involving "theft, dishonesty, and moral turpitude."

In or around July 2008, as a result of BMW's application of its criminal records background check, BMW denied Claimants (including 69 African Americans) access to its facility and the new logistics contractor rejected Claimants for hire.

The EEOC alleges that BMW's criminal conviction policy makes no distinction between felony and misdemeanor convictions. In addition, Claimants were denied access to the BMW's facility without any individualized assessment of the nature and gravity of their criminal offenses, the ages of the convictions, or the nature of their respective positions. Moreover, Claimants were denied access without any assessment or consideration of the fact that many had been working at the facility for several years without incident for UTi or prior logistic service providers. The EEOC cited the example of "one black female Claimant who was denied plant access solely based upon a 1990 misdemeanor conviction for simple assault, punished only by a $137 fine, after nearly 14 years of service for UTi and prior BMW logistics services providers." *Id.* Complaint ¶ 23. The EEOC alleged that a black male Claimant who had worked at the BMW facility for 12 years was also denied plant access as a result of BMW's criminal conviction policy.

The EEOC alleges that BMW's criminal conviction policy operates to exclude disproportionate percentages of blacks. In support of this assertion, the EEOC claims that of all the employees assigned by UTi to work at the BMW facility, 355 or 55% were black and 290 or 45% were non-black. BMW denied plant access pursuant to its criminal background check policy to a total of 88 employees assigned by UTi, or approximately 14% of all employees assigned by UTi to work at the BMW facility. Of these 88 employees, 70 (80%) were black and 18 (20%) were non-black. The EEOC asserts that the "gross disparity" in the rates between which blacks, as opposed to non-blacks, were denied access to the BMW facility and, therefore, lost their employment as a result of BMW's policy, is statistically significant and supports a disparate impact claim under Title VII.

The EEOC seeks injunctive relief to prevent BMW from continuing to employ its policy, to require BMW to affirmatively institute policies, practices, and programs which provide equal employment opportunities for black individuals, and monetary relief in the form of back pay for the claimants with prejudgment interest, and other affirmative relief including, but not limited to reinstatement or front pay in lieu thereof.

MINNESOTA LAW

Many states have restrictions regarding the use of arrest and conviction records in employment decisions. A nationwide canvas is beyond the scope of this presentation. However, Minnesota is a prime example.

I. The Minnesota Human Rights Act (MHRA).

As with federal law under Title VII, except when based on a bona fide occupational qualification, Minnesota statutes prohibit an employer from refusing to hire or to maintain a system of employment which unreasonably excludes a person seeking employment, or to discharge an employee, based upon race or national origin. Minn. Stat. § 363A.08, subd. 2. (2012).

In addition to the availability of disparate treatment claims, Minnesota has long-recognized the availability of a disparate-impact theory for violation of the MHRA due to discriminatory employment practices. See *Monson v. Rochester Athletic Club*, 759 N.W.2d 60, 65 (Minn. Ct. App. 2009) (citing *Brotherhood of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees, Lodge 364 v. State by Balfour*, 303 Minn. 178, 188-90, 229 N.W.2d 3, 9-10 (1975)).

For violation of the MHRA, the court may order that the discriminatory practice be stopped. Minn. Stat. § 363A.29, subd. 3. Compensatory damages up to three times the amount of the damages sustained may be awarded. *Id.* subd. 4. Damages for mental anguish or suffering and Punitive damages (up to a $25,000 cap) are also available. *Id.* A civil penalty paid to the state may also be imposed. *Id.* Other remedies such as back pay, reinstatement, and any other relief deemed just and equitable may be awarded. *Id.* at subd. 5(1). As with Title VII, attorneys fees and costs are available to the prevailing party. Minn. Stat. § 363A.33, subd. 7.

The single state case found involving allegations of violation of the MHRA based upon the use of criminal background history in employment involved a disparate treatment claim. In *Smith v. State*, No. C5-96-1997, 1997 WL 30724 (Minn. App. Jan. 28, 1997), *rev.* (Minn. Mar. 18, 1997), the plaintiff, a Native American, brought suit against the Minnesota Department of Human Services (DHS) as a result of his exclusion from employment as a drug treatment counselor for failure to provide fingerprints that

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would enable the DHS to obtain an FBI criminal record history. As part of its licensing process, the DHS performs background checks, including review of conviction records of the Minnesota Bureau of Criminal Affairs (MBCA). The MBCA, in turn, categorized a subject as "Single State," i.e., having a criminal history only in Minnesota, "Multi State," i.e., having a criminal file with the FBI, or "Not Determined," i.e., the BCA cannot determine whether other conviction records exist. Fingerprints were requested of all those in the "Multi State" or "Not Determined" categories so their files could be obtained from the FBI.

In affirming the trial court's grant of summary judgment to the DHS, the Minnesota Court of Appeals began by noting that there was no evidence that the DHS was plaintiff's employer, a requirement for coverage of the MHRA. However, even assuming this status, the plaintiff's disparate treatment claim failed as he failed to provide proof of a necessary element, *i.e.*, that he was treated differently than an unprotected class. Without regard to race, all those belonging to the group "Multi State" or "Not Determined" were required to provide fingerprints. *Id.*

II. Bureau of Criminal Apprehension Website Data.

Minnesota Statutes mandate that the MBCA maintain as of July 1, 2004, an Internet website containing public criminal apprehension data. Minn. Stat. § 13.87, subd. 3 (2012). The website must provide notice informing the subject of the data of the subject's right to contest the accuracy or the completeness of the data per statutory procedure. *Id.* at subsection (c). In addition, the MBCA is required to identify the effective date that the data is posted. *Id.* at subsection (d). The website must provide notice of the type of criminal data not maintained. *Id.* at subsection (e). Of particular importance to this article, a person who intends to access the site in consideration of an applicant for employment must notify the applicant of the intention to do so. *Id.* at subsection (f). However, Section 13.97, subd. 3 does not create a civil cause of action. *Id.* at subsection (g).

III. Public Employment and Occupational Licensing.

In the area of public employment and occupational licensing, Minnesota has had a long history of limiting criminal record consideration in favor of rehabilitation. The first paragraph of the original version of Minnesota Statutes Section 364, Minn. Laws 1974 c. 298 s. 3, (governing public employment and occupational licensing) was entitled: "Discrimination Against Ex-Criminal Offenders; Policy." For decades, Minnesota law has prohibited public employers and occupational licensing agencies from disqualifying an applicant unless there is a "direct" relationship between the occupation or license and conviction history, and the individual has not shown evidence of sufficient rehabilitation. *Id.*

Under Minnesota law, in determining whether a conviction directly relates to the position of public employment sought or the occupation for which the license is sought, the hiring or licensing authority is required to consider:

1. the nature and seriousness of the crime(s) for which the individual was convicted;

2. the relationship of the crime(s) to the purposes of regulating the position of public employment sought or the occupation for which the license is sought; and

3. the relationship of the crime(s) to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation.

Minn. Stat. § 364.03, subd. 2 (2012).

Even if the person has been convicted of a crime which directly relates to the public employment sought or to the occupation for which a license is sought, that person shall not be disqualified from the employment or occupation if the person can show competent evidence of sufficient rehabilitation and present fitness to perform the duties of the public employment sought or the occupation for which the license is sought. *Id.* at subd. 3(b). In the area of public employment and occupational licensing, the factors that must be considered involve a case-specific inquiry akin to that employed by the EEOC for Title VII enforcement guidance and then some.

For those who are denied public employment or licensure for prior conviction of a crime, notice must be provided that identifies the grounds and reasons for disqualification, the applicable complaint and grievance procedures, the earliest date the person may reapply, together with all competent evidence of rehabilitation that will be considered upon reapplication. Minn. Stat. § 364.05.

The are several exceptions to which the statute does not apply, such as licensing for peace officers, eligibility for school bus driver endorsements, and so on. Minn. Stat. § 364.09. Also excepted are attorneys and judicial branch employment. *Id.*

Since 2009, the general rule has been that "[a] public employer may not inquire into or consider the criminal record or criminal history of an applicant for public employment until the applicant has been selected for an interview by the employer." 2009 Minn. Laws c. 59 art 5 s 11. The statute did not apply to the Department of Corrections or to public employers who had a statutory duty to conduct a criminal history background check or otherwise take into consideration a potential employee's criminal history during the hiring process. Minn. Stat. § 364.021(b). In addition, a public employer was not prohibited from notifying applicants that law or the

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employer's policy would disqualify an individual with a particular criminal history background from employment in particular positions. Section 364.021(c).

Violation of the rights established under Minnesota statutes governing use of criminal record history in the area of public employment and occupation licensing constituted a violation of a person's civil rights. Minn. Stat. § 364.10.

IV. Minnesota's "Ban the Box" Legislation.

On May 8, 2013, Governor Mark Dayton signed SF523, Minnesota's so-called "Ban the Box" legislation (new law), into law. 2013 Minn. Laws Ch. 61 – S.F. No. 523; The Minnesota Office of The Revisor of Statutes' website indicates that the official 2013 session law will be available at the site in summer 2013. The bill amended certain sections of Minnesota Statutes Chapters 181 (concerning employment) and 364, referenced above (formerly concerning only public employment and occupational licensing) in significant respects.

As of January 1, 2014, the effective date of the new law, Minnesota statutes will no longer recognize an employer's right of a statement as to conviction of a public offense as a condition precedent to employment. As of January 1, 2014, both public and private employers "may not inquire into or consider or require disclosure of the criminal record or criminal history of an applicant for employment until the applicant has been selected for an interview by the employer or, if there is not an interview, before a conditional offer of employment is made to the applicant." *Id.*

Senator Bobby Joe Champion, one of the bill's authors, was reported to have stated that the legislation "would keep most employers from asking on job applications whether the person has ever been arrested or convicted of a crime." "'Ban the box' legislation would limit when job seekers have to reveal criminal past", *MINNPOST*, by James Nord, 04/22/13. The rationale was to prevent the scenario in which an application would reveal an arrest or conviction with the result that the application would simply be thrown away with no interview being granted. *Id.*

The above-referenced exceptions contained in the 2009 general rule applicable to public employers will remain in effect for public, and now private, employers under the new law. 2013 Minn. Laws Ch. 61 at § 364.021, as amended. There is a litany of additional exceptions, too voluminous to repeat here. However, some of the exceptions include those related to licensing for peace officers, fire protection agencies, private detectives, school bus driver endorsements, special transportation service endorsements, licensing for commercial driver trainer instructors, emergency medical services personnel and licensing by political subdivisions of taxicab drivers, if the applicant for the license has been discharged from sentence for a conviction within the ten years immediately preceding application of a violation of any of the several specified statutes. *Id.* at § 364.09 (as amended). An example of an additional exception is that the statute shall not apply to eligibility for juvenile corrections employment where the offense involved child physical or sexual abuse or criminal sexual conduct. *Id.*

The remedy for a public employer's violation of the new law is that the complaint or grievance shall be processed and adjudicated in an administrative proceeding. *Id.* at § 364.06, subd. 1 (as amended). In contrast, the Commissioner of Human Rights is charged with the investigation of the new law by private employers. *Id.* at § 364.06, subd. 2. The Commissioner is authorized to impose penalties that are dependent on when (what date) the violation occurred, the number of violations, and the size of the employer. These remedies as to private employers are exclusive for violations of the Act. *Id.* at subd. 2(d).

For violations of the new law by a private employer that occur after December 31, 2014, if the employer employs ten or fewer persons at a site in this state, the penalty is up to $100 for each violation, not to exceed $100 in a calendar month. *Id.* at subd. 2(c)(1). This increases to $500 for each violation, not to exceed $500 in a calendar month, for employers of 11 to 20 persons, and to $500 for each violation, not to exceed $2,000 in a calendar month for employers of more than 20 persons. *Id.* at subd. 2(c)(2) and (3). For violations occurring before January 1, 2015, the Commissioner is to issue a written warning. *Id.* at subd. 2(b)(1). If the violation is not remedied within 30 days of the issuance of the warning, the Commissioner may impose up to a $500 fine. *Id.* at subd. 2(b)(2). Subsequent violations before January 1, 2015 are subject to a fine of up to $500 per violation, not to exceed $500 in a calendar month. *Id.* at subd. 2(b)(3). As can be seen from examination of the statute, the penalty provisions are written in a contradictory manner; a penalty for violations occurring after December 31, 2014, can be greater than a penalty for violation before January 1, 2015 (even though after December 31, 2014, by definition, is before January 1, 2015). Legislative correction is in order.

V. Should Employers Stop Performing Criminal Background Checks?

In light of the potential for litigation and liability, should employers discontinue conducting criminal background checks altogether? The easy answer is no. Depending on the circumstances, employers may be exposed to civil liability for injury to others by an employee when a criminal background check would have revealed that the individual hired posed a threat of injury.

Liability in such circumstances is "predicated on the negligence of an employer in placing a person with known

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propensities, or propensities which should have been discovered by reasonable investigation, in an employment position which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others." *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 911 (Minn. 1983) (recognizing the tort of negligent hiring and adopting Restatement (Second) Agency § 213 (1958)).

While the *Ponticas* court refused to institute a blanket duty requiring criminal background checks by employers in all cases, one of the main reasons the court upheld judgment against the owner and operator/landlord of an apartment complex in favor of a tenant who was raped by the apartment manager, was the failure of the landlord (who gave the manager a passkey to 198 apartment units) to make sufficient inquiry that would have led to information about the manager's previous convictions for crimes of violence. Liability in the state of Minnesota for failure to make sufficient inquiry to discover known propensities, including past criminal conduct, remains alive and well. See *e.g. D.D.N. v. Face Festivals and Concert Events*, No. A09-707, 2010 WL 1190137 (Minn. Ct. App. Mar. 30, 2010) (upholding trial court's determination of duty to make sufficient inquiry in case where music festival organizer employer could have easily discovered that employee who sexually assaulted patron had past criminal history for first-degree sexual assault).

PRACTICE POINTERS

The following are practices an employer may consider instituting to minimize exposure for a claim related to consideration and use of criminal background history in employment.

I. Application for Employment.

In Minnesota, by at least January 1, 2014, employers should not have a request for criminal history in employment applications (unless the employer is a public employer that is specifically identified as being excepted from the requirements of the statute). This has already been the recommendation of the U.S. Department of Labor for federal contractors and subcontractors and federally-assisted construction contractors and subcontractors. U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), No. 306, January 29, 2013 ADM Notice ("Like the EEOC, OFCCP recommends that contractors, as a general rule, refrain from inquiring about convictions on job applications.").

Employers subject to the new "Ban the Box" statute are required *not to consider criminal record or criminal history* prior to the interview or, if there is no interview, conditional offer of employment. Therefore, at least by January 1, 2014, employers should consider refraining from looking up criminal records and history of prospective employees prior to the interview of an applicant or, if no interview, conditional offer of employment.

The application may still provide that an offer of employment is contingent on the receipt of a satisfactory background check.

II. The Use of Consumer Reporting Agencies; Yes, There Is an App for that.

If an employer uses a consumer reporting agency to perform the criminal background check, the requirements of the Fair Credit Reporting Act should be adhered to. In addition, employers should not make the mistake of believing that subscription to a criminal history checking app equates with compliance. *See e.g. In the Matter of Filiquarian Publishing, LLC*, et al. FTC File No. 112 3195, Docket No. C4401 (2013) (publisher of app advertised to permit search for criminal history of prospective employees alleged to have violated FCRA and Federal Trade Commission Act) and Consent Order.

III. Targeted Screening and Individual Assessment.

Employers should not institute a blanket policy concerning exclusion from employment based on any criminal record. Consider developing a targeted written policy and procedure for screening applicants and employees for criminal conduct that follows, at base, the *Green* factors above; the decision in *Green v. Missouri Pacific R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977) remains good law, providing precedent for the U.S. District Courts for the State of Minnesota.

The screening policy should also:

- Identify essential job requirements and the circumstances under which they are performed;
- Determine the offenses that may demonstrate unfitness for performing the job in question;
- Identify the criminal offenses of the applicant/employee based on available evidence/sources;
- Consider limiting the duration of exclusions for criminal conduct based on available evidence/sources and the job at issue;
- Include an individual assessment (notification that the individual may not be hired/the individual's employment may be terminated based on the criminal history and afford an opportunity to explain errors, mitigating factors and context that may satisfy an employer's concern) if possible.

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The employer should keep record of consultations and research performed in the development of the policy and procedures.

Employ the screening standard in a consistent manner. Ensure that those with similar records are treated in the same manner, regardless of race or national origin.

Take extreme care regarding consideration of arrest records. An arrest does not equate with the conviction of a crime. Therefore, the EEOC has taken the position that exclusion based on an arrest, in itself, is not job related or consistent with business necessity. EEOC Enforcement Guidance No. 915.002 at 12. On the other hand, an employer may be legitimately concerned about an arrest record, particularly when the matter remains pending before the criminal court. While the EEOC is of the position that an arrest record, itself, may not be considered, an employer can perform an investigation into the underlying conduct in an effort to determine whether the prospective or current employee is fit for the particular job held or sought. As the EEOC has related, depending on the circumstances, an employer may, in accordance with the law, make an employment decision based on the confirmed conduct for which the person was arrested, rather than the fact of the arrest, itself. *Id.*

D. Train Hiring Officials and Decision Makers on how to Implement Hiring Policies in a Manner Consistent with Federal and State Laws.

Employers should have employees that perform hiring and discipline trained regarding acceptable use of criminal background history in hiring and discipline in conformance with federal and state laws. Regarding the latter, do not assume that compliance with state law, in and of itself, automatically equates with compliance under federal law. Courts have held that "the mandates of state law are no defense to Title VII liability." See e.g. *Gulino v. New York State Educ. Dept.*, 460 F.3d 361, 380 (2nd Cir. 2006).

MDLA UPCOMING DATES

2013

MDLA 2013 Trial Techniques Seminar
Duluth Entertainment & Convention Center
Duluth, MN
August 22-24, 2013

Insurance Law Committee Meeting
Bassford Remele Law Firm
September 10, 2013

Medical Liability and Health Care Law Committee Meeting
Meagher & Geer, PLLP
September 26, 2013

Insurance Law Committee Meeting
Bassford Remele Law Firm
November 12, 2013

Medical Liability and Health Care Law Committee Meeting
Meagher & Geer, PLLP
November 21, 2013

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