

Arrest + Conviction = Job Offer?

By Byrona J. Maule, Phillips Murrah P.C.

Almost all employers do some type of background check on applicants. Many include criminal background checks—a practice that has recently come under fire from the Equal Employment Opportunity Commission for possible disparate impact upon minorities. The EEOC is paying very close attention to how employers are using criminal background checks—both arrest records and criminal convictions—and has prioritized the issue as a strategic initiative for 2012.

Last September, in a written response to a request for public comment on the Peace Corps Volunteer application, lawyers for the EEOC expounded upon its position on the use of criminal arrest and conviction records in the hiring process.¹ The letter is an informal discussion of the issue and does not constitute an official opinion of the Commission, but it is certainly indicative of the perspective the EEOC is taking on employers' use of arrest and conviction records in the hiring decision.

At issue are these two portions of the Peace Corps' related policies:

Applicants with *any drug-related charge/arrest or conviction in their legal history are not eligible to have their application considered for Peace Corps service until one year has passed from the date of the arrest, or conviction, whichever is later. Applicants charged with, or convicted of, public intoxication, DUI,*

DWI, or who receive a reduced charge of, or conviction for reckless driving from an initial charge of DUI or DWI, or who have a similar alcohol related offense in their legal history, are not eligible to have their application considered for Peace Corps service until one year has passed from the date of the offense or conviction, whichever is later. This includes arrests and citations.

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All Peace Corps invitees must undergo a National Agency Check (NAC) background investigation to help determine legal eligibility for service. *The NAC investigation will reveal all arrests regardless of disposition (i.e., suspended sentence, deferred judgment, dismissal, not guilty, reduced charge, mistaken identity, or expungement), therefore it is required that you disclose to the Peace Corps your official legal history and other experiences.* The NAC form and fingerprint charts will be provided at a later date.

The Peace Corps Volunteer application included multiple questions about the applicant's criminal history, including arrests and convictions. While recognizing that the Peace Corps has an interest in selecting employees who would not pose "an unacceptable risk" to the communities it served and that pre-employment inquiries aren't per se in violation of Title VII, the EEOC frowned on the policies and questions—asserting that use of this type of information

could violate Title VII, if the employer uses the information to discriminate against minorities.

The EEOC noted that these types of policies could have a disparate impact if the policies were applied differently to minorities than to whites. The letter also stated that "disproportionate numbers of African Americans and Hispanics are arrested and convicted, [thus] the use of conviction and arrest records to make employment decisions is likely to have a substantial disparate impact on those groups."

If there is a disparate impact, the employer may use the information only if it is "job related and consistent with business necessity," which means that the criminal conduct must be recent enough and sufficiently job related to be predictive of the applicant's performance in the sought position, given its duties and responsibilities.

What does this mean for employers? First, it requires a case-by-case analysis. Job descriptions are extremely important, because to meet the business necessity standard, the employer must tie the criminal behavior to a duty or responsibility of the position the applicant seeks. The EEOC has asserted that empirical evidence will be required to prove this standard.

Further, the Commission espoused that arrest records are unreliable indicators of guilt and, therefore, arrest records

should not be used, unless the criminal inquiry is related to the position in question, and—even then—only if the applicant is given a reasonable opportunity to dispute the validity of the records, to ensure the information is accurate.

The EEOC's bottom-line recommendation was that the Peace Corps needed to reevaluate and narrow its policies and tailor applicant questions to the duties pertinent to the position for which the applicant is applying. It also recommended limiting inquiries to the prior seven-year period.

Employers, I suggest reevaluating your hiring policies and applicant questions, using the EEOC's "informal" letter as a guideline. Examine all policies, applications, interview guidelines and job descriptions and duties, to ensure that the background information you gather and use in the application process meets the job related and business necessity standards.

About the Author... Byrona J. Maule is a successful labor and employment attorney with over 20 years of experience representing employers - from the courtroom to the boardroom - in H.R. matters. A director at Phillips Murrah P.C., Oklahoma City's third-largest law firm, Maule provides her clients with the power of a strategic partner. You may contact Maule at bjmaule@phillipsmurrah.com or (405) 235-4100.

¹ The letter is available in its entirety at:

http://www.eeoc.gov/eeoc/fpoa/letters/2011/title_vii_criminal_reconrd_peace_corps_application.html