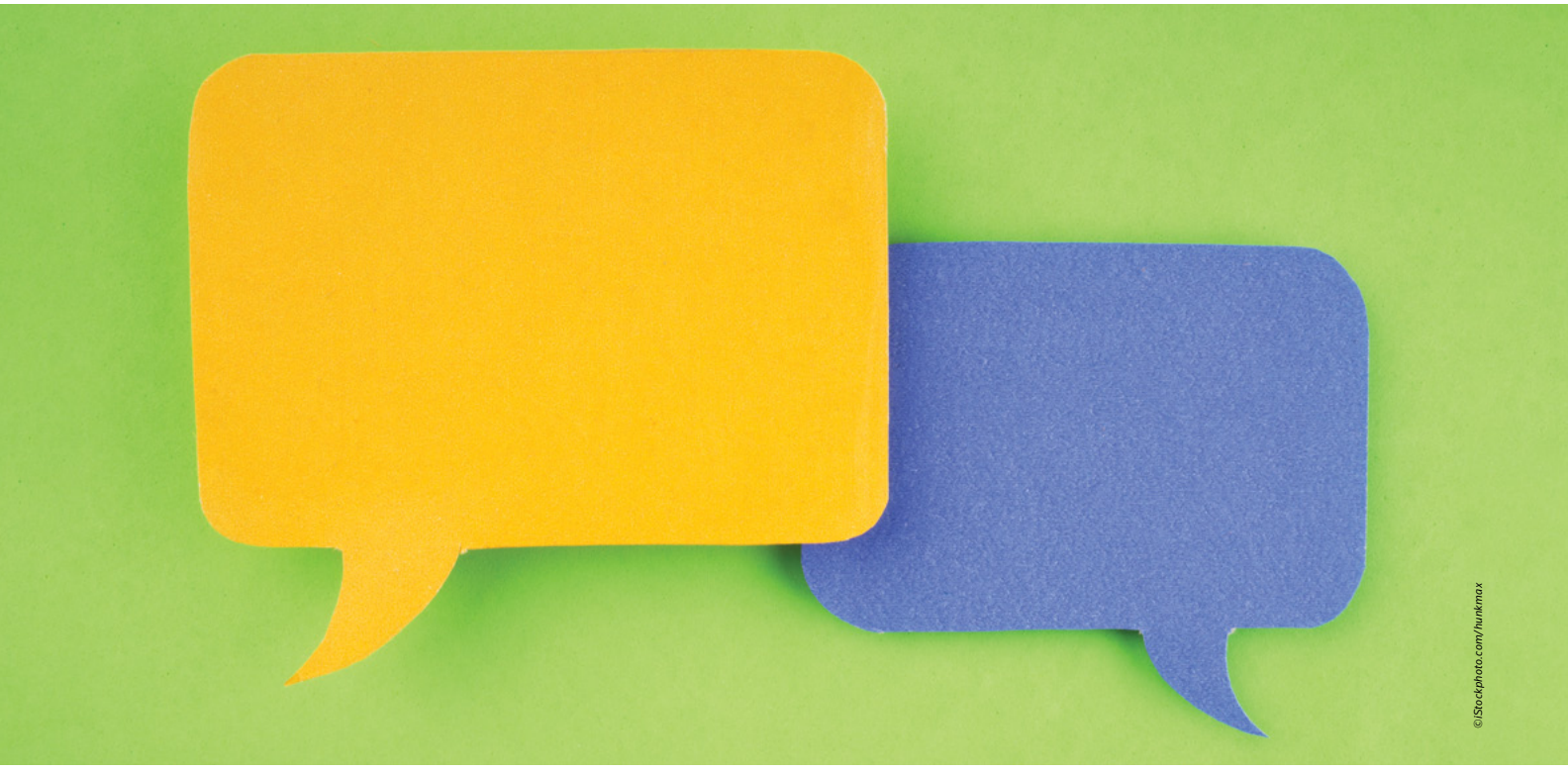

Criminal Charges and Employment Decisions

Understanding the various laws governing the use of criminal history in employment decisions can be challenging. So-called ban-the-box and other anti-discrimination laws generally impose limitations on when and how employers may consider this information when taking employment actions. However, employers may also face liability for negligent hiring or retention if they do not make criminal history inquiries but otherwise learn of past or pending criminal charges against an applicant or employee. Practical Law asked *Justin T. Kelton* of *Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP* to discuss the complex legal issues surrounding criminal history discrimination in employment and provide best practices for employers.

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What laws govern an employer's consideration of employees' or applicants' criminal history?

This issue is mostly addressed by state law. It is important for employers to be aware of the specific laws that apply in their jurisdiction. Although state and local laws vary considerably, there are many common themes and overlapping concepts regarding prohibited inquiries and employment actions.

In New York, for example, there is a complex statutory patchwork of numerous laws addressing how employers

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may handle employees' or applicants' criminal histories. The most broadly applicable statute in New York is Executive Law Section 296(16) of the New York Human Rights Law. Executive Law Section 296(16) provides that it is unlawful for an employer "to make any inquiry about" or "to act upon adversely" any arrest or criminal accusation "not then pending against that individual" that was followed by, among other things, "a termination of that criminal action or proceeding in favor of such individual ... or by an order adjourning the criminal action in contemplation of dismissal" (N.Y. Exec. Law § 296(16)).

Executive Law Section 296(16) also provides that "no person shall be required to divulge information pertaining to any arrest or criminal accusation" that is "not then pending" or was followed by a termination in favor of the individual. If an individual is asked to provide information in violation of the law, the employee or applicant is allowed to "respond as if the arrest, criminal accusation, or disposition of such arrest or criminal accusation did not occur." (N.Y. Exec. Law § 296(16).)

Additionally, employers must consider Section 752 of the New York Correction Law, which provides that no one may be denied employment based on a prior criminal conviction unless either:

- There is a direct relationship between the criminal offenses and the specific license or employment sought or held by the individual.
- The granting or continuation of the employment involves "an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."

(N.Y. Correct. Law § 752.)

The New York Correction Law also provides a list of factors employers should consider when making an employment determination regarding a previous criminal conviction, including the specific job duties involved and the time elapsed since the criminal offense (N.Y. Correct. Law § 753).

That employers must consider portions of the state's anti-discrimination laws and corrections laws shows just how complex this analysis can be. Ensuring compliance with these laws can be even more challenging for multistate employers. The statutory scheme varies from state to state, but many jurisdictions have laws similar to those of New York. State law may also permit or even require criminal background checks for certain professions or industries (for example, law enforcement or childcare).

Search Ban-the-Box State and Local Laws Chart: Overview for more on state and local laws restricting employers from inquiring about an applicant's criminal history during the recruitment process.

Do federal anti-discrimination statutes cover alleged discrimination on the basis of an employee's criminal record?

Federal courts have widely held that Title VII of the Civil Rights Act of 1964 (Title VII) does not cover discrimination based on a criminal record alone (see, for example, *Volpe v. Conn. Dep't of Mental Health & Addiction Servs.*, 88 F. Supp. 3d 67, 72 (D. Conn. 2015) ("Status in groups outside of one of the named protected classes, such as convicted felons, does not confer a right of action under Title VII"); *Williams v. City of New York*, 916 F. Supp. 2d 517, 524 n.3 (S.D.N.Y. 2013) ("Title VII does not address discrimination based on a criminal record"); *Gillum v. Nassau Downs Reg'l Off Track Betting Corp.*, 357 F. Supp. 2d 564, 569 (E.D.N.Y. 2005) (granting motion for summary judgment on pro se Title VII claim because "the Plaintiff's status as a convicted felon is not a protected class under Title VII")).

The Equal Employment Opportunity Commission (EEOC) has issued non-binding guidance on this issue. The guidance states that the issue of "whether a covered employer's reliance on a criminal record to deny employment violates Title VII depends on whether it is part of a claim of employment discrimination based on race, color, religion, sex, or national origin" (EEOC, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (Apr. 25, 2012), available at *eeoc.gov*).

A plaintiff may therefore potentially maintain a claim where an employer takes adverse action based on a criminal record and that employment action is part of a claim for discrimination based on a legally protected class (for example, if an employer rejects an applicant of one race based on a criminal record, but employs another individual of a different race with the same criminal record).

According to the EEOC guidance, an employer may also violate Title VII under a disparate impact theory if:

- The employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group.
- The employer fails to demonstrate that the policy or practice is job-related for the position in question and consistent with business necessity.

Courts differ on how to analyze criminal history policies and how much deference to afford the EEOC guidance.

The federal Fair Chance to Compete for Jobs Act of 2019, which will go into effect on December 20, 2021, also prohibits federal contractors from inquiring about a job applicant's criminal background in certain parts of the application process.

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Search Race, Color, and National Origin Discrimination Under Title VII and Section 1981 for more on the federal laws prohibiting discrimination, harassment, and retaliation against applicants and employees.

Search Discrimination: Overview and Discrimination Under Title VII: Basics for more on discrimination under federal law generally.

Employers should focus on the nature of the alleged conduct and the likelihood that the conduct occurred, as opposed to any arrests or charges flowing from the conduct.

How do anti-discrimination laws distinguish among arrests that have been dismissed, criminal convictions, and criminal charges that are currently pending?

Employers should review applicable state law to determine how the law distinguishes among arrests, charges, and convictions, as well as how it distinguishes between currently pending charges and past arrests or charges that have been cleared or dismissed.

In New York, for example, there is an important legal distinction between charges that have been dismissed and those that are pending. Executive Law Section 296(16) makes it unlawful for an employer to inquire about or act on any arrest or charge "not then pending against that individual" if the arrest or charge was followed by:

- A termination of that criminal action or proceeding in favor of the individual.
- An order adjourning the criminal action in contemplation of dismissal.

(N.Y. Exec. Law § 296(16).)

Therefore, while an employer in New York may properly consider convictions or pending charges under certain circumstances, the law prohibits employers from making adverse decisions based on charges that were dismissed, terminated in the individual's favor, or adjourned in contemplation of dismissal.

Notably, the protections afforded by Section 752 of the New York Correction Law apply only to individuals convicted of a crime, as opposed to those facing pending charges (N.Y. Correct. Law § 752). This can lead to the surprising result that, in certain cases, individuals convicted of crimes may have greater protections than those with pending charges.

Is there a distinction between considering criminal charges and considering the conduct underlying the charges in making employment decisions?

While federal law does not specifically bar discrimination based on arrest records, EEOC guidance states that using arrest records in employment decisions may have a disparate impact on certain protected groups. However, the EEOC guidance states that employers may exclude an individual from employment based on business justification if:

- It appears that the applicant or employee engaged in the conduct leading to the arrest.
- The conduct that indicates unsuitability for a particular position is job-related and relatively recent.

(See EEOC, Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (Sept. 7, 1990), available at *eeoc.gov*; see also EEOC, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (Apr. 25, 2012), available at *eeoc.gov* ("Although an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question."); EEOC, Tips for Small Businesses: Criminal Records, available at *eeoc.gov* ("an arrest may trigger an inquiry into whether the conduct underlying the arrest justifies a negative employment decision").)

Employers must also consider any relevant state law that prohibits inquiry into or consideration of a (non-pending) charge. This presents a complicated issue if the employer:

- Independently learns about an individual's alleged criminal conduct without making a prohibited arrest record inquiry (for example, if the charges are publicly available or widely broadcast or otherwise brought to the employer's attention), raising questions about whether the employer must ignore this information.
- Seeks to make an employment decision based on conduct that renders an individual unsuitable or

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disqualified for a job, but also cannot discriminate based on a dismissed arrest stemming from that conduct.

Although it does not address state law rules and nuances, EEOC guidance generally indicates that employers should focus on the nature of the alleged conduct and the likelihood that the conduct occurred, as opposed to any arrests or charges flowing from the conduct (see *Clemons v. WellPoint Cos., Inc.*, 2013 WL 1092101, at *12 (N.D.N.Y. Mar. 15, 2013) ("Once an employer or licensing agency lawfully discovers an arrest record 'it [is] permissible to consider the independent evidence of the conduct leading to the criminal charges.'")).

In some instances, the underlying conduct may not be at issue even if the criminal action was terminated. For example, the charges may have been dismissed based on a technicality (such as a statute of limitations), rather than a lack of evidence. There may be no dispute that the individual engaged in criminal conduct. The conduct may have been caught on camera or the employee or applicant may have admitted to the conduct. In other instances, it may be more challenging for the employer to determine the likelihood that the alleged conduct actually occurred. Counsel should assist the employer in navigating these challenges and advise on best practices to minimize the risk of liability for a potential discrimination claim.

How should an employer handle an employee who has engaged in distasteful or embarrassing conduct that may be illegal, but does not necessarily result in a criminal charge?

This is an interesting issue that has been arising more frequently in the context of public incidents that have led to individuals being "canceled" by the public and terminated by their employers. A recent example involves a woman widely dubbed as "Central Park Karen." She allegedly called the police on a Black man birdwatching in Central Park who asked her to leash her dog. The incident was caught on video and the woman was accused of racism, fired from her job, and ultimately criminally charged with making a false police report. Similar incidents of distasteful (and potentially criminal) public conduct have recently been reported or recorded in a variety of contexts.

Many employers question whether they can terminate an employee engaging in this type of embarrassing public conduct, even if it is entirely unrelated to the employee's job. In most cases, the answer is straightforward. If the employer is in a state with at-will employment and the employee has no employment contract or other heightened protections, the employer can terminate the employee for any reason, including embarrassing or inappropriate behavior, even if it is unrelated to the employee's job. Employers and their counsel should analyze each case individually to determine the appropriate course, but, generally speaking, individuals engaging in distasteful behavior are not protected from suffering employment consequences.

If the individual's conduct is unlawful and leads to criminal charges, the analysis is the same as discussed above. If the individual's conduct is not illegal, employers must ensure they do not run afoul of any lawful, off-duty conduct laws in their state.

Search Privacy in the Employment Relationship for more on privacy issues in employment, including employees' lawful, off-duty activities.

What steps should an employer take after learning that an employee or applicant has a pending criminal charge?

The employer should consult with experienced employment counsel to learn about the individual state laws that may affect the situation. In a state with laws similar to the New York statutes discussed above, the employer should thoroughly document how it came to learn of the information. Courts give more leeway to employers inadvertently obtaining this information, as opposed to seeking it out intentionally (which may violate a state's unlawful criminal inquiry law).

The employer should then carefully consider any conduct related to the charge, including making a reasoned determination about the likelihood that the conduct occurred and the time that has passed since the conduct. The employer should also analyze whether the information affects the individual's ability to perform the job at issue. Depending on the answers to these questions and the particular state laws that apply, the employer should work with counsel to reach and implement an appropriate and defensible decision regarding how to handle the employee or applicant.

Employers should also have policies and procedures in place that address criminal background checks (and other background checks) and train employees with hiring authority on these policies.

Search Guidelines for Using Background Checks in Employment for model guidelines for hiring managers and human resources staff on using background checks in employment, with explanatory notes and drafting tips.

Search Background Checks and References and Using Background Checks in Employment Checklist for more on background checks in the employment context.

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