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# Hold On To Your Employer Handbooks: Part 2

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This is the part two of a three-part series regarding federal agency challenges to a wide variety of employer policies. In this part, we discuss the U.S. Equal Employment Opportunity Employment Commission's and Occupational Safety and Health Administration's regulation of restrooms as well as the EEOC's guidance on background checks.

**I. Gender-Specific Restroom Use Policies**

Employers should carefully review their restroom use policies and examine the way they enforce those policies. Both the EEOC and OSHA have sent warning messages to employers to respect a transgender employee's choice of bathroom.

***A. EEOC Enforcement Actions***

On April 8, 2015, in Lusardi v. McHugh, No. 0120133395 (April 1, 2015), the EEOC found that the Department of the Army violated the sex discrimination provisions of Title VII when it prohibited a male-to-female transgender employee from using the common women's restroom. In Lusardi, the civilian employee complainant transitioned from a man to a woman during the course of her employment. Complainant met with her supervisors to discuss the process her transition from presenting herself as a man to presenting herself as a woman. During that meeting, a plan was created which indicated that complainant would use the "single-user" or "executive" restroom rather than the common women's room. Complainant initially agreed to the terms of this plan, but ultimately testified that she believed that because she was a woman, she was free to use whichever women's restroom she wanted.

Following her transition, complainant regularly used the single-user restroom — except when the single-user restroom was out of order or being cleaned. On those instances, complainant testified that her only options were to use a different restroom off-site or to use either the common women's or common men's restroom. She used the restroom that was associated with her gender: the common women's room. On each of those occasions, complainant's supervisor told her "she was making people uncomfortable" and that "she had to use the executive restroom until she could show proof of having undergone the 'final surgery.'" In addition to her restroom restrictions, complainant testified that there were times when her supervisor continued using the male pronoun in reference to her in order to "elicit a response."

Complainant filed a complaint, and the Army conducted an investigation. It found that it had "legitimate, nondiscriminatory reasons for its requirement that she use the executive restroom, and that complainant failed to show that the explanations were pretext for unlawful discrimination." It also noted that complainant agreed to use the single-user restroom until she had surgery and that complainant had not shown that she was subject to disparate treatment because she did not complain that the amenities in the single-user restroom were inadequate compared to the common restroom.

Ruling on an issue of first impression, the EEOC rejected the Army's view and overturned the final agency decision. The EEOC stated that "[t]his case represents well the peril of conditioning access to facilities on any medical procedure." Further, examining the law, the EEOC determined that "[n]othing in Title VII makes any medical procedure a prerequisite for equal opportunity (for transgender individuals, or anyone else)." For the EEOC, where a transgender female has let her employer know that she is living and working full-time as a woman, then the employer must allow her access to the women's restroom. Or, in other words, gender reassignment surgery is not a fundamental element of a transition.

In its Lusardi decision, the EEOC also provided some guidance on workplace transitions, stating that "for a variety of reasons, including the personal comfort of the transitioning employee, a transition plan might include a limited period of time where the employee opts to use a private facility instead of a common one." The EEOC also noted that because "[c]ircumstances can change, however and an employee is never in a position to prospectively waive Title VII rights," all plans relating to facility access should be viewed as a "temporary compromise." The employee retains the right, under Title VII, to use the facility designated for individuals with his or her gender.

The EEOC further acknowledged that "certain employees may object — some vigorously — to allowing a transgender individual to use the restroom consistent with his or her gender identity." However, for the EEOC, "supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment." Bowing to the preferences of co-workers "reinforces the very stereotypes that Title VII is intended to overcome." In response to the Army's argument that it is not clear whether restricting complainant's use of common restrooms is an adverse employment action, the EEOC stated that not only is equal access to restrooms a significant term of complainant's employment, any restriction in restroom use "perpetuated the sense that [complainant] was not worthy of equal treatment and respect" and indicated that the Army "refused to recognize complainant's very identity."

In addition to requiring the Army to immediately grant the complainant equal and full access to the common restroom facilities, the EEOC also ordered the department to further investigate what happened and to allow complainant to show whether she was subjected to compensatory damages. The EEOC also ordered the Army to complete specific training, post notices and institute specific policies.

***B. OSHA Guidance***

The EEOC is not the only agency to weigh in on this issue. On June 1, 2015, OSHA issued a four-page booklet, “Best Practices: A Guide to Restroom Access for Transgender Workers.” While the OSHA guidance is not a rule, employers who do not follow the guidance could find themselves cited for a violation of the general duty clause — or Section 5(a)(1) of the Occupational Safety and Health Act.

While OSHA’s mandate is ensuring health and safety for workers, the OSHA guidance makes clear that the agency considers this issue a health and safety matter. For OSHA, it is “essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives, based on their gender identity.” Further, OSHA noted that its sanitation standard requires employers to provide employees with access to toilets that is not unreasonably restricted. Overall, OSHA’s guidance states that “all employees should be permitted to use the facilities that correspond with their gender identity” and clarifies that it is the employee — not the employer — who determines the most appropriate and safest restroom for him or her to use. For OSHA, the best policies include additional options of bathrooms that employees could choose, but are not required to use. Those options may include single-occupant gender neutral facilities or multiple occupant, gender-neutral facilities with lockable single occupant stalls. OSHA’s guidelines make clear that an employer should not require any employee to provide medical or legal documentation of their gender identity in order to get access to a restroom facility. No employee should be required to use a segregated facility because of their gender identity or because they are transgender.

OSHA further noted in its guidance that state and local laws have been enacted affirming the principle that employees should be allowed to use restrooms that correspond to their gender identity, and listed out short descriptions of the laws from Colorado, Delaware, the District of Columbia, Iowa, Vermont and Washington.

**II. Background Check Policies**

In the wake of the EEOC’s guidance on the use of criminal records in employment decisions, a wave of state and local laws have been implemented. Employers should be very cautious about their policies on obtaining — and using — applicant criminal record information.

***A. EEOC Guidance***

On April 25, 2012, the EEOC promulgated "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions" in order to update and expand prior guidelines about using arrest or conviction records in employment decisions under Title VII. In the guidance, the EEOC states that there has been a “significant increase” in the number of Americans who have served time in prison in the last 20 years and notes that arrest and incarceration rates are particularly high for African-American and Hispanic men.

Because having a criminal record is not a protected status, the EEOC notes that in order for a covered employer’s reliance on a criminal record in denying employment to violate Title VII, it must be a part of a claim of employment discrimination based on a protected status. There are two frameworks for these claims: “disparate treatment” and “disparate impact.”

First, describing disparate treatment claims, the EEOC warns employers against treating potential employees differently based on a protected status — like race — when using criminal background information to make an employment decision. “[T]here is Title VII disparate treatment where the

evidence shows that a covered employer rejected an African-American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record." But, the EEOC warns that, in addition to straightforward disparate treatment claims, "an employer's decision to reject a job applicant based on racial or ethnic stereotypes about criminality — rather than qualifications and suitability for the position — is unlawful disparate treatment."

As a continued warning to employers using criminal background checks, the EEOC lists the type of evidence that can show that an applicant's protected status motivated the way an employer used criminal records in a hiring decision. These include: biased statements, inconsistencies in the hiring process, different treatment for people in similar positions and statistical evidence. Employers are advised to evenly conduct background checks and to give every individual an equal opportunity to explain their criminal history.

Second, describing disparate impact claims, the EEOC explains that "[a] covered employer is liable for violating Title VII when the plaintiff demonstrates that the employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job-related for the position in question and consistent with business necessity." After identifying the exclusionary policy or practice, the EEOC will then work to determine disparate impact.

In support of disparate impact in the context of criminal record exclusions, the EEOC cites the disproportionate nationwide incarceration and arrest rate for African-American and Hispanic men. Once the EEOC is investigating a Title VII disparate impact charge, the employer can provide data — like "regional or local data" or "applicant data" — in order to show that a particular employment policy or practice does not cause a disparate impact. Further, in the EEOC's view, evidence of a "racially balanced workforce" will not be sufficient to disprove disparate impact.

If the plaintiff is able to show disparate impact, Title VII shifts the burden to the employer to demonstrate that the challenged practice is job-related and consistent with business necessity. In order to assess, the EEOC may consider: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct and/or completion of the sentence; and (3) the nature of the job held or sought. Further, the agency points out that there is a distinction between an arrest and a conviction; the fact of an arrest does not establish that criminal conduct has occurred. In order to show that a criminal conduct exclusion is permissible under Title VII, the employer needs to "show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position."

The guidance concludes with suggested best practices for employers, which begins with the suggestion that employers not exclude anybody from employment based on any criminal record. In addition, the EEOC advises employers to train supervisors and decision makers on Title VII compliance. However, most of the EEOC's guidance focuses on developing a policy for screening applicants and including specific pieces of information in that policy. For instance, the policy could include specific offenses that may demonstrate unfitness for performing certain jobs and the duration of exclusions for criminal conduct. The justification for the policy and procedures should be recorded. Further, inquiries about criminal records should be limited to those records for which exclusion would be job-related and consistent with business necessity — or, in other words, don't ask somebody about it if you can't legally choose to not hire them based on their answer.

***B. Subsequent Federal and State Action***

On Nov. 2, 2015, President Obama ordered federal agencies to stop asking prospective employees about their criminal histories at the beginning of the application process. In a statement, the president said that, “This action will better ensure that applicants from all segments of society, including those with prior criminal histories, receive a fair opportunity to compete for federal employment.” The president has also called on Congress to “ban the box” on job applications; Congress is currently considering legislation that would “ban the box” for federal hiring and hiring by federal contractors.

Further, at least 19 states and 100 municipalities have enacted ban-the-box laws that require public or private employers — or both — to remove questions about criminal history from job applications. Like President Obama’s order, these laws are motivated by a growing public interest in improving recidivism rates by providing applicants a fair opportunity by removing questions about conviction history from the job application and waiting until later in hiring to do a background check inquiry.

These states include: California (2013, 2010), Colorado (2012), Connecticut (2010), Delaware (2014), Georgia (2015), Hawaii (1998), Illinois (2014, 2013), Maryland (2013), Massachusetts (2010), Minnesota (2013, 2009), Nebraska (2014), New Jersey (2014), New Mexico (2010), New York (2015), Ohio (2015), Oregon (2015), Rhode Island (2013), Vermont (2015), and Virginia (2015).

Of those, seven states have removed the conviction history question on job applications for private employers, while the rest solely deal with public employers. Those states constraining private employers include: Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon and Rhode Island.

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