EEOC RESCINDS GUIDANCE ON EMPLOYERS' USE OF ARREST AND CONVICTION RECORDS

Background checks are a routine part of the hiring process for many employers, but deciding what to do with the information they uncover is not always straightforward. The Equal Employment Opportunity Commission ("EEOC") recently rescinded its longstanding enforcement guidance related to employers' consideration of arrest and conviction records. Wisconsin employers, however, should not assume that the legal restrictions surrounding criminal-history screening have disappeared. The Wisconsin Fair Employment Act ("WFEA") directly protects individuals from discrimination based on arrest and conviction record, while an employer's use of criminal-history information may also continue to implicate Title VII when it results in discrimination based on race, national origin, or another protected characteristic.

On October 28, 2026, the EEOC rescinded its 2012 Enforcement Guidance on employers' use of arrest and conviction records, effective immediately. The Guidance had addressed the fact that an employer's consideration of criminal history could result in either disparate treatment or disparate impact liability under Title VII.

The rescission means that employers should no longer treat the 2012 Guidance as reflective of the EEOC's current enforcement position. It does not, however, change the requirements of Title VII or affect other federal, state, or local laws that restrict employers' use of criminal history information. Accordingly, employers remain subject to Title VII's disparate treatment and disparate impact standards when considering arrest and conviction records.

The revocation of the EEOC Guidance also does not change employers' obligations under Wisconsin law. The WFEA continues to prohibit employment discrimination based on an individual's arrest record or conviction record.

The WFEA treats arrest records and conviction records differently. An arrest record generally includes information showing that an individual has been questioned, apprehended, taken into custody, held for investigation, arrested, charged, indicted, or tried for an offense and generally cannot be the basis for an adverse employment decision. A conviction record, by contrast, generally includes information showing that an individual has been convicted of an offense and can only be used as the basis of an adverse employment decision if the circumstances of the conviction are substantially related to the circumstances of the particular job.

The bottom line is that the EEOC's rescission of the 2012 Guidance does not change the text of Title VII or eliminate potential Title VII liability arising from an employer's use of criminal history information. It does, however, reflect a significant change in the EEOC's enforcement

approach. More importantly for Wisconsin employers, it does not change the obligations under the WFEA to not discriminate on the basis of arrest and conviction records. Wisconsin employers should therefore continue to evaluate employment decisions involving criminal history to ensure that their practices comply with the WFEA's protections for arrest and conviction records, including the substantial relationship standard where applicable. As always, O'Neil Cannon is here for you. We encourage you to reach out with any labor and employment questions, concerns, or legal issues you may have, including those surrounding an applicant or employee's arrest or conviction record.