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**BANK OF AMERICA'S RECENT JOB POSTINGS
REQUIRING APPLICANTS TO DEMONSTRATE NO
CRIMINAL RECORD FACE INCREASED SCRUTINY
BY EEOC**

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Earlier this month, several labor and advocacy groups asked the Equal Employment Opportunity Commission to investigate recent Bank of America job postings for positions at its Hayward, California, location. The postings required all applicants to demonstrate, by passing a background check, that they had "no felonies or misdemeanors." This, the groups contend, violates Title VII.

Under Title VII, an employer generally may not adopt a facially neutral employment policy that, when applied, has a disparate impact on someone because of his or her race, color, religion, sex, or national origin. In the context of job applicants' criminal records, Title VII prohibits use of any absolute exclusion from employment because of arrests or convictions, unless justified by business necessity or particular job requirements. This prohibition stems from the disproportionate number of convictions and arrests among African-Americans and Hispanics when compared with Caucasians. Thus, a policy excluding applicants from employment because of a felony or misdemeanor conviction would have a disparate impact on African-American and Hispanic applicants and violate Title VII.

Title VII does not prohibit an employer from considering applicants' criminal histories altogether. What is important is that the employer consider the nature of any arrests and convictions, their potential relation to and impact on the position, and other individual characteristics. As long as an employer's policy does not automatically disqualify candidates with an arrest or conviction, it is unlikely to run afoul of Title VII. In the case of Bank of America, an ad informing potential applicants that they would have to pass background checks for specific offenses related to the job would not likely be questioned.

This recent scrutiny of Bank of America's job postings is a reminder that consideration of applicants' criminal records, while important and of legitimate concern, may subject an employer to potential liability under Title VII. Employers should be wary of implementing a hiring policy that, expressly or impliedly, excludes applicants merely because they have been arrested or convicted. Instead, employers should consider each applicant's criminal record closely, assess how it relates to the duties and responsibilities of the available position and determine whether exclusion because of a particular arrest or conviction is justified by business necessity.

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