



## Employers Wrestle With EEOC Guidance On Criminal Checks

Publication

7.16.12

In an effort to persuade employers to substantially curtail the use of applicants' criminal backgrounds in the hiring process, the Equal Opportunity Commission (EEOC) issued an enforcement guidance on April 25 calling into question an employment screening technique used by the vast majority of employers in the United States. Although the EEOC guidance largely reiterates positions that it has taken over the years regarding the impact that such criminal-history checks may have on minorities, the EEOC's recommendations regarding the use of this information are more forceful than ever.

Few employers want to risk an EEOC investigation or lawsuits brought by groups of employees alleging that the employer's policy on criminal-background checks is illegal. At the same time, employers are reluctant to give up criminal checks for fear that not doing them could create an unsafe working environment or lead to claims of "negligent hiring" should a person with a criminal background do something to harm a member of the public. It's this "pick your poison" dilemma that has many employers wondering how they should proceed.

Title VII of the Civil Rights Act prohibits discrimination in employment on the basis of race, gender, color, national origin and religion. For years the EEOC has taken the position that the use of applicants' criminal histories as a screening tool runs the risk of violating Title VII because this tool tends to screen out minorities – including blacks and Hispanics- who get arrested and convicted at a higher rate than white people, according to social science statistics. The recent guidance revisits and supplements the social science research.

It should be noted that the House Appropriations Committee voted in late April to approve an amendment to the 2013 appropriations bill that would effectively prohibit the use of EEOC funds for implementing, administering or enforcing the guidelines. On May 10, the House passed the appropriations bill containing the de-funding amendment, meaning the EEOC is technically prevented from using its regular budget to enforce the guidance. But since the EEOC's position regarding criminal histories has been established for years, it is likely that EEOC will simply continue to pursue its policy through day-to-day enforcement of Title VII.

This article appeared in the July 16, 2012 issue of *The National Law Journal*.

### **Related People**



**Stephen J. Roppolo**  
Regional Managing Partner  
713.292.5601  
Email