



Stuck In A Background Check Catch-22? Texas Has Your Back

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Employers seem to be caught in an impossible catch-22 these days: run a background check on a job candidate and risk a potential discrimination lawsuit or forego this procedure and risk exposing the company to potential liability for negligent hiring or supervision. This is the position that the Equal Employment Opportunity Commission seems to be putting employers in by its aggressive interpretation of Title VII as prohibiting blanket rules against hiring applicants with criminal backgrounds.

The Texas Legislature has taken an important step to help protect employers who are willing to give applicants with a criminal record a second chance. House Bill 1188, which takes effect Sept. 1, 2013, will limit the liability of employers who hire applicants with a criminal record. The new law provides that a "cause of action may not be brought against an employer, general contractor, premises owner, or other third party solely for negligently hiring or failing to adequately supervise an employee, based on evidence that the employee has been convicted of an offense."

HB 1188 will benefit both employers and those with criminal records who are seeking employment, who often have difficulty finding a job. According to the National Institute of Corrections, about 5 million Texas adults have criminal records and hundreds of thousands of Texans who are no longer on probation or parole have felony convictions on their records. As inmates leave prison and try to gain self-sufficiency, they are often met with resistance by employers who are concerned that hiring ex-offenders may expose them to liability.

While this statute provides some protection from negligent hiring or supervision claims, it is vital that employers understand the laws and vet applicants and employees to the maximum extent permissible under those laws. Employers should carefully and thoroughly review their current policies and be prepared to provide the EEOC with specific reasons to support why the information relied upon from a background check in connection with an employment decision is "job related and consistent with business necessity," which is the standard for defending such a practice.

As the EEOC continues to increase its efforts to combat systemic discrimination, employers should work with their employment counsel to review and revise their background-check policies to ensure they are consistent with the EEOC guidance while still protecting the employer from potential liability. While the new Texas law will ease many employers' concerns of potential liability for hiring applicants with criminal records, it will not completely insulate employers from all claims of

negligent hiring or supervision resulting from employment of such individuals.

To avoid the seemingly unavoidable catch-22, employers should continue to conduct appropriate criminal background checks for job applicants to determine if an applicant is appropriate for a particular position while remaining mindful of the EEOC's position on criminal background checks.

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