



The EEOC Reponds to Attack On Its Criminal Background Checks Policy

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In April of 2012, the EEOC released updated guidance regarding the use of criminal background checks in employment. This guidance – *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* – has been heavily criticized by courts and employers since its release, yet the EEOC continues to file federal lawsuits accusing employers who consider criminal histories in hiring of violating Title VII of the Civil Rights Act of 1963 (“Title VII”).

In late July, nine state attorneys general drafted a letter to the EEOC seeking reconsideration of the guidance on criminal background checks and raising concern regarding two EEOC lawsuits, filed in June, challenging criminal background exclusions under Title VII. The EEOC responded to the letter on August 29, 2013, explaining what the EEOC termed, “misunderstanding “ of the guidelines.

The Updated EEOC Guidance

Use of criminal background checks is common practice among employers; however there is risk that the use of such checks may violate the anti-discrimination provisions of Title VII. The EEOC’s guidance on the matter builds upon the long-standing policy that, if an employer uses a criminal background check that results in an adverse impact on a protected class, then the employer must present a “business necessity” for the particular selection criteria and show that the criteria is job-related.

The Attorneys General Letter

The letter attacks the EEOC on seemingly taking the position that the use of bright-line criminal background checks in the hiring process violates Title VII. The letter articulates a belief that the EEOC solidified a position that a neutral policy using prior criminal convictions as a job screen has a disparate impact on minorities.

The Lawsuits

In the cases brought against Dollar General and BMW, the EEOC alleges that the employers have used criminal background checks to disproportionately exclude African-Americans from their workforce.

Summary of the EEOC Reply to the Attorneys General

The EEOC's reply discards most of the statements made by the state attorneys general as incorrect misunderstandings. The EEOC responds that the agency's guidance on the issue in no way requires individualized assessments of all applicants and employees, but instead, simply proposes a two-fold procedure for employers. Employers are encouraged to *first* use a targeted screen of criminal records that considers the nature of the crime, the time elapsed, and the nature of the job. Then, as a *second* step, the letter states, the guidance encourages employers to provide opportunities for individualized assessment for those people who are screened out.

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