Federal Appeals Court Strikes Down EEOC's Criminal Background Guidance In Texas

3 THINGS FOR EMPLOYERS TO KNOW

Insights
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A federal appeals court ruled yesterday that the 2012 guidance document from the Equal Employment Opportunity Commission (EEOC) that cautioned employers not to apply blanket bans against hiring those with criminal records could not be enforced against the state of Texas, handing the agency a stinging loss. The sweeping decision from the 5th Circuit Court of Appeals calls into question not only the future of the guidance as applied to other employers across the country, but also the EEOC's power to issue such guidance in the first place. Here are three things all employers should know about yesterday's ruling.

1. **Court Rejects Application Of Guidance Against Texas**

   The EEOC's guidance was controversial from the start. In April 2012, the Obama-era EEOC released its "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII." It concluded that blanket bans on hiring those with criminal records disproportionately impact racial and ethnic minorities, which could lead to Title VII disparate impact liability. Therefore, according to the guidance, those employers who chose to apply blanket bans would provide a basis for the agency to further investigate and possibly bring a charge of discrimination.

   While the guidance further stated that employers could escape liability by demonstrating that the policy or practice of not hiring those with criminal backgrounds was "job related for the positions in question and consistent with business necessity," the bar to meet this standard was set very high. It would not be enough, the EEOC said, to simply show that an employer had a racially balanced workforce. Instead, employers would have the burden of showing that their policy or practice operated to effectively link specific criminal conduct with the risks inherent in the duties of the position in question.

   The guidance proved immediately controversial, not just because of its broad scope, but also because many questioned whether the agency had the power to issue it in the first place. This was not a formal regulation issued after a standard notice-and-comment period, but instead a unilateral announcement from the agency. Moreover, Congress has only granted the EEOC with

the power to issue "procedural" regulations implementing Title VII, and the agency does not have the ability to promulgate substantive rules.

One of the first employers that found itself under the EEOC's microscope after the guidance was published was the state of Texas. The state had long excluded persons with felony convictions from many public jobs. One such applicant brought a charge with the EEOC after being rejected for a position with the Texas Department of Public Safety, which categorically excluded all convicted felons from employment. After the EEOC took up the fight on the applicant's behalf, Texas fought back and argued that the guidance should be struck down because the agency did not have the power to issue such a broad rule.

Yesterday, the 5th Circuit agreed with Texas and upheld an injunction barring the EEOC from enforcing the guidance against the state. The appeals court ruled that the EEOC "overstepped its statutory authority" in issuing the guidance because it lacks the authority to promulgate substantive rules implementing Title VII.

2. **Other Employers Should Tread Carefully**

While the court decision is quite decisive, it is also narrowly applied: only the state of Texas itself – not all employers located in Texas – is protected from EEOC enforcement actions as a result of yesterday's ruling. While it does bode well for employers in the 5th Circuit's jurisdiction (those in Texas, Louisiana, and Mississippi), and it appears likely that this same line of reasoning would be applied by the Court of Appeals or any lower federal court in Texas, Louisiana, or Mississippi faced with a Title VII challenge to a criminal history hiring prohibition, employers in these areas should tread cautiously for now.

While this decision challenges the EEOC's ability to issue this guidance about the lawfulness of blanket criminal history exclusion policies and practices, such policies or practices could still be found by a court to be discriminatory depending on the circumstances of that particular situation and result in liability for the employer. You should coordinate with your labor and employment counsel to understand the scope of this ruling and how it would apply to your specific situation.

As for employers outside of the 5th Circuit's reach, yesterday's ruling might be considered a step in the right direction, but by no means will it offer you any protection should your hiring practices be challenged as a result of the EEOC's guidance. The ruling is limited to the state of Texas itself, and the injunction barring enforcement activity only shields the state itself. The best-case scenario is that you and your counsel can use the reasoning applied by the 5th Circuit to your own situation and that the court hearing your matter will find the ruling persuasive.

Another consideration to take into account is whether this ruling would have any impact on your operations at all, even if applied to your hiring practices. Many employers have already adapted to the EEOC's guidance over the past seven years and take a more holistic approach to hiring today than they did in 2012. Part of the rationale for such a position may be the tight job market,

or it could also reflect a different approach to identifying viable candidates for hire. Moreover, a good number of employers also operate in jurisdictions that have implemented a "ban the box" law over the past decade preventing them from inquiring about criminal histories at certain points during the hiring process.

3. **The EEOC Has Been Put On Notice**

   Finally, while yesterday's ruling might be limited to the state of Texas itself, the consequences of the court's words might reverberate for years to come. By pointedly stating that the EEOC "overstepped its authority" and "lacks authority" to promulgate such a rule, and that the employer in this case can essentially ignore the work of an enforcement agency, the 5th Circuit may have opened a can of worms for the agency. This ruling is consistent with other federal decisions and administrative actions we have seen in recent years to roll back certain Obama-era initiatives deemed to be overreaching or inconsistent with pre-Obama era legal authority.

   There is little doubt that employers across the country were keenly observing this case and the arguments set forth by the state of Texas, and are now prepared to weaponize the words published by the federal appeals court for their own benefit. Other agency guidance documents will certainly be scrutinized by employers and their attorneys to determine whether they, too, will be subject to similar challenges and could be next in line to be struck down.

   Yesterday's ruling may force the EEOC to proceed gingerly when issuing further guidance outside of the normal notice-and-comment process, recognizing that a group of employer advocates will be ready to pounce if they perceive that the guidance falls into the same category as this criminal background publication.

Conclusion

We will continue to monitor further developments at the EEOC and provide updates regarding all of these matters of interest, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney.

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