



# EEOC Supports Employers' Use Of The Work Opportunity Tax Credit

Insights

4.30.20

The Equal Employment Opportunity Commission just announced plans to issue its first formal opinion letter in over 30 years, confirming that employers can use the Work Opportunity Tax Credit (WOTC) for hiring individuals with disabilities, veterans, and other underrepresented workers without violating federal anti-discrimination laws. The agency said it would like to see more employers take advantage of what it described as the “highly underutilized” tax credit. In a major move to support that objective, the EEOC voted 2-1 on April 29 to issue an opinion letter formalizing its view that the laws it enforces do not prevent the use of the credit. What do employers need to know about this development?

## Program Details – And What Employers Can Now Do

The WOTC provides employers hiring individuals from several identified targeted groups with tax credits ranging from \$1,200 to \$9,600 per eligible employee. The groups include disabled individuals, qualified veterans, ex-felons, SNAP recipients, qualified long-term unemployment recipients, and other similarly underrepresented workers.

The formal letter, which should be released soon, will clarify that you can ask a worker to check a box verifying that they fall into one of these categories if you are seeking the WOTC. Although this would typically be a risky – if not illegal – practice under antidiscrimination laws that generally prohibit you from making these kinds of inquiries, the agency has laid the groundwork to permit such inquiries for this purpose.

## Vote Not Without Controversy

The announcement follows a public meeting held via audio-only on April 29. The meeting discussed whether to move forward with issuing the WOTC formal guidance and also whether to rescind portions of the EEOC’s Compliance Manual addressing theories of discrimination and polygraph examinations. With respect to the WOTC, the EEOC publicly addressed its view that an employer’s use of IRS Form 8850 in furtherance of seeking the WOTC credit does not violate the laws it enforces. As it stands, employers are required to use IRS Form 8850 to pre-screen and to make a written request to their state workforce agency to certify that a potential employee is a member of a targeted group for purposes of qualifying for the tax credit. The form asks questions such as whether the job applicant has a service-connected disability.

Prior to this, the agency issued informal discussion letters in 2004, 2007, and 2010. Notwithstanding those letters, the EEOC noted that it continued to receive questions from employers and tax preparers related to the topic. By way of background, informal discussion letters are written by EEOC staff typically from the Office of General Counsel and cannot be relied upon as an opinion of the EEOC. A formal opinion letter, by contrast, invokes the EEOC's authority to issue a written interpretation or opinion and can be relied upon as a defense by employers litigating Title VII and ADEA claims – so long as employers have acted in good faith and in compliance with the opinion letter. The EEOC indicated that the opinion letter will also provide persuasive authority in defending against claims under the ADA.

The decision to issue the opinion letter was not without debate. Indeed, Commissioner Charlotte Burrows raised concerns regarding issuing the opinion letter, including her concern that this would create another legal defense for employers. On the other hand, Chair Janet Dhillon shared her belief that the EEOC's position regarding pre-offer inquiries had created unintended tension with the WOTC process in that it requires employers to confirm pre-offer that an individual is a member of the targeted group before the employer may claim the credit. According to Chair Dhillon, issuing a formal opinion letter would ease the concern of well-meaning employers in making hiring decisions and encourage more employers to use the WOTC credit.

## **Conclusion**

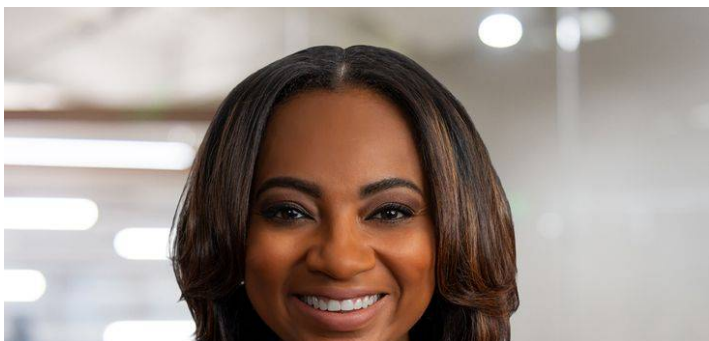
This step taken by the EEOC is a victory for employers who previously shied away from taking advantage of the WOTC process due to fears of discrimination claims. With the opinion letter, you will have a defense against certain discrimination claims brought by candidates as result of information learned through IRS Form 8850.

We will continue to monitor further developments and provide updates on this issue and other labor and employment issues, so make sure 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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