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Criminal Background Checks

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EXPAND YOUR EXPECTATIONS™

WHERE ARE WE GOING?

- Review of recent litigation related to Employers' use of background checks in the hiring process
- Review of Ban the Box Legislation
- Best Practices for Employers



EEOC: CRIMINAL BACKGROUND CHECKS DISCRIMINATORY AGAINST MINORITY APPLICANTS

- The EEOC says criminal background checks can be discriminatory because African-Americans are convicted of crimes at higher rates.
- The EEOC issued guidelines:
 - Should not deny employment based on arrest records and should utilize conviction records only after consideration of:
 - The crime (severity);
 - Crime's relation to the potential job;
 - Time passed since the conviction.

EEOC FILES CLASS ACTION IN FEDERAL COURT RE: CRIMINAL BACKGROUND CHECKS

Freeman Co. (Maryland):

- EEOC alleged Freeman's use of criminal background checks had a disparate impact on minorities in violation of Title VII.
- Hiring policy may violate Title VII if: disparate impact and employer fails to demonstrate that the challenged practice is job-related and consistent with business necessity.



CRIMINAL BACKGROUND CHECK

Name

COURT RULING IN FREEMAN CO.

- Maryland federal court throws out the EEOC's lawsuit.
- Judge Titus's stinging rebuke:
 - “The story of the present action has been that of a theory in search of facts to support it But there are simply no facts here to support the EEOC's claim that black applicants were improperly discriminated against.”

COURT RULING IN FREEMAN CO. (CONT'D)



- Judge Titus also noted:
 - Roughly 87% of employers use criminal-background checks in hiring, according to a 2012 survey by SHRM.
 - Even the EEOC conducts criminal background checks in its own hiring process.

COURT RULING IN FREEMAN CO. (CONT'D)

- Civil/Criminal Liability vs. EEOC:
 - “The EEOC has placed many employers in the ‘Hobson’s choice’ of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers.”

COURT RULING IN FREEMAN CO. (CONT'D)

- Court ruled that Freeman Co.'s use of criminal checks "*appears reasonable and suitably tailored to its purpose of ensuring an honest workforce.*"
- Court further held that Freeman limited its review to convictions in the past 7 years and didn't penalize applicants for arrests that didn't result in conviction.

EEOC FILES NEW LAWSUITS RELATED TO USE OF CRIMINAL BACKGROUND CHECKS

DOLLAR GENERAL[®]

- Dollar General (Illinois):
 - EEOC alleges DG uses criminal background check policies that violate Title VII.

- BMW (South Carolina):
 - EEOC makes similar allegations



ALLEGATIONS AGAINST DOLLAR GENERAL

- Applicant given a conditional offer of employment.
 - Offer withdrawn when the background check disclosed a 6 year old conviction for possession of a controlled substance.
- The application showed Applicant had worked for another discount retailer for 4 years.
- DG policy used her type of conviction as a disqualifier if the conviction was within the last 10 years.

ALLEGATIONS AGAINST BMW

- BMW directed its new contractor to perform background checks on every current employee applying for transition of employment.
- BMW's policy has no time limit with regard to convictions, and conducts no individualized assessment.
- BMW disproportionately screened out African Americans from jobs, and the policy is not job-related and consistent with business necessity.

STATE AGs RESPOND TO EEOC GUIDELINES

- AGs from AL, CO, GA, KS, MT, NE, SC, UT, and WV express concern re: EEOC's "substantive position" in DG and BMW lawsuits.
- Unlawful Expansion of Title VII:
 - Enf. Guid. "purports to supersede state and local hiring laws that impose bright-line criminal background restrictions that are not narrowly tailored."
- Burden on Business:
 - "[ERs] will have to spend more time and money evaluating applicant that they would not have previously considered due to their criminal history . . ."

EEOC RESPONDS TO AGs' CONCERNS

- Objection premised on a misunderstanding: that the Guidance urges employers “to use individualized assessments *rather than* bright-line screens.”
- The Guidance encourages a two-step process:
 1. Use “targeted” screen of criminal records by considering the nature of the crime, the time elapsed, and the nature of the job.
 2. Once administered, provide opportunities for individualized assessment for those people who are screened out.

Ban The Box Laws

BAN THE BOX!

Have you ever
been convicted
of a felony?



STATES WITH BAN THE BOX LAWS



BAN THE BOX LAWS – PRIVATE EMPLOYERS

- State-wide private employer ban the box laws: Hawaii, Massachusetts, Minnesota, and Rhode Island.
- City/County private employer ban the box laws: California, Connecticut, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, and Washington localities
 - Newark, New Jersey
 - Philadelphia, Pennsylvania
 - Seattle, Washington

BAN THE BOX LEGISLATION – MINNESOTA

- MN Enacts “Ban the Box Law” Prohibiting Employment Application Criminal History Checkmark Boxes and Restricting Criminal Record Inquiries Until After Interviews or Conditional Job Offers
- New law addresses the point at which the employer may inquire about an applicant's criminal history.



BAN THE BOX LEGISLATION – SEATTLE, WA

- Took effect on November 1, 2013.
- Only applies to employees who work 50% or more of the time in Seattle
- Prohibits employers from requiring applicants to disclose arrest or conviction records as part of initial applications
- Restricts how employers may use arrest and conviction records that eventually are disclosed



EEOC: EMPLOYERS' BEST PRACTICES

- Eliminate policies or practices that exclude people from employment based on any criminal record.
- Train managers, hiring officials and decision makers about Title VII and its prohibition on employment discrimination.
- Develop a narrowly-tailored policy and procedure for screening applicants and employees for criminal conduct.
- Train managers, hiring officials and decision makers on how to implement the policy and procedures consistent with Title VII.
- When asking questions about criminal records, limit inquiries to records for which exclusion would be job-related for the position in question and consistent with business necessity.

BEST PRACTICES FOR MULTI-STATE EMPLOYERS: DOs and DON'Ts

- **Don't:** Include questions about criminal history on your job application if you employ people in state and/or locality with Ban the Box legislation.
- **Don't:** Ask Applicants about their criminal history over the phone or prior to pre-qualifying them for the job.
- **Do:** Consider including clear exclusions for certain states or localities if you also employ in non-Ban the Box States or localities.



Questions?

