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On Capitol Hill

As the 113th Congress finished its work, there were a few final actions of interest to background and tenant screeners.

On November 24th, Senator Lamar Alexander (R-TN), ranking member of the Senate Health Education Labor and Pensions Committee, released a report on the activities of the Equal Employment Opportunity Commission (EEOC) titled: “EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns about Important Anti-Discrimination Agency.” As the title suggests, the report is highly critical of what Senator Alexander found to be missteps at the agency. On background check related issues, the report criticizes the EEOC for not providing notice and opportunity for public comment on its guidance regarding the use of criminal history information for employment purposes, and also highlights recent court opinions that have been critical of the manner in which the EEOC has sought to pursue disparate impact cases.

On December 3rd, the Senate confirmed Charlotte Burrows to be a member of the EEOC by a vote of 93-2 and also voted to re-confirm David Lopez to serve another term as General Counsel of the EEOC by a party-line vote of 53-43.

The hacking of Sony’s systems has sparked renewed interest on data security issues on Capitol Hill. On December 19, House Commerce Committee Chairman Fred Upton (R-MI) announced that the Committee would hold a series of hearings in 2015 on cybersecurity issues. The precise agendas for these hearings have not yet been announced, but it is possible that the hearings will be sufficiently broad to touch on data breach notification legislation and data broker legislation.

At the EEOC

In addition to the EEOC-related developments on Capitol Hill noted above, the EEOC also made news in connection with one of its ongoing suits over employer hiring practices involving the use of criminal history information. On December 8th, the federal judge in the EEOC’s suit against BMW-- EEOC v. BMW Manufacturing Co., LLC, 13-CV-1583 (D.S.C.)-- ordered the EEOC to turn over its own hiring policies to defendant BMW. A federal magistrate previously had sided with the EEOC, finding that the policies should not be produced. The judge, however, set aside the magistrate’s finding on the grounds that BMW need not rely on the EEOC’s assertions that the policies were not relevant and concluding that producing the documents should not be burdensome or harmful to the EEOC. The court did caution, however, that it was not making any decisions regarding the admissibility of the EEOC documents or that regarding their ultimate relevancy to the proceeding.

The District Court in Tennessee hearing the EEOC suit against Dollar General—the suit was announced the same day that the EEOC announced its suit against BMW—previously ruled

the other way, finding that EEOC need not produce its hiring policies to Dollar General. Dollar General is appealing that ruling, and it is unclear whether the EEOC will appeal the ruling against it in the BMW case.

At the Department of Commerce

On December 19th, the National Technical Information Service (NTIS) released a Notice of Proposed Rulemaking for final rules governing access to the Death Master File (DMF). The final rule, once adopted, would replace the temporary certification program currently in place for access to the DMF. The current Interim Final Rule will remain in effect until a final rule is adopted and comes into force. The rule is open for public comment for 30 days from its publication in the Federal Register (which is expected December 24).

On December 17th, NTIS also announced that the form necessary to request access to the DMF under the Interim Final Rule had been “reinstated” and that interested persons could once again apply to be certified for access. Those that were previously approved for access do not need to reapply at this time.

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