

THE WASHINGTON REPORT June 2013

On The Hill

Background screening activity continues on Capitol Hill, including immigration-reform-related initiatives. Progress continues to be slow, however, so this month's *Washington Report* focuses on the Equal Employment Opportunity Commission (EEOC), which has been a source of considerable activity since last month's *Report*.

On May 23rd, President Obama nominated EEOC Commissioner Chai Feldblum for a second term as an EEOC Commissioner. Commissioner Feldblum's current term is scheduled to expire on July 1. As the *Washington Report* goes to press, a hearing on her renomination has not yet been scheduled.

As last month's *Washington Report* went to press, we noted that the House Education and Workforce Committee's Subcommittee on Workforce Protections planned to conduct a hearing for on "Examining the Regulatory and Enforcement Actions of the Equal Employment Opportunity Commission." That hearing, held on May 22nd, had only one witness: EEOC Chairwoman Jacqueline Berrien. While all aspects of the EEOC's mission were within the scope of the hearing, the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII ("Enforcement Guidance"), as expected, was prominently featured during the hearing. This hearing is expected to be the first of several oversight hearings by the subcommittee exploring the EEOC, its regulatory and enforcement actions, and best use of its resources.

Chairwoman Berrien, in her written testimony, referenced the EEOC's January 2012 conciliation settlement with Pepsi, in which the company "agreed to pay \$3.13 million and provide job offers and training to resolve a charge of race discrimination. Based on the investigation, the EEOC found reasonable cause to believe that the criminal background check policy formerly used by Pepsi discriminated against African-Americans in violation of Title VII. Pepsi agreed to modify its background check policy and to report to the EEOC concerning implementation of its new policy."

Subcommittee Chairman Tim Walberg (R-MI) chaired the hearing and, during his opening remarks, asked: "Is it in the best interests of workers and employers when the Commission pursues regulatory policies that may make workplaces less safe?" He also expressed concern that the Enforcement Guidance "also puts many employers at risk of running afoul of state or local laws that require background checks for certain positions of public trust, such as child care providers."

During her testimony, Chairwoman Berrien downplayed concerns over the possible negative impact of the Enforcement Guidance stating that the guidance in no way prohibits employers from using background checks, focusing instead on how the background checks are used by employers.

In response to a question from Rep. Susan Brooks (R-IN), Chairwoman Berrien, indicated that the EEOC would provide a report to Congress in response to appropriations language from the Senate Appropriations Committee directing the EEOC to provide a report “detailing the steps [the EEOC] has taken to alleviate confusion about” the Enforcement Guidance. She did not indicate, however, when the report would be forthcoming.

Rep. Brooks also raised concerns about the possible preemption of state law requiring background checks. On this point, Chairwoman Berrien indicated that any preemption of state law which may occur is a function of the Constitution’s Supremacy clause and Title VII, not the Enforcement Guidance. She reiterated that the Employment Guidance does not prohibit anyone from conducting a check; she also indicated that compliance with a state law by an employer might be relevant to a determination by the EEOC as to whether it would investigate a particular employer. The Chairwoman also indicated that employee and customer health and safety are relevant considerations with respect to criminal background checks, and that it would be relevant that a state law requires exclusion from employment based on criminal history.

The use of credit for employment determinations also received a mention at the hearing. Rep. Suzanne Bonamici (D-OR) raised the issue of credit and eliminating barriers in recruitment and hiring. She expressed concern about the use of credit and noted that Oregon has passed legislation limiting the use of credit for employment screening purposes.

At the EEOC

Interest on Capitol Hill in the EEOC’s Enforcement Guidance likely will be further piqued by the EEOC’s June 11th announcement that the Commission has brought two suits alleging that employers BMW and Dollar General, respectively, have violated Title VII of the Civil Rights Act as a result of the manner in which they have conducted criminal background checks. In both cases the EEOC alleges that the employers’ practices have had a disparate impact on African Americans.

BMW. In the BMW case, filed in Federal District Court for the District of South Carolina, the EEOC’s allegations surround the decision to phase out a logistics contractor that provided support services at a BMW facility in Spartanburg, South Carolina. Employees of the former contractor were required to reapply with BMW’s new contractor and undergo new background checks. According to the EEOC complaint, 88 of the approximately 645 employees of the former contractor that sought positions with the new contractor were found to have criminal convictions that disqualified them from employment under BMW’s policy (which had been effect since 1994, but apparently may not have been fully or effectively complied with by prior contractors since all of these employees worked for one or more prior contractors).

The EEOC alleges that BMW was a “joint employer” of its contractor’s employees and also that BMW “interfered” with the relationship between the individuals and their contractor employer through denial of access to the BMW facility.

The EEOC’s complaint cites the cases of two individuals as examples. In one case, the claimant allegedly was denied plant access “solely upon a 1990 misdemeanor conviction for simple assault, punished only by a \$137 fine, after nearly 14 years of service” to contractors providing service to BMW at the facility. In another case the employee denied access had worked at the facility for 12 years, although the EEOC complaint does not indicate the nature of his prior offense.

The EEOC alleges that the employees were “denied access” to the facility, and ultimately denied employment, “without any individualized assessment of the nature and gravity of their criminal offenses, the ages of the convictions, or the nature of their respective positions.” The complaint also notes that they were denied plant access “without any assessment or consideration of the fact that many [of the individuals] had been working at the BMW facility for several years without incident for [the most recent] and prior logistics services providers.”

The EEOC complaint alleges that the former contractor’s pool of employees that worked at the BMW facility were 55% “black” and 45% “non-black” and 14% of that workforce was adversely impacted by the new background checks. 80% of the individuals denied access as a result of the new background checks were black and 20% were non-black.

Dollar General. The second suit, announced the same day and filed in Federal District Court for the Northern District of Illinois, is against Dolgencorp, doing business as Dollar General. Like the *BMW* suit, the *Dollar General* suit alleges that the Company’s background screening practices have a disparate impact on black applicants in violation of Title VII.

According to the complaint, Dollar General orders criminal background checks once an individual has been offered a conditional offer of employment. The background screener allegedly provides a “pass” or “fail” result using a matrix that Dollar General created with its background screening company. The matrix at issue allegedly identifies specific felonies and misdemeanors and specifies “how recent these convictions must be before they are deemed to require rescinding an employment offer or disqualification of an applicant.”

The EEOC alleges that Dollar General’s policy “has not been demonstrated to be and is not job-related and consistent with business necessity” and that, as applied, no individualized assessment is provided to those who receive a “fail” result. The complaint notes that the Dollar General policy “does not allow for consideration of the age of the offender; any actual nexus between the crime and the specific job duties, employee safety, or other matters necessary to the operation of defendant’s business; or to the time or events that have transpired since the offense.”

The EEOC alleges that over a period of slightly more than three years, approximately 75% of Dollar General's conditional offers of employment were made to non-blacks; and 25% to blacks. According to EEOC allegations 7% of conditional non-black employees were discharged for failing the background check; while 10% of conditional black employees were discharged; a disparity that the EEOC alleges is "statistically significant."

The EEOC complaint against Dollar General includes one specific example: At the time an applicant submitted her application she allegedly informed the Dollar General of a six-year-old felony conviction for possession of a controlled substance. She began work and two or three days later, Dollar General allegedly then rescinded her offer because a criminal background check identified the felony conviction she disclosed as well as a misdemeanor conviction for possession of drug paraphernalia.

Both BMW and Dollar General declined to settle the EEOC's allegations during the conciliation process and both have issued statements indicating that they believe that their practices comply with legal requirements. Both have indicated that they intend to defend themselves against the EEOC allegations. Background screeners, however, would be wise to stand ready to respond to ongoing inquiries from their customers on questions surrounding the EEOC's Guidance—recognizing, of course, that employers should consult their own legal counsel—and stand ready to work with them to assess whether any modifications to practices may be appropriate to mitigate chances for an EEOC enforcement action.

Disclaimer: The *Washington Report* provides a general summary of recent legal and legislative developments and is for informational purposes only. It is not intended to be, and should not be relied upon as legal advice. For more information, please contact Kevin Coy at 202-677-4034.