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At the EEOC

On May 5th, a federal district court denied DolGenCorp LLC's (Dollar General) attempt to use discovery to obtain the Equal Employment Opportunity Commission's (EEOC) policies regarding the agency's own use of criminal background checks in employment decisions. The EEOC filed the suit against Dollar General in 2013, alleging that the company's use of criminal background checks for prospective employees is discriminatory because it has a disparate impact on African-American applicants. Dollar General sought to compel the EEOC to produce its policies regarding the use of background checks in making employment decisions. The EEOC argued that such document requests were irrelevant. The court agreed with the EEOC, ruling that the EEOC need not produce its background check policies for its own employees because Dollar General had not shown that "the functions performed by its employees are in any way comparable to those undertaken by the EEOC's employees."

On April 23rd, the EEOC urged a federal district court to deny BMW Manufacturing Co. LLC's (BMW) attempt to compel the agency to turn over its analysis of BMW's background check policy in a racial discrimination lawsuit. On the same day, BMW filed the initial motion to compel the EEOC to produce, in particular, a "spreadsheet created by the EEOC's expert" related to BMW's background check policy. The EEOC argues that the spreadsheet is privileged work product and that the analysis is derived from information that BMW already has. According to BMW, "the EEOC's efforts to prevent BMW from learning about what the EEOC provided and withheld from its expert witness are aimed at hindering BMW's ability to challenge the methodology and conclusions of [the EEOC's] expert." The EEOC originally filed the lawsuit in June 2013, alleging that BMW's use of criminal background checks for hiring has a disparate impact on African-American job applicants, in violation of Title VII.

At the FTC

On May 21st, Federal Trade Commission ("FTC") Commissioner Joshua Wright spoke before an audience at the U.S. Chamber of Commerce on the regulation of the Internet of Things. Commissioner Wright used his remarks to question some aspects of the Commission's approach to regulation and enforcement in the areas of privacy and consumer protection more generally. While Commissioner Wright's view is a minority on the Commission, the remarks are instructive for background and tenant screeners as to his views on the Commission's approach to policy making and enforcement. Commissioner Wright's critique focused on five primary points which he formulated as his top "FTC do's and don'ts") for the Commission, including:

- **Don't regulate by anecdote or speculation**. He criticized FTC's report on data brokers as "going off the rails" in the "legislative and best practices recommendations" section of the report because it used hypotheticals to recommend congressional action without any evidence as to the existence or scope of the hypothetical problem.
- **Don't regulate by slogan**. He noted that there was not a common understanding of terms or they "do not appear to contain any meaningful analytical content." He referred to terms such as "big data", "security by design", "data minimization", "PII" and "sensitive" among others arguing that use of such terminology should not be a substitute for rigorous economic analysis.
- **Do perform a proper cost-benefit analysis**. He is seeking to encourage a deeper integration of economics and cost-benefit analysis into the Commission's consumer protection framework. He suggested that the Commission has a tendency, including in its Internet of Things report and some of its enforcement actions to discount the benefits of services under review.
- **Don't issue recommendations or best practices without doing the necessary work**. He urged the Commission to exercise caution when using reports on its workshops as a vehicle for legislative and policy recommendations because those reports frequently synthesize what is said at the workshops without necessarily involving independent research by the FTC Staff.
- **Do articulate a cognizable harm**. He urged the Commission to engage on policy issues only to the extent that it can be confident that its recommendations target actual, cognizable harm.

On May 5th, testimony resumed in the FTC's administrative action against LabMD for alleged data security violations. In addition to the testimony, LabMD continued its efforts to have the case dismissed, filing a motion with the administrative law judge in late April on a range of grounds, including claims that the case should be dismissed on due process grounds around alleged failings by the FTC to properly investigate the incident that gave rise to the FTC action. LabMD also is seeking to have FTC Chairwoman Ramirez disqualified from participating in the proceedings at the Commission level claiming that she "has been irrevocably tainted and compromised" because of her involvement in the Commission's response to inquiries about from the House Oversight and Government Reform in connection with its related investigation into facts that gave rise to the FTC's case. LabMD alleges that there is "a reasonable

suspicion" that she has prejudged the case. The FTC's counsel in the case is opposing the effort to disqualify Chairwoman Ramirez from the matter. Commissioner Brill previously recused herself in the case.

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