

EEOC BEGINS ENFORCING 2012 CRIMINAL BACKGROUND CHECK GUIDANCE

By Scott J. Wenner

EEOC Sues Two Employers for Race Discrimination for Using Criminal Background Checks to Exclude Applicants Without Also Making “Individualized Assessment” of Other Factors

In April 2012, the Equal Employment Opportunity Commission (EEOC or Commission) published a new guidance document updating its earlier position on the use by employers of arrest records and criminal background checks as part of the pre-employment screening process. (The Schnader Alert discussing the guidance document is available [here](#).)

As we observed then, unlike the EEOC’s view on the use of arrest records, its 2012 guidance document does not posit that employers may *never* use criminal background checks without violating Title VII — a position that would be unsustainable. The guidance instead cautioned employers against a black and white rule broadly excluding for all positions all applicants who were convicted of a felony in the past, regardless of how long ago and irrespective of how job-related the felony conviction was. Instead, the Commission advocated a nuanced, multi-factor approach that balanced the legitimate needs of employers to protect their workers and their assets against the EEOC’s mission to eradicate practices that have a discriminatory impact against protected groups.

Citing statistics on the remarkable disparity in conviction rates of blacks and Hispanics compared to whites — especially among males — the agency guidance document warned of bringing disparate impact lawsuits against employers that too broadly excluded candidates based on felony convictions and failed to tailor their exclusions to convictions of job-related felonies based on proof of business necessity, after also considering *on an individualized basis* other extenuating factors such as how long ago the applicant was convicted and at what age.

Now, roughly a year after posting its guidance document the agency seemingly has stepped up its campaign against the use of broad criminal background checks as pre-employment screens. In mid-June, the EEOC filed suit against two large employers claiming that their use of criminal background checks screened out a disproportionate number of black applicants. One action was filed in the Northern District of Illinois against Dolgencorp LLC, which does business nationally as Dollar General, a discount retailer. *EEOC v. Dolgencorp LLC d/b/a Dollar General*, Case No. 1:13-cv-04307. The second lawsuit was brought in federal district court in Spartanburg, South Carolina against BMW Manufacturing. *EEOC v. BMW Manufacturing Co., Inc.*, Case No. 7:13-cv-01583. A copy of the EEOC press release trumpeting the filing of these lawsuits can be found [here](#).

In its lawsuit against Dollar General, the EEOC accused the retailer of applying its criminal background check policy in a manner that disproportionately excluded black applicants without a demonstration that its policy is job-related and consistent with business necessity — the showing an employer must make to defend a practice that has a disparate impact. The Dollar General policy described in the complaint apparently excludes applicants by applying a matrix that considers the specific felony involved and the age of the conviction — not a black and white exclusionary rule.

The EEOC nonetheless contends that the policy’s impact on black applicants is unlawful because Dollar General does not *individually assess* each applicant the matrix screens out by further examining, *e.g.*, the age of the applicant at the time of the offense, the actual connection between the nature of the crime and the duties of the job for which the applicant applied, any specific employee safety implications and events that have taken place since the conviction. The Commission’s 2012 guidance

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document forcefully asserted the necessity for an individualized assessment of factors such as those outlined above in order to defend successfully a background check policy on grounds of job-relatedness and business necessity.

The EEOC's complaint against BMW Manufacturing was brought on behalf of 69 black employees of a contractor, UTi Integrated Logistics, Inc. (UTi). UTi provided warehouse and distribution assistance, transportation services and manufacturing support to BMW at its Spartanburg, S.C. facility. The EEOC alleged that BMW exercised sufficient control over UTi's employees to be their joint employer, and hence liable for acts of discrimination against them in which BMW participated.

When BMW chose another contractor to replace UTi to perform the same services, the UTi employees were directed to reapply for positions with the new contractor if they wanted to remain working at the BMW plant. As part of this application process, BMW directed the new contractor to perform a criminal background check, using BMW's written criminal background check criteria, on every UTi employee applying for transition of employment to the new contractor. Of the 645 employees who applied, 88 had convictions that violated BMW's policy for employment eligibility.

According to the EEOC, BMW's written criminal conviction background check policy has been in effect since the BMW facility opened in 1994. The policy purportedly excludes applicants convicted of broad categories of crimes, including assault, domestic abuse, various drugs and weapons crimes, and, more sweepingly, any crime of a violent nature and criminal convictions involving "theft, dishonesty, and moral turpitude." BMW directed the new contractor to apply the BMW policy as written and the 88 former UTi employees with qualifying convictions were denied access to the BMW facility and, therefore, were not offered jobs with the new contractor. Of this group of 88, 70, or 80 percent, were black.

The Commission has alleged that these applicants for transition of their employment were denied jobs "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. Moreover, they were denied plant access without any assess-

ment or consideration of the fact that many had been working at the BMW facility for several years without incident for UTi and prior logistics services providers." The complaint concludes that BMW's practices in using criminal background checks to screen and exclude former UTi employees from working on its premises for the new contractor had an adverse impact on black applicants for transition that was neither job-related nor consistent with business necessity, therefore violating Title VII.

Significance of EEOC's Lawsuits

The simultaneous initiation of these two actions by the Commission to challenge the use of criminal background checks in the employment screening process is significant. The fact that these lawsuits apply the rationale that the EEOC articulated in its 2012 guidance, and was accompanied by a more substantial press release than the agency typically prepares, can only be viewed as notice that the EEOC has launched enforcement of its theory that the use of criminal background checks in the screening process can unlawfully discriminate against black and Hispanic job applicants and employees. It is worth keeping in mind that the Commission is invested in this issue in several ways beyond the fact that it held public meetings and published a substantial updated guidance document last year.

First, commencing these lawsuits aligns with the agency's widely publicized 2013-2016 Strategic Enforcement Plan, which identified as one of its six enforcement priorities the elimination of barriers for protected groups in recruitment and hiring, especially class based recruitment and hiring practices. The EEOC's announcement of these lawsuits positions them as the latest in a series of efforts by the agency to challenge systemic discrimination in recruitment and hiring of minorities.

In addition, the EEOC is a member of the federal Reentry Council, an interagency group convened at the direction of the Attorney General to examine issues connected with reentry into society of persons with criminal records. Among other issues, the Reentry Council is working to reduce barriers to employment faced by convicts, so that people with past criminal involvement — after their sentences have been served — can com-

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pete for work opportunities. By filing lawsuits attacking the use of criminal background checks to screen out applicants with criminal records in a manner that it views as overbroad or otherwise unjustified, the EEOC is promoting the agenda of the Reentry Council in a manner it views as consistent with its mission to prevent and remediate race discrimination.

Steps Going Forward

Now that the EEOC has confirmed by action what it articulated in words in its April 2012 guidance on criminal background checks in employment, it would be advisable for employers that use background checks to screen applicants to take a close analytical look at their policies and practices for using background checks and, position by position, examine whether excluding an applicant with a criminal background is job-related and consistent with business necessity. For those positions which are deemed to require exclusion of persons with criminal records, consideration should be given to identifying specific classes of crimes that should exclude an applicant based on specific business needs, such as employee and customer safety and the need to protect vulnerable assets. Moreover, documented attention should be given to developing guidelines for considering the age of a possibly disqualifying conviction and the length of time since the applicant's release from prison in ascertaining on an individual basis whether the applicant remains a threat to the business.

Consideration also should be given to developing a process for ensuring individualized assessment of each applicant's facts and circumstances, during which attention can be given to some of the other factors the EEOC guidance identified as germane, such as the age of the applicant at the time of conviction. Development of appropriate forms to document each individualized assessment also should be part of the internal review process. ♦

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