

## **Failure to Heed EEOC Warnings Regarding Hiring Practices Could Result in Disparate Impact Claims**

The Equal Employment Opportunity Commission (EEOC) recently cautioned employers against the practices of excluding unemployed job candidates from consideration and of using credit checks to screen candidates for nonfinancial job openings. The EEOC has stated publicly that both practices may lead to disparate impact discrimination claims.

According to the EEOC, excluding the unemployed from consideration for hiring may be discriminatory as it may have an adverse impact on certain protected classes. For instance, denying an individual a job based upon current or recent unemployment status may have a disproportionate negative effect on members of certain racial and ethnic minorities, as unemployment rates for African-Americans, Hispanics and Native Americans are higher than those of whites. Similarly, when considering college-educated workers, the unemployment rate for Asian workers is higher than for other protected classes. Screening workers by using employment status also may impact individuals with disabilities.

Separately, the EEOC recently spoke out against the practice of using credit checks to screen candidates for nonfinancial job openings. As poor credit is more common among certain protected classes, screening out applicants because of poor credit may have a disproportionate effect on individuals in those protected classes. As there is no proven link between poor credit and an individual's ability to perform a job, or between poor credit and employee theft, credit checks may not be considered a legitimate, nondiscriminatory business reason for rejecting an applicant.

The EEOC recently sued companies for using credit histories and criminal background checks to exclude applicants of certain protected classes. For example, at the end of 2010, the EEOC sued the Kaplan Higher Education division of *The Washington Post*, claiming the company's rejection of job applicants with poor credit histories constituted disparate-impact discrimination based upon their race. The EEOC's position is consistent with informal guidance the EEOC issued at the end of 2005, which stated that an employer using a blanket policy of disqualifying any applicant with a history of arrest or convictions violates Title VII. The EEOC stated that such a policy "disproportionately excludes members of certain racial and ethnic groups, unless the employer can demonstrate a business need for use of these criteria."

Fourteen states currently are considering legislation prohibiting the use of credit checks in employment. Four states – Hawaii, Illinois, Oregon and Washington -- have passed legislation that limits the use of credit history as a screening tool in employment decisions.

The following guidelines may assist employers in avoiding these types of disparate impact claims:

- Do not put language in job openings that excludes unemployed applicants. Statements such as, "only employed candidates will be considered" may get companies into trouble with the EEOC or state Fair Employment Practices Agencies;
- Avoid blanket use of credit checks and be selective on which positions applicants are screened with credit checks;
- If credit checks are used, make sure there is a legitimate business reason for doing so and be able to explain why they are needed for predicting job performance;

- Train employees who interview and select candidates to avoid immediately disqualifying someone who is unemployed or has poor credit;
- Allow applicants to explain their unemployment or negative credit history;
- In states that limit the use of credit history as a screening tool, make sure applications and other relevant forms have been revised so that they comply with the law; and
- If credit checks are used, consult with an employment attorney to ensure the organization's practices are defensible.

Many employers overlook the danger of disparate impact claims. As the EEOC now has put employers on notice that it will be focusing on these types of claims, particularly in connection with the hiring process, employers should re-examine their hiring practices to ensure they will not run afoul of the EEOC and/or state FEP agencies.

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