

# Discriminatory Background Checks? -- State AGs Accuse EEOC of Unlawful Expansion of Title VII

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by John Husband

Nine Republican state Attorneys General (AGs) are fed up with the Equal Employment Opportunity Commission's (EEOC's) position that it can be discriminatory for an employer to reject candidates with criminal records, even when the employer applies that policy to all candidates regardless of race, gender, religion, or other protected characteristic. In a letter dated July 24, 2013, the AGs from Colorado, Montana, Utah, Kansas, Nebraska, West Virginia, Alabama, South Carolina and Georgia criticize the EEOC for its recent disparate impact lawsuits based on employers' bright-line screening policies and seek rescission of the EEOC's April 2012 Enforcement Guidance on Arrest and Conviction Records. Not mincing any words, they state: "[w]e believe that these lawsuits and your application of the law, as articulated through your enforcement guidance, are misguided and a quintessential example of gross federal overreach."

### **Criminal Background Checks for Employment Purposes Under Attack**

To show how far the EEOC has gone to attack the use of criminal background checks in the hiring process, the AGs dissect the EEOC's complaints in two recent lawsuits, one against Dolgencorp (Dollar General) and the other against BMW Manufacturing Co., LLC. In the complaints, the EEOC alleges that these companies violate Title VII's disparate impact prohibition by using bright-line screening policies that target past convictions of certain types of crimes, such as murder, assault, reckless driving and possession of drug paraphernalia. The EEOC asserts in the lawsuits that these policies have a disparate impact on African-American applicants because the policies are not job-related or consistent with business necessity and African Americans have higher convictions rates. In the BMW case, the EEOC seeks to permanently stop BMW from using conviction records as a selection or plant access criteria without conducting an individualized assessment that considers the nature and gravity of the offense, the time that has passed since the conviction and/or completion of the sentence and the nature of the job held or sought.

The AGs point out that the bright-line screening policies at issue are not discriminatory, but instead treat every individual who fails a criminal background check the same by rejecting them for employment.

Significantly, the EEOC does not allege that the companies have a discriminatory intent in applying their screening policies. There is no allegation that the companies treat individuals of different races who have similar criminal records differently, or that the policies are based on racial stereotypes of criminality. The AGs see the lawsuits as furthering the agency's policy of rejecting any bright-line criminal screening tool.

### **EEOC's "Illegitimate Expansion of Title VII Protection to Former Criminals"**

Tying the recent lawsuits to the EEOC's April 2012 Enforcement Guidance on Arrest and Convictions, the AGs chastise the EEOC for incorrectly applying the law and grossly overreaching its role. They state that they believe that the agency's true purpose may not be the correct enforcement of Title VII but instead may be the racial prejudice in the criminal justice system that results in more African Americans being convicted. The AGs stress that there are numerous nondiscriminatory reasons for companies to want to screen out former criminals in the hiring process and that an individualized assessment of each conviction provides far more opportunity for racial discrimination than the nondiscretionary bright-line screening policies at issue in the lawsuits. The AGs vehemently reject the EEOC's attempt to create a new protected class for persons with conviction records, stating:

But no matter how unfair a bright-line criminal background check might seem to some, it is not your agency's role to expand the protections of Title VII under the pretext of preventing racial discrimination. If Congress wishes to protect former criminals from employment discrimination, it can amend the law. Title VII's prohibition on practices that have a disparate impact should not be used as just another regulatory tool to advance your agency's policy agenda.

### **Preemption of State and Local Law Unacceptable to AGs**

Concerned that many of their states' laws could be affected, the AGs also reject the EEOC's purported preemption of state and local laws as stated in its Enforcement Guidance. For example, under many state laws, a felony conviction may disqualify an individual from being licensed by the state or being employed in certain positions. By claiming to preempt state laws, the EEOC seeks to intrude into matters of state sovereignty – a move the AGs find particularly troublesome and egregious.

### **Businesses Bear the Burden of the EEOC's Criminal Background Check Guidance**

Recognizing that conducting more individualized assessments of criminal records results in significant added costs to employers, the AGs express concern over the practical consequences of the EEOC's criminal background check policy guidance. More individualized assessments cause employers to spend more time and money in evaluating applicants and in defending discrimination lawsuits which are liable to increase as more rejected applicants allege discrimination. The AGs point to the

burdensome regulations already weighing down American businesses to propose that "our country can ill afford yet another federal mandate."

In the end, the AGs urge the EEOC to dismiss the lawsuits against Dollar General and BMW and rescind its April 2012 Enforcement Guidance on Arrest and Conviction Records. It is unclear whether we will see a response from the EEOC but the AGs may have set the stage for employers to fight back against the EEOC's overreaching policies and unlawful expansion of the nation's discrimination laws.

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