



MEMBER ADVISORY

Recent EEOC Litigation Developments Provide Important Insight and Guidance for Professional Background Screening Industry

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Employers Must Avoid Broad or "Blanket" Criminal Background and Credit Screening Policies As Equal Opportunity Commission Continues to Mount Aggressive Litigation and Enforcement Strategy Targeting Employment Discrimination

The recent outcomes of two U.S. Equal Employment Opportunity Commission cases involving background screening practices, *Equal Employment Opportunity Commission v. BMW Manufacturing Co. L.L.C.* and *Equal Employment Opportunity Commission v. Freeman*, provide valuable insight and guidance into how employers should structure their background screening practices in order to avoid legal hurdles due to EEOC's litigation and enforcement initiatives.

BMW \$1.6 Million Settlement with EEOC Sounds the Alarm on Broad Criminal Background Screening Policies

On September 8, BMW Manufacturing Co. LLC's reached a \$1.6 million settlement with the EEOC over the alleged disparate impact the company's criminal background checks had on African-American job applicants. The settlement shows that employers looking to avoid legal liability should take efforts to avoid overly broad or "blanket" background screening policies.

When BMW switched contractors handling the company's logistics at its Spartanburg, S.C., plant in 2008, it required the new contractor to perform a criminal background screening on all existing logistics workers who reapplied to keep their jobs.

A large number of African-American workers were not allowed to keep their jobs because, at the time, BMW's criminal background screening guidelines barred employment to people with convictions in some types of crimes regardless of when the employee had been convicted or the severity of the conviction, according to the agency's suit. The agency's suit sought relief for 56 of those people.

The BMW settlement stemmed from a two-year-old lawsuit stemming from the company's background check policy. The key terms of the settlement include BMW agreeing to pay \$1.6 million in monetary relief to fifty-six claimants and to offer those claimants who want to return, the opportunity to return to work at the facility. By entering into the consent decree, BMW expressly denies liability and does not admit any wrongdoing. At the same time, BMW is enjoined from use of the criminal background check guidelines that were in effect. The consent decree further sets forth other key requirements under which:

- BMW and its logistics provider may not decline to hire any job applicant or otherwise disqualify any individual in a logistics position because of "criminal arrests or charges of any type if such arrests or charges did not result in a conviction."
- They can, however, postpone an offer of employment if there is a pending charge, pending resolution.
- BMW and its logistics provider must conduct an individualized assessment if they seek to disqualify any job applicant based on criminal history. Meaning they must provide written notice to the job applicant describing the criminal history which is at issue and an offer to the applicant to explain the conviction and their appropriateness for employment.
- The above notice must be delivered by "reasonable means" and must afford the job applicant a period of at least 21 days during which time they can contact BMW or the logistics provider before an adverse employment decision is finalized.
- BMW and its logistics provider must appoint an official to review all final decisions to decline to hire or otherwise disqualify an applicant due to criminal history.

EEOC Loss in Freeman Case Bolsters Employer's Options to Utilize Targeted and Individualized Background and Credit Checks

On September 4, U.S. District Judge Roger Titus in the District of Maryland ordered the EEOC to pay legal fees of nearly \$1 million to a company it accused of conducting discriminatory background checks after the agency submitted expert testimony riddled with errors but still pursued the case.

These most recent developments pertaining to a suit the EEOC filed in 2009 represent a victory for employers who rely on background screening to ensure they do not hire individuals whose backgrounds present significant questions as to their qualifications for employment.

In *EEOC v. Freeman*, the EEOC claimed that Freeman's use of criminal and credit background checks in connection with its hiring practices had a disparate impact against African-American, Hispanic, and male job applicants. To support its claims, the EEOC proffered expert testimony purporting to support their disparate impact analysis. In 2012 Freeman filed a motion for summary judgment and a motion to preclude the EEOC's expert testimony which the court granted. In that August 9, 2013 decision Judge Titus blasted both the EEOC's theory and the multiple flaws in the analysis of its experts, concluding that the EEOC's lawsuit was "a theory in search of facts to support it."

In the decision issued on September 4 requiring EEOC to pay legal fees to Freeman, Judge Titus quoted Kenny Rogers' "The Gambler" and compared the case to a poker game, calling Freeman's case a "royal flush" and chastised the EEOC for "playing a hand it could not win."