

Attorneys General Challenge Criminal History Policy

By former Associate Ethan Don

Shortly before the EEOC v. Freeman case was decided, nine state attorneys general sent a letter to the Equal Employment Opportunity Commission (“EEOC”) challenging the EEOC’s position on the permissible use of criminal history background checks. In particular, the letter (found here[AU2]) addressed the lawsuits filed by the EEOC against Dollar General and BMW Manufacturing Co., LLC (“BMW”) and those companies’ use of bright-line criminal background checks in the hiring process. The attorneys general accused the EEOC of attacking the use of criminal background checks in the hiring process, of unlawfully expanding Title VII protections, and of creating a further burden on businesses.

For example, the letter notes that in the suits against Dollar General and BMW, the EEOC is challenging the mere use of a bright-line test (which equally refused employment to applicants who fail the test), even though neither complaint contains any allegation of overt racial discrimination or discriminatory intent. The attorneys general also point out that there is no contention in either case that the companies have treated individuals of different races dissimilarly based on similar criminal backgrounds.

The letter is even more pointed in questioning the EEOC’s true purpose in attempting to bar the use of bright-line criminal conviction screens in hiring decisions. The attorneys general argue that the EEOC is trying to unlawfully expand Title VII protections to individuals with conviction records. Deeply troubling to the attorneys general is that fact that the EEOC claims that its authority and guidance preempt state and local laws which do impose bright-line tests. The letter provides examples, such as being ineligible to become a municipal judge if convicted of a felony or certain enumerated misdemeanors, where the attorneys general note the EEOC’s attempted intrusion upon state sovereignty.

The attorneys general also advance the position that barring bright-line tests and requiring more individualized assessments add to employer costs and will likely raise the number of discrimination suits filed by rejected applicants.

The letter urges the EEOC to reconsider its position and to rescind its most recent policy guidance on the use of criminal background checks. We will all have to wait and see how the two pending cases are resolved. If *Freeman* is any indication, however, the EEOC may have a long, hard fight on its hands to maintain its positions.