

Update on New Credit and Criminal History Guidance reported by Consumer Reporting Agencies

It appears that new guidance could be issued by the Equal Employment Opportunity Commission (“EEOC” or “Commission”) as soon as December. Such guidance would impact the use of credit and criminal history records used by employers and others as a part of a background check.

At this juncture, new guidance on the use of credit in employment screening will be the first out of the gate. The thinking is that limitations on the use of credit will be first, followed by limitations on the use of criminal history records. New guidance impacting how employers will be able to use credit history for employment screening purposes has been drafted and we believe reviewed by at least some of the [Commissioners](#).

With respect to revised criminal records guidance, the issue that seems to keep popping up is the placing of a time limitation of seven years...akin to a blanket prohibition...on the use of criminal records by employers. In other words, one could not use a conviction for employment screening purposes if it occurred beyond seven years from the job application.

A September 2011 Informal Discussion [Letter](#) from the EEOC on the use of background checks by the Peace Corps states the following, “A pre-employment inquiry concerning criminal records does not in itself violate Title VII because Title VII does not regulate inquiries by employers. However, an employer’s *use* of criminal record information in its selection process may violate Title VII in certain circumstances. Thus, an employer must not use criminal history information to engage in unlawful disparate treatment (e.g., excluding African American applicants with certain criminal charges while accepting White applicants with the same charges). Moreover, because disproportionate numbers of African Americans and Hispanics are arrested and convicted, the use of conviction and arrest records to make employment decisions is likely to have a substantial disparate impact on those groups. Where there is such an impact, an employer must not use criminal history information in a manner that is not job related and consistent with business necessity.” Reference to a seven year timeline follows this statement. The EEOC states, “The Peace Corps Volunteer Application asks about all convictions regardless of when they occurred. If this means that the Peace Corps is prepared to exclude applicants for any conviction, whenever it occurred and whatever it involved (even a conviction for a minor offense), we question whether the exclusion is ‘job related and consistent with business necessity.’ To ensure that applicants’ criminal history information is used in a way that is consistent with Title VII, the EEOC recommends that the Peace Corps narrow its criminal history inquiry to focus on convictions that are related to the specific positions in question, and that have taken place in the past **seven years**....(emphasis added).”

As I’ve written in past columns, there will be no Federal Register notice and comment period when the Commission issues its new guidance in the case of credit or revised guidance in the case of criminal history records. It will simply be a done deal.

In August, after the Commission’s public [meeting](#) entitled “EEOC to Examine Arrest and Conviction Records as a Hiring Barrier”, 55 trade associations joined in a [letter](#) to the

Commission stressing the importance of the fair and appropriate use by employers, volunteer organizations and non-profits of criminal histories when conducting background checks in order to mitigate risk and promote safety. Unfortunately, there appears to be a presumption at the EEOC that use of criminal history records is inherently bad and a serve as a barrier to employment for ex-offenders.

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