

Challenging Times for CRAs with the EEOC

Commissioner Victoria Lipnic recently spoke at the National Association of Professional Background Screeners (NAPBS) Mid-Year Conference in Orlando, Florida. Commissioner Lipnic is one of five Commissioners at the Equal Employment Opportunity Commission (EEOC). During her hour plus speech, it was clear that she is quite knowledgeable about the background screening industry and understands the concerns of background screeners given the on-going attacks on the industry. Having said that, she laid out a grim forecast for the background screening industry, particularly for the use of criminal history records in employment screening.

While Commissioner Lipnic may understand that background screening is a necessary practice or policy for businesses and others to protect themselves, their employees and their customers, that view is not the prevailing view at the EEOC. Throw into the mix the current employment situation and EEOC Chairwoman Berrien's strong push for re-entry of ex-offenders and you come up with a negative perception of the background screening industry at the EEOC. The prevailing view at the EEOC is that criminal background checks are presumptively bad because of the effect on Latino and Black individuals and disparate impact. Quick side note, the EEOC and others are part of a [Federal Interagency Reentry Council](#).

Additionally, the EEOC has a long and proud institutional history of making policy through litigation. The General Counsel's office, not the Commissioners, leads the charge on which cases to pursue. And what do lawyers like to do? Litigate! A side note: I'm a lawyer and believe litigation is only to be used as a last, last, last resort so I guess working at the EEOC isn't in my future. Anyhow, there is an initiative at the EEOC to bring forth "systemic cases". Any systemic policy for employment screening is therefore ripe for a lawsuit under the EEOC's case initiative. For instance, if you say "we have a policy of XX for employment screening purposes" that is subject to litigation. Any screen or matrix that automatically screens out someone with a conviction is presumptively bad and subject to review.

I've written before that the EEOC is considering revising its 1987 guidance on the use of arrest and conviction records. Not to pile on, but they are also considering guidance on the use of credit reports for employment screening. Where this guidance is at the EEOC or when it will be issued is anyone's guess, but as far as revised guidance on the use of criminal history records goes, that could be out as soon as early 2012. Will the background screening industry have any input into the guidance? No. So much for transparency in government.

Is there a concern at the EEOC about negligent hiring situations? Apparently not. How about employers and volunteer organizations seeking such information from job applicants for risk mitigation purposes? Guess not.

While the EEOC is not a legislative body, any guidance they issue will carry weight. What could the new guidance on criminal history records look like? It will certainly increase the standard of proof for employers and present them with a higher burden if they use criminal history records for employment screening. It could draw a line in the sand and disallow the use of conviction records older than seven or ten years. It could require that employers conduct individualized assessments of job applicants if a criminal history is present. It could require that employer's consider an individual's rehabilitation. Whatever it is, it will make it

more difficult for employers, volunteer organizations and others to protect themselves; their employees and customers; and their assets. I wouldn't want to be that small, woman owned business that fears an EEOC lawsuit and decides not to conduct background checks under this new regime, only to hire someone who has been convicted of embezzlement and wipes me out financially.

What can **YOU** do? Monitor the EEOC. Obviously for consumer reporting agencies and those using consumer reports which include job applicants' criminal and credit history, ensure your compliance with the Fair Credit Reporting Act. But don't forget about Title VII of the Civil Rights Act and Equal Employment Opportunity compliance under the EEOC. Be an advocate for the value of using criminal history information and how it allows employers to mitigate risks. The EEOC seems to view this as an all or nothing situation and that's a shame. There is a balance between allowing ex-offenders a second chance and employers protecting their customers, employees and themselves. The focus should be on the larger societal issues which leads to such ridiculously high incarceration levels and not on the use of criminal history records for employment screening purposes. Attacking the background screening industry may be convenient, but it doesn't address why individuals commit crimes and the collateral consequences to employers are high if they are forced into a position where they don't conduct background checks when they should.

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