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Refusing to Hire Ex-Cons and Poor Credit Risks can Violate Federal Law

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One would think that an employer has the right to just say no to hiring felons or applicants with significant credit problems, but the Equal Employment Opportunity Commission (EEOC) disagrees.

In addition, as part of the EEOC's "Eradicating Racism and Colorism in Employment" (E-RACE) initiative, the new acting chair is considering issuing guidance to employers on the use of credit histories in hiring decisions, as well as using litigation as a vehicle to strengthen the EEOC's position on these issues.

The concern is an unlawful disparate impact on minorities. A Princeton University professor reports that young black men are seven to eight times more likely to be incarcerated than their white male counterparts and that one out of every three black males will be incarcerated at some time during their lives. Also, there are 700,000 people released from jails and prisons each year in the United States and 12 million ex-felons are living among us right now.

Because a blanket rule excluding felons from the work place would have a disparate impact on black males, the EEOC took the position that refusing to hire any individual with a criminal record violates Title VII. Its position is that, whenever an applicant might be excluded based on a criminal record, the employer must consider the nature and gravity of the offense, the time that has passed since the conviction and/or incarceration and the nature of the job sought.

Few courts have addressed the issue. However, the EEOC's initiative appears to have been energized by the U.S. Court of Appeals for the Third Circuit's opinion in *El v. Southeastern Pennsylvania Transportation Authority,* which at least seven years earlier, approved the employer's blanket rule to exclude violent felons and to only hire others who were convicted of certain other crimes. That decision, however, scrutinized the particular facts of the case, including that the person who had the job at issue was responsible for transporting disabled patrons who were especially vulnerable to attack.

The Third Circuit declined to give "much deference" to the EEOC's guidance on the issue, but still requires employers to adopt a hiring policy that distinguishes between individuals who pose an unacceptable risk and those who do not. Therefore, the burdens of proof in such a case would result in the employer showing its policy is consistent with "business necessity." Even with such evidence, a plaintiff could still prevail if he can establish that an "alternative employment practice" would equally satisfy the employer's legitimate goals and still result in less impact on minorities.

The problem with this analysis is twofold. First, a criminal conviction record is not an immutable characteristic of race. Rather, it reflects a conscious decision to engage in a criminal act that results in the conviction of the crime. Second, excluding one felon, but hiring others, results in an increased chance of a disparate treatment claim just like other inconsistent employment decisions. However, this is a hot issue to the EEOC, so for now, employers are cautioned against a blanket exclusionary rule.

It should be noted that Michigan's Elliott-Larsen Civil Rights Act specifically prohibits making employment decisions based on misdemeanor arrests that have not resulted in a conviction. A best practice is that employers should only ask about misdemeanor convictions and arrests for felonies that are either pending or that have resulted in convictions, and to investigate the accuracy of the applicant's response. If an employer should find the applicant has misrepresented his or her criminal record, the employer can refuse to hire the individual because of his misrepresentation if the applicant warns of such consequences.

A word of caution: Michigan's Department of Correction's web site (OTIS) now only posts criminal records for two years following an inmate's release from prison. Therefore, it is imperative that the record be printed and retained for future challenges since it may not be available when a failure to hire suit is brought at a later date.