

## Compliance Update 2015

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### Disability Laws

In 2008 the Americans With Disabilities Amendment Act (ADAAA) expanded the menu of conditions from the Americans With Disabilities Act (ADA) that might qualify as a disability. Neither the ADA nor the ADAAA considers pregnancy to be a disability unless some complications associated with pregnancy significantly impair a major life function. Nevertheless, in July of 2014, the Equal Employment Opportunity Commission (EEOC), the federal agency that investigates complaints that employers have violated a federal employment law, issued new “enforcement guidance rules” (1) which essentially includes pregnancy as a workplace disability by reinterpreting the 1978 Pregnancy Discrimination Act (2). In a case currently before the U.S. Supreme Court (3), the previous interpretation, that medical events associated with activities away from the job are not work related, is being challenged. Since it is the Court and not the EEOC that will interpret the meaning of this and other federal employment laws, employers should use caution before changing any present practices and policies regarding pregnancy and the new EEOC enforcement guidance rules, at least until this case is resolved.

### Ban The Box

As of October of 2014, thirteen states and at least sixty cities and counties have enacted laws, ordinances or policies prohibiting public employers from requesting information about criminal convictions on applications and Personal History Statements or conducting criminal record checks prior to Conditional Offer of Employment (COE) (4). While some of these prohibitions exempt public safety employers, they are not uniform or consistent. Colorado, for example, exempts the Department of Public Safety, public and private Corrections and public employee Retirement Associations but not elder care facilities, Fire Departments or public and private schools (5). Employers are therefore strongly advised to have state and local statutes and policies reviewed to first determine applicability.

As discussed at length previously (6), deferring the review of criminal convictions appears to contradict at least two federal appellate court decisions encouraging that all phases of the pre-employment selection process, except the physical and psychological, be conducted prior to COE, determining that offers with too many conditions are not real (7).

In 2012 the EEOC updated its Enforcement Guidance on Employer Use of Arrest and Conviction Records in Employment Decisions (8) having concluded that certain races and nationalities might be disproportionately or adversely affected by such evaluations and placed significant restrictions on the practice of criminal record checking.

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All criminal record data bases, including the U.S. Department of Justice (9), clearly show this disparity, with African-Americans and Hispanics being convicted approximately twice as often as Whites. Notably absent from the EEOC observation, however, is any discussion of type of crime or gender. Males are convicted nearly four times as often as females and crimes of violence seem to be the most significant distinguishing variable based on race.

Proponents of criminal record checking maintain that the statistical disparities only reflect realities: that males actually engage in work place violence and other employment related criminal activities more frequently than females and delaying the evaluation of criminal activity harms both applicants and employers. Further, since most crime in America is opportunistic in nature, while statistically African-American males are arrested and convicted of crimes of violence more frequently than any other racial group, over 90% of their victims are also African-American. Opponents of criminal record checking propose that these disparities are the result of gender and racial bias against men and African-Americans on the part of complainants, police, prosecutors, judges and juries. This statistical disparity or adverse impact, is not limited to criminal record checking and appears in all measures of criminality including psychological testing, character reference checking and pre-employment polygraph testing based on pre-test and post-test admissions.

#### Sexual Orientation

Executive Order 11478 prohibits federal employers and to a large degree, their subcontractors from discriminating in employment based upon Sexual Orientation (10). The U.S. Merit Systems Protection Board points out that Executive Orders are different from legislative statutes and therefore lack the legal mechanisms for redress accorded Civil Rights (11). As is the case with any variable protected in this manner, it may not be illegal to ask for or obtain the information identifying the applicant as a member of a protected group but most would consider it ill advised to solicit the information. Overtly asking for the information strongly implies the information was, in fact, used as part of the employment decision – why ask for it if you don't use it? Therefore, it might be wise to remove requests for information regarding sexual orientation from any personal history statements, applications or pre-polygraph assessment forms.

#### Educational Standards

The EEOC has indicated that it intends to continue to challenge the use of education standards and educational employment requirements, maintaining that disqualifying applicants who fail to meet educational requirements could be a discriminatory practice on the basis of both race and disability. The EEOC's argument is that a person with a learning disability might not be able to qualify for jobs with specified educational prerequisites. While the EEOC is not prohibiting the use of educational standards, the EEOC's interpretation of the Americans With Disabilities Act Amendment Act requires employers to first prove that a specific educational standard is a Bona Fide Occupational Qualification, of Business Necessity or an Essential Function for the position being sought. This might be easy to achieve if there are federal licensing or certification requirements with imbedded educational prerequisites, in effect, playing off one federal mandate against another. Unfortunately, since federal law trumps state law,

employers without federal protection would have to show that employees with less than the required level of education either couldn't perform the job or have an unacceptable lower level of performance. As law enforcement agencies require higher levels of education as minimums but employ individuals with less than the new requirements, proving the need for the higher levels based upon actual job performance could become problematic. However, the EEOC further requires that even if an employer can show that the education requirement is job related and consistent with business necessity, "...the employer may still have to determine whether a particular applicant whose learning disability prevents him from meeting it can perform the essential functions of the job, with or without a reasonable accommodation, despite not have the diploma (educational requirement)" (12).

As is the case with admissions of criminal activity and criminal records, there are significant statistical differences based on race and gender with regard to objective measures of educational achievement. Women, increasingly, have higher college enrollment and graduation rates – as well as higher GPA's – than men (13) so, statistically, college education requirements discriminate against men, particularly, African-American males. However, there are far more successful performers in male dominated professions such as law enforcement, than women simply because there are far more males. One could therefore conclude either that educational requirements are irrelevant to performance in law enforcement or that the measures of successful performance are gender biased to favor males, neither of which may actually be true. Proving or disproving any of these postulations would be difficult and time consuming if even possible, a reality the EEOC often uses to obtain compliance with its interpretations of federal employment laws and Executive Orders. Ironically, the Obama Administration recently proposed that new hires in charge of certain public school food services "...have bachelor's degrees in food and nutrition or other related fields, while master's degrees are preferred" (14), a new education requirement few school food service employees possess.

### Electronic Recordings

On May 12, 2014 the U.S. Department of Justice issued a new "Policy Concerning Electronic Recording of Statements" creating a presumption that custodial interviews (and presumably, polygraph examinations) and interrogations be electronically (preferably both audio and video) recorded "as soon as the subject enters the interview area until the interview is completed" (15). The policy, effective July 11, 2014, applies to U.S. Attorneys, federal agents and private contractors working as agents with the FBI, DEA, ATF and U.S. Marshals Office. There are some exceptions permitted, e.g. when agents and the U.S. Attorney agree in advance not to record, when subjects refuse to be recorded, anything that could damage national security, etc. Since most polygraph examinations of witnesses and suspects take place prior to arrest or detention, it appears that this policy would not affect most polygraph examinations since they usually take place in non-custodial circumstances. Nevertheless, examiners retained or employed by these federal agencies should check with their specific agency's interpretation of the new policy as well as changes to previous policies requiring the presence of two agents and Form 302.

## 2014 Profiling Guidelines

On December 8, 2014 the Department of Justice issued new guidelines superseding the previous guidelines prohibiting racial profiling by federal law enforcement agencies. The new guidelines expands the identification variables to include not only race but ethnicity, gender, national origin, religion, sexual orientation, or gender identity and applies to both federal law enforcement activities and national security and intelligence operations. Further, it limits the use of these variables to “listed characteristics in a specific suspect description” and the “...prohibition applies even where the use of listed characteristics might otherwise be lawful” (16). While there are some federal agencies exempted from these new requirements, as are all state, county and municipal police agencies, it is assumed that private polygraph examiners acting as agents for non-exempt federal agencies would have to conform to the new directives as if they were federal employees.

It is unlikely that this directive will require any significant changes to the normal investigative process since the type of profiling as described in the directive is not part of any recognized investigative procedure or practice. However, it may be difficult for a federal agency to prove it not use a prohibited profiling practice because of the overlap between criminal profiling and the new, prohibited profiling. Most sexual abusers of children are male, regardless of the gender of the victim. The vast majority of people involved in computer, securities and Medicare fraud are white. In some large urban areas, the vast majority of victims of violence will be of the same ethnic or racial group as the suspects. Investigators and polygraph examiners should avoid any mention of the Voice of Experience, probability analysis and intuitive deduction in any report or discussion with associates since these practices are never part of a “specific suspect description”.

## References

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6. *Polygraph*, V38, N3, 2009
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