Criminal and Credit Records and Pre-employment Background Investigations

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Recently, the Equal Opportunity Employment Commission (EEOC) has escalated initiation of its 2007 "Eradicating Racism and Colorism from Employment" initiative by redefining certain employment practices, previously considered facially neutral, to be illegal practices due to their disparate impact on protected racial and gender classes. Specifically, the EEOC maintains that criminal record checking has an adverse impact on African Americans and credit record checking an adverse impact on both African Americans and women with regard to negative information and employment decisions.

This position, of course, assumes that employers neither consider when or what an applicant was convicted of nor the underlying cause for negative information appearing in a credit report. As someone who has created employment background systems and hiring standards for hundreds of the most respected public and private organizations, I have rarely found the practice of blanket disqualification based exclusively on methodology to be true. Applicants are almost never disqualified based solely upon unsubstantiated polygraph responses but usually based upon admissions of misconduct, albeit, sometimes preceded by those same deceptive responses. Likewise, with regard to the admissions or criminal and credit record information, not only do employers limit the periods of accountability but tend to apply a totality of circumstances approach to negative information including the possibility of exceptions to Disqualification Guidelines. Unfortunately, should the EEOC prevail in its recent lawsuit (12/21/10) against the Kaplan Higher Education Corporation, selection procedures involving criminal and credit information, will become more difficult, expensive and vulnerable to challenge. If the practice – in this specific case, credit record checking – merely has a significant statistical disparity, then the employer will be considered "guilty until proven innocent". In short, the employer must now prove that the practice causing the disparity is performance related to the point of being a Business Necessity and no alternative exists with a less of a disparate impact. Trying to prove which criminal convictions significantly affect future work performance will be like trying to prove that "21" – not "20" or "22" – is the age where alcohol consumption no longer significantly affects behavior. Perhaps more problematic will be state law enforcement certification agencies such as Police Officers Standards and Training or Commissions on Law Enforcement Standards. At the present time, applicants who have ever been convicted of any felony cannot be certified. Since federal law trumps state law, should "Eradicating Racism…" replace current accepted practices, arguments about being a credible witness in court will have to be limited to criminal convictions employers can demonstrate affect credibility. For the short run, however, since "Kaplan" involves a private employer, public employers may escape immediate compliance requirements. Likewise, only those federal agencies who have adopted the federal employment laws as a matter of policy, should think about contingencies since Congress has traditionally excluded federal employers from all employment law requirements. Everyone else should consider how to comply.