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Update on Criminal Background Checks: Impact of *EEOC v. Freeman* and Ongoing Challenges in a Continuously Changing Legal Environment

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The latest chapter in the ongoing saga of employment-related criminal background checks in the United States has been written, and one of the authors had some particularly strong words for the Equal Employment Opportunity Commission.

On February 20, 2015, in *Equal Employment Opportunity Commission v. Freeman*,¹ the U.S. Court of Appeals for the Fourth Circuit affirmed summary judgment in favor of the employer in a case involving a challenge to the employer's use of criminal background and credit history checks in the hiring process. The EEOC had alleged that the criminal checks had a disparate impact on African American and male applicants, and that the credit checks had a disparate impact on African American job applicants. In a unanimous decision by a three-judge panel, the Fourth Circuit affirmed the lower court's decision, which stemmed from the exclusion of the EEOC's expert reports, noting the "district court found a 'mind-boggling' number of errors and unexplained discrepancies."

A separate concurring opinion was written to address what one judge referred to as "disappointing litigation conduct" by the EEOC, including continued reliance on an expert whose testimony was "fatally flawed in multiple respects," who previously had been used by the EEOC despite a "record of slipshod work, faulty analysis, and statistical sleight of hand." The concurring opinion further cautioned: "The EEOC must be constantly vigilant that it does not abuse the power conferred upon it by Congress, as its 'significant resources, authority, and discretion' will affect all 'those outside parties they investigate or sue'...The Commission's conduct in this case suggests that its exercise of vigilance has been lacking. It would serve the agency well in the future to reconsider how it might better discharge the responsibilities delegated to it or face the consequences for failing to do so."²

While the Fourth Circuit's decision in *EEOC v. Freeman* offers some comfort to employers, the bottom line is that this is a constantly evolving area of the law, and an employer's reliance on criminal history records in the hiring or employment process continues to present significant

¹ See *Equal Employment Opportunity Commission v. Freeman*, No. 13-2365, 2015 U.S. App. LEXIS 2592 (4th Cir. Feb. 20, 2015) (hereinafter "*Freeman Opinion*").

² *Freeman*, 2015 U.S. App. LEXIS 2592, at *23.

risk, especially for employers with high attrition for hourly workers. This is aptly illustrated by two additional large-scale lawsuits filed by the EEOC on June 11, 2013, which are being vigorously litigated and most likely will continue in litigation throughout 2015.

Aside from Equal Employment Opportunity (EEO) issues, employers also continue to face additional legal hurdles based on various legislative developments at the state and even the local level (e.g., Seattle, Washington, and San Francisco, California), such as "ban the box" restrictions and related limits on the use of criminal history in hiring and employment decisions. Employers also have been battling against a massive surge in class action litigation under the Fair Credit Reporting Act (FCRA) based on gathering criminal history through third-party consumer reporting agencies when conducting background checks on applicants and/or employees.

This Insight provides important takeaways for employers regarding this evolving area of the law, and to put those takeaways in context, highlights key portions of the EEOC's Criminal History Guidance; reviews in detail the *Freeman* case and lessons learned based on EEOC systemic charges and litigation that challenge an employer's use of criminal history in the employment process; summarizes the EEOC's additional pending litigation on the topic; and reviews another key federal appellate court decision discussing criminal history.

EEOC Guidance on Criminal History

Eliminating hiring barriers is one of the EEOC's key priorities based on the agency's December 2012 Strategic Enforcement Plan (SEP). This priority includes challenges to policies and practices that exclude applicants based on criminal history. As a result, the EEOC will continue to closely scrutinize exclusions based on an applicant's criminal history as well as background checks that, although facially neutral, have a discriminatory effect on certain applicants or employees.

The EEOC's April 2012 Criminal History Guidance outlines in detail the EEOC's concerns regarding use of criminal history in the hiring process and factors that employers are expected to consider prior to excluding any applicant based on criminal history.³ The EEOC stresses that any reliance on criminal history records that have an adverse impact on protected groups must be job-related and consistent with business necessity. In relying on criminal history in making employment decisions, the EEOC's Guidance advises employers to consider: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct and/or completion of the sentence; and (3) the nature of the job held or sought. The Guidance further underscores the importance of an "individualized assessment" prior to excluding an applicant based on a criminal record, but also refers to permitting exclusions involving specific criminal conduct (i.e. "targeted exclusions") that are "narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question."⁴

Numerous questions remain unanswered despite issuance of the Guidance, including: (1) the level of specificity required in developing defensible policies and procedures; (2) whether an employer can develop general across-the-board exclusions of candidates based on certain offenses; and (3) what factors an employer needs to consider in setting time frames for potentially excluding applicants based on certain offenses.

Impact of *Freeman* Decision

While employers have been patiently awaiting the Fourth Circuit's decision in this case in hopes of gleaning some clarity on the topic, they may be disappointed to read that the court stopped short of analyzing whether the company's background check policy was lawful.⁵

Below we summarize the factual and procedural history of the case,⁶ as well as the Fourth Circuit's opinion. We also briefly discuss related background check cases initiated by the EEOC that are currently pending before other courts and other noteworthy developments before offering key takeaways for employers.

³ See EEOC, [Enforcement Guidance on the Consideration of Arrest and Criminal Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.](#) (Apr. 25, 2012), hereinafter "EEOC Enforcement Guidance."

⁴ EEOC Enforcement Guidance, p. 14.

⁵ As further discussed below, only one federal appellate court, *El v. South Eastern Pennsylvania Transportation Authority (SEPTA)*, 479 F.3d 232 (3d Cir. 2007), has addressed the merits of a criminal background check policy.

⁶ See also Rod Fliegel and Jennifer Mora, [Federal Court Dismisses EEOC Title VII Disparate Impact Suit Over Alleged Discriminatory Background Checks Without Trial](#), Littler ASAP (Aug. 12, 2013); see also Rod Fliegel and Jennifer Mora, [Another Court Upholds the Employer's Right to Discover Information About the EEOC's Own Hiring Policies](#), Littler ASAP (Aug. 29, 2012).

Initial EEOC Investigation

The *Freeman* case is illustrative of the potential expansive nature of EEOC investigations, particularly when dealing with failure-to-hire claims. The initial discrimination charge, filed on January 17, 2008, involved an individual race discrimination claim by an African American woman, who alleged that she was discriminated against based on her credit history.⁷ Nearly nine months later, in September 2008, the employer was notified that the EEOC had expanded its investigation to include the employer's use of criminal history information in the hiring process.⁸ The EEOC's complaint, which was filed on September 30, 2009 following a reasonable cause finding and failure to conciliate, dramatically expanded the scope of the initial charge and alleged the employer engaged in a pattern and practice of unlawful discrimination against: (1) African American applicants by using poor credit history as a hiring criterion, and (2) African American, Hispanic, and white male applicants by using criminal history as a hiring criterion.⁹

Lawsuit Filed Despite Comprehensive Background Check Procedures

A related concern is that the EEOC filed this lawsuit despite the fact that the employer in *Freeman* had developed a comprehensive policy and related procedures based on the use of criminal and credit history in the hiring and employment process.

The employer, a nationwide convention, exhibition, and corporate events marketing company, began performing background checks of applicants and employees after various work-related concerns that had arisen, including embezzlement, theft, drug use, and workplace violence. Based on the employer's policy, different types of background checks were ordered depending on the nature of the job sought. For some positions, the background check included only a criminal history investigation and Social Security number verification. For "credit sensitive" positions, the check also included a credit history review.¹⁰ Lastly, for positions such as general managers and department heads, the company added an education and certification verification.

The company inquired about convictions on its employment application and provided space on the application for the applicant to describe the date and circumstances surrounding any conviction. It specified that the applicant should "[g]ive all the facts, so that a fair decision can be made." The application also stated that a conviction would not automatically bar the applicant from being offered a job. The company limited its consideration of convictions to those that occurred within seven years of the application date and did not consider arrest records.

The company then used a multi-step evaluation process in considering criminal records and determining whether an applicant was qualified to work for the company. First, it considered whether the applicant was honest about his or her criminal convictions on the application and automatically disqualified those who made materially dishonest statements. Next, the company examined outstanding arrest warrants—applicants with pending warrants were given the opportunity to resolve the matter and have the warrant withdrawn. Last, the company considered criminal convictions for which the applicant was committed or released from confinement within the past seven years, and evaluated whether the conduct underlying a conviction made the applicant unsuitable for employment. The company generally disqualified applicants with convictions involving violence, destruction of private property, sexual misconduct, felony drug convictions, or job-related misdemeanors.¹¹

From the EEOC's perspective, despite the detailed procedures, the employer's policies and procedures allegedly were fatally flawed because (1) reliance on criminal history has an adverse impact and improperly excluded African Americans, Hispanics, and males, and (2) reliance on credit history information had an adverse impact and improperly excluded African Americans from hire. The EEOC alleged that the policies were not job-related or consistent with business necessity, and failed to consider less-discriminatory alternative selection procedures.

Freeman as a "Blueprint" for Criminal and Credit History Litigation by the EEOC

The *Freeman* lawsuit provides an excellent "blueprint" regarding the manner in which criminal and credit history cases are being litigated.

Applicable Limitations Period. A critical element in these cases is identifying the potential class of applicants on whose behalf the EEOC can seek relief. Thus, a key factor is determining the applicable statute of limitations that will be applied by the courts.

⁷ *EEOC v. Freeman*, Case No. 8:09-cv-02573, Docket No. 7-2 at 3.

⁸ *Id.*, Docket No. 27-4.

⁹ *Id.* Complaint, Docket No. 1, at ¶¶ 8-11.

¹⁰ "Credit sensitive" positions were those in which the employee holding that position had access to client or company credit card information; handled money, checks, etc.; had budgetary authority; had authority to make agreements with respect to customer invoices; or made purchases from vendors.

¹¹ *EEOC v. Freeman*, Case No. 8:09-cv-02573, Docket No. 149 at 6.

In the early stages of the *Freeman* case, the court was faced with the employer's motion to dismiss to limit the potential class of applicants entitled to relief based on the lawsuit. On April 27, 2010, in an initial ruling, the district court held that based on this "pattern or practice" lawsuit, Title VII "precludes the EEOC from seeking relief for individuals who were not subjected to an unlawful employment practice during the 300 days before the filing of the triggering charge" (i.e. January 17, 2008), thus dismissing all claims asserted in the complaint to the extent they related to hiring decisions made before March 23, 2007.¹² In short, the court held that the only potential class members were applicants who purportedly were excluded from employment within 300 days of the complainant's charge.

As significantly, in a subsequent motion by the employer to further limit the scope of the applicable class, the employer focused on the EEOC's delay in notifying the employer that it had expanded the charge to address criminal history until eight months after the charge was filed. As a result, the court further narrowed the scope of the applicable class and held that the EEOC could only seek relief of those allegedly excluded from hire based on criminal history if they had been excluded during the time period 300 days prior to the date that the employer had been notified that the charge also would challenge any exclusions based on an applicant's criminal history record.¹³

While the applicable limitations period was an issue presented for appeal to the Fourth Circuit in the *Freeman* case, the appellate court declined to consider the issue, basing its affirmance of the summary judgment ruling solely on the exclusion of the expert's reports.¹⁴

Discovery of the EEOC's Own Reliance on Criminal History in its Hiring Practices. In criminal and credit history cases, employers also have attempted to focus on the EEOC's own hiring practices to establish an estoppel affirmative defense. In *Freeman*, the employer attempted to depose EEOC officials to specifically inquire about such practices. In rejecting the EEOC's motion for a protective order, the district court ruled that "if [the EEOC] uses hiring practices similar to those used by [Freeman], this fact may show the appropriateness of those practices, particularly because [the EEOC] is the agency fighting unfair hiring practices."¹⁵ However, while neither the court in *Freeman* nor other courts in similar criminal/credit history cases have relied on this factor in ultimately deciding the case, the significance of such practices by the EEOC will continue to be front and center in criminal history litigation.

Critical Role of Statistics in Supporting Disparate Impact Discrimination. Similar to other EEOC challenges of employers relying on criminal history in the hiring process, the basis for the EEOC's claim in *Freeman* does not involve alleged intentional discrimination. Rather, the focus has been disparate impact claims, which attack rules that are "fair in form, but discriminatory in operation" based on an applicant's protected status.¹⁶ These cases essentially rely on statistical evidence in demonstrating that the practice has the effect of denying the members of one race equal access to employment opportunities.¹⁷ The burden then shifts to the employer to demonstrate that the "challenged practice is job related for the position in question and consistent with business necessity."¹⁸

A critical factor in these cases is the relevant pool of statistics that needs to be considered in proving disparate impact, since a certain level of specificity is required in proving a disparate impact claim. While the EEOC challenged the use of criminal and credit history in *Freeman*, the EEOC's experts merely attempted to compare the percentage of African American applicants not hired because of the criminal or credit background check with the percentage of non-African American applicants not hired because of the check. The employer, on the other hand, argued that in proving disparate impact, the EEOC is required to demonstrate the specific employment practice having a disparate impact, such as demonstrating that excluding applicants based on particular offenses such as theft, sex offenses, and/or drug trafficking had a disparate impact.¹⁹

¹² *Id.*, Docket No. 18 at 7, 12.

¹³ *Id.*, Docket No. 42 at 11.

¹⁴ On appeal, the EEOC included last-minute submissions in support of its view that the 300-day limitations period did not apply to pattern or practice litigation initiated by the EEOC, citing *EEOC v. New Prime, Inc.* 2014 WL 4060305 (W.D. Mo. Aug. 14, 2014), and *EEOC v. PMT Corp.*, 2014 WL 4321401 (D. Minn. Aug. 27, 2014), Docket 56 (Sept. 3, 2014). In response, *Freeman* cited the wealth of authority that supported application of the 300-day limitation to the EEOC, Docket 57 (Sept. 3, 2014).

¹⁵ *Id.*, Docket No. 92 at 4, citing *EEOC v. Kaplan Higher Educ. Corp.*, No. 1:10 CV 2882, 2011 WL 2115878, at *4 (N.D. Ohio May 27, 2011) ("Whether the EEOC uses background or credit checks in hiring its employees is relevant to whether such measures are a business necessity. Accordingly, defendant is entitled to depose [EEOC's] Rule 30(b)(6) designee on these topics."). The district court relied on a similar ruling in which an employer was successful in seeking the EEOC's credit history practices based on an EEOC lawsuit challenging the employer's credit history practices as being discriminatory against African Americans. While the court in *Freeman* subsequently limited the scope of the inquiries based on the nature of the employer's discovery request, the extent to which such facts may be admissible in any trial on the issue remains an open question.

¹⁶ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

¹⁷ See *N.Y. Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979).

¹⁸ See 42 U.S.C. § 2000e-2(k)(1)(A)(i).

¹⁹ See *EEOC v. Freeman*, Case No. 8:09-cv-02573, Docket No.114 at 17-22.

Procedural History and District Court's Decision

As discussed above, the EEOC's lawsuit in *Freeman* alleged that the employer engaged in a "pattern or practice" of discrimination against African American applicants by using poor credit history as a hiring criterion ("credit class"), and against African American, Hispanic, and male job applicants by using criminal history as a hiring criterion ("criminal class"). According to the EEOC, these hiring criteria had a significant disparate impact on the identified classes and were not job-related or consistent with business necessity. After dismissals based on procedural issues, the "credit class" consisted of 51 African Americans allegedly unlawfully excluded from employment, while the "criminal class" comprised African American and males allegedly unlawfully excluded from employment.

In a pivotal move attacking the EEOC's claims, the company moved to strike the expert report and testimony of the EEOC's statistical experts, Kevin R. Murphy and Beth M. Huebner, based on inaccuracies in the underlying data in support of the EEOC's disparate impact claim. These experts analyzed data produced by the company in an attempt to show that African American applicants failed the company's credit background checks at a significantly higher rate than did other races, and that male and African American applicants failed the company's criminal background checks at a significantly higher rate than did females and non-African Americans. Just a few days later, the company moved for summary judgment, contending that because the EEOC failed to present reliable statistical evidence, the EEOC was unable to show disparate impact.

Judge Titus of the District Court of Maryland ultimately agreed with the company and granted its motion for summary judgment, explaining, "[t]he story of the present action has been that of a theory in search of facts to support it." The district court's opinion primarily concentrated on the reasons Murphy's expert opinion was inadmissible and thus insufficient to demonstrate disparate impact. The court felt it had "no choice" but to disregard the experts' disparate impact analysis, stating that "there appear to be such a plethora of errors and analytical fallacies underlying Murphy's conclusions to render them completely unreliable, and insufficient to support a finding of disparate impact." The court explained that Murphy's analysis was flawed because (1) it was not based on a random sample of accurate data from the relevant applicant pool and time period; (2) it did not cover the time period identified in the EEOC's claims, but instead represented a distorted fraction of the time period relevant in the case; (3) Murphy used "meaningless, skewed statistics" and data generated under the company's old credit check policy to enhance his disparate impact results; (4) Murphy's database omitted data from half of the company's branch offices, with no apparent explanation; and (5) Murphy's database was "rife with material errors and unexplained discrepancies."

The court also opined that the national statistics cited in the experts' reports were not enough to show disparate impact. The experts relied on general population statistics to create an inference of disparate impact, even though the general population pool was not representative of the relevant applicant pool. The court went on to state that even if the expert reports were admissible, the EEOC nevertheless failed to identify any policies causing the alleged disparate impact. The company's background investigation policies consisted of multiple elements that involved different types of checks depending on the particular job an applicant sought, consideration of both subjective and objective criteria, and examination of several factors. The court explained that the EEOC made no effort to break down the company's multi-faceted policy and identify which parts were responsible for creating a disparate impact on certain classes.

The court concluded by empathizing with employers and recognizing the difficult position they are in due to the EEOC filing such lawsuits:

By bringing actions of this nature, the EEOC has placed many employers in the "Hobson's choice" of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers.

Fourth Circuit's Opinion

As discussed at the outset, the Fourth Circuit did not reach the merits of the case regarding the EEOC's challenge to the employer's use of criminal and credit checks. Rather, the Fourth Circuit affirmed the district court's grant of summary judgment "solely on the basis that the district court did not abuse its discretion in excluding the EEOC's expert reports as unreliable under [the Federal Rules of Evidence]."²⁰ The court noted: "We emphasize that by our disposition we express no opinion on the merits of the EEOC's claims."²¹

²⁰ *Freeman*, 2015 U.S. App. LEXIS 2592, at *10.

²¹ *Id.*, fn. 8.

In the majority opinion, the Fourth Court reviewed in detail the district court's finding that there was an "alarming number of errors and fallacies" in the expert reports, "making it impossible to rely on any of its conclusions." The appellate court highlighted the district court's findings that: (1) the expert omitted applicant data for certain time periods and omitted data "from half of Freeman's offices," despite the fact that the scope of the EEOC's lawsuit was a nationwide challenge to the employer's background check practices; (2) there were "a 'mind-boggling' number of errors and unexplained discrepancies" in the expert's database; and (3) the EEOC represented that one of the experts fixed any errors in his analysis, but found that "he did not make certain corrections to his database, despite claims of doing so," "managed to introduce fresh errors into his new analysis" and "still omitted hundreds of applicants for whom Freeman produced complete information in discovery."²²

The separate concurring opinion by one of the judges was particularly harsh in its criticism of the EEOC's conduct in the litigation, commenting, "The Commission's work of serving 'the public interest' is jeopardized by the kind of missteps that occurred here" and added: "It is my hope that the agency will reconsider pursuing a course that does not serve it or the public interest well."²³

In adding additional criticism further justifying exclusion of the expert report, the concurring opinion underscored that the primary expert's work "simply did not meet the standards for expert testimony" and it was "not a close question."²⁴

According to the concurring opinion, three problems merited "special recognition." First, while courts "caution experts against drawing broad conclusions from incomplete data," the expert's data "ignored at least two-and-a half years of relevant and available data" and "ignored relevant criminal background check data from 21 of Freeman's 39 different locations." Second, courts "consistently [have] excluded expert testimony that 'cherry-picks' relevant data," and the EEOC's primary expert not only was "capriciously selective" in his use of certain data, but the approach used "suggests that he fully intended to skew the results," relying on an approach that the district court appropriately referred to as "an egregious example of scientific dishonesty." Third, and finally, the expert's analysis contained "many obvious errors and mistakes, and these 'factual deficiencies' further evidence his 'faulty methods and lack of investigation,'" which included "basic arithmetic mistakes," miscoding criminal and credit check outcomes and double counting other applicants.

The concurring opinion was also critical of the EEOC based on its reliance on an expert who demonstrated a pattern of "suspect work," including another recent case by the EEOC in which summary judgment was granted based on the unreliability of the expert's report.²⁵ The decision further highlighted additional earlier opinions in which this same expert had been criticized by the courts based on his "flawed approach."

Finally, as previously discussed, the concurring opinion concluded with scathing criticism of the EEOC, pointing out that the EEOC must "balance sometimes-competing responsibilities," which involves serving the public's interest by preventing an employer from "engaging in any unlawful employment practice," but also complying with its "duties to employers," which includes a duty to properly investigate charges, conciliate in good faith and "a duty to cease enforcement attempts after learning that an action lacks merit." In the opinion of one judge: "That the EEOC failed in the exercise of this second duty in this case now before us would be restating the obvious."²⁶

Two Additional EEOC Cases Worth Watching

As discussed above, despite the criticism the Fourth Circuit leveled at the EEOC in *Freeman*, the court never reached the merits of the case. Failure-to-hire claims remain an EEOC priority, and employers should assume the EEOC will learn from its mistakes in the *Freeman* case and plan its cases going forward.

Two additional EEOC lawsuits, which were both filed on June 11, 2013 and are in the midst of being vigorously litigated by the parties, may ultimately provide enhanced guidance on the lawfulness of criminal background check policies, depending on whether the courts have the opportunity to rule on the merits of those cases.²⁷

²² *Id.* at *10.

²³ *Id.* at *11.

²⁴ *Id.* at *12.

²⁵ The court cited *EEOC v. Kaplan Higher Education Corp.*, 748 F.3d 749 (6th Cir. 2014) in which the Sixth Circuit similarly had affirmed a district court finding involving faulty analysis by the same expert. For more information on the Kaplan decision, see Rod Fliegel, Jennifer Mora, and William Simmons, [EEOC Suit Against Employer Screening Applicants Based on Credit History Information Dismissed](#), Littler ASAP (Feb. 4, 2013).

²⁶ *Freeman*, 2015 U.S. App. LEXIS 2592 at *22.

²⁷ See EEOC Press Release: [EEOC Files Suit Against Two Employers For Use of Criminal Background Checks](#) (June 11, 2013); see also Rod M. Fliegel, Barry Hartstein, and Jennifer L. Mora, [Two New EEOC Criminal Record Lawsuits Underscore Important Strategic and Practical Considerations for Employers Conducting Background Checks](#), Littler ASAP (June 12, 2013).

Pending Lawsuit Against Automobile Manufacturer

In the lawsuit against a car manufacturer,²⁸ which is currently pending in the District of South Carolina, the EEOC filed suit on behalf of 69 individuals who were employees of a contractor that provided logistical services to the company at one of its manufacturing facilities. After the automobile manufacturer ended its relationship with the contractor, the employees were told they needed to reapply with a new contractor to retain their positions. As part of that application process, the automobile manufacturer directed the new contractor to perform criminal background checks on the workers and subsequently discovered that numerous employees of the prior contractor had criminal convictions in violation of the car manufacturer's criminal conviction policy. Thus, those employees were terminated and denied rehire with the new contractor.

The EEOC alleges that the automobile manufacturer's use of criminal background checks in hiring disproportionately screened out African American job applicants. The EEOC contends that the automobile manufacturer's written criminal conviction background check policy excluded individuals with convictions for the following categories of crimes: "Murder, Assault & Battery, Rape, Child Abuse, Spousal Abuse (Domestic Violence), Manufacturing of Drugs, Distribution of Drugs, [and] Weapons Violations." The EEOC also claims that the automobile manufacturer excluded from employment individuals with criminal convictions involving "theft, dishonesty, and moral turpitude;" that the car manufacturer's policy made no distinction between felony and misdemeanor convictions; and that there was no statute of limitations for any of the crimes. The heart of the EEOC's complaint is that applicants were excluded from employment "without any individualized assessment of the nature and gravity of their criminal offenses, the ages of the convictions, or the nature of their respective positions." In failing to make an individualized assessment, the company was also challenged because there allegedly was not any consideration of the fact that many of the applicants had performed the same work at the same facility for several years with the prior contractor without incident.²⁹

While there have not yet been any substantive rulings on the merits of this case, a contentious discovery issue is worthy of discussion. Similar to *Freeman*, the defendant employer turned the tables on the EEOC and filed a motion to compel, seeking all documents relating to any policy, guideline, standard or practice used by the EEOC in considering the criminal conviction records of individuals who apply to work for the EEOC. The auto manufacturer argued that its criminal conviction policy is justified by business necessity and that the EEOC is estopped from claiming that the policy violates Title VII. The auto manufacturer argued that the documents may reveal that the EEOC's internal practices so contradict its contentions in the lawsuit as to estop (or preclude) its claims. While the magistrate judge denied the auto manufacturer's motion to compel, the district judge reversed that decision. The EEOC argued that documents related to its criminal conviction background check policy were not relevant to the claims and defenses because the positions for which the EEOC utilized its policy were not similar to the positions at issue in the litigation. However, the judge pointed out that the EEOC had not submitted its policies or the positions for which they are used, and the car manufacturer is not required to simply accept the EEOC's position that the two entities' practices are dissimilar. While the court recognized that the EEOC's policies ultimately may not be relevant to the suit, the court decided that the EEOC must nevertheless produce its internal policies to the car manufacturer.

Other discovery disputes have continued to heat up in this case as well. For instance, the EEOC recently filed a motion for a protective order seeking to limit the employer from asking certain questions in deposing EEOC investigators and a manager.³⁰ The employer responded by arguing that the EEOC should be required to answer questions regarding the EEOC's analysis of the employer's background check policy, since, according to the employer, the EEOC's suit is based only on statistics and is void of any allegations of intentional discrimination.³¹

Another point worth mentioning is that the EEOC apparently decided not to use the experts it previously engaged in the *Freeman* case. Instead, the EEOC has designated Dr. Michael A. Campion of Campion Consulting Services who, according to the EEOC, is expected to provide expert testimony with regard to the disparate impact that defendant's criminal background check policy has on African Americans.

Pending Lawsuit Against Retail Operation

On the very same day the EEOC filed suit against the car manufacturer, it also hit a retail chain with a similar lawsuit in the Northern District of Illinois.³² In this second lawsuit, the EEOC asserts that the retail operation's criminal background check policy has a disparate impact on

²⁸ See No. 7:13-cv-01583 (D.S.C., Spartanburg Div., Filed: June 11, 2013).

²⁹ *Id.*, Complaint, at ¶ 23.

³⁰ *Id.*, Docket No. 78.

³¹ *Id.*, Docket No. 91.

³² See Case No. 1:13-cv-04307.

African American applicants and conditional hires in violation of Title VII and that this policy is not job-related or consistent with business necessity. This lawsuit stems from two charges that were filed at the EEOC. The first charge concerned the employer's alleged withdrawal of an applicant's job offer days after she began working as a stocker and cashier due to a six-year old felony conviction for possession of a controlled substance. The second charge concerned an individual who was allegedly fired from the company despite the fact that the background check report on her was erroneous. Here, too, a central focus of the lawsuit is the failure to make an individualized assessment prior to excluding the applicants from employment.

Similar to the other pending district court lawsuit, the court has not yet made any substantive rulings but instead has been engulfed in managing and deciding discovery disputes between the parties.³³ The case has recently been referred to the magistrate judge for purposes of holding a settlement conference and supervising the remainder of the discovery process. Assuming the lawsuit is not resolved through settlement, this pending matter also may provide guidance in dealing with the EEOC regarding background checks.

Impact of Third Circuit Decision in *El v. SEPTA*

While the Fourth Circuit in *Freeman* declined to address the merits of criminal background checks when faced with a claim that the use of criminal history has an unlawful discriminatory impact on certain protected groups, this issue was addressed by the Third Circuit a number of years ago in *El v. South Eastern Pennsylvania Transportation Authority (SEPTA)*.³⁴ While the 2007 *El* decision did not involve litigation by the EEOC, it was a focal point of discussion in the EEOC's 2012 updated guidance on criminal history.

In *El v. SEPTA*, the plaintiff, an African American, was rejected for a job as a paratransit driver based on a second-degree murder conviction approximately 40 years earlier when he was 15 years old for which he served three and a half years in jail. SEPTA had a policy of not hiring anyone with convictions for "moral turpitude or violence." Although he was hired by the subcontractor, he thereafter was terminated based on the SEPTA policy following the background check. The EEOC issued a reasonable cause finding, and the plaintiff filed a lawsuit against SEPTA alleging that the policy had a disparate impact on minority applicants because they are more likely than white applicants to have a conviction on their records. Though finding a disparate impact, the district court granted summary judgment in SEPTA's favor, and the appeal followed.

At issue on appeal was how courts should interpret disparate impact claims and the "business necessity" defense. The appeals court reviewed in detail the long history of disparate impact claims since *Griggs v. Duke Power Company*,³⁵ in which the court announced that "disparate impact" cases should proceed in two steps: (1) the plaintiff must prove that the challenged policy discriminates against members of a protected class, and then (2) the defendant can overcome the showing of disparate impact by demonstrating "business necessity" (*i.e.*, proving a "manifest relationship" between the policy and job performance).

The Third Circuit in *El* acknowledged that the U.S. Supreme Court "has never dealt directly with criminal record policies."³⁶ The Third Circuit then commented: "Attempting to implement the *Griggs* standard, we have held that hiring criteria must effectively measure the 'minimum qualifications for successful performance of the job in question.'"³⁷ Notwithstanding, the court of appeals concluded that the Supreme Court's prior decisions on "business necessity" did not really apply because the hiring policy dealing with criminal history was not tied to a person's ability to perform the job in question (*i.e.*, drive a paratransit bus), and instead was tied to whether hiring the individual posed "too much of a risk of potential harm" to passengers.³⁸

33 Notably, the retail operation filed a motion to compel information on EEOC's policies regarding using background checks and criminal histories in employment decisions. The retail operation also seeks information on background check policies that do pass legal muster. The court has not yet ruled on these issues.

34 479 F.3d 232 (3d Cir. 2007). While *El* was critical in part of the EEOC's prior guidance, the updated guidance relies on and cites with approval various holdings in the decision relating to application of the disparate impact theory to cases involving exclusion of applicants on the basis of criminal history. See Section V.B of the EEOC Enforcement Guidance.

35 401 U.S. 424 (1971). In *Griggs*, where the employer imposed a requirement of a high school education and passing a general intelligence test as a condition of employment for unskilled jobs, the Supreme Court first addressed the disparate impact theory and held: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity." The Court further underscored that "if the employment practice . . . cannot be shown to be related to job performance, the practice is prohibited." The updated guidance also relies on *Griggs* and its progeny. See Section V.B.1 of the EEOC Enforcement Guidance.

36 The Third Circuit highlighted that the Supreme Court only dealt "tangentially with criminal behavior in two cases:" (1) *McDonnell Douglas Corp. v. Green*, 411 U.S. 92 (1973) (dealt with employer refusal to rehire a former employee on the ground that the employee had engaged in disruptive, illegal protests in front of the employer's premises and found "employer's fear that this employee would continue to be disruptive was a legitimate reason for the refusal [to rehire]"); and (2) *New York City Transit Authority v. Beazer*, 440 U.S. 569 (1979) (holding it was permissible under Title VII to refuse to hire anyone using methadone to treat illegal drug addiction for "safety sensitive" positions because it serves the "legitimate employment goals of safety and efficiency").

37 *El*, 479 F.3d at 242.

38 *Id.* at 242-43.

The Third Circuit in *El* explained that "the issue before us is the risk that the employee will harm a passenger, and the phrase 'minimum qualification' simply does not fit," thus holding that policies regarding criminal convictions pertain to risk, not job performance and therefore applied a unique method of analysis. The court ultimately concluded that the policy under review needed to "accurately distinguish between the applicants that pose an unacceptable level of risk and those that do not."³⁹ The court affirmed summary judgment in favor of the employer based on the findings of an expert criminologist who found that there was a greater risk of hiring someone with a conviction for a violent crime, even someone with a remote crime, but the court was careful in underscoring that this stemmed in part from the plaintiff's failure to produce any contrary expert evidence.

Whether the *El* decision will be followed in other jurisdictions remains to be seen. In the interim, employers need to brace themselves for additional potential EEOC challenges to the use of criminal history in the hiring and employment process.⁴⁰

Takeaways for Employers to Mitigate Legal Risk

Employers have been awaiting the Fourth Circuit's *Freeman* decision with the hope that it might provide further guidance on the use of criminal background checks. However, the *Freeman* decision stops short of providing such a solution when an employer is faced with a disparate impact challenge to the use of criminal history in the hiring and employment process. As shown above, the 2007 *El* decision is the only federal appeals decision to address disparate impact claims, but that decision also fails to squarely address many issues faced by employers.

Thus, from an EEO perspective, in considering an individual's criminal history in the hiring and employment process, employers are left with a number of unanswered questions. For instance, exactly what "job-related and consistent with business necessity" means in practical terms is not anywhere near crystal clear in any court decisions. Employers are also left questioning just how closely a past criminal conviction has to correspond with the duties of a particular job in order for an employer to legally deny employment to an applicant, and what time limitations can be applied based on certain types of convictions. As significantly, for employers involved in mass hiring, where an individualized assessment may not be feasible, in what circumstances can an employer apply a blanket exclusion based on certain offenses?

Moreover, employers continue to witness expanding restrictions dealing with criminal history based on ban-the-box legislation at the state and local level.⁴¹ Employers have also been confronted with an increasing number of class action lawsuits based on the failure to comply with legal requirements involving background checks as required under the Fair Credit Reporting Act.⁴²

While employers are encouraged to work closely with legal counsel based on this evolving area of the law, the following are some general guidelines to take into consideration in reviewing current policies and procedures dealing with criminal history inquiries and/or use of criminal background checks in the hiring and employment process:⁴³

- Closely monitor ongoing local, state and federal developments, including EEOC case developments, that may impact an employer's use and/or reliance on criminal history.

³⁹ Section V.B.1 of the updated EEOC Enforcement Guidance cites this standard with approval.

⁴⁰ See, e.g., Rod Fliegel and Molly Shah, [Federal Court Grants Class Certification in Title VII Disparate Impact Suit Over Alleged Discriminatory Criminal Records Screening Policy](#), Littler ASAP (July 7, 2014).

⁴¹ See, e.g., Philip Gordon, Jennifer Mora, Joseph Harkins and Zoe Argento, [Four New Laws Within 40 Miles: The Washington, DC Area Accelerates the "Ban-the-Box" Movement](#), Littler ASAP (Dec. 2, 2014); Adam Wit, Darren Mungerson and Jennifer Mora, [Illinois Enacts New Law Impacting Inquiries on Criminal Background Checks](#), Littler ASAP (July 21, 2014); Rod Fliegel, Phil Gordon, Jennifer Mora and Keith Rosenblatt, [New Jersey's "Opportunity to Compete Act" Continues the Nationwide "Ban-the-Box" Trend](#), Littler ASAP (Aug. 12, 2014); Rod Fliegel, Jennifer Mora, Joseph Harkins and Melanie Augustin, [Private Sector Employers in the District of Columbia Will Soon Be Required to Comply with a New Law Restricting Their Ability to Rely on Criminal Records for Employment Purposes](#), Littler ASAP (Aug. 22, 2014); Rod Fliegel and Jennifer Mora, ["Ban-the-Box" and Beyond: Employers That Do Business In or Contract with the City of San Francisco Should Review Sweeping Restrictions Regarding Inquiries Into, and the Use of, Criminal Records](#), Littler ASAP (Feb. 14, 2014). In addition to ban-the-box restrictions, other state laws pose challenges in using background checks. See, e.g., Jennifer Mora and William Simmons, [The Old \(Law\) is New Again: Plaintiffs Increasingly Using Old Pennsylvania Law to Challenge Background Check Decisions](#), Littler ASAP (Nov. 7, 2014).

⁴² For a comprehensive review of FCRA-related issues involving criminal background checks, see Rod Fliegel, Jennifer Mora, and William Simmons, [Fair Credit Reporting Act Amendment Offers Important Protections From Lawsuits Targeting Background Check Programs](#), Littler Report (Sept. 10, 2013); Rod Fliegel, Jennifer Mora and William Simmons, [The Swelling Tide of Fair Credit Reporting Act \(FCRA\) Class Actions: Practical Risk-Mitigating Measures for Employers](#), Littler Report (Aug. 1, 2014); Rod M. Fliegel and Jennifer Mora, [Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014](#), Littler ASAP (Jan. 6, 2014); Rod Fliegel and Jennifer Mora, [The FTC Staff Report on "40 Years of Experience with the Fair Credit Reporting Act" Illuminates Areas of Potential Class Action Exposure for Employers](#), Littler Report (Dec. 12, 2011).

⁴³ For a comprehensive summary of the EEOC's guidance and related legal concerns, including applicable state law compliance issues, see Barry Hartstein, [Recent EEOC Developments Involving Disqualification of Applicants Based on Criminal History](#), Littler ASAP (Mar. 28, 2011); Barry Hartstein, Rod Fliegel, Marcy McGovern, and Jennifer Mora, [Criminal Background Checks: Evolution of the EEOC's Updated Guidance and Implications for the Employer Community](#), Littler ASAP (May 17, 2012); see also Rod Fliegel, Barry Hartstein, and Jennifer Mora, [EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers](#), Littler ASAP (Apr. 30, 2012).

- Consider a privileged review of current job postings and employment applications, including on-line job postings and applications. The timing of making such inquiries may vary depending on restrictions based on ban-the-box legislation and/or ordinances at the state or local levels. The employer must also weigh the pros and cons of deferring such inquiries until after a conditional offer of employment. Having such inquiries in a separate addendum (including with masked fields) also can be used to limit access to Human Resources and other appropriate personnel involved in reviewing an applicant's criminal history.
- Review the specific criminal history inquiries currently made to ensure language is included that provides such disclosures will not automatically result in disqualification of an applicant, and provide an opportunity for an applicant to further explain any criminal convictions and/or criminal records disclosed.
- Carefully consider any potential inquiries regarding pending arrests in light of potential restrictions under state and/or federal law, both in terms of making the inquiry and potentially excluding an applicant based on such inquiries.
- Provide to any decision makers in the field who may be exposed to criminal record information, including voluntary disclosures by job applicants, resources and training, such as interview guidelines and Frequently Asked Questions (FAQs).
- Ensure FCRA compliance based on preparing disclosure and authorization forms to be completed by applicants, as well as pre-adverse and adverse action letters to the extent that criminal history may be relied on in whole or in part to exclude an applicant from employment to ensure legal compliance, particularly based on recent case developments in which such forms have been subject to legal challenge.
- Consider conducting an individualized assessment prior to excluding an applicant based on criminal history and/or carefully restrict to a bare minimum the circumstances in which an applicant may automatically be excluded from employment based on conviction of certain offenses, taking into account the EEOC's guidance in this area.
- Consider developing appropriate documentation, including criminal history worksheets, prior to excluding an applicant based on criminal history, particularly in jurisdictions such as New York in which applicable law and court decisions highlight the importance of considering various factors prior to excluding an applicant based on criminal history.
- Develop a core team of individuals who have knowledge of the employer's business and are well-versed in the use of criminal history to make any final decision prior to excluding an applicant and/or employee from employment and/or a particular position based on the individual's criminal record.

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