

Blog Post

Is The EEOC's Background Check Guidance In Jeopardy?

February 21, 2018

Employers that have been frustrated with the EEOC's position on how they can use arrest and conviction records, take note: earlier this month, a federal court in Texas enjoined the EEOC and the Attorney General of the United States from enforcing the EEOC's "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII" (the Guidance) against the State of Texas. The Guidance, which was issued in April 2012, requires an employer to make an individualized assessment when using a criminal record to disqualify an employee from employment. When the Guidance was first issued, many complained that it was issued without notice and the opportunity for public comment.

Texas law takes a person's criminal history into consideration in many ways, including in employment. For example, felons are categorically excluded from certain state job opportunities. In 2013, an EEOC charge was filed against Texas based on the state's categorical ban on hiring felons. This prompted Texas to bring an action against the EEOC and the Attorney General of the United States in federal court seeking a declaration that Texas has the right to enforce its laws barring convicted felons from serving in certain jobs and an injunction preventing the EEOC from enforcing the Guidance and from issuing right-to-sue letters. Texas claimed

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that the Guidance was issued without notice and the opportunity for comment as required for substantive rules by the Administrative Procedures Act (the APA).

Texas asked the court to rule in its favor without going to trial, arguing that the guidance interferes with its ability to impose categorical bans on hiring felons and to use its discretion to reject felons from certain jobs. On February 1, 2018, the Court granted that part of the state's motion regarding its claim that the Guidance violated the APA. The Court enjoined the EEOC and the Attorney General from enforcing the EEOC Guidance against Texas until the EEOC complies with the notice and comment requirements for substantive rules under the APA. The Court, however, declined to enjoin the EEOC from issuing right-to-sue letters and to issue the declaration sought by Texas.

Although the injunction is limited to Texas, the Court's ruling may encourage others to bring similar lawsuits seeking to enjoin the EEOC from enforcing the Guidance. This ruling may also prompt the EEOC to reconsider the Guidance. Given that the decision came down less than two weeks ago, it is too early to tell exactly what the effects of this decision will be outside of Texas. Akerman's Labor & Employment attorneys will monitor any developments.

This information is intended to inform clients and friends about legal developments, including recent decisions of various courts and administrative bodies. This should not be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this email without seeking the advice of legal counsel.