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Fuzzy law on employers' use of arrest records

By Brett Burns and Anna Suh

On Nov. 4, the state of Texas sued the Equal Employment Opportunity Commission and Jacqueline A. Berrien (in her official capacity as chair of the EEOC), requesting a federal district court to declare invalid the EEOC's enforcement guidance on employers' use of arrest and conviction records and to enjoin the EEOC from using this guidance against the state and its agencies. *Texas v. EEOC*, No. 5:13-cv-00255-C (N.D. Tex.)

The EEOC's Guidance

While the EEOC's guidance does not preclude employers from using criminal background checks, the guidelines inform employers that, in the event their background checks result in a disparate impact on a protected class, employers will have to defend their policies on job relatedness and business necessity grounds. The guidelines essentially presuppose that most employers' policies will have a disparate impact, given that African Americans and Hispanics are arrested and convicted at rates disproportionate to their numbers in the general population. The guidelines further specify that "[a]n employer's evidence of a racially balanced workforce will not be enough to disprove disparate impact."

In terms of the job related/business necessity defense, the guidance sets out two circumstances where employers will consistently meet the "job related and consistent with business necessity" defense: (1) employer validates the criminal conduct screen per the Uniform Guidelines on Employee Selection Procedures (which employers find difficult to do given its stringent validation standards), or (2) employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job, and then provides an opportunity for an individualized assessment for people excluded by the screen.

The guidance further notes (as highlighted in the complaint filed by Texas) that, although compliance with other federal laws or regulations that conflict with Title VII is a defense, any conflicting state and local laws or regulations are preempted by Title VII. Accordingly, employers following conflicting state and local laws may be subject to suit under Title VII.

Texas' Challenge

Texas contends that Congress never granted the EEOC substantive rulemaking power under Title VII and the agency has overstepped its statutory authority. Texas further contends that the guidance encroaches upon the state's sovereign right to maintain and enforce laws and policies that place an absolute bar on the hiring of convicted felons by many of its state agencies, highlighting positions in state public safety, disability services, land office, juvenile justice, lottery, parks and wildlife, and public school system departments.

The complaint further alleges that the EEOC already has launched hundreds of meritless investigations against employers and highlights some key cases of purported prosecutorial abuse by the EEOC:

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- The EEOC's lawsuit against G4S Secure Solutions (USA) Inc., a private security company that provides security guards for government buildings, nuclear power plants, and other secure installations, for G4S's compliance with Pennsylvania law prohibiting the hiring of felons to work as security officers.
- The EEOC's lawsuit against national discount retailer Dollar General for its refusal to hire felony convicts (including the named plaintiff for the position of stocker because she had two drug-related convictions).
- The EEOC's lawsuit against carmaker BMW for firing employees because they had been convicted of various crimes including murder, rape, and other offenses involving "theft, dishonesty, and moral turpitude."
- The EEOC's lawsuit against temporary staffing company Peoplemark, where disparate impact was never proven, where the named plaintiff Peoplemark declined to hire was sent back to prison in the middle of the EEOC's investigation, and where the federal court dismissed the EEOC's complaint with prejudice and awarded fees and costs to Peoplemark.
- The EEOC's lawsuit against trade-show-and-convention company Freeman, where the court granted Freeman's motion for summary judgment, struck the EEOC's experts, and characterized the EEOC's lawsuit as "a theory in search of facts to support it."

Texas' lawsuit follows a July 24 letter sent by state attorney generals from nine states (Alabama, Colorado, Georgia, Kansas, Montana, Nebraska, South Carolina, Utah and West Virginia) to Berrien and the EEOC commissioners, describing the Dollar General and BMW lawsuits as "quintessential example[s] of gross federal overreach" and requesting the EEOC to dismiss the cases and to rescind its guidance. The letter contends, inter alia, that:

- The true purpose of the guidance is an illegitimate expansion of Title VII protection to former criminals, even though employers may have numerous nondiscriminatory reasons for wanting to screen out former criminals (including bright-line bans for certain positions), and even though the individualized consideration the guidance advocates would create more opportunity for racial discrimination than the nondiscretionary screening processes allegedly used by the companies.
- If there is truly a concern about racial prejudice in the criminal justice system, there are more direct ways to reform that system.
- Forcing employers to undertake more individualized assessments will add significant costs.
- The EEOC is improperly intruding into states' rights and jeopardizing the enforcement of state laws that disqualify those with specific convictions from a variety of occupations based on the convictions alone.

Anticipated Response

Through its lawsuit, Texas asks the court to hold unlawful and set aside the guidance on the grounds that the EEOC exceeded its statutory authority by promulgating an unauthorized substantive rule interpreting Title VII without complying with the notice-and-comment strictures of the Administrative Procedure Act. The EEOC is anticipated to respond that it promulgated a lawful interpretation of Title VII in the context of carrying out its enforcement mandate, not an unauthorized substantive rule, and that its interpretation is not final agency action subject to suit under the APA.

A key issue will be whether the guidance is a substantive rule. Whether it is or not is a close call. On one hand, one may reasonably argue that the guidance meets the traditional indicia of a substantive rule — it "mark[s] the 'consummation' of the agency's decisionmaking process" (*Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)), it is presented as the "'definitive' statement of the [agency's] position," and has a "direct and immediate ... effect of the day-to-day business' of the complaining parties." *Federal Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232, 239 (1980). The Hobson's Choice of altering employment protocols to comply with the EEOC's new rule, or risking substantial class liabilities, is significant, real, imminent and certain. On the other hand, while the EEOC's new rule is action for which "immediate compliance with [its] terms [is] expected" (*Standard Oil*, 499 U.S. at 239), the EEOC likely will argue that it is not action from which "legal consequences will flow" (*Bennett*, 520 U.S. at 178), noting that it has no inherent power to adjudicate liability, but rather must file suit and ask a court of competent jurisdiction to award relief. Ironically, the fact that the EEOC not only lost the *Peoplemark* and *Freeman* cases, but lost them badly, illustrates this point.

While these issues are not easy to resolve, Texas has the right to raise them, and to oppose a federal agency's attempts to impose new substantive obligations under the rubric of interpretive guidance. And in response to these claims, the EEOC may very well be required to clarify whether it is requiring, or merely encouraging, the individualized assessments of job applicants who have criminal convictions.

Significance

While the Texas lawsuit makes some arguments that would not apply to private employers, the complaint still challenges the authority of the EEOC to promulgate what the state characterizes as "substantive rules" as opposed to "procedural regulations." Moreover, the lawsuit follows nine attorney generals' public challenge to the guidance as well as decisions issued in the *Peoplemark* and *Freeman* cases which make it tougher for the EEOC to establish disparate impact in future background check cases.

Private employers face unique challenges during this fluctuating legal landscape in defending the current background check policies and practices they have and in assessing what revisions (if any) to make to their current practices. While waiting for the courts to continue to assess the merits of cases the EEOC brings under its guidance, employers may nevertheless want to consider reviewing their policies/practices to assess whether their policies/practices do in fact have a disparate impact, what the business justifications are for their exclusion calls, and what revisions and updates to the policies may be helpful for the company going forward not just from a legal perspective but also from a business standpoint.

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