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The War on Background Checks: EEOC Wins One and Loses One

By: Katherine E. Judd*

Over the past several years, the U.S. Equal Employment Opportunity Commission (EEOC) has brought lawsuits against employers alleging that the use of criminal background checks leads to disparate impact discrimination.

The U.S. District Court for the District of South Carolina recently entered a consent decree (settlement) ordering BMW Manufacturing Co., LLC (BMW) to pay $1.6 million and provide job opportunities to alleged victims of race discrimination as part of the resolution of a lawsuit filed by the EEOC. *E.E.O.C. v. BMW Mfg. Co., LLC*, No. 7:13-cv-01583 (D.S.C.). The lawsuit alleged that BMW's criminal background check guidelines used to screen applicants excluded African-American workers at a disproportionate rate, was not job related, and not consistent with business necessity.

This is a win for the EEOC, particularly after several high-profile setbacks for the EEOC in disparate impact discrimination lawsuits challenging criminal conviction record screening policies, including *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015). In *Freeman*, the Fourth Circuit Court of Appeals rebuked the EEOC, focusing on its unreliable expert report. The EEOC was slapped with paying nearly $1 million in attorneys’ fees and costs to Freeman.

Although the *Freeman* case might give the EEOC reason to rethink its steady focus on criminal record screening policies, it could just as easily hire a different expert and keep pushing, bolstered by the BMW settlement. Employers should continue to exercise caution when using criminal records to screen applicants or employees.

*Katherine E. Judd* is a shareholder at Clyde Snow & Sessions, PC in Salt Lake City, Utah, focusing her practice in the area of management-side employment law; email Katherine E. Judd.

Obama Orders Federal Contractors to Offer Paid Sick Leave

By: Katherine E. Judd

President Obama issued an executive order on Labor Day that requires federal contractors to grant at least seven days (56 hours) of paid sick leave per year to their employees, including 300,000 who had none. Executive Order 13706 appears very similar to provisions in paid leave legislation (the “Healthy Families Act”) that has failed to advance in a divided Congress.

This executive order applies to contracts entered into after January 1, 2017, that are (a) procurement contracts for services or construction; (b) contracts for services covered by the Service Contract Act; (c) contracts for concessions, including any concessions contracts excluded by Department of Labor regulations at 29 CFR 4.133(b); or (d) contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.
Paid sick leave may be used (1) for an employee’s own illness, injury, medical condition or when an employee needs to obtain diagnosis, care, or preventative care; (2) to care for a child, parent, spouse, domestic partner, or “any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship” who has an illness, injury, medical condition, or who needs to obtain diagnosis, care, or preventative care; (3) for domestic violence, assault, or stalking situations resulting in an illness, injury or medical condition or the need for obtaining diagnosis, care, or preventative care; or (4) to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action for the employee or one of the above-listed individuals in domestic violence, assault, or stalking situations.

Under the executive order, accrued, unused sick leave does not have to be paid out upon termination of the employment relationship, unless the contractor’s policies explicitly provide for such a benefit. However, paid sick leave must be allowed to carry over from year to year without any cap or limitation on accrual and must be reinstated for employees rehired by a covered contractor within 12 months after a job separation.

The use of paid sick leave cannot be made contingent on the requesting employee finding a replacement to cover any work time to be missed. Employees must request paid sick time at least seven calendar days in advance where the need for leave is foreseeable, or “as soon as practicable” where the need is not foreseeable. A request can be made orally or in writing, and should specify the expected duration. An employer may only require medical certification if an employee takes leave for three or more consecutive workdays and was taken for a reason other than domestic violence, stalking, or assault.

Finally, covered employers are prohibited from retaliating against or interfering with an employee’s right to request or take covered sick leave.

The details of an employer’s obligations under the order will be set forth in regulations to be issued by the Department of Labor. The Secretary of Labor is directed to issue regulations by September 30, 2016, concerning the requirements of the executive order.

*Katherine E. Judd is a shareholder at Clyde Snow & Sessions, PC in Salt Lake City, Utah, focusing her practice in the area of management-side employment law; email Katherine E. Judd.

**NEWS AND ANNOUNCEMENTS**

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101/201 Articles. 101 articles are geared toward new lawyers and should cover general topics and include snapshot tips in law and practice. 201 articles are designed for those who already have a baseline of knowledge in the relevant field. If you are interested in writing and getting published, please contact Vice-Chairs of the Labor and Employment Committee Tae Phillips and Nelson Williams, and provide them with a brief description of the article you are interested in submitting.

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