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TAKE 5

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Five EEOC Initiatives to Monitor on the Agency's Golden Anniversary

The U.S. Equal Employment Opportunity Commission ("EEOC") opened its doors on July 2, 1965, exactly one year after President Lyndon B. Johnson signed the Civil Rights Act of 1964. Title VII of that act ("Title VII") prohibits employment discrimination on the basis of race, color, religion, national original, or sex, and also prohibits retaliation against individuals who seek, or assist others in seeking, relief under the law.

Title VII created the EEOC, the federal agency charged with enforcing the prohibitions against discrimination and retaliation contained in the act. Since opening its doors, the EEOC has expanded its purview to enforce the Age Discrimination in Employment Act of 1967, Sections 501 and 505 of the Rehabilitation Act of 1973, Title I of the Americans with Disabilities Act of 1990,[1] Sections 102 and 103 of the Civil Rights Act of 1991, and the Genetic Information Nondiscrimination Act of 2008.

Fifty years after opening, the EEOC has reinforced its commitment to traditional areas of enforcement, such as remedying race and sex discrimination and addressing workplace harassment. But the agency also has aggressively fashioned and pursued novel theories to press a new agenda and expand the scope of protections afforded by existing laws. These dual purposes can be seen in reviewing the agency's Strategic Enforcement Plan ("SEP"), approved in 2012 for fiscal years ("FYs") 2013-2016, which includes six national priorities: (1) eliminating barriers in recruitment and hiring; (2) protecting immigrant, migrant, and other vulnerable workers; (3) addressing emerging and developing issues; (4) enforcing equal pay laws; (5) preserving access to the legal system; and (6) preventing harassment through systemic enforcement and targeted outreach. *See* EEOC Strategic Enforcement Plan, FY 2013-2016. Due to an extension received by the EEOC, this strategic plan will remain in effect through at least FY 2018.

[1] This year also represents a big milestone for the Americans with Disabilities Act ("ADA"), as it is the 25th anniversary of that statute. For a discussion of five recent developments and future trends under Title III of the ADA that places of public accommodation should be aware of, please see the Epstein Becker Green *Take 5* newsletter entitled "Key Issues Facing Places of Public Accommodation at the 25th Anniversary of the ADA."

Although the EEOC's work remains wide-ranging, this edition of *Take 5* will highlight five areas of enforcement that the agency continues to tout publicly and aggressively pursue:

1. **Religious Discrimination and Accommodation—EEOC Is Victorious in New U.S. Supreme Court Ruling**
2. **Transgender Protections Under Title VII—EEOC Relies on Expanded Sex Discrimination Theories**
3. **Systemic Investigations and Litigation—EEOC Gives Priority to Enforcement Initiative**
4. **Narrowing the "Gender Pay Gap"—EEOC Files Suits Under the Equal Pay Act**
5. **Background Checks—EEOC Seeks to Eliminate Barriers to Recruitment and Hiring**

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1. Religious Discrimination and Accommodation—EEOC Is Victorious in New U.S. Supreme Court Ruling

On June 1, 2015, the EEOC scored a victory—courtesy of the U.S. Supreme Court—in its lawsuit against Abercrombie & Fitch alleging religious discrimination under Title VII. *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 14-86 (June 1, 2015).

Samantha Elauf was a practicing Muslim who applied for a sales position at an Abercrombie retail store. She appeared for her interview in a hijab (a Muslim headscarf). Although the interviewer rated Elauf favorably, she was concerned that Elauf's hijab would violate the store's dress code. Abercrombie had a "Look Policy" that prohibited its sales employees from wearing "caps." Elauf never mentioned her religion or requested a religious accommodation during her interview, but the interviewer assumed Elauf wore her hijab because she is Muslim. Ultimately, Abercrombie did not hire Elauf because the hijab conflicted with its facially neutral Look Policy.

Under Title VII, an employer may not refuse to hire an applicant because of a religious observance that conflicts with the employer's neutral policy, unless it can show that accommodating the religious observance would cause undue hardship. The EEOC sued Abercrombie on behalf of Elauf for failing to accommodate her because the company refused to make an exception to its Look Policy. Abercrombie argued that it could not be liable for intentional discrimination because the company never had "actual knowledge" that Elauf wore the hijab for religious purposes.

The district court granted the EEOC's motion for summary judgment on liability, but the U.S. Court of Appeals for the Tenth Circuit reversed, holding that a plaintiff must show that the employer had actual knowledge of the need for a religious accommodation in order to prove a disparate treatment claim. The Supreme Court granted *certiorari* to determine whether a reasonable accommodation must be made "only where an applicant has informed the employer of his need for an accommodation."
In an 8-1 decision, the Supreme Court held that an applicant claiming disparate treatment has to show only that the need for accommodation was a "motivating factor"

in the employer's hiring decision, not that the employer had actual knowledge of her need. Quite simply, "[a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

On the heels of this decision, employers should expect the EEOC to critically examine facially neutral hiring policies, grooming, and dress codes, and similar policies and procedures that may adversely impact religious groups or individuals. This is especially true in light of the EEOC's stated intention in the SEP to target "facially neutral recruitment and hiring practices that adversely impact particular groups," including religious groups.

The Supreme Court, however, provided little guidance to employers confronted with a suspicion that a religious accommodation may be needed. So what should an employer do to avoid liability for religious discrimination when applying a neutral policy to its workforce? For starters, employers should continue to avoid asking about an applicant's, or an employee's, religious beliefs or practices. The only time that religion should enter a job interview is if there is a job-related basis for initiating that conversation. In all other situations, that inquiry should be avoided; otherwise, a disparate treatment claim may arise.

Understanding the EEOC will be emboldened to scrutinize any image-based policy, including dress codes and grooming policies, prudent employers should review these policies to determine whether and to what extent there is a business purpose for their implementation. Those policies that do not further the business interests of the company and that invite discrimination claims may be worth discontinuing.

Employers that employ neutral image-based policies should be prepared when they suspect that such a policy might conflict with an applicant's religious practices. In those situations, the employer should make the relevant policy and essential job functions clear to the applicant and, without mentioning religion, ask whether there is any reason that he or she cannot comply with those policies and functions. If the applicant responds that he or she can comply, no further conversation is necessary. If the applicant states that he or she cannot comply or would need a reasonable accommodation, then the company should be prepared to engage in an interactive dialogue and offer a reasonable accommodation. At all times, the company should avoid raising the subject of religion unless and until the applicant articulates a religious need for an accommodation.

In all circumstances, employers should seek advice from appropriate human resources and legal professionals when navigating the complicated issues of religion and accommodation. Of course, employers should ensure that their human resources personnel, managers, and interviewers are adequately trained as to how to appropriately respond to accommodation issues, religious or otherwise.

2. Transgender Protections Under Title VII—EEOC Relies on Expanded Sex Discrimination Theories

Sexual orientation and gender identity are not expressly addressed in Title VII. Nevertheless, the EEOC has increasingly pushed to expand the definition of "sex discrimination" under Title VII to include these classes.

Title VII's Prohibitions in Gender Stereotyping

Title VII contains no express protections for LGBT workers. However, the statute's prohibition on sex discrimination has been interpreted by the U.S. Supreme Court to include treating employees differently for failing to conform to traditional gender stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, a female senior manager was denied partnership because she was perceived as too "macho" and "aggressive" for a woman. She was told she could improve her chances at partnership if she were to take "a course at charm school, walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled and wear jewelry." The Court reasoned that the plaintiff's male colleagues had discriminated against her on the basis of her gender by denying her partnership based on her failure to conform to traditional notions of female conduct. Nine years later, a unanimous Supreme Court held that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). These two decisions are often cited in the context of Title VII claims brought by LGBT workers.

Recently, the U.S. Court of Appeals for the Fifth Circuit held that a male manager had discriminated against a male employee on the basis of sex after learning that the employee used moist towelettes instead of ordinary dry toilet paper, which the manager thought was "kind of gay" and "feminine." *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. 2013) (en banc). The manager allegedly subjected the employee homophobic slurs, simulated anal intercourse with the employee numerous times, and showed his penis to the employee on multiple occasions.

In pursuing a Title VII claim on behalf of the employee, the EEOC relied on evidence that the manager viewed him as "insufficiently masculine." Finding that the manager's harassment was motivated by a perception that the employee did not conform to the manager's "manly-man stereotype," the Fifth Circuit held that the EEOC had established a sexual harassment claim based on sex stereotyping.

Gender Stereotyping and Transgender Employees

Individual plaintiffs also have been successful in expanding the scope of Title VII to afford protections to transgender employees, specifically. *See, e.g.*, *Schwenk v. Hartford,* 204 F.3d 1187 (9th Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (transgender firefighter); *Barnes v. City of Cincinnati,* 401 F.3d 729 (6th Cir. 2005) (transgender police officer); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (transgender applicant for Library of Congress). In *Schroer*, the District of Columbia went beyond gender stereotyping and also held that discrimination based on gender

transition, such as the plaintiff's transition from male to female, constitutes sex discrimination.

In its adjudicatory capacity in federal sector employment disputes, the EEOC has clearly articulated that LGBT workers, and transgender workers specifically, are protected from sex discrimination under Title VII. In 2012, the EEOC held that discrimination against an employee because that person is transgender constitutes discrimination based on sex or sex stereotyping. *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012). In April 2015, the EEOC concluded that denying employees the use of a restroom consistent with their gender identity and subjecting them to the intentional use of the wrong gender pronouns constitutes sex discrimination under Title VII. *Lusardi v. McHugh*, EEOC Appeal No. 0120133395 (April 1, 2015).

In recent months, the EEOC has pressed this theory in the private sector by filing three lawsuits over alleged sex discrimination against transgender individuals. On September 25, 2014, the EEOC filed two lawsuits—in Florida and Michigan, respectively—alleging discrimination based on transgender status. In its Florida lawsuit against Lakeland Eye Clinic, the agency claimed that the plaintiff was fired after she began wearing feminine clothing to work and informed the clinic she was transitioning from male to female. The parties settled that lawsuit, with the clinic agreeing to pay $150,000.

Also on September 25, 2014, in the Eastern District of Michigan, the EEOC sued R.G. & G.R. Harris Funeral Homes, Inc., alleging that the funeral home discharged its funeral director and embalmer two weeks after she gave notice that she was transitioning from male to female. On April 21, 2015, the district court denied the funeral home's motion to dismiss. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710 (E.D. Mich. Apr. 21, 2015). The court rejected the EEOC's position that transgender status is a protected class. However, the court held that a transgender person can bring a sex-stereotyping discrimination claim under Title VII, and permitted the case to proceed on that basis.

Most recently, on June 4, 2015, the EEOC filed suit against Deluxe Financial Services Corp. in the District of Minnesota alleging that the company subjected a transgender employee to sex discrimination. According to the complaint, the employee was discriminated against and subjected to a hostile work environment when the company refused to let her use the women's restroom, made hurtful epithets, and intentionally used the wrong gender pronouns to refer to her.

Responding to Transgender Employees in the Workplace

Going forward, employers should expect the EEOC to continue its efforts to remedy discrimination against LGBT workers through Title VII claims. The EEOC may engage in joint investigations with the Department of Justice regarding sexual orientation and/or gender identity discriminations, with complaints against non-federal contractors referred to the EEOC. Additionally, employers should be aware that 16 states and the District of Columbia now prohibit discrimination on gender identity, gender expression, or

transgender status. Thus, even if federal law does not provide express protections for LGBT workers, state law might offer such protection.

Given the EEOC's recent efforts to address discrimination against transgender individuals, even those employers that do not operate in a jurisdiction that has enacted a law expressly prohibiting such discrimination should be conscious of these issues and take steps to prevent sex stereotyping in the workplace. Employers should consider amending their non-discrimination and non-harassment policies to include, at a minimum, prohibitions against setting gender-based expectations or using sex stereotypes.

Employers also should consider creating protocols for working with transgender employees that establish procedures for assisting transitioning employees, require the use of proper gender pronouns, and provide appropriate access to restrooms and locker rooms. In fact, on June 1, 2015, the Department of Labor's Occupational Safety and Health Administration issued guidance on the best practices for providing restroom access to transgender workers (see the Epstein Becker Green *Act Now* Advisory entitled "OSHA's New Guidance on Transgender Restroom Access: What Employers Need to Know"), the core principle of which is that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity. Once these protocols have been established, the remainder of the workforce should be trained in complying with company policies and educated about potential transgender issues.

3. Systemic Investigations and Litigation—EEOC Gives Priority to Enforcement Initiative

The EEOC has repeatedly emphasized that its systemic program is a primary enforcement initiative, including systemic enforcement as one of its six priorities in the current SEP. The EEOC defines "systemic discrimination" as involving "a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession, company or geographic area."

The EEOC has broad statutory authority to pursue this enforcement initiative. The EEOC derives from Section 707 of Title VII the authority to file "pattern or practice" lawsuits against employers. Relying upon that authority, the EEOC has pursued systemic investigations not only in cases in which the underlying allegations contain "pattern or practice" claims, but also in situations in which the EEOC expands its investigation to include "pattern or practice" claims based on allegations raised in an individual charge. Section 706 also permits the EEOC Commissioners to issue charges, including those alleging systemic discrimination, on their own initiative. Further, the Equal Pay Act ("EPA") and the Age Discrimination in Employment Act empower the EEOC to initiate "directed investigations" into potential equal pay violations or potential age discrimination, respectively, even in the absence of the filing of a charge.

The EEOC has prioritized its systemic enforcement initiative since the creation of a Systemic Task Force in 2006. That initiative continues to pursue expansive

investigations against employers. According to the EEOC's most recent Performance and Accountability Report ("PAR"), the agency completed 260 systemic investigations in FY 2014, and recovered $13 million in monetary relief as part of 78 voluntary agreements.

Although these figures appear small in comparison to the 88,778 total charges filed in FY 2014, employers should be wary. One systemic investigation can be extremely burdensome on an employer, given that such investigations, on average, involve far more people and data than an individual charge. Particularly where the EEOC finds reasonable cause to support "pattern or practice" claims, these investigations encourage additional lawsuits by individuals who claim that they were injured by the discriminatory practice. Moreover, the EEOC is far more likely to issue a reasonable cause determination in a systemic investigation than in the average case: in FY 2014, the EEOC found reasonable cause in 45 percent of systemic investigations, as opposed to just 3.1 percent of all charges.

In addition to investigations, the EEOC also pursues systemic claims in litigation, filing 17 systemic lawsuits in FY 2014. At the end of that fiscal year, 57 of the 228 cases (i.e., 25 percent) on the EEOC's active litigation docket focused on systemic matters, representing the largest portion of systemic suits pursued by the EEOC since tracking began in FY 2006.

Employers should expect the EEOC to continue to aggressively pursue systemic cases. The PAR for FY 2014 states that, through FY 2018, the EEOC will seek to maintain 22-24 percent of its litigation docket as systemic cases. There also are indications that workplace harassment will be a focus of the EEOC's systemic litigation initiative, given the SEP's focus on preventing harassment through systemic enforcement. In the first commission meeting over which she presided as Chair, which addressed workplace harassment, EEOC Chair Jenny R. Yang stated that the EEOC intends to pursue systemic enforcement to prevent workplace harassment and "promote broader voluntary compliance." (See "Workplace Harassment Still a Major Problem Experts Tell EEOC at Meeting.")

On multiple occasions, the EEOC has received an individual charge and expanded the scope of its investigation, ultimately resulting in a reasonable cause finding and a federal lawsuit. Certainly, the EEOC has broad investigatory powers to obtain evidence relevant to the charge under investigation. In *EEOC v. Shell Oil*, 466 U.S. 54 (1984), the U.S. Supreme Court suggested that the term "relevant" in the context of EEOC's request for evidence related to its investigations is far broader than the scope of discovery under the Federal Rules of Civil Procedure. Nonetheless, the EEOC is not entitled to embark on a fishing expedition.

Thus, in the context of charge investigations, employers must be vigilant of the EEOC's attempts to expand the scope of investigations and issuance of broad requests for information. Although prudent employers will work in good faith to provide necessary information for the EEOC to complete its investigation, employers should be prepared to

negotiate with EEOC investigators to limit the scope of inquiry and to avoid any over-reaching. Limiting the EEOC's investigatory scope to the specific allegations at issue will remain a key to preventing any individual charge from expanding to a systemic investigation or litigation.

4. Narrowing the "Gender Pay Gap"—EEOC Files Suits Under the Equal Pay Act

Pledging to "crack down" on violations of equal pay laws, in 2010, President Barack Obama established the National Equal Pay Task Force, comprising representatives of the EEOC, Department of Justice, Department of Labor, and the Office of Personnel Management. The goals of the task force include enhancing federal interagency collaboration to enforce federal equal pay laws.

In concert with the goals of the National Equal Pay Task Force, the SEP prioritizes the enforcement of equal pay laws by targeting "compensation systems and practices that discriminate based on gender." This enforcement priority furthers the stated goals of President Obama and his administration to bridge what has been termed the "gender pay gap."

One of the tools being used by the EEOC to effect this enforcement priority is the EPA, which is part of the Fair Labor Standards Act ("FLSA"). The EPA gets less publicity than the Civil Rights Act of 1964, despite being signed into law one year earlier. But, especially given the attention to equal pay that the EEOC, President Obama, and the national task force have given recently, employers should be aware of the protections that it affords employees.

The EPA requires employers to pay men and women equal wages for equal work. To establish a violation of the EPA, a plaintiff must show that a company paid men and women in the same establishment different wages for jobs that require substantially equal skill, effort, and responsibility, and which are performed under similar working conditions. Employers, however, may justify wage disparities by proving that any wage differential is based on seniority, merit, quantity or quality of production, or a factor other than sex. These are affirmative defenses, meaning the burden of proof rests on the employer, rather than the employee.

Given the EEOC's stated pursuit of potential pay discrimination, employers must be particularly sensitive to the differences in the procedural administration and remedies available under the EPA. The current SEP calls for the EEOC to pursue alleged equal pay violations through "directed investigations." The EEOC may launch a directed investigation on its own initiative without receiving an individual charge of discrimination. Because they are not focused on specific allegations by an individual or handful of individuals, these investigations may be wide-ranging and, thus, especially burdensome on employers.

In addition, unlike with Title VII claims, there is no requirement that a charge of discrimination alleging EPA violations has to be brought within 180 days (or 300 days,

depending on the jurisdiction) or that administrative remedies be exhausted before a court action is filed. Under the EPA, plaintiffs have two years (three years if the violation was "willful") to file a lawsuit. Thus, an employer may still face a pay discrimination lawsuit long after the time expires for an individual to file a charge under Title VII.

Further, violations of the EPA can be costly. To remedy any gender-based pay disparity, an employer may not reduce the wages of other employees. In other words, the employer must correct a pay disparity by raising the wages of the female employee rather than decreasing the wages of her comparators. In addition, the EPA contains a 100 percent liquidated damages provision, allowing a plaintiff to recover double damages.

A plaintiff also may recover damages under both the EPA and Title VII for the same unlawful conduct. Where the jurisdictional prerequisites of both statutes have been satisfied, a violation of the EPA is also a violation of Title VII. Thus, although a plaintiff cannot receive duplicative relief for the same wrong, relief is computed so that a plaintiff receives the highest benefits under the statutes. Thus, a prevailing plaintiff can receive liquidated damages under the EPA and compensatory and punitive damages under Title VII.

Because of the burden placed on employers in defending EPA claims and the risk of costly remedies for any violation, employers should consider conducting periodic compensation audits of their staff. Employers may combine this exercise with an FLSA audit. Any pay differences between men and women in the same job should be critically assessed to ensure that any such disparities are the product of seniority, merit, quantity or quality of production, or a factor other than sex. Any such audit should be managed by legal counsel so that the audit and related communications are privileged.

5. Background Checks—EEOC Seeks to Eliminate Barriers to Recruitment and Hiring

Background checks, particularly those that exclude applicants based on criminal history, are at the forefront of the EEOC's priority to eliminate barriers in recruitment and hiring. Despite suffering a recent embarrassing defeat in the U.S. Court of Appeals for the Fourth Circuit, the EEOC likely will continue to closely scrutinize policies and practices that exclude applicants based on criminal and credit history, even if such policies are facially neutral.

In April 2012, the EEOC updated its enforcement guidance on the consideration of arrest and conviction history in employment decisions. The EEOC emphasizes that the exclusions based on criminal history should be job-related for the position in question and consistent with business necessity. In making this assessment, employers are advised 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 EEOC also instructs employers to make an "individualized assessment" prior to excluding an applicant based on criminal history. However, the EEOC's guidance also permits employers to use a targeted criminal

records screen to exclude applicants with a history of specific criminal conduct, provided that the criminal conduct screened has a "demonstrably tight nexus to the position in question."

Last year, the EEOC jointly published guidance with the Federal Trade Commission ("FTC") regarding employers' use of background checks in the hiring process. In that publication, the EEOC and the FTC provided general guidelines for gathering and using background information. Among the guidelines, the publication urges employers to treat everyone equally, comply with the procedures of the Fair Credit Reporting Act ("FCRA"), and take care when taking adverse actions based on information received during a background check.

Prior to issuing these guidelines, the EEOC instituted a background check lawsuit against an integrated services provider. *EEOC v. Freeman*, No. 13-2365 (4th Cir. Feb. 20, 2015). In *Freeman*, the EEOC alleged that the company's policy of conducting criminal and credit background checks had a disparate impact on African American, Hispanic, and male job applicants. The case began when an African American woman filed a charge with the EEOC alleging she had been discriminated against based on her credit history. Consistent with another enforcement priority to pursue systemic discrimination claims, the EEOC expanded its investigation to include the employer's use of criminal history in hiring and sought information about the treatment of African Americans, Hispanics, and males in the hiring process. The EEOC then filed a lawsuit alleging that the company had engaged in a "pattern or practice" of discrimination against (1) African American applicants by using credit history as a hiring criterion, and (2) African American, Hispanic, and male applicants by using criminal history as a hiring criterion.

The Fourth Circuit affirmed the district court's dismissal of the lawsuit on summary judgment. The EEOC had attempted to prove its claims of disparate impact discrimination through hiring statistics. But the court found that the EEOC's expert analysis contained an "alarming number of errors and fallacies" that precluded reliance on its conclusions. Thus, the Fourth Circuit held that the district court appropriately excluded the EEOC's expert report and granted summary judgment in favor of the employer.

Despite the strong rebuke issued by the Fourth Circuit to the EEOC, employers should not expect the EEOC to pare back its pursuit of background check investigations and litigation. Indeed, in June 2013, the EEOC filed similar lawsuits against Dollar General and BMW Manufacturing Co., and those suits remain pending.

Employers also should be aware of state legislative efforts to curb the use of background checks in the hiring process. "Ban the box" legislation, which typically prohibits the consideration of criminal history before extending a conditional offer of employment, has now been passed and made applicable to private employers in six states—Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, and Rhode Island—the District of Columbia, and over 100 cities and counties—including Baltimore,

Montgomery County, Philadelphia, Prince George's County, San Francisco, and Seattle. Other jurisdictions, such as New York City, have passed or considered related legislation that would further restrict the use of criminal history or consumer credit history for employment purposes.

With the EEOC continuing to advance its position that background checks should rarely, if ever, be used in employment decision-making processes, and state and local jurisdictions increasingly passing legislation to restrict their use, employers should consider the following when implementing background checks:

- Know the applicable state and local laws regarding reliance on criminal history, consumer credit, or other background checks, and monitor these laws for any changes.

- Treat all applicants or employees equally when deciding whether to gather background information.

- Where criminal history is obtained, use that history as the basis for an adverse employment action only if it is job-related and consistent with business necessity.

- Prior to refusing to hire or rescinding a job offer based on criminal history, conduct an individualized assessment, including providing an opportunity for the person to explain any criminal arrests, convictions, or other criminal records, and use any criminal history as the bases for an adverse decision only if it is job-related and consistent with business necessity.

- If an individualized assessment of criminal history is not feasible, automatically exclude applicants for a job only for specific criminal offenses that bear a nexus to that job.

- Avoid making arrest record inquiries because they are prohibited in some jurisdictions and come with increased scrutiny by the EEOC. If you do seek arrest records, then carefully consider their import, as they are prone to error and are not final. Additionally, further investigate any arrests to determine whether and how they were resolved.

- Review the specific criminal history inquiries currently made to ensure that language is included that indicates that any 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.

- Ensure any background checks are compliant with the FCRA.

Despite the Fourth Circuit's favorable decision in *Freeman*, employers must remember that the court's decision had more to do with the EEOC's flawed expert analysis than

with the viability of background checks in the application process. Significant risks remain when using background checks in the hiring process, particularly where the background checks bear little indicia of job-relatedness or business necessity. Thus, employers should proceed with caution when making ultimate employment decisions based on the results of background checks.

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For additional information about the issues discussed above, please contact the Epstein Becker Green attorney who regularly handles your legal matters or the author of this *Take 5:*

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