

PUBLICATION

EEOC Issues Advisory Opinions on Possible Disparate Impact in Credit Checks, Education Requirements

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On March 29, 2010, the EEOC's Office of Legal Counsel released two informal discussion letters addressing disparate impact in credit checks and education requirements.

Disparate Impact of Credit Searches

Although none of the laws enforced by the EEOC directly prohibit discrimination based on credit information, they may be implicated in some circumstances, explains the EEOC's first informal discussion letter, released March 29, 2009. For example, an employer's use of credit information that disproportionately excludes African-American and/or Hispanic candidates would be unlawful unless the employer could establish that the practice is needed for it to operate safely or efficiently. The letter addresses the concerns of an individual who wrote to Acting Chairman Stuart J. Ishimaru urging that legislation be passed to prohibit the practice of credit checks to screen job applicants. In the letter, Assistant Legal Counsel Dianna B. Johnston responded that while the EEOC has no authority to enact legislation, the EEOC was of the opinion that credit checks have not been shown to be a valid measure of job performance. Johnston did, however, note that some courts have determined that credit checks are appropriate for certain positions, such as where an employee handles large amounts of cash.

Disparate Impact of Education Requirements

Requiring a master's degree for public health director jobs, without the possibility of substituting experience or other education, may violate Title VII if that requirement is not job-related and consistent with business necessity, explained the EEOC in its second informal discussion letter, released March 29, 2009. The letter addresses the concerns of an individual who wrote the EEOC concerning proposed changes to the qualification standards for public health director jobs. A director at the individual's organization suggested that a strict master's degree requirement for such a position could result in a significantly disproportionate exclusion of racial minorities.

In the letter, EEOC Attorney-Advisor Aaron Konopasky wrote that "if someone could show – most likely using statistical evidence – that the strict requirement had such an adverse effect, and that the effect was significant, adopting the requirement could subject [the employer] to liability for disparate impact discrimination unless (a) [the employer] could show that the requirement is job-related and consistent with business necessity, and (b) the plaintiff could not show that a less discriminatory requirement would have been equally effective in predicting job performance." To rebut this showing, the employer would have to show that a master's degree is job-related and consistent with business necessity, by showing that it is "necessary to the safe and efficient performance" of the public health director job. "Whether [the employer] could make such a showing depends on the specific duties of the job," he wrote. "Two relevant considerations are how effectively a master's degree predicts Public Health Director job performance, and whether the strict degree requirement applies to other people holding substantially similar jobs. Assuming that the employer could show that the master's degree requirement was 'job related and consistent with business necessity,' an employer might nevertheless be liable if there is an available alternative that would equally effectively meet its business objectives. Accordingly, assuming this requirement has a disparate impact on racial minorities, the employer is advised to determine

whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure.”

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