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Chamber Wants Review Of EEOC Background Check Guidance

By **Abigail Rubenstein**

Law360, New York (April 04, 2012, 6:24 PM ET) -- The U.S. Chamber of Commerce in a letter released Tuesday urged the Office of Management and Budget to require the U.S. Equal Employment Opportunity Commission to seek public comment before issuing new guidance on employer use of criminal convictions or credit history.

The lobbying group claims that the EEOC is planning to issue two guidance documents concerning the interaction of disparate impact under Title VII of the Civil Rights Act of 1964 and employer use of information obtained during applicant and employee background checks. One document will relate to credit history information, and the other will discuss criminal history, the Chamber said in a letter to Cass Sunstein, the administrator of the OMB's Office of Information and Regulatory Affairs.

"By all accounts, the EEOC is now preparing to approve these significant guidance documents without making them available for public comments and without seeking review by the OMB," the letter said.

The Chamber maintains that the potential guidance documents are "likely to be extremely controversial," and that they warrant public comment and OMB review for both procedural and substantive reasons.

The letter states that the Chambers members are concerned that the potential guidance "will not interpret Title VII in a fair and balanced manner" and that a preadoption comment period would help limit the more controversial aspects of the agency's output.

"Employers are concerned that the anticipated guidance will remove or significantly limit the use of two important tools that employers use in hiring and related decisions," the letter said. "The impact could be significant both in terms of costs but also in terms of increased exposure and risk to co-workers, customers and clients, and the public."

As such, the letter requests that the OMB make sure that the EEOC does not finalize its guidance without seeking public comment and submitting it to the office for review.

The EEOC did not respond to a request for comment Wednesday, but attorneys say the agency has been gearing up to release this new guidance for the past few years.

The EEOC has held public meetings focused on employer use of background checks, and its commissioners have held meetings with stakeholders to hear their concerns, which the Chamber's letter acknowledged.

Although the content of any forthcoming guidance from the agency is unknown, attorneys

say it will most likely be aimed at curbing employers' use of credit histories and criminal background checks in making employment decisions. The new guidance will probably also cause more employers to face discrimination claims over their use of background checks, attorneys say.

"What the EEOC is trying to do is limit the use of these traditional tools to weed out applicants because they may disparately impact certain minority categories," Jim Nicholas of Mintz Levin Cohn Ferris Glovsky & Popeo PC

The guidance will be directed at the agency's own investigators, but it will nonetheless impact employers because it will increase the agency's scrutiny of their hiring practices, according to Raymond Carey of Foley & Lardner LLP.

"The biggest thing I see from an employer point of view if the EEOC comes out with this guidance is that proactive activities by the EEOC or the Department of Labor will probably encourage more filing of charges associated with claims of wrongfully denied hire or employment and more scrutiny of employer practices," Carey said.

And more attention to these issues from the agency may also lead to more attention from the plaintiffs' bar, according to Ellen Storch of Kaufman Dolowich Voluck & Gonzo LLP.

"When the EEOC comes out with these guidance documents, I think plaintiffs lawyers interpret that signal as a green light to really push these types of cases," Storch told Law360. "They know that while the guidance is not binding on courts, it is considered persuasive, so they're going to be more interested in bringing this particular type of case, especially class action attorneys."

But employers who don't use background checks can face other legal pitfalls, such as negligent hire claims, Storch said.

"This should be available for public comment because while the stakes are high in this economy for job applicants given the high unemployment rate, the stakes are also high for business who in this economy can't afford the risks of hiring and not being able to do their diligence," Storch said.

--Editing by Lindsay Naylor.

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