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# BOND INFORMATION MEMO

## Labor and Employment Law

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### Federal District Court Scolds EEOC for Meritless Background Check Lawsuit

The elimination of barriers in recruitment and hiring was identified as one of the Equal Employment Opportunity Commission's six priorities in its 2013-2016 Strategic Enforcement Plan ("SEP"). Accordingly, the EEOC is focusing its enforcement efforts and resources on eradicating both class-based intentional discrimination, as well as facially-neutral recruitment and hiring practices that have a discriminatory effect on particular groups. To this end, the EEOC has been aggressively challenging employers' use of criminal and credit background checks in recruitment and hiring, alleging that such practices have a disparate impact on certain applicants in protected classes. However, in a significant victory for employers, the EEOC's efforts were recently thwarted in a decision issued by the United States District Court for the District of Maryland.

In *EEOC v. Freeman*, the EEOC challenged the defendant's use of criminal background and credit checks, alleging that, although facially-neutral, the practice had a discriminatory effect on African-American and male applicants. In granting the defendant's summary judgment motion dismissing the complaint, the court held that the EEOC and their experts failed to identify a specific policy causing an alleged disparate impact and "something more, far more, than what is relied upon by the EEOC in this case must be utilized to justify a disparate impact claim based upon criminal history and credit checks." The court further admonished the EEOC's lack of factual support, stating that:

"[b]y bringing actions of this nature, the EEOC has placed many employers in the "Hobson's choice" of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers."

To further underscore the importance of background checks to employers, the court pointed out that ironically, even the EEOC conducts criminal background investigations as a condition of employment for all employees, and conducts credit background checks on approximately 90% of its positions.



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The Freeman court explained that it is not the “mere use” of background checks that presents Title VII concerns, but rather “what specific information is used and how it is used.” Here, Freeman’s use of criminal and credit checks were not used as automatic exclusions and were conducted only for specific types of jobs. The Freeman court held that the use of these screening tools is a “rational and legitimate component of a reasonable hiring process.”

Although this decision is an important victory for employers defending their right to refuse to hire applicants whose backgrounds call into question their character and qualifications for employment, it is unlikely to stop the EEOC’s enforcement efforts completely. The SEP, together with the EEOC’s April 2012 Enforcement Guidance on criminal background checks, make clear that the EEOC is determined to seriously limit the use of background checks, if not prohibit their use altogether. Therefore, employers should consult with legal counsel to ensure that any use of background checks is both job-related and consistent with business necessity, and that such use does not result in automatic exclusions. Background checks should also be limited only to those positions where there is a direct correlation between the background check and the job involved.

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