

## EEOC Makes Good On Its Promise To Rekindle Disparate Impact Claims: Files Lawsuits Against Dollar General And BMW

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### Warning Sign

You can't say that we didn't warn you.

Last week, the EEOC made good on its promise to protect those adversely affected because of criminal background checks. The EEOC filed two lawsuits – one in federal court in Chicago against the national small-box retailer, Dollar General; and another in South Carolina against BMW. These lawsuits appear to be the first lawsuits filed by the EEOC since it issued its criminal background check enforcement guidance in April of 2012 – and the first since issuing its Strategic Enforcement Plan last December. (You might remember that SEP identified “*Eliminating Barriers in Recruitment and Hiring*” as the first of its six named priorities.)

The lawsuits filed last week appear to be well-chosen battles for the EEOC. In both, the EEOC alleges that the companies' background check policies disproportionately affect black applicants. It cited as an example, an employee conditionally hired by Dollar General, who was disqualified by a six-year old felony conviction for possession of a controlled substance; and alleged that the standard used by Dollar General to screen applicants are not job-related and not consistent with business necessity.

Similarly, the case against BMW includes examples of an employee who had worked for a logistics provider at the BMW facility for 14 years, and then lost employment because of a criminal conviction policy that disqualified her based on a 1990 misdemeanor conviction for assault. The EEOC asserts that BMW's policy disqualified applicants (and current employees of their subcontractors) “without any individualized assessment of the nature and gravity of their criminal offenses, the ages of the convictions, or the nature of their respective positions.”

We know. We know. We've been telling you for years (and the courts and EEOC had been telling us) that you should apply the same employment standards to everyone. If you've been convicted, you're not hired. If you can't do the job, you're not hired. That approach went out the window with the “individualized assessment” required by the ADA; and now, has been further diluted by the “individualized assessment” required by the criminal background check guidance issued by the EEOC.

In some respects, it's common sense. A propensity for violence reflected in someone's criminal history makes me nervous. A safe workplace is not only

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required by law, it's critical. And, someone who has a history of fraud or dishonesty will be disqualified from certain positions—maybe even all of them in your organization.

So, please review the EEOC's enforcement guidelines. Make sure you are complying with the Fair Credit Reporting Act. Consider the job and the skills required to perform it. Remember that the once-encouraged wide-sweeping, blanket policies now work against you. At the very least, ask questions.

And, stay tuned.

**Additional Resources :**

[Here's the link](#) to the EEOC's news release on the lawsuits for more details.

To refresh your memory on the criminal background check enforcement guidance, [check out this](#) EEOC Enforcement Guidance document.