The College of Labor and Employment Lawyers

Semi-Annual Meeting

December 1, 2015

Proskauer

Table of Contents

THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS
New York, Connecticut, Northern New Jersey Semi Annual Meeting

Proskauer
Eleven Times Square
(8th Avenue at 41st Street)
New York, NY 10036

December 1, 2015

5:15 P.M.	Registration
5:30 - 8:30 P.M.	Presentations, Panel Discussion and Q&A Period (3.5 Hours CLE credits)

Remote Attendees:
Please contact Monica (mgirardi@proskauer.com) for CLE Information
Toll-free dial-in number (U.S. and Canada):
(866) 239-6216

Conference code: 2129695101

Equal Employment Opportunity: The Latest Judicial, Administrative and Legislative Developments

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Regional Chair for the College and Program Moderator
Evan J. Spelfogel
Epstein Becker & Green, P.C.

Host
Kathleen M. McKenna
Proskauer

Greetings
Alan B. Epstein
Spector Gadon & Rosen
President-Elect, College of Labor and Employment Lawyers

Guest Speakers
Kevin Berry, New York District Director, United States Equal Employment Opportunity Commission
Helen Diane Foster, Commissioner, New York State Division on Human Rights
Carmelyn P. Malalis, Chair and Commissioner, New York City Commission on Human Rights

Fellow Speakers
Wayne Outten, Outten & Golden, LLP
Jill Rosenberg, Orrick, Herrington & Sutcliffe, LLP

THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS, INC.

PRINCIPLES OF CIVILITY AND PROFESSIONALISM FOR ADVOCATES

Preamble

As a Fellow of The College of Labor and Employment Lawyers, I recognize that I have a special obligation to ensure that our system of justice works fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all practitioners, but I will also conduct myself in accordance with the following Principles of Civility and Professionalism as guidance for Fellows when dealing with clients, opposing parties, their counsel, the courts, other adjudicators, arbitrators, mediators and neutrals, and the general public.

A. With respect to client(s):

1. Fellows should be loyal and committed to their client's cause. Fellows should not permit that loyalty and commitment to interfere with their ability to provide clients wixth objective and independent advice.
2. Fellows should endeavor to accomplish their client's objectives in all matters as expeditiously and economically as possible.
3. Fellows should counsel their clients with respect to mediation, arbitration and other forms of alternative dispute resolution in appropriate cases.
4. Fellows should advise their clients against pursuing litigation (or any other course of action) that is without merit, and against insisting on tactics which are intended to unduly delay resolution of a matter or to harass or drain the financial resources of the opposing party.
5. Fellows should advise their clients, colleagues and co-workers, and demonstrate by example, that civility and courtesy are not to be equated with weakness.
6. Fellows should counsel their clients that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation, and should abide by the client's decisions concerning the objectives and strategies of the representation.

B. With respect to opposing parties and their counsel:

1. Fellows should be zealous advocates, but should treat opposing counsel, opposing parties, tribunals and tribunal staff with courtesy, civility, respect and dignity, conducting business in a professional manner at all times.
2. In litigation and other proceedings, Fellows should zealously advocate for their clients, consistent with their duties to the proper functioning of our judicial system.
3. Fellows should consult with opposing counsel before scheduling depositions, meetings and hearings, and be cooperative with opposing counsel when scheduling changes are requested.
4. Fellows should refrain from utilizing litigation or any other course of conduct to harass the opposing party.
5. Fellows should refrain from engaging in excessive or abusive discovery tactics.
6. Although delay may be necessary or appropriate in certain circumstances, Fellows should refrain from utilizing improper delaying tactics.
7. In depositions, proceedings and negotiations, Fellows should act with dignity, avoiding groundless objections and maintaining a courteous and respectful demeanor towards all other persons present.
8. Fellows should be guided by the clients' goals in completing a transaction. Pride of authorship, when matters of substance are not involved, only contributes to delay and cost in a transaction.
9. Fellows should clearly identify for other counsel or parties all changes that they have made in documents submitted to them for review.

C. With respect to the courts and other tribunals:

1. Fellows should recognize that the proper functioning of our system of justice is enhanced by both vigorous and zealous advocacy and civility and courtesy.
2. Where consistent with the clients' interests and instructions, Fellows should communicate with opposing counsel or parties in an effort to minimize or resolve litigation.
3. Fellows should voluntarily withdraw claims or defenses when it becomes apparent that they do not have merit.
4. Fellows should refrain from filing frivolous claims, motions or responses thereto.
5. Fellows should make reasonable efforts to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery.
6. Fellows should attempt to resolve by agreement objections to matters contained in the opponents' pleadings and discovery requests or responses.
7. Fellows should notify opposing counsel and, if appropriate, the court or other tribunal, as early as possible when scheduled hearings, meetings or depositions must be cancelled, postponed or rescheduled.
8. Fellows should verify the availability of known key participants and witnesses before dates for hearings or trials are set — or, if that is not feasible, immediately after such dates have been set — so that the court (or other tribunal) and opposing counsel or party can be promptly notified of any scheduling conflicts.
9. Fellows should be punctual in court proceedings, hearings, arbitrations, conferences, depositions and other meetings.
10. Fellows should approach all tribunals with candor, honesty, diligence and utmost respect.

D. With respect to the public and our system of justice:

1. Fellows should remember that, in addition to a commitment to their clients' causes, their responsibilities as lawyers and Fellows of the College include a devotion to the public good.
2. Fellows should endeavor to keep current in the areas of law in which they practice and, when necessary, to associate with, or refer clients to, others knowledgeable in a field of practice in which they do not have the requisite experience.
3. Fellows should conduct themselves in a manner that reflects acceptance of their obligations as Fellows of the College and as members of a self-regulating profession. Fellows should also encourage fellow lawyers to conduct themselves in accordance with the standards set forth in these Principles and other standards of civility and professionalism.
4. Fellows should be mindful of the need to conduct themselves in a way that will enhance the image of the legal profession in the eyes of the public, and should be so guided when considering methods and contents of advertising.
5. Fellows should conduct themselves in a manner that reflects acceptance of their obligation as attorneys to contribute to public service, to the improvement of the administration of justice and to the provision of uncompensated time and civic influence on behalf of those persons who do not have access to adequate legal assistance.

EPSTEIN BECKER GREEN

Evan J. Spelfogel

Member of the Firm

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EVAN J. SPELFOGEL is a Member of Epstein Becker & Green, P.C., in the labor, employment, and employee benefits practices. Based in the firm's New York office, he represents management and benefit providers in all areas of employment law, labor, and employee relations.

Mr. Spelfogel's experience includes the following:

- Representing management in all aspects of employment law, including age, sex, race, religion, national origin and disability discrimination before the EEOC and deferral agencies, and in state and federal courts
- Counseling clients and litigating concerning FLSA and state wage and overtime, Davis-Bacon Act and prevailing rate matters; affirmative action plans; human resource audits; employee handbooks and policies; drug and alcohol programs; wrongful discharge claims; breach of employment, confidentiality and noncompete contracts; National Labor Relations and Railway Labor Act matters; union avoidance strategies, organizational campaigns and decertification proceedings; strikes and picketing; union negotiations and arbitration; safety laws and regulations; workplace violence, negligent hiring and/or retention; independent contractor vs. employee issues; due diligence in acquisitions and mergers; and employee benefits/ERISA/fiduciary and MPPAA withdrawal liability matters
- Conducting grievance and arbitration hearings, advising on the creation and implementation of non-union alternative dispute resolution procedures (ADR) and the mediation and arbitration of statutory employment discrimination claims.

After graduating from Harvard College and the Columbia University Law School, Mr. Spelfogel served five years with the United States Department of Labor, Office of the Solicitor and the National Labor Relations Board in Washington, D.C., Boston, and New York.

Mr. Spelfogel has served as an adjunct professor at Baruch College of the City College of New York, and as a lecturer in labor law at St. John's University, and at annual labor and employment institutes of New York University, Southern Methodist University, Boston University, and the University of Washington. He has written, edited and published numerous articles, books and book chapters on a broad range of issues, including wage and hour collective actions, comparable worth and pay equity, employment discrimination, wrongful discharge, retiree health care, plant closings and reductions in work force, e-mail and workplace privacy, union picketing and handbilling on private property, NLRB representation and unfair labor practice proceedings, the interaction of ERISA, the ADA and the NLRA, pregnancy disability, sexual harassment and alternative dispute resolution.

A Former Chair of the New York State Bar Association's (NYSBA) Labor & Employment Law Section, Mr. Spelfogel continues to serve on its Executive Committee and as a member of the Executive Committee of the NYSBA's Dispute Resolution Section. He has also served on the American Bar Association's (ABA) Labor & Employment Law Section's governing Council and as a Delegate to the Houses of Delegates of both the ABA and the NYSBA.

Mr. Spelfogel was awarded the 2014 Samuel M. Kaynard Award for Excellence in the Fields of Labor & Employment Law, given annually in recognition of those who hold strong ideals, display keen legal acumen, and make outstanding contributions to the fields of labor and employment law. He was also elected to the College of Labor and Employment Lawyers as a Fellow, the highest recognition by one's colleagues of sustained outstanding performance in the profession, exemplifying integrity, dedication, and excellence. Mr. Spelfogel is currently listed in *The Best Lawyers in America; New York Super Lawyers - Metro Edition; PLC Which Lawyer? Yearbook; Who's Who in America; Who's Who in American Education; Who's Who in Industry and Finance; Who's Who Legal: The International Who's Who of Management Labour & Employment Lawyers;* and *Who's Who in the World.*

Education

Columbia University School of Law (J.D., 1959); Harvard University (A.B., 1956)

Bar Admissions

Massachusetts and New York

Court Admissions

- U. S. Supreme Court
- First, Second, Fourth and Ninth Circuits, U.S. Courts of Appeals
- D MA, SD NY, ED NY, ND NY, ND OH, D CO

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Related Practices
Employment Litigation & Arbitration
Employment Law Counseling & Training
Class/Collective Action
Labor-Management Relations
Terminations, Reductions in Force & WARN Act
Strategic Corporate Planning
Higher Education

Education
Boston College Law School, J.D., 1978

St. Peter's College, B.A., 1975
summa cum laude

Admissions & Qualifications
New York
New Jersey

Kathleen M McKenna

Partner

Kathleen M. McKenna is a partner in the Labor & Employment Law Department. With a formidable track record for success in major employment matters, she has extensive experience litigating employment disputes of all types, including defending employers against claims alleging all forms of discrimination, sexual harassment, retaliation, wrongful discharge, wage and hour and breach of contract. Her clients include major multi-national businesses, such as television networks, pharmaceutical companies, international retailers and law firms.

Adept at counseling clients at every turn of the litigation process, Kathleen employs a creative mix of litigation experience and business acumen to determine which cases should be litigated in court, which should be resolved in some alternative forum and which can and should be settled. While she is regularly successful on her clients' behalf through negotiation and dispositive motions, she possesses significant jury trial experience, and is well-versed in all forms of alternate dispute resolution.

Kathleen is regularly called upon to support clients with strategies, counseling and training to help them avoid litigation and government investigations, and provides practical advice on all workplace-related issues to today's top employers. These topics include employee discharge and discipline, reductions in force, employment policies and procedures, and compliance with federal, state and local employment laws.

Kathleen also has significant experience dealing with traditional labor matters. She has litigated the full range of labor proceedings and has served as the chief spokesperson or advisor in numerous collective bargaining negotiations. She also has advised management on National Labor Relations Act issues, including union organizing campaigns and representation elections, strikes, picketing, plant closings and work transfers, and purchase and acquisition issues.

Kathleen is a member of the College of Labor & Employment Lawyers. She is also a sought after lecturer on labor and employment issues.

Court Admissions

U.S. District Court, New Jersey

U.S. Court of Appeals, Seventh Circuit

U.S. District Court, New York, Southern District

U.S. District Court, New York, Eastern District

U.S. Court of Appeals, Third Circuit

U.S. Court of Appeals, Second Circuit

U.S. District Court, New York, Northern District

U.S. Supreme Court

Memberships

American Bar Association (Law and Employment Law Section, Litigation Law Section)

New York State Bar Association (Labor and Employment Law Section)

New Jersey State Bar Association (Labor and Employment Law Section)

College of Labor & Employment Lawyers

Awards & Recognition

Chambers USA: New York: Labor & Employment 2007-2015

Best Lawyers in America 2005-2016

Top 50 Female *New York Super Lawyers* 2010-2014

Top 100 *New York Super Lawyers* 2012-2014

New York Super Lawyers 2010-2015

The International Who's Who of Management Labour & Employment Lawyers 2012-2013

Fellow, College of Labor and Employment Lawyers

The Legal 500 United States: Labor & Employment: Workplace & Employment Counseling 2009-2010, 2013-2015

The Legal 500 United States: Labor & Employment: Labor & Employment Litigation 2011-2013

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Philadelphia, PA 19103
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Practice Area(s)
Commercial Litigation
Employment Law
Professional Liability and Malpractice Litigation

Admissions
Pennsylvania, 1969
U.S. District Court Eastern District of Pennsylvania
U.S. District Court Middle District of Pennsylvania
U.S. Court of Appeals 3rd Circuit
U.S. Court of Appeals 7th Circuit
U.S. Court of Appeals 9th Circuit
U.S. Supreme Court

Education
Temple University School of Law
J.D. 1969

Temple University
B.S. (Journalism) 1967

Professional Organizations
The College of Labor and Employment Lawyers, Fellow and Member of the National Board

National Employment Law Association

Philadelphia Bar Association

Pennsylvania Bar Association

American Bar Association

Third Circuit Bar Association

American Association for Justice

Temple American Inn of Court, Master, President 2001-2002

USDC for the E.D. Pa. - Employment Litigation Panel, Mentor

Alan B. Epstein

Alan B. Epstein is the chair of Spector Gadon & Rosen's Employment Law Practice Group. He has litigated complex claims before courts throughout the United States and is admitted to practice before the state and federal courts of Pennsylvania, the United States Court of Appeals for the Third, Seventh and Ninth Circuits, and the United States Supreme Court.

Mr. Epstein concentrates his practice in civil litigation in state and federal courts, with special emphasis on litigating claims and giving transactional advice in the areas of employment rights, civil rights, and constitutional torts. He also represents professionals and organizations of professionals in the many unique problems that arise in the practice of law, medicine, accounting, insurance, real estate, stockbrokerage, pharmacy, and architecture. He is a frequent lecturer and has served as an expert witness in the areas of employment law and professional responsibility. In 2000, he was elected to Fellowship in the prestigious College of Labor and Employment Lawyers and has been selected to serve a three-year term on the Board of Governors beginning January 2011. He has been named as one of the Best Lawyers in America in the publication of that name for over ten years and has been a top 100 Superlawyer in Pennsylvania. He has also been selected as one of the nation's 500 Leading Lawyers (2010), Top 500 Plaintiff's Lawyers (2009), and Top 500 Litigators (2006) by Lawdragon. He is an active member of the National Employment Lawyers Association, and a volunteer mentor for the Employment Litigation Panel of the United States District Court for the Eastern District of Pennsylvania. He has served as a national leader in the American Inns of Court movement, is an active member of the Philadelphia, Pennsylvania and American Bar Associations, and the American Association for Justice.

In the context of significant litigation in the employment law area, he is well known for his participation in high profile litigation for individuals and corporate entities (including the representation of a young, HIV-positive attorney against a prestigious Philadelphia law firm that received national attention because of the award-winning film Philadelphia starring Tom Hanks and Denzel Washington and daily coverage of the trial by Court TV and Cable News Network) and his frequent representation of local and national sports figures, broadcast personalities, and officers and directors of large national corporations who require his service in connection with litigation and negotiation of their contracts of employment.

Mr. Epstein was also the founder and President/CEO of JUDICATE, The National Private Court System, a company coordinating private dispute resolution services for approximately 700 former judges throughout the United States and its territories. He has lectured in the area of alternative dispute resolution and serves as a mediator and arbitrator by private appointment and through certification by state and federal courts.

Kevin J. Berry

Kevin Berry is District Director of EEOC New York District Office. The district covers New York State, all of New England and Northern New Jersey with offices in New York City, Boston, Newark and Buffalo. In this position he is responsible for the enforcement of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Equal Pay Act and the Genetic Nondiscrimination Act. In order to accomplish the mission of eliminating employment discrimination Mr. Berry's scope of oversight includes the Alternate Dispute Resolution Program, all investigative enforcement activity, the systemic program, state and local agency interaction, outreach, and the federal sector program for the New York District. Mr. Berry came to the EEOC in July 1979 from the U.S. Department of Labor as an Investigator assigned to the Philadelphia District Office. He has held various positions with the EEOC including Deputy Director, Enforcement Manager, Supervisory Investigator, State and Local Coordinator and Investigator. Prior to serving as Deputy Director, Mr. Berry was an Administrative Judge responsible for the adjudication of individual and class discrimination complaints in the federal government. Mr. Berry has conducted numerous training and outreach presentations to private entities, state and federal agencies throughout the New York District and around the country. He is the recipient of a number of organizational performance awards including eleven time recipient of the Director's Award. Mr. Berry has also served as 1st Vice President and eventually President of Local 3555 of the American Federation of Government Employees, AFL-CIO. He received his law degree from Rutgers University, a B.A. from Hofstra University and is a graduate of the Federal Executive Institute. He is a member of the New York State Bar and the Chair of the New York City Federal Executive Board.

Helen Diane Foster

Helen Diane Foster was appointed by Governor Andrew M. Cuomo as Commissioner of the New York State Division of Human Rights in September 2013. She was confirmed by the New York State Senate in June 2014. As Commissioner, Ms. Foster is responsible for the enforcement of New York State's Human Rights Law, the oldest such law in the country. In this capacity, she is in charge of developing, managing, and executing strategies to prosecute systematic forms of discrimination through investigations and complaints initiated by the Division or by individual complainants, and developing policies and legislation to advance the civil rights of all New Yorkers.

Prior to her appointment, Ms. Foster served in the New York City Council for 11 years representing the 16th District in Bronx County, one of the poorest council districts in the city. As Councilmember, Ms. Foster served as the Chairperson for the New York City Council Committee on State and Federal Legislation, and the Committee on Parks and Recreation, She also served as Co-chair of the Black, Latino and Asian Caucus and Co-chair of the Women's Caucus. In addition, Ms. Foster served on the Committees on Aging, Education, Health; Community Development, and Public Safety.

Ms. Foster donates her time to a variety of causes. As a person with dyslexia, she is especially committed to working with children and adults with this condition. Every year she participates in the International Dyslexia Association's conference in a panel discussion on adults with dyslexia. She uses speaking engagements as a tool to empower communities and encourage youth to achieve their full potential.

Ms. Foster attended Hyde School in Bath, Maine, Howard University in Washington D.C. and the City University of New York School of Law (CUNY). While attending law school, Councilmember Foster participated in an international exchange program at the University of Havana. She served as a summer associate at the Bronx County District Attorney's Office and the Atlanta Legal Aid Office.

Upon graduating from CUNY, Ms. Foster worked as an Assistant District Attorney in the Manhattan District Attorney's Office. She eventually moved into the private sector, where she served for a number of years as Assistant Vice President for Legal Affairs at St. Barnabas Hospital.

She lives in Bronx County with her husband Eric McKay, and their daughter Nia and her stepdaughter, Aminah.

Carmelyn P. Malalis

Carmelyn P. Malalis was appointed Chair and Commissioner of the New York City Commission on Human Rights in November 2014, by Mayor Bill de Blasio following more than a decade in private practice as an advocate for employees' rights in the workplace. Ms. Malalis has a dedicated history of combating prejudice, intolerance, discrimination and harassment through her representation of employees from a variety of industries and income levels, work with employers' advocates, and collaborations with community groups, non-profit organizations and bar associations.

As Chair and Commissioner of the Commission, Ms. Malalis leads an agency with the dual roles of investigating complaints of discrimination and retaliation in employment, housing and public accommodations; and providing outreach, education and training to the public to prevent discrimination before it occurs and avert intergroup tension. The Commission leads New York City's efforts to enforce the New York City Human Rights Law, educate the public about the law, and work with governmental and non-governmental agencies and organizations with similar functions.

Prior to her appointment, Ms. Malalis was a partner at Outten & Golden LLP. She joined the firm in 2004 and represented individuals and classes of employees in New York City and across the country in civil rights and employment actions. At the firm, she co-founded and co-chaired its Lesbian, Gay, Bisexual and Transgender Workplace Rights Practice Group; co-chaired its Disability and Family Responsibilities Discrimination Practice Group; and successfully represented employees in negotiations, agency proceedings, and litigations involving claims of sexual harassment, retaliation, and discrimination based on race, national origin, sex, gender identity, gender expression, sexual orientation, age, pregnancy, disability, and religious discrimination. Previously, Ms. Malalis worked as a litigation associate at Sullivan & Cromwell LLP, and for the Honorable Magistrate Judge Ronald L. Ellis on the United States District Court for the Southern District of New York.

Throughout her career, Ms. Malalis has demonstrated her commitment to promoting diversity and inclusion, and challenging discrimination and intolerance through her numerous speaking engagements, collaborations with educational institutions and bar associations, pro bono legal assistance she has provided to legal services and non-profit organizations, and cooperative working relationships she has forged with counsel representing employers. She is currently a member of the New York City Bar Association's Executive Committee and has held a variety of leadership roles with other groups, including co-chairing the Committee on Diversity in the Legal Profession of the American Bar Association's Labor and Employment Law Section, serving on the advisory committee of the LGBT Rights Project at the Human Rights Watch, chairing the City Bar's Committee on LGBT Rights, co-founding and serving on the board of BABAE Inc., and serving on the board of Queers for Economic Justice. She was also a longtime member of the National Employment Lawyers Association and its New York affiliate, and has been a member of the New York State Bar Association, the National Lesbian & Gay Law Association, and the Lesbian & Gay Law Association of Greater New York.

In recognition of her professionalism, commitment to civil rights and human rights, and her contributions to different marginalized communities, Ms. Malalis has been awarded numerous honors throughout her career, including the Arthur S. Leonard Award (The New York City Bar Association), a Community Vision Award (The Lesbian & Gay Law Association of Greater New York), a Women on the Move Award (The Arthritis Foundation), a Pro Bono Publico Award (The Legal Aid Society), an inaugural Best LGBT Lawyers Under 40 Award (The National LGBT Bar Association), and a Visionary and Policymaker Award as one of the 100 Most Influential Filipina Women in the US (Filipina Women's Network).

Ms. Malalis earned her J.D. from the Northeastern University School of Law and received a B.A. in women's studies from Yale University.

Wayne N. Outten

Wayne N. Outten is founding and managing partner of Outten & Golden LLP. His practice focuses exclusively on representing individuals in all areas of employment law. He co-chairs the firm's Executives and Professionals and Whistleblower Retaliation Practice Groups.

Mr. Outten's practice focuses on representing high-level employees and professionals in all aspects of their employment, including negotiation of employment, compensation, and severance agreements. He is the author of the "Representing the Executive" chapter in Executive Compensation (BNA Books). His practice includes representing employees in multinational employment contexts, including expatriate and seconded employees.

Mr. Outten was selected by his peers as one of the "Best Lawyers in America" every year since 1987 and as one of New York's Super Lawyers, where he has been listed as one of the Top 100 New York Metro Super Lawyers every year since 2006. Best Lawyers designated him "Lawyer of the Year 2010" for Labor and Employment Law - New York City and "Lawyer of the Year 2012" for Litigation - Labor and Employment in New York City. He was selected for listing in Lawdragon every year since 2005 and was selected for the Lawdragon 500 Leading Lawyers in America in 2006 and for the Lawdragon 500 Leading Plaintiff Lawyers in America in 2007; Lawdragon designated him a "legend" (one of 50 in the U.S.) in 2015. Mr. Outten has been an AV Preeminent Rated Lawyer in the LexisNexis Martindale-Hubbell Top Rated Lawyers since 1992.

Mr. Outten is a founding member and/or leader in numerous professional associations, including the National Employment Lawyers Association (NELA) and its New York affiliate, the College of Labor and Employment Lawyers, the Section of Labor and Employment Law of the American Bar Association (Chair, 2015-2016), and the New York State Bar Association's Labor & Employment Law Section. Mr. Outten has also lectured extensively on employment law, especially on negotiation, mediation, and arbitration of employment disputes, on employment and severance agreements, and on retaliation and whistleblower claims. He is a widely published author whose work is frequently found in legal and popular publications.

Mr. Outten's notable cases include a recovery of $12 million in a gender discrimination/retaliation case against Morgan Stanley in federal court and (with partner Larry Moy) a $18.9 million arbitration award in a breach of contract case against Deutsche Bank and a $72.0 million arbitration award against another major international bank - one of the largest arbitration awards in an employment case.

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Jill L. Rosenberg

Partner, Employment Law
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Jill Rosenberg, a New York employment law partner, is a nationally recognized employment litigator and counselor. Jill has significant experience defending and advising employers in discrimination, sexual harassment, whistleblowing, wrongful discharge, affirmative action, wage-and-hour and traditional labor matters. She handles complex individual cases, as well as class actions and systemic government investigations. She represents a broad range of companies, including employers in the securities industry, banks and financial institutions, accounting firms, law firms, and employers in the food service and publishing industries. Jill also has particular expertise in the representation of nonprofit entities, including colleges, universities, hospitals, foundations and cultural institutions.

Jill's notable engagements include:

- **Employment Arbitrations for Securities Industry Employers.** Jill has tried to decision more than 30 employment arbitrations before FINRA (formerly NASD and NYSE), JAMS and AAA involving claims for bonuses and other forms of compensation, wrongful termination, sexual harassment, discrimination and whistleblowing/retaliation. She has also litigated important issues in the field of arbitration, including the permissibility of mandatory arbitration, the scope of judicial review of arbitration awards and the availability of certain remedies.
- **Higher Education Litigation.** Jill was lead trial counsel representing a university in a federal court jury trial involving allegations of gender discrimination arising out of a denial of tenure. This two-week trial resulted in a defense verdict for our client, which was upheld on appeal by the Second Circuit. Jill also counsels and litigates on behalf of higher education clients with regard to Title IX athletics compliance, student discipline, sexual harassment, disabilities issues and other issues unique to higher education settings.
- **Whistleblower Defense.** Jill frequently defends employers against Sarbanes-Oxley and other whistleblower and retaliation claims. She is also retained by employers to conduct internal investigations and advise on whistleblowing and retaliation issues.

Related Practice Areas

- Employment Law & Litigation
- Discrimination, Harassment & Retaliation
- Traditional Labor Law
- Wage-and-Hour
- Corporate Whistleblowing

Education

- J.D., University of Chicago Law School, 1986
- A.B., *cum laude*, Princeton University, 1983

Honors

- Consistently ranked by *Chambers USA* as a Leading Employment Lawyer
- *The Recorder* California Labor & Employment Department of the Year (2013-2015)
- *The International Who's Who of Management Labour and Employment Lawyers* (2014)
- *Euromoney* Leading Women in Business Law, Labor and Employment (2013)
- *Euromoney* The Best of the Best USA, Labor and Employment (2007)
- College of Labor and Employment Lawyers, Fellow
- Lawyers Division of UJA Federation of New York, *The James H. Fogelson Young Leadership Award*

She designs and conducts training programs for clients and frequently speaks on employment law issues for employer and bar association groups such as National Employment Law Institute, Practising Law Institute, National Association of College and University Attorneys and the New York State Bar Association.

Jill is the firmwide Partner in Charge of Pro Bono Programs, and serves on the firm's Personnel Development, Risk Management, and Diversity Committees.

Before joining the firm, Jill was an associate at Baer Marks & Upham in New York from 1986 to 1991.

Admitted in

- New York

Memberships

- Advisory Board Member, National Employment Law Institute
- Co-Chair, Diversity and Leadership Committee and Executive Committee Member, New York State Bar Association, Labor and Employment Law Section
- Board Member and Secretary, New York Legal Assistance Group
- Member, Board of Directors, UJA-Federation of New York
- Former Vice-Chair and Board Member, Lawyers Alliance for New York
- National Association of College and University Attorneys
- Member of ADR Committee, American Bar Association, Labor and Employment Law Section
- American Bar Association, Litigation Section
- Association of the Bar of the City of New York

Publications

- "The Commission Speaks: Guidance for Employers Regarding the New York City Fair Chance Act," Orrick's Employment Law & Litigation Blog, November 20, 2015.
- "New York State Expands Equal Pay Law and Other Workplace Protections for Women," Orrick's Employment Law & Litigation Blog, October 26, 2015.
- "Time To Pay Up? California Adopts Stronger Equal Pay Protections," Orrick's Employment Law & Litigation Blog, October 20, 2015.

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- "NYCCHR's Enforcement Guidance on NYC Credit Check Law: Answers and New Questions," Orrick's Employment Law & Litigation Blog, October 9, 2015.
- "Second Circuit Speaks: No Private Settlements of FLSA Actions," Orrick's Employment Law & Litigation Blog, August 11, 2015.
- "Lawyers Entitled to Overtime Pay? Maybe So When Not "Practicing Law"," Orrick's Employment Law & Litigation Blog, July 24, 2015.
- ""Unpredictable and Potentially Messy"?: NLRB Ruling Could Complicate Employers' Workplace Investigations," Orrick's Employment Law & Litigation Blog, July 14, 2015.
- "To Pay or Not To Pay: The Second Circuit Rules on Unpaid Interns," Orrick's Employment Law & Litigation Blog, July 7, 2015.
- "Show Me the Money: DOL Proposed Regulations Dramatically Expand Overtime Eligibility for White Collar Employees," Orrick's Employment Law & Litigation Blog, July 1, 2015.
- "New York City "Bans the Box"—Inquiries Into Applicants' Criminal Histories Now Significantly Restricted," Orrick's Employment Law & Litigation Blog, June 12, 2015.
- "Is the EEOC Rushing Your Company to Court? SCOTUS Says Not So Fast," Orrick's Employment Law & Litigation Blog, May 5, 2015.
- "New York City Council Passes Ground-Breaking Legislation Limiting the Use of Credit Checks in Employment," Orrick's Employment Law & Litigation Blog, April 17, 2015.
- "Airline Tragedy Prompts Renewed Discussion on Employment Inquiries into Mental Health," Orrick's Employment Law & Litigation Blog, April 7, 2015.
- "SEC Makes Good on Its Promise to "Un-Muzzle" Employees from Cooperating in SEC Investigations," Orrick's Employment Law & Litigation Blog, April 2, 2015.
- "In the Nick of Time: Governor Cuomo Approves Repeal of Annual Wage Notices," Orrick's Employment Law & Litigation Blog, December 31, 2014.
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ORRICK

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ACT NOW ADVISORY

New York State Passes Five New Laws to Effectuate Gender Equality in the Workplace

November 2, 2015

By William J. Milani, Susan Gross Sholinsky, Nancy L. Gunzenhauser, and Matthew S. Aibel*

The New York State Legislature recently passed several pieces of legislation, all of which are intended to curtail gender-related employment discrimination. Among other things, this legislation strengthens existing laws, creates new causes of action, and provides for the award of attorneys' fees. All of this legislation, collectively referred to as the Women's Equality Agenda ("WEA"), was signed into law by Governor Andrew Cuomo on October 21, 2015.

Further, in his continued push on gender-related issues, at the Empire State Pride Agenda's dinner on October 22, 2015, Governor Cuomo announced proposed regulations that would ban private and public employment discrimination against transgender individuals.[1] This proposal is subject to a 45-day notice and comment period before it can be fully implemented.

Below is a summary of the amendments that make up the WEA, which will become effective on January 19, 2016.

1) Fair Pay Law Amendments (NY Bill A6075)

As we have discussed previously with respect to the California Fair Pay Act, New York has now joined the national trend of states that are bolstering their fair pay laws, so that such laws are even more robust than their federal counterpart, the Equal Pay Act of 1963. Bill A6075 modifies the following sections of the New York State Labor Law regarding equal pay:

First, the Fair Pay Law Amendments amend Labor Law Section 194's equal pay provisions from the original standard, which permitted pay differentials based on "any

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[1] In New York City, the City Human Rights Law already protects employees from discrimination on the basis of "gender identity."

factor other than sex" to a "bona fide factor other than sex" standard, which may include education, training, or experience. The Fair Pay Law Amendments make clear, however, that such a factor must:

- not be based upon or derived from a sex-based differential in compensation,
- be job-related with respect to the position in question, and
- be consistent with business necessity.

An employee may still proceed with a claim under Section 194.1 if the employee demonstrates that, despite the factor meeting these three elements:

- the employer's particular employment practice causes a disparate impact on the basis of sex,
- an alternative employment practice exists that would serve the same business purpose and not produce such pay differential, and
- the employer has refused to adopt such alternative practice.

Second, the Fair Pay Law Amendments amend the definition of the term "same establishment" in New York State's Labor Law Section 194.1 to include more than one workplace located in the same geographical region. So, under the New York Equal Pay Act, employers must now ensure that no employee is paid a lower wage than the wage paid to an employee of the opposite sex in the same establishment for equal work on a job that requires equal skill, effort, and responsibility, and which is performed under similar working conditions (except under certain limited circumstances). This expanded definition, however, limits a "geographical region" to no larger than a county.

Third, the Fair Pay Law Amendments add a pay transparency provision, prohibiting employers from taking adverse action against an employee who inquires about, discusses, or discloses his or her wages *or* the wages of another employee. Employers may, however, establish a written policy that sets forth "reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages." There are also limitations to this pay transparency scheme, including that employees may not discuss or disclose the wages of another employee without that employee's consent, and that employees who have access to wage information of other employees as a part of their essential job functions (i.e., HR staff) may not share such wage information with others who do not otherwise have access to such information, except when certain circumstances are present (e.g., an investigation or government inquiry). Employers should be mindful of the National Labor Relations Board's position regarding prohibiting covered employees from discussing wages when considering whether to create such a policy and, if so, how to craft it.

Finally, the Fair Pay Law Amendments increase the amount of liquidated damages under Section 194 from 100 percent to up to 300 percent of the total damages when a willful violation is found.

2) Sexual Harassment Protections (NY Bill A5360)

This bill amends the New York State Human Rights Law ("NYSHRL"), which generally applies only to businesses with four or more employees, so that the sexual harassment protections under the NYSHRL apply to all New York employers, regardless of the number of employees. The Sponsor's Memo to this bill indicated that the bill will affect the more than 60 percent of New York employers that employ fewer than four employees.

3) Recovery of Attorneys' Fees (NY Bill A7189)

This bill amends New York Executive Law Section 297(10) to permit plaintiffs and defendants to recover attorneys' fees in connection with claims of employment or credit discrimination on the basis of sex. The NYSHRL previously granted reasonable attorneys' fees only in the context of housing discrimination claims. This bill does not provide attorneys' fees for other types of employment discrimination under the NYSHRL.

4) Discrimination Based on Familial Status (NY Bill A7317)

This bill amends the NYSHRL, which bans employment discrimination on the basis of many protected categories, so that it now includes "familial status" as a protected classification. Familial status was already a protected category under the NYSHRL, but only with respect to housing discrimination.

The term "familial status" means:

(a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years, or

(b) one or more individuals (who have not attained the age of eighteen years) being domiciled with:

(1) a parent or another person having legal custody of such individual or individuals, or

(2) the designee of such parent.

The Sponsor's Memo to this bill indicates that the legislation was intended to protect women with children because that group is "less likely to be recommended for hire and promoted, and, in most cases, are offered less in salary than similarly situated men."

The bill will likely provide greater protections outside its intended group, because it also covers men and other individuals who are gaining custody of a child.

5) Reasonable Accommodations for Pregnancy (NY Bill A4272)

This bill amends the NYSHRL to require employers to provide reasonable accommodations for employees with a pregnancy-related condition, which is defined as "a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques." The bill requires an employee to "cooperate" in providing medical or other information that is necessary to verify the existence of a "disability or pregnancy-related condition," meaning that employees must engage in the interactive process with the employer attempting to provide a reasonable accommodation.

The Sponsor's Memo for the bill provides a list of potential reasonable accommodations, including "a stool to sit on, extra restroom breaks, transfer away from hazardous duties, a temporary reprieve from heavy lifting, or a reasonable time for child-birth recovery." The new legislation itself, however, does not specifically reference these proposed accommodations. Employers in New York City will already be familiar with pregnancy accommodation requirements, since the City enacted a reasonable accommodation law for pregnant individuals (whether or not the individual suffers from a "pregnancy-related condition") on January 30, 2014.

What New York Employers Should Do Now

In anticipation of this quintet of legislation becoming effective this coming January, New York employers should do the following:

- With the assistance of counsel, consider conducting a review of job titles and compensation methodology to ensure compliance with Section 194.1's amended fair pay provisions.

- If you are a small employer (i.e., you have fewer than four employees), review your policies and ensure that you maintain a robust policy prohibiting sexual harassment and providing an internal complaint procedure.

- Train hiring and other managers to be sensitive to issues regarding familial status, in all phases of the employment relationship, from interview to termination.

- Train supervisors and human resources professionals to engage in an interactive process with pregnant individuals seeking workplace accommodations.

* * * *

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***Act Now* Advisory** **October 29, 2015**

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ACT NOW ADVISORY

Now That New York City's Credit Check and "Ban the Box" Laws Are in Effect, How Do Employers Comply?

by Susan Gross Sholinsky, Marc A. Mandelman, William J. Milani, Dean L. Silverberg, Jeffrey M. Landes, Nancy L. Gunzenhauser, and Ann Knuckles Mahoney

Two important New York City laws impacting the hiring process have recently taken effect, requiring immediate action by most City employers.

The Fair Chance Act, New York City's "ban the box" law ("Ban-the-Box Law"), took effect on October 27, 2015, restricting City employers' ability to inquire about job applicants' criminal history. In addition, New York City's Stop Credit Discrimination in Employment Act ("Credit Check Law") took effect on September 3, 2015, restricting City employers' ability to conduct credit checks on applicants and current employees. This *Act Now* Advisory will assist you in ensuring that your hiring processes are in compliance with these new laws.

New York City's Ban-the-Box Law

The Ban-the-Box Law restricts the timing of *when* an employer may inquire about an applicant's criminal history. Under this law, New York City employers with four or more employees may not inquire about an applicant's criminal history (including pending arrests) until a contingent offer of employment has been made. This restriction applies to any direct (i.e., asking the applicant or placing the inquiry on the employment application) or indirect (i.e., by running a criminal background check) inquiry.

Further, the Ban-the-Box Law requires that certain steps be taken when an employer wishes to rescind a contingent offer on the basis of the applicant's criminal history.

Employers not claiming one of the limited exceptions to the law must do the following:

- Remove questions concerning criminal convictions and pending arrests from job

applications.

- Indicate in an offer letter that the offer is contingent on the successful completion of a criminal background check or questionnaire, if such an inquiry will be made.
- Create (if desired) a criminal background questionnaire, which is generally in the form of the criminal history inquiry traditionally found in the employment application. This questionnaire can be provided to the employee along with the conditional offer letter. This way, if a disqualifying response is provided, the employer can avoid performing a background check. The questionnaire should make it clear that if inconsistencies exist between such reports and the report procured by the consumer reporting agency, adverse action may be taken based on those inconsistencies.
- Ensure full compliance with existing federal Fair Credit Reporting Act ("FCRA") requirements, including all notice and authorization/disclosure requirements, as well as all applicable state laws.
- Once a report is obtained, analyze the applicant's criminal history using the eight-factor balancing test set forth in New York Correction Law Article 23-A.
- If you wish to take an adverse action based upon the applicant's criminal history, send the applicant a "Notice of Intent to Take Adverse Action." With this notice, also include:
  - a completed "Fair Chance Notice," summarizing the factors analyzed and the reasons for the decision[1];
  - a copy of the criminal background report;
  - any other supporting documents that formed the basis for the intended adverse action;
  - a copy of "Summary of Your Rights Under the Fair Credit Reporting Act"; and
  - a copy of Article 23-A of the New York Correction Law.
- Hold the position open for five business days[2] to allow the applicant to respond.
- If a satisfactory response is not timely received from the applicant, send the applicant a "Notice of Adverse Action," along with additional copies of:
  - the criminal background report,[3]
  - the supporting documents that formed the basis for the adverse action,
  - the "Summary of Your Rights Under the Fair Credit Reporting Act," and
  - Article 23-A of the New York Correction Law.

In addition to the model Fair Chance Notice, the New York City Commission on Human Rights ("NYCCHR") has also just released a "Fact Sheet" regarding this new law.

New York City's Credit Check Law

New York City's Credit Check Law prohibits an employer from requesting or considering "consumer credit history" in employment decisions regarding applicants or employees. The Credit Check Law recognizes certain limited exemptions to this general prohibition.

The NYCCHR, the agency charged with enforcing the Credit Check Law, recently released Enforcement Guidance, which provides greater detail about the Credit Check Law and clarifies its interpretation of the exemptions. Importantly, the NYCCHR has also recently indicated that it will undertake formal rulemaking later this year, including a notice and comment period, during which employers may submit inquiries and comments regarding the Credit Check Law.

The Enforcement Guidance appears to significantly narrow the Credit Check Law's exemptions. However, during a recent training session held by the NYCCHR to educate employers on compliance with the Credit Check Law, NYCCHR representatives indicated that the narrow

interpretation of the exemptions in the Enforcement Guidance may not necessarily apply in all situations, especially for employers in the financial services industry. Instead, certain exemptions may likely be applied in a manner that is more closely aligned with the actual text of the Credit Check Law.

For example, one statutory exemption applies to employees who have signatory authority over assets valued at $10,000 of more. The Enforcement Guidance states that this exemption will only apply to employees at the executive level. During the training session, though, the NYCCHR indicated that the exemption would likely be applied more broadly, e.g., where the employee would have signatory authority over $10,000, would oversee the transfer of $10,000, or had a corporate credit card and could spend at least $10,000 without receiving supervisor approval—even if such employee was not at the executive level.

Although the interpretation of the exemptions may be in flux at the present time, employers must nevertheless follow a clearly stated process when claiming an exemption under the Credit Check Law:

- Employers must inform the applicant or employee of any exemption being claimed under the Credit Check Law prior to running a credit check. To inform an applicant of the exemption being claimed, employers should either:
    - revise offer letters for exempt positions in New York City to state that the offer is contingent upon completion of a successful background check, which will include a credit check, and then the employer must indicate which exemption(s) would justify the credit check being performed (for example, "[t]his offer is contingent upon successful completion of a background check, which will include a credit check because the position into which you are being hired will allow you to modify digital security systems established to prevent the unauthorized use of the company's or its clients' networks or databases)," or
    - revise the state/local notices page[4] of the authorization/disclosure form required under the FCRA when requesting consumer credit checks for applicants or employees in New York City, such that it contains a list of the exemptions with check-boxes, so that the employer can indicate the exemption being claimed.
- Maintain an "exemption log" to assist in responding to information requests by the NYCCHR, which should include:
    - which exemption is claimed,
    - how the applicant/employee fits into the exemption,
    - the qualifications of the applicant/employee for the position/promotion,
    - the name and contact information of the applicant/employee,
    - the nature of the credit history information considered and a copy of such information,
    - how the credit history information was obtained, and
    - how the credit history impacted any employment action.
- Maintain a copy of the applicant's or employee's job description with the exemption log to facilitate the determination of why a particular exemption was claimed.
- Retain the exemption log for a period of five years from the date that an exemption is claimed.

What Employers Should Do Now

New York City employers must *act now* to review their practices and procedures and ensure that they are in compliance with both the Ban-the-Box Law and the Credit Check Law.

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Read this advisory online.

ENDNOTE

[1] The Fair Chance Notice is a template prepared by the New York City Commission on Human Rights ("NYCCHR"). Employers may download and use this notice, as is, or they may use their own preferred format of written notice, as long as the material substance does not change. The text of the Ban-the-Box Law does not require that employers use the actual form prepared by the NYCCHR. For ease, however, and because the NYCCHR will expect to see an analysis similar to that incorporated in the Fair Chance Notice, we recommend using the template notice.

[2] The Ban-the-Box Law requires that the applicant be provided with no less than three business days to respond. Under the FCRA, however, the Federal Trade Commission has recommended in an opinion letter that the employer provide the applicant with five business days to respond. Thus, to best comply with both laws, we recommend providing the applicant with five business days to respond.

[3] If the applicant provides additional information, you may wish to revise the Fair Chance Notice to incorporate the new information into your analysis under Article 23-A and send it along with the Notice of Adverse Action. However, this step does appear to be explicitly required by the Ban-the-Box Law.

[4] In light of several lawsuits alleging that extraneous information included within the FCRA authorization/disclosure document violates the requirement under the FCRA that the authorization/disclosure form must be a clear and conspicuous disclosure and must be "in a document that consists solely of the disclosure," this page should be entirely separate from the authorization/disclosure form and may include additional information that is needed to run a background check in New York (e.g., a criminal background questionnaire or confirmation of receipt of Article 23-A) or any other state. It should be noted here that, according to the FCRA, the authorization and disclosure may, indeed, be in the same document.

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NEW YORK STATE DIVISION OF HUMAN RIGHTS

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Orders | Contact Us | Language Access

Mission Statement | Agency History | Agency Overview | Biographies

Mission Statement

New York has the proud distinction of being the first state in the nation to enact a Human Rights Law, which affords every citizen "an equal opportunity to enjoy a full and productive life." This law prohibits discrimination in employment, housing, credit, places of public accommodations, and non-sectarian educational institutions, based on age, race, national origin, sex, sexual orientation, marital status, disability, military status, and other specified classes.

The New York State Division of Human Rights was created to enforce this important law. The mission of the agency is to ensure that " every individual . . . has an equal opportunity to participate fully in the economic, cultural and intellectual life of the State." It does so in many ways, including the following:

- Through the vigorous prosecution of unlawful discriminatory practices;
- Through the receipt, investigation, and resolution of complaints of discrimination;
- Through the creation of studies, programs, and campaigns designed to, among other things, inform and educate the public on the effects of discrimination and the rights and obligations under the law; and
- Through the development of human rights policies and proposed legislation for the State.

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N.Y. / REGION

New Commissioner Vows to Revitalize Agency That Fights Discrimination in New York

MARCH 8, 2015

The Working Life

By RACHEL L. SWARNS

Every year, thousands of New Yorkers turn to the Commission on Human Rights, the city agency responsible for battling discrimination in the workplace, the housing market and beyond.

They describe sexual harassment and racial discrimination on the job, public buildings that remain inaccessible to disabled people, and landlords who refuse to rent to people who receive public assistance.

Then they wait. And wait. And wait.

Finally, some people realize what city officials already know: The commission, the watchdog empowered to investigate and prosecute violators of the city's anti-discrimination law, is largely toothless. The agency files too few cases, initiates too few investigations, levies too few fines and fails to meet its own timelines for resolving complaints, officials say.

That is why Carmelyn P. Malalis, the new commissioner appointed by Mayor Bill de Blasio, received such a warm welcome last week from members of the City

Council and advocates for the poor. In her second week on the job, Ms. Malalis was vowing to vigorously enforce the law and to revitalize the chronically underfinanced agency, which primarily serves residents who cannot afford to hire their own lawyers.

"I get that folks want to see results," Ms. Malalis, a 40-year-old lawyer who specializes in workplace discrimination cases, said in an interview. "I know that we're going to do some great work here."

She certainly received a boost from the City Council speaker, Melissa Mark-Viverito, a Democrat from East Harlem, who promised last month to add $5 million to the commission's $6.9 million budget in the coming fiscal year, enough to more than double the number of staff lawyers while also increasing the number of human rights specialists.

Even so, reinvigorating the commission will be no easy task.

"You have your work cut out for you," Councilwoman Deborah Rose, a Democrat from Staten Island, told Ms. Malalis, who testified before the Council's civil rights committee last week.

That would be an understatement.

The city, which financed 173 positions at the commission in 1992, now pays for only 11. (The federal government provides funding for an additional 55 positions.) And it shows.

The commission received 4,975 inquiries from the public in 2014, but formally opened only 633 cases, city statistics show. Of the cases resolved that year, only 10 percent were found to have probable cause to move forward. (Lawyers for the indigent, who believe many more cases are viable, say the agency's staff receives inadequate training in how to enforce the law.)

And when new cases are opened, the commission often fails to investigate them in a timely manner. An audit released by the New York City comptroller's office last week found that less than half of all cases closed from Jan. 1, 2012, to June 14, 2013, were resolved within the agency's internally established one-year timeline.

Despite those problems, the commission has "not analyzed its case files to identify the key factors that affected its case processing and caused delays," Scott M. Stringer, the city comptroller, wrote in a letter that accompanied the audit.

All of this means that Ms. Malalis, a former partner at Outten & Golden, an employment law firm, has plenty on her plate.

Ms. Malalis, who replaces Patricia L. Gatling, an appointee of former Mayor Michael R. Bloomberg, has already begun reviewing the commission's operations, its cases and how it investigates and processes complaints. She also wants to initiate more proactive investigations and respond to public complaints.

But that will take time, Ms. Malalis said at last week's City Council hearing, voicing her opposition to proposed legislation that would require the commission to immediately organize and conduct investigations into housing and employment discrimination and to provide more information about its operations to the public. She said she needs more time to assess the agency.

"The reality is that I've only been there for two weeks," Ms. Malalis said repeatedly, explaining why she could not say how much money or how many employees the agency needs or pinpoint how much time it will take to hammer out her strategic plan.

City Councilman Brad Lander, a Democrat from Brooklyn, said the city simply could not wait any longer to take legislative action.

"If it were just about you, we could definitely be patient," Mr. Lander said. "But we, and I really mean we, have let this agency deteriorate long past the point of patience."

Ms. Malalis said she was keenly aware of the urgency. At Outten & Golden, she often represented clients who faced discrimination at work because of their sexual orientation, family status or disabilities.

But the new commissioner, who lives in Park Slope, Brooklyn, also has a personal stake in the fight.

Ms. Malalis, the daughter of Filipino immigrants, is married to a woman from Ethiopia and has two biracial daughters. Their photographs sit on her new desk, a private, daily reminder of why the battle to combat discrimination and intolerance in New York City is so important.

Email: swarns@nytimes.com Twitter: @rachelswarns

Rachel Swarns would like to hear about your experiences in New York's work world. Please contact her directly by filling out **this brief form**. She may follow up with you directly for an interview.

A version of this article appears in print on March 9, 2015, on page A12 of the New York edition with the headline: New Commissioner Vows to Revitalize Agency That Fights Discrimination.

EEOC Enforcement Guidance	**Number** 915.002 **Date** 4/25/2012

1. **SUBJECT**: Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq*.

2. **PURPOSE**: The purpose of this Enforcement Guidance is to consolidate and update the U.S. Equal Employment Opportunity Commission's guidance documents regarding the use of arrest or conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*.

3. **EFFECTIVE DATE**: Upon receipt.

4. **EXPIRATION DATE**: This Notice will remain in effect until rescinded or superseded.

5. **ORIGINATOR**: Office of Legal Counsel.

Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964

Table of Contents

I. Summary

- An employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended.

- The Guidance builds on longstanding court decisions and existing guidance documents that the U.S. Equal Employment Opportunity Commission (Commission or EEOC) issued over twenty years ago.

- The Guidance focuses on employment discrimination based on race and national origin. The Introduction provides information about criminal records, employer practices, and Title VII.

- The Guidance discusses the differences between arrest and conviction records.

    - The fact of an arrest does not establish that criminal conduct has occurred, and an exclusion based on an arrest, in itself, is not job related and consistent with business necessity. However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question.

    - In contrast, a conviction record will usually serve as sufficient evidence that a person engaged in particular conduct. In certain circumstances, however, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision.

- The Guidance discusses disparate treatment and disparate impact analysis under Title VII.

    - A violation may occur when an employer treats criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment liability).

    - An employer's neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity (disparate impact liability).

        - National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.

- Two circumstances in which the Commission believes employers will consistently meet the "job related and consistent with business necessity" defense are as follows:

  - The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or

  - The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)). The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.).

- Compliance with other federal laws and/or regulations that conflict with Title VII is a defense to a charge of discrimination under Title VII.

- State and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7.

- The Guidance concludes with best practices for employers.

II. Introduction

The EEOC enforces Title VII of the Civil Rights Act of 1964 (Title VII) which prohibits employment discrimination based on race, color, religion, sex, or national origin.[1] This Enforcement Guidance is issued as part of the Commission's efforts to eliminate unlawful discrimination in employment screening, for hiring or retention, by entities covered by Title VII, including private employers as well as federal, state, and local governments.[2]

In the last twenty years, there has been a significant increase in the number of Americans who have had contact[3] with the criminal justice system[4] and, concomitantly, a major increase in the number of people with criminal records in the working-age population.[5] In 1991, only 1.8% of the adult population had served time in prison.[6] After ten years, in 2001, the percentage rose to 2.7% (1 in 37 adults).[7] By the end of 2007, 3.2% of all adults in the United States (1 in every 31) were under some form of correctional control involving probation, parole, prison, or jail.[8] The Department of Justice's Bureau of Justice Statistics (DOJ/BJS) has concluded that, if incarceration rates do not decrease, approximately 6.6% of all persons born in the United States in 2001 will serve time in state or federal prison during their lifetimes.[9]

Arrest and incarceration rates are particularly high for African American and Hispanic men.[10] African Americans and Hispanics[11] are arrested at a rate that is 2 to 3 times their proportion of the general population.[12] Assuming that current incarceration rates remain unchanged, about 1 in 17 White men are expected to serve time in prison during their lifetime;[13] by contrast, this rate climbs to 1 in 6 for Hispanic men; and to 1 in 3 for African American men.[14]

The Commission, which has enforced Title VII since it became effective in 1965, has well-established guidance applying Title VII principles to employers' use of criminal records to screen for employment.[15] This Enforcement Guidance builds on longstanding court decisions and policy documents that were issued over twenty years ago. In light of employers' increased access to criminal history information, case law analyzing Title VII requirements for criminal record exclusions, and other developments,[16] the Commission has decided to update and consolidate in this document all of its prior policy statements about Title VII and the use of criminal records in employment decisions. Thus, this Enforcement Guidance will supersede the Commission's previous policy statements on this issue.

The Commission intends this document for use by employers considering the use of criminal records in their selection and retention processes; by individuals who suspect that they have been denied jobs or promotions, or have been discharged because of their criminal records; and by EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions.

III. Background

The contextual framework for the Title VII analysis in this Enforcement Guidance includes how criminal record information is collected and recorded, why employers use criminal records, and the EEOC's interest in such criminal record screening.

A. Criminal History Records

Criminal history information can be obtained from a wide variety of sources including, but not limited to, the following:

- Court Records. Courthouses maintain records relating to criminal charges and convictions, including arraignments, trials, pleas, and other dispositions.[17] Searching county courthouse records typically provides the most complete criminal history.[18] Many county courthouse records must be retrieved on-site,[19] but some courthouses offer their records online.[20] Information about federal crimes such as interstate drug trafficking, financial fraud, bank robbery, and crimes against the government may be found online in federal court records by searching the federal courts' Public Access to Court Electronic Records or Case Management/Electronic Case Files.[21]

- Law Enforcement and Corrections Agency Records. Law enforcement agencies such as state police agencies and corrections agencies may allow the public to access their records, including records of complaints, investigations, arrests, indictments, and periods of incarceration, probation, and parole.[22] Each agency may differ with respect to how and where the records may be searched, and whether they are indexed.[23]

- Registries or Watch Lists. Some government entities maintain publicly available lists of individuals who have been convicted of, or are suspected of having committed, a certain type of crime. Examples of such lists include state and federal sex offender registries and lists of individuals with outstanding warrants.[24]

- State Criminal Record Repositories. Most states maintain their own centralized repositories of criminal records, which include records that are submitted by most or all of their criminal justice agencies, including their county courthouses.[25] States differ with respect to the types of records included in the repository,[26] the completeness of the records,[27] the frequency with which they are updated,[28] and whether they permit the public to search the records by name, by fingerprint, or both.[29] Some states permit employers (or third-parties acting on their behalf) to access these records, often for a fee.[30] Others limit access to certain types of records,[31] and still others deny access altogether.[32]

- The Interstate Identification Index (III). The Federal Bureau of Investigation (FBI) maintains the most comprehensive collection of criminal records in the nation, called the "Interstate Identification Index" (III). The III database compiles

records from each of the state repositories, as well as records from federal and international criminal justice agencies.[33]

The FBI's III database may be accessed for employment purposes by:

- the federal government;[34]

- employers in certain industries that are regulated by the federal government, such as "the banking, nursing home, securities, nuclear energy, and private security guard industries; as well as required security screenings by federal agencies of airport workers, HAZMAT truck drivers and other transportation workers";[35] and

- employers in certain industries "that the state has sought to regulate, such as persons employed as civil servants, day care, school, or nursing home workers, taxi drivers, private security guards, or members of regulated professions."[36]

Recent studies have found that a significant number of state and federal criminal record databases include incomplete criminal records.

- A 2011 study by the DOJ/BJS reported that, as of 2010, many state criminal history record repositories still had not recorded the final dispositions for a significant number of arrests.[37]
- A 2006 study by the DOJ/BJS found that only 50% of arrest records in the FBI's III database were associated with a final disposition. [38]

Additionally, reports have documented that criminal records may be inaccurate.

- One report found that even if public access to criminal records has been restricted by a court order to seal and/or expunge such records, this does not guarantee that private companies also will purge the information from their systems or that the event will be erased from media archives.[39]
- Another report found that criminal background checks may produce inaccurate results because criminal records may lack "unique" information or because of "misspellings, clerical errors or intentionally inaccurate identification information provided by search subjects who wish to avoid discovery of their prior criminal activities."[40]

Employers performing background checks to screen applicants or employees may attempt to search these governmental sources themselves or conduct a simple Internet search, but they often rely on third-party background screening businesses.[41] Businesses that sell criminal history information to employers are "consumer reporting agencies" (CRAs)[42] if they provide the information in "consumer reports"[43] under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. (FCRA). Under FCRA, a CRA generally may not report records of arrests that did not result in entry of a judgment of conviction, where the arrests occurred more than seven years ago.[44]

However, they may report convictions indefinitely.[45]

CRAs often maintain their own proprietary databases that compile information from various sources, such as those described above, depending on the extent to which the business has purchased or otherwise obtained access to data.[46] Such databases vary with respect to the geographic area covered, the type of information included (e.g., information about arrests, convictions, prison terms, or specialized information for a subset of employers such as information about workplace theft or shoplifting cases for retail employers[47]), the sources of information used (e.g., county databases, law enforcement agency records, sex offender registries), and the frequency with which they are updated. They also may be missing certain types of disposition information, such as updated convictions, sealing or expungement orders, or orders for entry into a diversion program.[48]

B. Employers' Use of Criminal History Information

In one survey, a total of 92% of responding employers stated that they subjected all or some of their job candidates to criminal background checks.[49] Employers have reported that their use of criminal history information is related to ongoing efforts to combat theft and fraud,[50] as well as heightened concerns about workplace violence[51] and potential liability for negligent hiring.[52] Employers also cite federal laws as well as state and local laws[53] as reasons for using criminal background checks.

C. The EEOC's Interest in Employers' Use of Criminal Records in Employment Screening

The EEOC enforces Title VII, which prohibits employment discrimination based on race, color, religion, sex, or national origin. Having a criminal record is not listed as a protected basis in Title VII. Therefore, whether a covered employer's reliance on a criminal record to deny employment violates Title VII depends on whether it is part of a claim of employment discrimination based on race, color, religion, sex, or national origin. Title VII liability for employment discrimination is determined using two analytic frameworks: "disparate treatment" and "disparate impact." Disparate treatment is discussed in Section IV and disparate impact is discussed in Section V.

IV. Disparate Treatment Discrimination and Criminal Records

A covered employer is liable for violating Title VII when the plaintiff demonstrates that it treated him differently because of his race, national origin, or another protected basis.[54] For example, there is Title VII disparate treatment liability where the evidence shows that a covered employer rejected an African American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record.[55]

> **Example 1: Disparate Treatment Based on Race.** John, who is White, and Robert, who is African American, are both recent graduates of State University. They have similar educational backgrounds, skills, and work experience. They each pled guilty to charges of possessing and

distributing marijuana as high school students, and neither of them had any subsequent contact with the criminal justice system.

After college, they both apply for employment with Office Jobs, Inc., which, after short intake interviews, obtains their consent to conduct a background check. Based on the outcome of the background check, which reveals their drug convictions, an Office Jobs, Inc., representative decides not to refer Robert for a follow-up interview. The representative remarked to a co-worker that Office Jobs, Inc., cannot afford to refer "these drug dealer types" to client companies. However, the same representative refers John for an interview, asserting that John's youth at the time of the conviction and his subsequent lack of contact with the criminal justice system make the conviction unimportant. Office Jobs, Inc., has treated John and Robert differently based on race, in violation of Title VII.

Title VII prohibits "not only decisions driven by racial [or ethnic] animosity, but also decisions infected by stereotyped thinking . . . ."[56] Thus, an employer's decision to reject a job applicant based on racial or ethnic stereotypes about criminality—rather than qualifications and suitability for the position—is unlawful disparate treatment that violates Title VII.[57]

Example 2: Disparate Treatment Based on National Origin. Tad, who is White, and Nelson, who is Latino, are both recent high school graduates with grade point averages above 4.0 and college plans. While Nelson has successfully worked full-time for a landscaping company during the summers, Tad only held occasional lawn-mowing and camp-counselor jobs. In an interview for a research job with Meaningful and Paid Internships, Inc. (MPII), Tad discloses that he pled guilty to a felony at age 16 for accessing his school's computer system over the course of several months without authorization and changing his classmates' grades. Nelson, in an interview with MPII, emphasizes his successful prior work experience, from which he has good references, but also discloses that, at age 16, he pled guilty to breaking and entering into his high school as part of a class prank that caused little damage to school property. Neither Tad nor Nelson had subsequent contact with the criminal justice system.

The hiring manager at MPII invites Tad for a second interview, despite his record of criminal conduct. However, the same hiring manager sends Nelson a rejection notice, saying to a colleague that Nelson is only qualified to do manual labor and, moreover, that he has a criminal record. In light of the evidence showing that Nelson's and Tad's educational backgrounds are similar, that Nelson's work experience is more extensive, and that Tad's criminal conduct is more indicative of untrustworthiness, MPII has failed to state a legitimate, nondiscriminatory reason for rejecting Nelson. If Nelson filed a Title VII charge alleging disparate treatment based on national origin and the EEOC's investigation

confirmed these facts, the EEOC would find reasonable cause to believe that discrimination occurred.

There are several kinds of evidence that may be used to establish that race, national origin, or other protected characteristics motivated an employer's use of criminal records in a selection decision, including, but not limited to:

- Biased statements. Comments by the employer or decisionmaker that are derogatory with respect to the charging party's protected group, or that express group-related stereotypes about criminality, might be evidence that such biases affected the evaluation of the applicant's or employee's criminal record.

- Inconsistencies in the hiring process. Evidence that the employer requested criminal history information more often for individuals with certain racial or ethnic backgrounds, or gave Whites but not racial minorities the opportunity to explain their criminal history, would support a showing of disparate treatment.

- Similarly situated comparators (individuals who are similar to the charging party in relevant respects, except for membership in the protected group). Comparators may include people in similar positions, former employees, and people chosen for a position over the charging party. The fact that a charging party was treated differently than individuals who are not in the charging party's protected group by, for example, being subjected to more or different criminal background checks or to different standards for evaluating criminal history, would be evidence of disparate treatment.

- Employment testing. Matched-pair testing may reveal that candidates are being treated differently because of a protected status.[58]

- Statistical evidence. Statistical analysis derived from an examination of the employer's applicant data, workforce data, and/or third party criminal background history data may help to determine if the employer counts criminal history information more heavily against members of a protected group.

V. Disparate Impact Discrimination and Criminal Records

A covered employer is liable for violating Title VII when the plaintiff demonstrates that the employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity.[59]

In its 1971 *Griggs v. Duke Power Company* decision, the Supreme Court first recognized that Title VII permits disparate impact claims.[60] The *Griggs* Court explained that "[Title VII] proscribes . . . practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited."[61] In 1991,

Congress amended Title VII to codify this analysis of discrimination and its burdens of proof.[62] Title VII, as amended, states:

> An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. . . .[63]

With respect to criminal records, there is Title VII disparate impact liability where the evidence shows that a covered employer's criminal record screening policy or practice disproportionately screens out a Title VII-protected group and the employer does not demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity.

A. Determining Disparate Impact of Policies or Practices that Screen Individuals Based on Records of Criminal Conduct

1. Identifying the Policy or Practice

The first step in disparate impact analysis is to identify the particular policy or practice that causes the unlawful disparate impact. For criminal conduct exclusions, relevant information includes the text of the policy or practice, associated documentation, and information about how the policy or practice was actually implemented. More specifically, such information also includes which offenses or classes of offenses were reported to the employer (e.g., all felonies, all drug offenses); whether convictions (including sealed and/or expunged convictions), arrests, charges, or other criminal incidents were reported; how far back in time the reports reached (e.g., the last five, ten, or twenty years); and the jobs for which the criminal background screening was conducted.[64] Training or guidance documents used by the employer also are relevant, because they may specify which types of criminal history information to gather for particular jobs, how to gather the data, and how to evaluate the information after it is obtained.

2. Determining Disparate Impact

Nationally, African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population. In 2010, 28% of all arrests were of African Americans,[65] even though African Americans only comprised approximately 14% of the general population.[66] In 2008, Hispanics were arrested for federal drug charges at a rate of approximately three times their proportion of the general population.[67] Moreover, African Americans and Hispanics were more likely than Whites to be arrested, convicted, or sentenced for drug offenses even though their rate of drug use is similar to the rate of drug use for Whites.[68]

African Americans and Hispanics also are incarcerated at rates disproportionate to their numbers in the general population. Based on national incarceration data, the U.S. Department of Justice estimated in 2001 that 1 out of every 17 White men (5.9% of the White men in the U.S.)

is expected to go to prison at some point during his lifetime, assuming that current incarceration rates remain unchanged.[69] This rate climbs to 1 in 6 (or 17.2%) for Hispanic men.[70] For African American men, the rate of expected incarceration rises to 1 in 3 (or 32.2%).[71] Based on a state-by-state examination of incarceration rates in 2005, African Americans were incarcerated at a rate 5.6 times higher than Whites,[72] and 7 states had a Black-to-White ratio of incarceration that was 10 to1.[73] In 2010, Black men had an imprisonment rate that was nearly 7 times higher than White men and almost 3 times higher than Hispanic men.[74]

National data, such as that cited above, supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to further investigate such Title VII disparate impact charges. During an EEOC investigation, the employer also has an opportunity to show, with relevant evidence, that its employment policy or practice does not cause a disparate impact on the protected group(s). For example, an employer may present regional or local data showing that African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer's particular geographic area. An employer also may use its own applicant data to demonstrate that its policy or practice did not cause a disparate impact. The Commission will assess relevant evidence when making a determination of disparate impact, including applicant flow information maintained pursuant to the Uniform Guidelines on Employee Selection Procedures,[75] workforce data, criminal history background check data, demographic availability statistics, incarceration/conviction data, and/or relevant labor market statistics.[76]

An employer's evidence of a racially balanced workforce will not be enough to disprove disparate impact. In *Connecticut v. Teal*, the Supreme Court held that a "bottom line" racial balance in the workforce does not preclude employees from establishing a prima facie case of disparate impact; nor does it provide employers with a defense.[77] The issue is whether the policy or practice deprives a disproportionate number of Title VII-protected individuals of employment opportunities.[78]

Finally, in determining disparate impact, the Commission will assess the probative value of an employer's applicant data. As the Supreme Court stated in *Dothard v. Rawlinson*, an employer's "application process might itself not adequately reflect the actual potential applicant pool since otherwise qualified people might be discouraged from applying" because of an alleged discriminatory policy or practice.[79] Therefore, the Commission will closely consider whether an employer has a reputation in the community for excluding individuals with criminal records. Relevant evidence may come from ex-offender employment programs, individual testimony, employer statements, evidence of employer recruitment practices, or publicly posted notices, among other sources.[80] The Commission will determine the persuasiveness of such evidence on a case-by-case basis.

B. Job Related For the Position in Question and Consistent with Business Necessity

1. Generally

After the plaintiff in litigation establishes disparate impact, Title VII shifts the burdens of

production and persuasion to the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[81] In the legislative history of the 1991 Civil Rights Act, Congress referred to *Griggs* and its progeny such as *Albemarle Paper Company v. Moody*[82] and *Dothard*[83] to explain how this standard should be construed.[84] The *Griggs* Court stated that the employer's burden was to show that the policy or practice is one that "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used" and "measures the person for the job and not the person in the abstract."[85] In both *Albemarle*[86] and *Dothard*,[87] the Court emphasized the factual nature of the business necessity inquiry. The Court further stated in *Dothard* that the terms of the exclusionary policy must "be shown to be necessary to safe and efficient job performance."[88]

In a case involving a criminal record exclusion, the Eighth Circuit in its 1975 *Green v. Missouri Pacific Railroad* decision, held that it was discriminatory under Title VII for an employer to "follow[] the policy of disqualifying for employment any applicant with a conviction for any crime other than a minor traffic offense."[89] The Eighth Circuit identified three factors (the "*Green* factors") that were relevant to assessing whether an exclusion is job related for the position in question and consistent with business necessity:

- The nature and gravity of the offense or conduct;[90]
- The time that has passed since the offense or conduct and/or completion of the sentence; [91] and
- The nature of the job held or sought.[92]

In 2007, the Third Circuit in *El v. Southeastern Pennsylvania Transportation Authority*[93] developed the statutory analysis in greater depth. Douglas El challenged SEPTA's policy of excluding everyone ever convicted of a violent crime from the job of paratransit driver.[94] El, a 55 year-old African American paratransit driver-trainee, was terminated from employment when SEPTA learned of his conviction for second-degree murder 40 years earlier; the conviction involved a gang fight when he was 15 years old and was his only disqualifying offense under SEPTA's policy.[95] The Third Circuit expressed "reservations" about a policy such as SEPTA's (exclusion for all violent crimes, no matter how long ago they were committed) "in the abstract."[96]

Applying Supreme Court precedent, the *El* court observed that some level of risk is inevitable in all hiring, and that, "[i]n a broad sense, hiring policies . . . ultimately concern the management of risk."[97] Recognizing that assessing such risk is at the heart of criminal record exclusions, the Third Circuit concluded that Title VII requires employers to justify criminal record exclusions by demonstrating that they "accurately distinguish between applicants [who] pose an unacceptable level of risk and those [who] do not."[98]

The Third Circuit affirmed summary judgment for SEPTA, but stated that the outcome of the case might have been different if Mr. El had, "for example, hired an expert who testified that there is a time at which a former criminal is no longer any more likely to recidivate than the average person, . . . [so] there would be a factual question for the jury to resolve."[99] The Third Circuit reasoned, however, that the recidivism evidence presented by SEPTA's experts, in

conjunction with the nature of the position at issue—paratransit driver-trainee with unsupervised access to vulnerable adults—required the employer to exercise the utmost care.[100]

In the subsections below, the Commission discusses considerations that are relevant to assessing whether criminal record exclusion policies or practices are job related and consistent with business necessity. First, we emphasize that arrests and convictions are treated differently.

2. Arrests

The fact of an arrest does not establish that criminal conduct has occurred.[101] Arrests are not proof of criminal conduct. Many arrests do not result in criminal charges, or the charges are dismissed.[102] Even if an individual is charged and subsequently prosecuted, he is presumed innocent unless proven guilty.[103]

An arrest, however, may in some circumstances trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action. Title VII calls for a fact-based analysis to determine if an exclusionary policy or practice is job related and consistent with business necessity. Therefore, an exclusion based on an arrest, in itself, is not job related and consistent with business necessity.

Another reason for employers not to rely on arrest records is that they may not report the final disposition of the arrest (e.g., not prosecuted, convicted, or acquitted). As documented in Section III.A., *supra*, the DOJ/BJS reported that many arrest records in the FBI's III database and state criminal record repositories are not associated with final dispositions.[104] Arrest records also may include inaccuracies or may continue to be reported even if expunged or sealed.[105]

> **Example 3: Arrest Record Is Not Grounds for Exclusion.** Mervin and Karen, a middle-aged African American couple, are driving to church in a predominantly white town. An officer stops them and interrogates them about their destination. When Mervin becomes annoyed and comments that his offense is simply "driving while Black," the officer arrests him for disorderly conduct. The prosecutor decides not to file charges against Mervin, but the arrest remains in the police department's database and is reported in a background check when Mervin applies with his employer of fifteen years for a promotion to an executive position. The employer's practice is to deny such promotions to individuals with arrest records, even without a conviction, because it views an arrest record as an indicator of untrustworthiness and irresponsibility. If Mervin filed a Title VII charge based on these facts, and disparate impact based on race were established, the EEOC would find reasonable cause to believe that his employer violated Title VII.

Although an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes.

Example 4: Employer's Inquiry into Conduct Underlying Arrest. Andrew, a Latino man, worked as an assistant principal in Elementary School for several years. After several ten and eleven-year-old girls attending the school accused him of touching them inappropriately on the chest, Andrew was arrested and charged with several counts of endangering the welfare of children and sexual abuse. Elementary School has a policy that requires suspension or termination of any employee who the school believes engaged in conduct that impacts the health or safety of the students. After learning of the accusations, the school immediately places Andrew on unpaid administrative leave pending an investigation. In the course of its investigation, the school provides Andrew a chance to explain the events and circumstances that led to his arrest. Andrew denies the allegations, saying that he may have brushed up against the girls in the crowded hallways or lunchroom, but that he doesn't really remember the incidents and does not have regular contact with any of the girls. The school also talks with the girls, and several of them recount touching in crowded situations. The school does not find Andrew's explanation credible. Based on Andrew's conduct, the school terminates his employment pursuant to its policy.

Andrew challenges the policy as discriminatory under Title VII. He asserts that it has a disparate impact based on national origin and that his employer may not suspend or terminate him based solely on an arrest without a conviction because he is innocent until proven guilty. After confirming that an arrest policy would have a disparate impact based on national origin, the EEOC concludes that no discrimination occurred. The school's policy is linked to conduct that is relevant to the particular jobs at issue, and the exclusion is made based on descriptions of the underlying conduct, not the fact of the arrest. The Commission finds no reasonable cause to believe Title VII was violated.

3. Convictions

By contrast, a record of a conviction will usually serve as sufficient evidence that a person engaged in particular conduct, given the procedural safeguards associated with trials and guilty pleas.[106] However, there may be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction. For example, a database may continue to report a conviction that was later expunged, or may continue to report as a felony an offense that was subsequently downgraded to a misdemeanor.[107]

Some states require employers to wait until late in the selection process to ask about convictions.[108] The policy rationale is that an employer is more likely to objectively assess the relevance of an applicant's conviction if it becomes known when the employer is already knowledgeable about the applicant's qualifications and experience.[109] As a best practice, and consistent with applicable laws,[110] the Commission recommends that employers not ask about

convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.

4. Determining Whether a Criminal Conduct Exclusion Is Job Related and Consistent with Business Necessity

To establish that a criminal conduct exclusion that has a disparate impact is job related and consistent with business necessity under Title VII, the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.

Two circumstances in which the Commission believes employers will consistently meet the "job related and consistent with business necessity" defense are as follows:

- The employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible); [111] or

- The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three *Green* factors), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

The individualized assessment would consist of notice to the individual that he has been screened out because of a criminal conviction; an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances; and consideration by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity. *See* Section V.B.9, *infra* (examples of relevant considerations in individualized assessments).

Depending on the facts and circumstances, an employer may be able to justify a targeted criminal records screen solely under the *Green* factors. Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question. Title VII thus does not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity.

5. Validation

The Uniform Guidelines describe three different approaches to validating employment screens.[112] However, they recognize that "[t]here are circumstances in which a user cannot or

need not utilize" formal validation techniques and that in such circumstances an employer "should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact as set forth [in the following subsections]."[113] Although there may be social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications,[114] and thereby provide a framework for validating some employment exclusions, such studies are rare at the time of this drafting.

6. Detailed Discussion of the *Green* Factors and Criminal Conduct Screens

Absent a validation study that meets the Uniform Guidelines' standards, the *Green* factors provide the starting point for analyzing how specific criminal conduct may be linked to particular positions. The three *Green* factors are:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct and/or completion of the sentence; and
- The nature of the job held or sought.

a. The Nature and Gravity of the Offense or Conduct

Careful consideration of the nature and gravity of the offense or conduct is the first step in determining whether a specific crime may be relevant to concerns about risks in a particular position. The nature of the offense or conduct may be assessed with reference to the harm caused by the crime (e.g., theft causes property loss). The legal elements of a crime also may be instructive. For example, a conviction for felony theft may involve deception, threat, or intimidation.[115] With respect to the gravity of the crime, offenses identified as misdemeanors may be less severe than those identified as felonies.

b. The Time that Has Passed Since the Offense, Conduct and/or Completion of the Sentence

Employer policies typically specify the duration of a criminal conduct exclusion. While the *Green* court did not endorse a specific timeframe for criminal conduct exclusions, it did acknowledge that permanent exclusions from all employment based on any and all offenses were not consistent with the business necessity standard.[116] Subsequently, in *El*, the court noted that the plaintiff might have survived summary judgment if he had presented evidence that "there is a time at which a former criminal is no longer any more likely to recidivate than the average person . . . ."[117] Thus, the court recognized that the amount of time that had passed since the plaintiff's criminal conduct occurred was probative of the risk he posed in the position in question.

Whether the duration of an exclusion will be sufficiently tailored to satisfy the business necessity standard will depend on the particular facts and circumstances of each case. Relevant and available information to make this assessment includes, for example, studies demonstrating how much the risk of recidivism declines over a specified time.[118]

c. The Nature of the Job Held or Sought

Finally, it is important to identify the particular job(s) subject to the exclusion. While a factual inquiry may begin with identifying the job title, it also encompasses the nature of the job's duties (e.g., data entry, lifting boxes), identification of the job's essential functions, the circumstances under which the job is performed (e.g., the level of supervision, oversight, and interaction with co-workers or vulnerable individuals), and the environment in which the job's duties are performed (e.g., out of doors, in a warehouse, in a private home). Linking the criminal conduct to the essential functions of the position in question may assist an employer in demonstrating that its policy or practice is job related and consistent with business necessity because it "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used."[119]

7. Examples of Criminal Conduct Exclusions that Do Not Consider the *Green* Factors

A policy or practice requiring an automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct is inconsistent with the *Green* factors because it does not focus on the dangers of particular crimes and the risks in particular positions. As the court recognized in *Green*, "[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed."[120]

> **Example 5: Exclusion Is Not Job Related and Consistent with Business Necessity.** The National Equipment Rental Company uses the Internet to accept job applications for all positions. All applicants must answer certain questions before they are permitted to submit their online application, including "have you ever been convicted of a crime?" If the applicant answers "yes," the online application process automatically terminates, and the applicant sees a screen that simply says "Thank you for your interest. We cannot continue to process your application at this time."
>
> The Company does not have a record of the reasons why it adopted this exclusion, and it does not have information to show that convictions for all offenses render all applicants unacceptable risks in all of its jobs, which range from warehouse work, to delivery, to management positions. If a Title VII charge were filed based on these facts, and there was a disparate impact on a Title VII-protected basis, the EEOC would find reasonable cause to believe that the blanket exclusion was not job related and consistent with business necessity because the risks associated with all convictions are not pertinent to all of the Company's jobs.
>
> **Example 6: Exclusion Is Not Job Related and Consistent with Business Necessity.** Leo, an African American man, has worked

successfully at PR Agency as an account executive for three years. After a change of ownership, the new owners adopt a policy under which it will not employ anyone with a conviction. The policy does not allow for any individualized assessment before exclusion. The new owners, who are highly respected in the industry, pride themselves on employing only the "best of the best" for every position. The owners assert that a quality workforce is a key driver of profitability.

Twenty years earlier, as a teenager, Leo pled guilty to a misdemeanor assault charge. During the intervening twenty years, Leo graduated from college and worked successfully in advertising and public relations without further contact with the criminal justice system. At PR Agency, all of Leo's supervisors assessed him as a talented, reliable, and trustworthy employee, and he has never posed a risk to people or property at work. However, once the new ownership of PR Agency learns about Leo's conviction record through a background check, it terminates his employment. It refuses to reconsider its decision despite Leo's positive employment history at PR Agency.

Leo files a Title VII charge alleging that PR Agency's conviction policy has a disparate impact based on race and is not job related for the position in question and consistent with business necessity. After confirming disparate impact, the EEOC considers PR Agency's defense that it employs only the "best of the best" for every position, and that this necessitates excluding everyone with a conviction. PR Agency does not show that all convictions are indicative of risk or danger in all its jobs for all time, under the *Green* factors. Nor does PR Agency provide any factual support for its assertion that having a conviction is necessarily indicative of poor work or a lack of professionalism. The EEOC concludes that there is reasonable cause to believe that the Agency's policy is not job related for the position in question and consistent with business necessity. [121]

8. Targeted Exclusions that Are Guided by the *Green* Factors

An employer policy or practice of excluding individuals from particular positions for specified criminal conduct within a defined time period, as guided by the *Green* factors, is a targeted exclusion. Targeted exclusions are tailored to the rationale for their adoption, in light of the particular criminal conduct and jobs involved, taking into consideration fact-based evidence, legal requirements, and/or relevant and available studies.

As discussed above in Section V.B.4, depending on the facts and circumstances, an employer may be able to justify a targeted criminal records screen solely under the *Green* factors. Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question. Title VII thus does not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity.

9. Individualized Assessment

Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity.

The individual's showing may include information that he was not correctly identified in the criminal record, or that the record is otherwise inaccurate. Other relevant individualized evidence includes, for example:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison; [122]
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct; [123]
- Rehabilitation efforts, e.g., education/training; [124]
- Employment or character references and any other information regarding fitness for the particular position;[125] and
- Whether the individual is bonded under a federal, state, or local bonding program.[126]

If the individual does not respond to the employer's attempt to gather additional information about his background, the employer may make its employment decision without the information.

> **Example 7: Targeted Screen with Individualized Assessment Is Job Related and Consistent with Business Necessity.** County Community Center rents meeting rooms to civic organizations and small businesses, party rooms to families and social groups, and athletic facilities to local recreational sports leagues. The County has a targeted rule prohibiting anyone with a conviction for theft crimes (e.g., burglary, robbery, larceny, identity theft) from working in a position with access to personal financial

information for at least four years after the conviction or release from incarceration. This rule was adopted by the County's Human Resources Department based on data from the County Corrections Department, national criminal data, and recent recidivism research for theft crimes. The Community Center also offers an opportunity for individuals identified for exclusion to provide information showing that the exclusion should not be applied to them.

Isaac, who is Hispanic, applies to the Community Center for a full-time position as an administrative assistant, which involves accepting credit card payments for room rentals, in addition to having unsupervised access to the personal belongings of people using the facilities. After conducting a background check, the County learns that Isaac pled guilty eighteen months earlier, at age twenty, to credit card fraud, and that he did not serve time in prison. Isaac confirms these facts, provides a reference from the restaurant where he now works on Saturday nights, and asks the County for a "second chance" to show that he is trustworthy. The County tells Isaac that it is still rejecting his employment application because his criminal conduct occurred eighteen months ago and is directly pertinent to the job in question. The information he provided did nothing to dispel the County's concerns.

Isaac challenges this rejection under Title VII, alleging that the policy has a disparate impact on Hispanics and is not job related and consistent with business necessity. After confirming disparate impact, the EEOC finds that this screen was carefully tailored to assess unacceptable risk in relevant positions, for a limited time period, consistent with the evidence, and that the policy avoided overbroad exclusions by allowing individuals an opportunity to explain special circumstances regarding their criminal conduct. Thus, even though the policy has a disparate impact on Hispanics, the EEOC does not find reasonable cause to believe that discrimination occurred because the policy is job related and consistent with business necessity. [127]

Example 8: Targeted Exclusion Without Individualized Assessment Is Not Job Related and Consistent with Business Necessity. "Shred 4 You" employs over 100 people to pick up discarded files and sensitive materials from offices, transport the materials to a secure facility, and shred and recycle them. The owner of "Shred 4 You" sells the company to a competitor, known as "We Shred." Employees of "Shred 4 You" must reapply for employment with "We Shred" and undergo a background check. "We Shred" has a targeted criminal conduct exclusion policy that prohibits the employment of anyone who has been convicted of any crime related to theft or fraud in the past five years, and the policy does not provide for any individualized consideration. The company explains that its clients entrust it with handling sensitive and confidential information

and materials; therefore, it cannot risk employing people who pose an above-average risk of stealing information.

Jamie, who is African American, worked successfully for "Shred 4 You" for five years before the company changed ownership. Jamie applies for his old job, and "We Shred" reviews Jamie's performance appraisals, which include high marks for his reliability, trustworthiness, and honesty. However, when "We Shred" does a background check, it finds that Jamie pled guilty to misdemeanor insurance fraud five years ago, because he exaggerated the costs of several home repairs after a winter storm. "We Shred" management informs Jamie that his guilty plea is evidence of criminal conduct and that his employment will be terminated. Jamie asks management to consider his reliable and honest performance in the same job at "Shred 4 You," but "We Shred" refuses to do so. The employer's conclusion that Jamie's guilty plea demonstrates that he poses an elevated risk of dishonesty is not factually based given Jamie's history of trustworthiness in the same job. After confirming disparate impact based on race (African American), the EEOC finds reasonable cause to believe that Title VII was violated because the targeted exclusion was not job related and consistent with business necessity based on these facts.

C. Less Discriminatory Alternatives

If an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory "alternative employment practice" that serves the employer's legitimate goals as effectively as the challenged practice but that the employer refused to adopt.[128]

VI. Positions Subject to Federal Prohibitions or Restrictions on Individuals with Records of Certain Criminal Conduct

In some industries, employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations. Compliance with federal laws and/or regulations is a defense to a charge of discrimination. However, the EEOC will continue to coordinate with other federal departments and agencies with the goal of maximizing federal regulatory consistency with respect to the use of criminal history information in employment decisions.[129]

A. Hiring in Certain Industries

Federal laws and regulations govern the employment of individuals with specific convictions in certain industries or positions in both the private and public sectors. For example, federal law excludes an individual who was convicted in the previous ten years of specified crimes from working as a security screener or otherwise having unescorted access to the secure areas of an airport.[130] There are equivalent requirements for federal law enforcement officers,[131]

child care workers in federal agencies or facilities,[132] bank employees, [133] and port workers,[134] among other positions.[135] Title VII does not preempt these federally imposed restrictions. However, if an employer decides to impose an exclusion that goes beyond the scope of a federally imposed restriction, the discretionary aspect of the policy would be subject to Title VII analysis.

> **Example 9: Exclusion Is Not Job Related and Consistent with Business Necessity.** Your Bank has a rule prohibiting anyone with convictions for any type of financial or fraud-related crimes within the last twenty years from working in positions with access to customer financial information, even though the federal ban is ten years for individuals who are convicted of any criminal offense involving dishonesty, breach of trust, or money laundering from serving in such positions.
>
> Sam, who is Latino, applies to Your Bank to work as a customer service representative. A background check reveals that Sam was convicted of a misdemeanor for misrepresenting his income on a loan application fifteen years earlier. Your Bank therefore rejects Sam, and he files a Title VII charge with the EEOC, alleging that the Bank's policy has a disparate impact based on national origin and is not job related and consistent with business necessity. Your Bank asserts that its policy does not cause a disparate impact and that, even if it does, it is job related for the position in question because customer service representatives have regular access to financial information and depositors must have "100% confidence" that their funds are safe. However, Your Bank does not offer evidence showing that there is an elevated likelihood of committing financial crimes for someone who has been crime-free for more than ten years. After establishing that the Bank's policy has a disparate impact based on national origin, the EEOC finds that the policy is not job related for the position in question and consistent with business necessity. The Bank's justification for adding ten years to the federally mandated exclusion is insufficient because it is only a generalized concern about security, without proof.

B. Obtaining Occupational Licenses

Title VII also does not preempt federal statutes and regulations that govern eligibility for occupational licenses and registrations. These restrictions cover diverse sectors of the economy including the transportation industry,[136] the financial industry,[137] and import/export activities,[138] among others.[139]

C. Waiving or Appealing Federally Imposed Occupational Restrictions

Several federal statutes and regulations provide a mechanism for employers or individuals to appeal or apply for waivers of federally imposed occupational restrictions. For example, unless a bank receives prior written consent from the Federal Deposit Insurance

Corporation (FDIC), an individual convicted of a criminal offense involving dishonesty, breach of trust, money laundering, or another financially related crime may not work in, own, or control "an insured depository institution" (e.g., bank) for ten years under the Federal Deposit Insurance Act.[140] To obtain such FDIC consent, the insured institution must file an application for a waiver on behalf of the particular individual.[141] Alternatively, if the insured institution does not apply for the waiver on the individual's behalf, the individual may file a request directly with the FDIC for a waiver of the institution filing requirement, demonstrating "substantial good cause" to grant the waiver.[142] If the FDIC grants the individual's waiver request, the individual can then file an application directly with the FDIC for consent to work for the insured institution in question.[143] Once the institution, or the individual, submits the application, the FDIC's criminal record waiver review process requires consideration of mitigating factors that are consistent with Title VII, including evidence of rehabilitation, and the nature and circumstances of the crime.[144]

Additionally, port workers who are denied the Transportation Workers Identification Credential (TWIC) based on their conviction record may seek a waiver for certain permanently disqualifying offenses or interim disqualifying offenses, and also may file an individualized appeal from the Transportation Security Administration's initial determination of threat assessment based on the conviction.[145] The Maritime Transportation Security Act, which requires all port workers to undergo a criminal background check to obtain a TWIC,[146] provides that individuals with convictions for offenses such as espionage, treason, murder, and a federal crime of terrorism are permanently disqualified from obtaining credentials, but those with convictions for firearms violations and distribution of controlled substances may be temporarily disqualified.[147] Most offenses related to dishonesty are only temporarily disqualifying.[148]

> **Example 10: Consideration of Federally Imposed Occupational Restrictions.** John Doe applies for a position as a truck driver for Truckers USA. John's duties will involve transporting cargo to, from, and around ports, and Truckers USA requires all of its port truck drivers to have a TWIC. The Transportation Security Administration (TSA) conducts a criminal background check and may deny the credential to applicants who have permanently disqualifying criminal offenses in their background as defined by federal law. After conducting the background check for John Doe, TSA discovers that he was convicted nine years earlier for conspiracy to use weapons of mass destruction. TSA denies John a security card because this is a permanently disqualifying criminal offense under federal law.[149] John, who points out that he was a minor at the time of the conviction, requests a waiver by TSA because he had limited involvement and no direct knowledge of the underlying crime at the time of the offense. John explains that he helped a friend transport some chemical materials that the friend later tried to use to damage government property. TSA refuses to grant John's waiver request because a conviction for conspiracy to use weapons of mass destruction is not subject to the TSA's waiver procedures.[150] Based on this denial, Truckers USA rejects John's application for the port truck driver position. Title VII does not override Truckers USA's policy because the policy is consistent with another federal law.

While Title VII does not mandate that an employer seek such waivers, where an employer does seek waivers it must do so in a nondiscriminatory manner.

D. Security Clearances

The existence of a criminal record may result in the denial of a federal security clearance, which is a prerequisite for a variety of positions with the federal government and federal government contractors.[151] A federal security clearance is used to ensure employees' trustworthiness, reliability, and loyalty before providing them with access to sensitive national security information.[152] Under Title VII's national security exception, it is not unlawful for an employer to "fail or refuse to hire and employ" an individual because "such individual has not fulfilled or has ceased to fulfill" the federal security requirements.[153] This exception focuses on whether the position in question is, in fact, subject to national security requirements that are imposed by federal statute or Executive Order, and whether the adverse employment action actually resulted from the denial or revocation of a security clearance.[154] Procedural requirements related to security clearances must be followed without regard to an individual's race, color, religion, sex, or national origin.[155]

E. Working for the Federal Government

Title VII provides that, with limited coverage exceptions, "[a]ll personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."[156] The principles discussed above in this Guidance apply in the federal employment context. In most circumstances, individuals with criminal records are not automatically barred from working for the federal government.[157] However, the federal government imposes criminal record restrictions on its workforce through "suitability" requirements for certain positions.[158] The federal government's Office of Personnel Management (OPM) defines suitability as "determinations based on a person's character or conduct that may have an impact on the integrity or efficiency of the service."[159] Under OPM's rules, agencies may bar individuals from federal employment for up to three years if they are found unsuitable based on criminal or dishonest conduct, among other factors.[160] OPM gives federal agencies the discretion to consider relevant mitigating criteria when deciding whether an individual is suitable for a federal position.[161] These mitigating criteria, which are consistent with the three *Green* factors and also provide an individualized assessment of the applicant's background, allow consideration of: (1) the nature of the position for which the person is applying or in which the person is employed; (2) the nature and seriousness of the conduct; (3) the circumstances surrounding the conduct; (4) the recency of the conduct; (5) the age of the person involved at the time of the conduct; (6) contributing societal conditions; and (7) the absence or presence of rehabilitation or efforts toward rehabilitation.[162] In general, OPM requires federal agencies and departments to consider hiring an individual with a criminal record if he is the best candidate for the position in question and can comply with relevant job requirements.[163] The EEOC continues to coordinate with OPM to achieve employer best practices in the federal sector.[164]

VII. Positions Subject to State and Local Prohibitions or Restrictions on Individuals with Records of Certain Criminal Conduct

States and local jurisdictions also have laws and/or regulations that restrict or prohibit the employment of individuals with records of certain criminal conduct.[165] Unlike federal laws or regulations, however, state and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII.[166] Therefore, if an employer's exclusionary policy or practice is *not* job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability.[167]

> **Example 11: State Law Exclusion Is Job Related and Consistent with Business Necessity.** Elijah, who is African American, applies for a position as an office assistant at Pre-School, which is in a state that imposes criminal record restrictions on school employees. Pre-School, which employs twenty-five full- and part-time employees, uses all of its workers to help with the children. Pre-School performs a background check and learns that Elijah pled guilty to charges of indecent exposure two years ago. After being rejected for the position because of his conviction, Elijah files a Title VII disparate impact charge based on race to challenge Pre-School's policy. The EEOC conducts an investigation and finds that the policy has a disparate impact and that the exclusion is job related for the position in question and consistent with business necessity because it addresses serious safety risks of employment in a position involving regular contact with children. As a result, the EEOC would not find reasonable cause to believe that discrimination occurred.

> **Example 12: State Law Exclusion Is Not Consistent with Title VII.** County Y enforces a law that prohibits all individuals with a criminal conviction from working for it. Chris, an African American man, was convicted of felony welfare fraud fifteen years ago, and has not had subsequent contact with the criminal justice system. Chris applies to County Y for a job as an animal control officer trainee, a position that involves learning how to respond to citizen complaints and handle animals. The County rejects Chris's application as soon as it learns that he has a felony conviction. Chris files a Title VII charge, and the EEOC investigates, finding disparate impact based on race and also that the exclusionary policy is not job related and consistent with business necessity. The County cannot justify rejecting everyone with any conviction from all jobs. Based on these facts, County Y's law "purports to require or permit the doing of an[] act which would be an unlawful employment practice" under Title VII.

VIII. Employer Best Practices

The following are examples of best practices for employers who are considering criminal record information when making employment decisions.

General

- Eliminate policies or practices that exclude people from employment based on any criminal record.

- Train managers, hiring officials, and decisionmakers about Title VII and its prohibition on employment discrimination.

Developing a Policy

- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.

    - Identify essential job requirements and the actual circumstances under which the jobs are performed.

    - Determine the specific offenses that may demonstrate unfitness for performing such jobs.

        - Identify the criminal offenses based on all available evidence.

    - Determine the duration of exclusions for criminal conduct based on all available evidence.

        - Include an individualized assessment.

    - Record the justification for the policy and procedures.

    - Note and keep a record of consultations and research considered in crafting the policy and procedures.

- Train managers, hiring officials, and decisionmakers on how to implement the policy and procedures consistent with Title VII.

Questions about Criminal Records

- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

Confidentiality

- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.

Approved by the Commission:

_____ _____

Chair Jacqueline A. Berrien Date

ENDNOTES

[1] 42 U.S.C. § 2000e *et seq*. The EEOC also enforces other anti-discrimination laws including: Title I of the Americans with Disabilities Act of 1990, as amended (ADA), and Section 501 of the Rehabilitation Act, as amended, which prohibit employment discrimination on the basis of disability; the Age Discrimination in Employment Act of 1967, as amended (ADEA), which prohibits discrimination on the basis of age 40 or above; Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits discrimination on the basis of genetic information; and the Equal Pay Act of 1963, as amended (EPA), which requires employers to pay male and female employees at the same establishment equal wages for equal work.

[2] All entities covered by Title VII are subject to this analysis. *See* 42 U.S.C. § 2000e-2 (anti-discrimination provisions); 42 U.S.C. § 2000e(b)–(e) (defining "employer," "employment agency," and "labor organization"); 42 U.S.C. § 2000e-16(a) (prohibiting discriminatory employment practices by federal departments and agencies). For purposes of this Guidance, the term "employer" is used in lieu of listing all Title VII-covered entities. The Commission considers other coverage questions that arise in particular charges involving, for example, joint employment or third party interference in *Compliance Manual Section 2: Threshold Issues*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, § 2-III B., *Covered Entities*, http://www.eeoc.gov/policy/docs/threshold.html#2-III-B (last visited April 23, 2012).

[3] For the purposes of this Guidance, references to "contact" with the criminal justice system may include, for example, an arrest, charge, indictment, citation, conviction, incarceration, probation, or parole.

[4] *See* THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 3 (2003), http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf [hereinafter PREVALENCE OF IMPRISONMENT] ("Between 1974 and 2001 the number of former prisoners living in the United States more than doubled, from 1,603,000 to 4,299,000."); SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 1 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (reporting that between 1990 and 2006, there has been a 37% increase in the number of felony offenders sentenced in state courts); *see also* PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 4 (2009), http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf [hereinafter ONE IN 31] ("During the past quarter-century, the number of prison and jail inmates has grown by 274 percent . . . .[bringing] the total population in custody to 2.3 million. During the same period, the number under community supervision grew by a staggering 3,535,660 to a total of 5.1 million."); PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3 (2008), http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf ("[M]ore than one in every 100 adults is now confined in an American jail or

prison."); Robert Brame, Michael G. Turner, Raymond Paternoster, & Shawn D. Bushway, *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25, 26 (2012) (finding that approximately 1 out of 3 of all American youth will experience at least 1 arrest for a nontraffic offense by the age of 23).

[5] *See* JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 12 (2010), www.cepr.net/documents/publications/ex-offenders-2010-11.pdf ("In 2008, ex-prisoners were 2.9 to 3.2 percent of the total working-age population (excluding those currently in prison or jail) or about one in 33 working-age adults. Ex-felons were a larger share of the total working-age population: 6.6 to 7.4 percent, or about one in 15 working-age adults [not all felons serve prison terms]."); *see id.* at 3 (concluding that "in the absence of some reform of the criminal justice system, the share of ex-offenders in the working-age population will rise substantially in coming decades").

[6] PREVALENCE OF IMPRISONMENT, *supra* note 4, at 4, Table 3.

[7] *Id.*

[8] ONE IN 31, *supra* note 4, at 5 (noting that when all of the individuals who are probationers, parolees, prisoners or jail inmates are added up, the total is more than 7.3 million adults; this is more than the populations of Chicago, Philadelphia, San Diego, and Dallas combined, and larger than the populations of 38 states and the District of Columbia).

[9] PREVALENCE OF IMPRISONMENT, *supra* note 4, at 7.

[10] *Id.* at 5, Table 5; *cf.* PEW CTR. ON THE STATES, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 6 (2010), http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653 ("Simply stated, incarceration in America is concentrated among African American men. While 1 in every 87 white males ages 18 to 64 is incarcerated and the number for similarly-aged Hispanic males is 1 in 36, for black men it is 1 in 12."). Incarceration rates are even starker for 20-to-34-year-old men without a high school diploma or GED: 1 in 8 White males in this demographic group is incarcerated, compared to 1 in 14 Hispanic males, and 1 in 3 Black males. PEW CTR. ON THE STATES, *supra*, at 8, Figure 2.

[11] This document uses the terms "Black" and "African American," and the terms "Hispanic" and "Latino," interchangeably.

[12] *See infra* notes 65–67 (citing data for the arrest rates and population statistics for African Americans and Hispanics).

[13] PREVALENCE OF IMPRISONMENT, *supra* note 4, at 1.

[14] *Id.* at 8.

[15] *See Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 4, 1987), http://www.eeoc.gov/policy/docs/convict1.html; *EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (July 29, 1987), http://www.eeoc.gov/policy/docs/convict2.html; *Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Sept. 7, 1990), http://www.eeoc.gov/policy/docs/arrest_records.html; *Compliance Manual Section 15: Race & Color Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, § 15-VI.B.2 (April 19, 2006), http://www.eeoc.gov/policy/docs/race-color.pdf. *See also* EEOC Decision No. 72-1497 (1972) (challenging a criminal record exclusion policy based on "serious crimes"); EEOC Decision No. 74-89 (1974) (challenging a policy where a felony conviction was considered an adverse factor that would lead to disqualification); EEOC Decision No. 78-03 (1977) (challenging an exclusion policy based on felony or misdemeanor convictions involving moral turpitude or the use of drugs); EEOC Decision No. 78-35 (1978) (concluding that an employee's discharge was reasonable given his pattern of criminal behavior and the severity and recentness of his criminal conduct).

[16] In 2011, U.S. Attorney General Eric Holder assembled a Cabinet-level interagency Reentry Council to support the federal government's efforts to promote the successful reintegration of ex-offenders back into their communities. *National Reentry Resource Center – Federal Interagency Reentry Council*, http://www.nationalreentryresourcecenter.org/reentry-council (last visited April 23, 2012). As a part of the Council's efforts, it has focused on removing barriers to employment for ex-offenders to reduce recidivism by publishing several fact sheets on employing individuals with criminal records. *See, e.g.*, FED. INTERAGENCY REENTRY COUNCIL, REENTRY MYTHBUSTER! ON FEDERAL HIRING POLICIES (2011), http://www.nationalreentryresourcecenter.org/documents/0000/1083/Reentry_Council_Mythbuster_Fed_Employment.pdf; FED. INTERAGENCY REENTRY COUNCIL, REENTRY MYTHBUSTER! ON HIRING/CRIMINAL RECORDS GUIDANCE (2011), http://www.nationalreentryresourcecenter.org/documents/0000/1082/Reentry_Council_Mythbuster_Employment.pdf; FED. INTERAGENCY REENTRY COUNCIL, REENTRY MYTHBUSTER! CRIMINAL HISTORIES AND EMPLOYMENT BACKGROUND CHECKS (2011), http://www.nationalreentryresourcecenter.org/documents/0000/1176/Reentry_Council_Mythbuster_FCRA_Employment.pdf; FED. INTERAGENCY REENTRY COUNCIL, REENTRY MYTHBUSTER! ON FEDERAL BONDING PROGRAM (2011), http://www.nationalreentryresourcecenter.org/documents/0000/1061/Reentry_Council_Mythbuster_Federal_Bonding.pdf.

In addition to these federal efforts, several state law enforcement agencies have embraced initiatives and programs that encourage the employment of ex-offenders. For example, Texas' Department of Criminal Justice has a Reentry and Integration Division and within that Division, a Reentry Task Force Workgroup. *See Reentry and Integration Division-Reentry Task Force*, TEX. DEP'T OF CRIMINAL JUSTICE, http://www.tdcj.state.tx.us/divisions/rid/rid_texas_reentry_task_force.html (last visited April 23, 2012). One of the Workgroups in this Task Force specifically focuses on identifying

employment opportunities for ex-offenders and barriers that affect ex-offenders' access to employment or vocational training programs. *Reentry and Integration Division – Reentry Task Force Workgroups*, TEX. DEP'T OF CRIMINAL JUSTICE, http://www.tdcj.state.tx.us/divisions/rid/r_workgroup/rid_workgroup_employment.html (last visited April 23, 2012). Similarly, Ohio's Department of Rehabilitation and Correction has an Offender Workforce Development Office that "works with departmental staff and correctional institutions within the Ohio Department of Rehabilitation and Correction to prepare offenders for employment and the job search process." *Jobs for Ohio Offenders*, OHIO DEP'T OF REHAB. AND CORR. OFFENDER WORKFORCE DEV., http://www.drc.ohio.gov/web/JOBOFFEN.HTM (last updated Aug. 9, 2010). Law enforcement agencies in other states such as Indiana and Florida have also recognized the importance of encouraging ex-offender employment. *See, e.g.*, *IDOC: Road to Re-Entry*, IND. DEP'T OF CORR., http://www.in.gov/idoc/reentry/index.htm (last visited April 23, 2012) (describing various services and programs that are available to ex-offenders to help them to obtain employment); FLA. DEP'T OF CORRS., RECIDIVISM REDUCTION STRATEGIC PLAN: FISCAL YEAR 2009-2014, at 11, 12 (2009), http://www.dc.state.fl.us/orginfo/FinalRecidivismReductionPlan.pdf (identifying the lack of employment as one of the barriers to successful ex-offender reentry).

[17] CARL R. ERNST & LES ROSEN, "NATIONAL" CRIMINAL HISTORY DATABASES 1 (2002), http://www.brbpub.com/articles/CriminalHistoryDB.pdf.

[18] LEXISNEXIS, CRIMINAL BACKGROUND CHECKS: WHAT NON-PROFITS NEED TO KNOW ABOUT CRIMINAL RECORDS 4 (2009), http://www.lexisnexis.com/risk/nonprofit/documents/Volunteer_Screening_White_Paper.pdf.

[19] *Id.*

[20] ERNST & ROSEN, *supra* note 17, at 1; NAT'L ASS'N OF PROF'L BACKGROUND SCREENERS, CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT PURPOSES 5, http://www.napbs.com/files/public/Learn_More/White_Papers/CriminalBackgroundChecks.pdf.

[21] LEXISNEXIS, *supra* note 18, at 6. *See also* NAT'L ASS'N OF PROF'L BACKGROUND SCREENERS, *supra* note 20 at 5.

[22] ERNST & ROSEN, *supra* note 17, at 1.

[23] *Id.*

[24] *See* SEARCH, THE NATIONAL TASK FORCE ON THE CRIMINAL BACKGROUNDING OF AMERICA 3, 4 (2005), http://www.search.org/files/pdf/ReportofNTFCBA.pdf. Registries and watch lists can also include federal and international terrorist watch lists, and registries of individuals who are being investigated for certain types of crimes, such as gang-related crimes. *Id. See also* LEXISNEXIS, *supra* note 18, at 5 (reporting that "all 50 states currently have a publicly available sex offender registry").

[25] *See* U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY

BACKGROUND CHECKS 4 (2006), http://www.justice.gov/olp/ag_bgchecks_report.pdf [hereinafter BACKGROUND CHECKS]. *See also* ERNST & ROSEN, *supra* note 17, at 2.

[26] *See* NAT'L ASS'N OF PROF'L BACKGROUND SCREENERS, *supra* note 20, at 5. *See also* LEXISNEXIS, *supra* note 18, at 5.

[27] LEXISNEXIS, *supra* note 18, at 5. *See also* AM. ASS'N OF COLLS. OF PHARMACY, REPORT OF THE AACP CRIMINAL BACKGROUND CHECK ADVISORY PANEL 6–7 (2006), http://www.aacp.org/resources/academicpolicies/admissionsguidelines/Documents/AACPBackgroundChkRpt.pdf.

[28] AM. ASS'N OF COLLS. OF PHARMACY, *supra* note 27, at 6–7.

[29] BACKGROUND CHECKS, *supra* note 25, at 4.

[30] *Id.*

[31] NAT'L ASS'N OF PROF'L BACKGROUND SCREENERS, *supra* note 20, at 5.

[32] BACKGROUND CHECKS, *supra* note 25, at 4.

[33] *Id.* at 3.

[34] *See id.* ("Non-criminal justice screening using FBI criminal history records is typically done by a government agency applying suitability criteria that have been established by law or the responsible agency.").

[35] *Id.* at 5.

[36] *Id.* at 4.

[37] DENNIS A. DEBACCO & OWEN M. GREENSPAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2010, at 2 (2011), https://www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf [hereinafter STATE CRIMINAL HISTORY].

[38] *See* BACKGROUND CHECKS, *supra* note 25, at 17.

[39] SEARCH, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 83 (2005), www.search.org/files/pdf/RNTFCSCJRI.pdf; *see also* Douglas Belkin, *More Job Seekers Scramble to Erase Their Criminal Past*, WALL ST. J., Nov. 11, 2009, at A1, *available at* http://online.wsj.com/article/SB125789494126242343.html?KEYWORDS=Douglas+Belkin ("Arrests that have been legally expunged may remain on databases that data-harvesting companies offer to prospective employers; such background companies are under no legal obligation to erase them.").

If applicants deny the existence of expunged or sealed records, as they are permitted to do in several states, they may appear dishonest if such records are reported in a criminal background check. *See generally* Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1509–10 (2003) (noting that 29 of the 40 states that allow expungement/sealing of arrest records permit the subject of the record to deny its existence if asked about it on employment applications or similar forms, and 13 of the 16 states that allow the expungement/sealing of adult conviction records permit the subject of the record to deny its existence under similar circumstances).

[40] *See* SEARCH, INTERSTATE IDENTIFICATION NAME CHECK EFFICACY: REPORT OF THE NATIONAL TASK FORCE TO THE U.S. ATTORNEY GENERAL 21–22 (1999), www.search.org/files/pdf/III_Name_Check.pdf ("A so-called 'name check' is based not only on an individual's name, but also on other personal identifiers such as sex, race, date of birth and Social Security Number. . . . [N]ame checks are known to produce inaccurate results as a consequence of identical or similar names and other identifiers."); *id.* at 7 (finding that in a sample of 82,601 employment applicants, 4,562 of these individuals were *inaccurately* indicated by a "name check" to have criminal records, which represents approximately 5.5% of the overall sample).

[41] BACKGROUND CHECKS, *supra* note 25, at 2.

[42] A "consumer reporting agency" is defined by FCRA as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information *or other information* on consumers for the purposes of furnishing consumer reports to third parties . . . ." 15 U.S.C. § 1681a(f) (emphasis added); *see also* BACKGROUND CHECKS, *supra* note 25, at 43 (stating that the records that CRAs collect include "criminal history information, such as arrest and conviction information").

[43] A "consumer report" is defined by FCRA as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, *character, general reputation, personal characteristics*, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . employment purposes . . . ." 15 U.S.C. § 1681a(d)(1) (emphasis added).

[44] *See* 15 U.S.C. § 1681c(a)(2) ("[N]o consumer reporting agency may make any consumer report containing . . . records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period."). *But see id.* §1681c(b)(3) (stating that the reporting restrictions for arrest records do not apply to individuals who will earn "an annual salary which equals, or which may reasonably be expected to equal $75,000 or more").

[45] 15 U.S.C. § 1681c(a)(5) ("[N]o consumer reporting agency may make any consumer report containing . . . [a]ny other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.").

[46] BACKGROUND CHECKS, *supra* note 25, at 2.

[47] *See* Adam Klein, *Written Testimony of Adam Klein*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/7-26-11/klein.cfm (last visited April 23, 2012) (describing how "several data-collection agencies also market and sell a retail-theft contributory database that is used by prospective employers to screen applicants"). *See also Retail Theft Database, ESTEEM, Workplace Theft Contributory Database*, LEXISNEXIS, http://www.lexisnexis.com/risk/solutions/retail-theft-contributory-database.aspx (last visited April 23, 2012) (stating that their database has "[t]heft and shoplifting cases supplied by more than 75,000 business locations across the country"). These databases may contain inaccurate and/or misleading information about applicants and/or employees. *See generally* Goode v. LexisNexis Risk & Info. Analytics Grp., Inc., No. 2:11-CV-2950-JD, 2012 WL 975043 (E.D. Pa. Mar. 22, 2012) (unpublished).

[48] BACKGROUND CHECKS, *supra* note 25, at 2.

[49] SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS, slide 3 (Jan. 22, 2010), http://www.slideshare.net/shrm/background-check-criminal?from=share_email [hereinafter CONDUCTING CRIMINAL BACKGROUND CHECKS] (73% of the responding employers reported that they conducted criminal background checks on all of their job candidates, 19% reported that they conducted criminal background checks on selected job candidates, and a mere 7% reported that they did not conduct criminal background checks on any of their candidates). The survey excluded the "not sure" responses from its analysis, which may account for the 1% gap in the total number of employer responses. *Id.*

[50] CONDUCTING CRIMINAL BACKGROUND CHECKS, *supra* note 49, at slide 7 (39% of the surveyed employers reported that they conducted criminal background checks "[t]o reduce/prevent theft and embezzlement, other criminal activity"); *see also* Sarah E. Needleman, *Businesses Say Theft by Their Workers is Up*, WALL ST. J., Dec. 11, 2008, at B8, *available at* http://online.wsj.com/article/SB122896381748896999.html.

[51] CONDUCTING CRIMINAL BACKGROUND CHECKS, *supra* note 49, at slide 7 (61% of the surveyed employers reported that they conducted criminal background checks "[to] ensure a safe work environment for employees"); *see also* ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WORKPLACE VIOLENCE, 1993–2009, at 1 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/wv09.pdf (reporting that in 2009, "[n]onfatal violence in the workplace was about 15% of all nonfatal violent crime against persons age 16 or older"). *But see id.* (noting that from "2002 to 2009, the rate of nonfatal workplace violence has declined by 35%, following a 62% decline in the rate from 1993 to 2002"). Studies indicate that most workplace violence is committed by individuals with no relationship to the business or its employees. *See id.* at 6 (reporting that between 2005 and 2009, strangers committed the majority of workplace violence against individuals (53% for males and 41% for females) while violence committed by co-workers accounted for a much smaller percentage (16.3% for males and 14.3% for females)); *see also* NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTR. FOR DISEASE CONTROL & PREVENTION, WORKPLACE VIOLENCE PREVENTION STRATEGIES AND RESEARCH

NEEDS 4, Table 1 (2006), http://www.cdc.gov/niosh/docs/2006-144/pdfs/2006-144.pdf (reporting that approximately 85% of the workplace homicides examined were perpetrated in furtherance of a crime by persons with no relationship to the business or its employees; approximately 7% were perpetrated by employees or former employees, 5% were committed by persons with a personal relationship to an employee, and 3% were perpetrated by persons with a customer-client relationship to the business).

[52] CONDUCTING CRIMINAL BACKGROUND CHECKS, *supra* note 49, at slide 7 (55% percent of the surveyed employers reported that they conducted criminal background checks "[t]o reduce legal liability for negligent hiring"). Employers have a common law duty to exercise reasonable care in hiring to avoid foreseeable risks of harm to employees, customers, and the public. If an employee engages in harmful misconduct on the job, and the employer has not exercised such care in selecting the employee, the employer may be subject to liability for negligent hiring. *See, e.g.*, Stires v. Carnival Corp., 243 F. Supp. 2d 1313, 1318 (M.D. Fla. 2002) ("[N]egligent hiring occurs when . . . the employer knew or should have known of the employee's unfitness, and the issue of liability primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background.").

[53] CONDUCTING CRIMINAL BACKGROUND CHECKS, *supra* note 49, at slide 4 (40% of the surveyed employers reported that they conducted criminal background checks for "[j]ob candidates for positions for which state law requires a background check (e.g., day care teachers, licensed medical practitioners, etc.)"); *see id.* at slide 7 (20% of the employers reported that they conducted criminal background checks "[t]o comply with the applicable State law requiring a background check (e.g., day care teachers, licensed medical practitioners, etc.) for a particular position"). The study did not report the exact percentage of employers that conducted criminal background checks to comply with applicable federal laws or regulations, but it did report that 25% of the employers conducted background checks for "[j]ob candidates for positions involving national defense or homeland security." *Id.* at slide 4.

[54] *See* 42 U.S.C. § 2000e-2(a).

[55] Disparate treatment based on the race or national origin of job applicants with the same qualifications and criminal records has been documented. For example, a 2003 study demonstrated that White applicants with the same qualifications and criminal records as Black applicants were three times more likely to be invited for interviews than the Black applicants. *See* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 958, Figure 6 (2003), www.princeton.edu/~pager/pager_ajs.pdf. Pager matched pairs of young Black and White men as "testers" for her study. The "testers" in Pager's study were college students who applied for 350 low-skilled jobs advertised in Milwaukee-area classified advertisements, to test the degree to which a criminal record affects subsequent employment opportunities. The same study showed that White job applicants with a criminal record were called back for interviews more often than equally-qualified Black applicants who *did not have* a criminal record. *Id.* at 958. *See also* Devah Pager et al., *Sequencing Disadvantage: The Effects of Race and Criminal Background for Low Wage Job Seekers*, 623 ANNALS AM. ACAD. POL. & SOC. SCI., 199 (2009), www.princeton.edu/~pager/annals_sequencingdisadvantage.pdf (finding that among Black and

White testers with similar backgrounds and criminal records, "the negative effect of a criminal conviction is substantially larger for blacks than whites. . . . the magnitude of the criminal record penalty suffered by black applicants (60 percent) is roughly double the size of the penalty for whites with a record (30 percent)"); *see id.* at 200–201 (finding that personal contact plays an important role in mediating the effects of a criminal stigma in the hiring process, and that Black applicants are less often invited to interview, thereby having fewer opportunities to counteract the stigma by establishing rapport with the hiring official); Devah Pager, *Statement of Devah Pager, Professor of Sociology at Princeton University*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/11-20-08/pager.cfm (last visited April 23, 2012) (discussing the results of the *Sequencing Disadvantage* study); DEVAH PAGER & BRUCE WESTERN, NYC COMMISSION ON HUMAN RIGHTS, RACE AT WORK, REALITIES OF RACE AND CRIMINAL RECORD IN THE NYC JOB MARKET 6, Figure 2 (2006), http://www.nyc.gov/html/cchr/pdf/race_report_web.pdf (finding that White testers *with* a felony conviction were called back 13% of the time, Hispanic testers *without* a criminal record were called back 14% of the time, and Black testers *without* a criminal record were called back 10% of the time).

[56] *Race & Color Discrimination*, *supra* note 15, § V.A.1.

[57] A 2006 study demonstrated that employers who are averse to hiring people with criminal records sometimes presumed, in the absence of evidence to the contrary, that African American men applying for jobs have disqualifying criminal records. Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451 (2006), http://www.jstor.org/stable/pdfplus/10.1086/501089.pdf; *see also* HARRY HOLZER ET AL., URBAN INST., EMPLOYER DEMAND FOR EX-OFFENDERS: RECENT EVIDENCE FROM LOS ANGELES 6–7 (2003), http://www.urban.org/UploadedPDF/410779_ExOffenders.pdf (describing the results of an employer survey where over 40% of the employers indicated that they would "probably not" or "definitely not" be willing to hire an applicant with a criminal record).

[58] The Commission has not done matched-pair testing to investigate alleged discriminatory employment practices. However, it has issued an Enforcement Guidance that discusses situations where individuals or organizations file charges on the basis of matched-pair testing, among other practices. *See generally Enforcement Guidance: Whether "Testers" Can File Charges and Litigate Claims of Employment Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (May 22, 1996), http://www.eeoc.gov/policy/docs/testers.html.

[59] 42 U.S.C. § 2000e-2(k)(1)(A)(i). If an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory "alternative employment practice" that serves the employer's legitimate goals as effectively as the challenged practice but that the employer refused to adopt. *Id.* § 2000e-2(k)(1)(A)(ii).

[60] 401 U.S. 424, 431–32 (1971).

[61] *Id.* at 431.

[62] The Civil Rights Act of 1991, Pub. L. No. 102-166, § 105; *see also* Lewis v. City of Chicago, 130 S. Ct. 2191 (2010) (reaffirming disparate impact analysis); Ricci v. DeStefano, 557 U.S. 557 (2009) (same).

[63] 42 U.S.C. § 2000e-2(k)(1)(A)(i).

[64] The Commission presumes that employers use the information sought and obtained from its applicants and others in making an employment decision. *See* Gregory v. Litton Sys. Inc.,316 F. Supp. 401, 403 (C.D. Cal.1970). If an employer asserts that it did not factor the applicant's or employee's known criminal record into an employment decision, the EEOC will seek evidence supporting this assertion. For example, evidence that the employer has other employees from the same protected group with roughly comparable criminal records may support the conclusion that the employer did not use the applicant's or employee's criminal record to exclude him from employment.

[65] UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, CRIME IN THE U.S. 2010, at Table 43a (2011), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-43/10tbl43a.xls.

[66] U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 3 (2011) , http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf (reporting that in 2010, "14 percent of all people in the United States identified as Black, either alone, or in combination with one or more races").

[67] Accurate data on the number of Hispanics arrested and convicted in the United States is limited. *See* NANCY E. WALKER ET AL., NAT'L COUNCIL OF LA RAZA, LOST OPPORTUNITIES: THE REALITY OF LATINOS IN THE U.S. CRIMINAL JUSTICE SYSTEM 17–18 (2004), http://www.policyarchive.org/handle/10207/bitstreams/20279.pdf (explaining why "[i]t is very difficult to find any information – let alone accurate information – on the number of Latinos arrested in the United States"). The Department of Justice's Bureau of Justice Statistics' (BJS) *Sourcebook of Criminal Justice Statistics* and the FBI's Crime Information Services Division do not provide data for arrests by ethnicity. *Id.* at 17. However, the U.S. Drug Enforcement Administration (DEA) disaggregates data by Hispanic and non-Hispanic ethnicity. *Id.* at 18. According to DOJ/BJS, from October 1, 2008 to September 30, 2009, 45.5% of drug arrests made by the DEA were of Hispanics or Latinos. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2009 – STATISTICAL TABLES, at 6, Table 1.4 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf. Accordingly, Hispanics were arrested for drug offenses by the DEA at a rate of three times their numbers in the general population. *See* U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 3 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf (reporting that in 2010, "there were 50.5 million Hispanics in the United States, composing 16 percent of the total population"). However, national statistics indicate that Hispanics have similar or lower drug usage rates compared to Whites. *See, e.g.*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS.

ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 21, Figure 2.10 (2011), http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.pdf (reporting, for example, that the usage rate for Hispanics in 2009 was 7.9% compared to 8.8% for Whites).

[68] *See, e.g.*, HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 1 (2009), http://www.hrw.org/sites/default/files/reports/us0309web_1.pdf (noting that the "[t]he higher rates of black drug arrests do not reflect higher rates of black drug offending . . . . blacks and whites engage in drug offenses - possession and sales - at roughly comparable rates"); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 21 (2011), http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.pdf (reporting that in 2010, the rates of illicit drug use in the United States among persons aged 12 or older were 10.7% for African Americans, 9.1% for Whites, and 8.1% for Hispanics); HARRY LEVINE & DEBORAH SMALL, N.Y. CIVIL LIBERTIES UNION, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY, 1997–2007, at 13–16 (2008), www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf (citing U.S. Government surveys showing that Whites use marijuana at higher rates than African Americans and Hispanics; however, the marijuana arrest rate of Hispanics is nearly three times the arrest rate of Whites, and the marijuana arrest rate of African Americans is five times the arrest rate of Whites).

[69] PREVALENCE OF IMPRISONMENT, *supra* note 4, at 1, 8. Due to the nature of available data, the Commission is using incarceration data as a proxy for conviction data.

[70] *Id.*

[71] *Id.*

[72] MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 10 (2007), www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Crd_stateratesofincbyraceandethnicity.pdf.

[73] *Id.*

[74] PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2010, at 27, Table 14 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf (reporting that as of December 31, 2010, Black men were imprisoned at a rate of 3,074 per 100,000 Black male residents, Hispanic men were imprisoned at a rate of 1,258 per 100,000 Hispanic male residents, and White men were imprisoned at a rate of 459 per 100,000 White male residents); *cf.* ONE IN 31, *supra* note 4, at 5 ("Black adults are four times as likely as whites and nearly 2.5 times as likely as Hispanics to be under correctional control. One in 11 black adults -- 9.2 percent -- was under correctional control [probation, parole, prison, or jail] at year end 2007.").

[75] The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. part 1607, provide that "[employers] should maintain and have available . . . information on [the] adverse impact of [their employment selection procedures]." 29 C.F.R. § 1607.15A. "Where [an employer] has not maintained [such records, the EEOC] may draw an inference of adverse impact of the selection process from the failure of [the employer] to maintain such data . . . ." *Id.* § 1607.4D.

[76] *See, e.g.*, El v. SEPTA, 418 F. Supp. 2d 659, 668–69 (E.D. Pa. 2005) (finding that the plaintiff established a prima facie case of disparate impact with evidence from the defendant's personnel records and national data sources from the U.S. Bureau of Justice Statistics and the Statistical Abstract of the U.S.), *aff'd on other grounds*, 479 F.3d 232 (3d Cir. 2007); Green v. Mo. Pac. R.R., 523 F.2d 1290, 1294–95 (8th Cir. 1975) (concluding that the defendant's criminal record exclusion policy had a disparate impact based on race by evaluating local population statistics and applicant data), *appeal after remand*, 549 F.2d 1158, 1160 (8th Cir. 1977).

[77] 457 U.S. 440, 442 (1982).

[78] *Id.* at 453–54

[79] 433 U.S. 321, 330 (1977).

[80] *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977) (stating that "[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection").

[81] 42 U.S.C. § 2000e-2(k)(1)(A)(i). *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See also* 42 U.S.C. § 2000e(m) (defining the term "demonstrates" to mean "meets the burdens of production and persuasion").

[82] 422 U.S. 405 (1975).

[83] 433 U.S. 321 (1977).

[84] 137 CONG. REC. 15273 (1991) (statement of Sen. Danforth) ("[T]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co*, and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*." (citations omitted)). Section 105(b) of the Civil Rights Act of 1991 provides that only the interpretive memorandum read by Senator Danforth in the Congressional Record may be considered legislative history or relied upon in construing or applying the business necessity standard.

[85] 401 U.S. at 431, 436.

[86] 422 U.S. at 430–31 (endorsing the EEOC's position that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to predict or correlate with "'important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated'" (quoting 29 C.F.R. § 1607.4(c))).

[87] 433 U.S. at 331–32 (concluding that using height and weight as proxies for strength did not satisfy the business necessity defense because the employer failed to establish a correlation between height and weight and the necessary strength, and also did not specify the amount of strength necessary to perform the job safely and efficiently).

[88] *Id.* at 331 n.14.

[89] 523 F.2d 1290, 1293 (8th Cir. 1975). "In response to a question on an application form, Green [a 29-year-old African American man] disclosed that he had been convicted in December 1967 for refusing military induction. He stated that he had served 21 months in prison until paroled on July 24, 1970." *Id.* at 1292–93.

[90] Green v. Mo. Pac. R.R., 549 F.2d 1158, 1160 (8th Cir. 1977) (upholding the district court's injunction prohibiting the employer from using an applicant's conviction record as an absolute bar to employment but allowing it to consider a prior criminal record as a factor in making individual hiring decisions, as long as the defendant took these three factors into account).

[91] *Id.* (referring to completion of the sentence rather than completion of parole).

[92] *Id.*

[93] 479 F.3d 232 (3d Cir. 2007).

[94] *Id.* at 235.

[95] *Id.* at 235, 236.

[96] *Id.* at 235.

[97] *Id.* at 244.

[98] *Id.* at 244–45.

[99] *Id.* at 247. *Cf.* Shawn Bushway et al., *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 CRIMINOLOGY 27, 52 (2011) [hereinafter *The Predictive Value of Criminal Background Checks*] ("Given the results of the current as well as previous [recidivism] studies, the 40-year period put forward in *El v. SEPTA* (2007) . . . seems too old of a score to be still in need of settlement.").

[100] *El*, 479 F.3d at 248.

[101] Some states have enacted laws to limit employer inquiries concerning all or some arrest records. *See* BACKGROUND CHECKS, *supra* note 25, at 48–49. At least 13 states have statutes explicitly prohibiting arrest record inquiries and/or dissemination subject to certain exceptions. *See, e.g.*, Alaska (ALASKA STAT. § 12.62.160(b)(8)); Arkansas (ARK. CODE ANN. § 12-12-1009(c)); California (CAL. LAB. CODE § 432.7(a)); Connecticut (CONN. GEN. STAT. § 46a-80(e)); Illinois (775 ILL. COMP. STAT. § 5/2-103(A)) (dealing with arrest records that have been ordered expunged, sealed, or impounded); Massachusetts (MASS. GEN. LAWS ch. 151B § 4(9)); Michigan (MICH COMP. LAWS § 37.2205a(1) (applying to misdemeanor arrests only)); Nebraska (NEB. REV. STAT. § 29-3523(2)) (ordering no dissemination of arrest records under certain conditions and specified time periods)); New York (N.Y. EXEC. LAW § 296(16)); North Dakota (N.D. CENT. CODE § 12-60-16.6(2)); Pennsylvania (18 PA. CONS. STAT. § 9121(b)(2)); Rhode Island (R.I. GEN. LAWS § 28-5-7(7)), and Wisconsin (WIS. STAT. §§ 111.321, 111.335a).

[102] *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (discussing federal prosecutors' broad discretionary authority to determine whether to prosecute cases and whether to bring charges before a grand jury); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (explaining same for state prosecutors); *see also* THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 10, Table 11 (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf (reporting that in the 75 largest counties in the country, nearly one-third of the felony arrests did not result in a conviction because the charges against the defendants were dismissed).

[103] Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 241 (1957) ("The mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct."); United States. v. Hynes, 467 F.3d 951, 957 (6th Cir. 2006) (upholding a preliminary jury instruction that stated that a "defendant is presumed to be innocent unless proven guilty. The indictment against the Defendant is only an accusation, nothing more. It's not proof of guilt or anything else."); *see* Gregory v. Litton Sys. Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) ("[I]nformation concerning a prospective employee's record of arrests without convictions, is irrelevant to [an applicant's] suitability or qualification for employment."), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972); Dozier v. Chupka, 395 F. Supp. 836, 850 n.10 (S.D. Ohio 1975) (stating that the use of arrest records was too crude a predictor of an employee's predilection for theft where there were no procedural safeguards to prevent reliance on unwarranted arrests); City of Cairo v. Ill. Fair Empl. Prac. Comm., 8 Empl. Prac. Dec. (CCH) ¶ 9682 (Ill. App. Ct. 1974) (concluding that, where applicants sought to become police officers, they could not be absolutely barred from appointment solely because they had been arrested, as distinguished from convicted); *see also* EEOC Dec. 74-83, ¶ 6424 (CCH) (1983) (finding no business justification for an employer's unconditional termination of all employees with arrest records (all five employees terminated were Black), purportedly to reduce thefts in the workplace; the employer produced no evidence that these particular employees had been involved in any of the thefts, or that all people who are arrested but not convicted are prone towards crime in the future); EEOC Dec. 76-87, ¶ 6665 (CCH) (1983) (holding that an applicant who sought to become a police officer could not be rejected based on one arrest five years earlier

for riding in a stolen car when he asserted that he did not know that the car was stolen and the charge was dismissed).

[104] *See* STATE CRIMINAL HISTORY, *supra* note 37, at 2; *see also* BACKGROUND CHECKS, *supra* note 25, at 17.

[105] *See supra* notes 39–40.

[106] S*ee* Clark v. Arizona, 548 U.S. 735, 766 (2006) ("The first presumption [in a criminal case] is that a defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged. . . ."). *See also* FED. R. CRIM P 11 (criminal procedure rule governing pleas). The Supreme Court has concluded that criminal defendants have a Sixth Amendment right to effective assistance of counsel during plea negotiations. *See generally* Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012).

[107] *See supra* text accompanying note 39.

[108] *See e.g.*, HAW. REV. STAT. § 378-2.5(b). Under this provision, the employer may withdraw the offer of employment if the prospective employee has a conviction record "that bears a rational relationship to the duties and responsibilities of the position." *Id. See also* CONN. GEN. STAT. § 46a-80(b) ("[N]o employer . . . shall inquire about a prospective employee's past convictions until such prospective employee has been deemed otherwise qualified for the position."); MINN. STAT. § 364.021(a) ("[A] public employer may not inquire or consider the criminal record or criminal history of an applicant for public employment until the applicant has been selected for an interview by the employer."). State fair employment practices agencies have information about applicable state law.

[109] *See generally* NAT'L LEAGUE OF CITIES & NAT'L EMP'T LAW PROJECT, CITIES PAVE THE WAY: PROMISING REENTRY POLICIES THAT PROMOTE LOCAL HIRING OF PEOPLE WITH CRIMINAL RECORDS (2010), www.nelp.org/page/-/SCLP/2010/CitiesPavetheWay.pdf?nocdn=1 (identifying local initiatives that address ways to increase employment opportunities for individuals with criminal records, including delaying a background check until the final stages of the hiring process, leveraging development funds, and expanding bid incentive programs to promote local hiring priorities); NAT'L EMP'T LAW PROJECT, CITY AND COUNTY HIRING INITIATIVES (2010), www.nelp.org/page/-/SCLP/CityandCountyHiringInitiatives.pdf (discussing the various city and county initiatives that have removed questions regarding criminal history from the job application and have waited until after a conditional offer of employment has been made to conduct a background check and inquire about the applicant's criminal background).

[110] Several federal laws automatically prohibit employing individuals with certain felony convictions or, in some cases, misdemeanor convictions. *See, e.g.*, 5 U.S.C. § 7371(b) (requiring the mandatory removal of any federal law enforcement officer who is convicted of a felony); 46 U.S.C. § 70105(c)(1)(A) (mandating that individuals who have been convicted of espionage, sedition, treason or terrorism be permanently disqualified from receiving a biometric transportation security card and thereby excluded from port work employment); 42 U.S.C.

§ 13726(b)(1) (disqualifying persons with felony convictions or domestic violence convictions from working for a private prisoner transport company); 25 U.S.C. § 3207(b) (prohibiting individuals with a felony conviction, or any of two or more misdemeanor convictions, from working with Indian children if their convictions involved crimes of violence, sexual assault, molestation, exploitation, contact or prostitution, crimes against persons, or offenses committed against children); 18 U.S.C. § 922(g)(1), (9) (prohibiting an individual convicted of a felony or a misdemeanor for domestic violence from possessing a firearm, thereby excluding such individual from a wide range of jobs that require such possession); 18 U.S.C. § 2381 (prohibiting individuals convicted of treason from "holding any office under the United States"). Other federal laws prohibit employing individuals with certain convictions for a defined time period. *See, e.g.*, 5 U.S.C. § 7313(a) (prohibiting individuals convicted of a felony for inciting a riot or civil disorder from holding any position in the federal government for five years after the date of the conviction); 12 U.S.C. § 1829 (requiring a ten-year ban on employing individuals in banks if they have certain financial-related convictions); 49 U.S.C. § 44936(b)(1)(B) (imposing a ten-year ban on employing an individual as a security screener for an air carrier if that individuals has been convicted of specified crimes).

111 *See* 29 C.F.R. § 1607.5 (describing the general standards for validity studies).

112 *Id.*

113 *Id.* § 1607.6B. The following subsections state:

> (1) *Where informal or unscored procedures are used*. When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.
> (2) *Where formal and scored procedures are used*. When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.
>
> *Id.* § 1607.6A, B(1)–(2).

114 *See, e.g.*, Brent W. Roberts et al., *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 J. APPLIED PSYCHOL. 1427, 1430 (2007), http://internal.psychology.illinois.edu/~broberts/Roberts,%20Harms,%20Caspi,%20&%20Moffitt,%202007.pdf (finding that in a study of New Zealand residents from birth to age 26, "[a]dolescent criminal convictions were unrelated to committing counterproductive activities at work [such as tardiness, absenteeism, disciplinary problems, etc.]. In fact, according to the

[results of the study], people with an adolescent criminal conviction record were less likely to get in a fight with their supervisor or steal things from work.").

[115] *See* OHIO REV. CODE ANN. § 2913.02.

[116] 523 F.2d at 1298 (stating that "[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed").

[117] 479 F.3d at 247.

[118] *See, e.g.*, Keith Soothill & Brian Francis, *When do Ex-Offenders Become Like Non-Offenders?*, 48 HOWARD J. OF CRIM. JUST., 373, 380–81 (2009) (examining conviction data from Britain and Wales, a 2009 study found that the risk of recidivism declined for the groups with prior records and eventually converged within 10 to 15 years with the risk of those of the nonoffending comparison groups); Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009) (concluding that there may be a "point of redemption" (i.e., a point in time where an individual's risk of re-offending or re-arrest is reasonably comparable to individuals with no prior criminal record) for individuals arrested for certain offenses if they remain crime free for a certain number of years); Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQUENCY 64 (2007) (analyzing juvenile police contacts and Racine, Wisconsin police contacts for an aggregate of crimes for 670 males born in 1942 and concluding that, after seven years, the risk of a new offense approximates that of a person without a criminal record); Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483 (2006) (evaluating juvenile police contacts and arrest dates from Philadelphia police records for an aggregate of crimes for individuals born in 1958, a 2006 study concluded that the risk of recidivism decreases over time and that, six or seven years after an arrest, an individual's risk of re-arrest approximates that of an individual who has never been arrested).

[119] *Griggs*, 401 U.S. at 431.

[120] 523 F.2d at 1298; *see also* Field v. Orkin Extermination Co., No. Civ. A. 00-5913, 2002 WL 32345739, at *1 (E.D. Pa. Feb. 21, 2002) (unpublished) ("[A] blanket policy of denying employment to any person having a criminal conviction is a [*per se*] violation of Title VII."). The only exception would be if such an exclusion were required by federal law or regulation. *See, e.g.*, *supra* note 110.

[121] *Cf. Field*, 2002 WL 32345739, at *1. In *Field*, an employee of ten years was fired after a new company that acquired her former employer discovered her 6-year-old felony conviction. The new company had a blanket policy of firing anyone with a felony conviction less than 10 years old. The court granted summary judgment for the employee because the employer's argument that her conviction was related to her job qualifications was "weak at best," especially

given her positive employment history with her former employer. *Id.*

[122] Recidivism rates tend to decline as ex-offenders' ages increase. A 2011 study found that an individual's age at conviction is a variable that has a "substantial and significant impact on recidivism." *The Predictive Value of Criminal Background Checks*, *supra* note 99, at 43. For example, the 26-year-olds in the study, with no prior criminal convictions, had a 19.6% chance of reoffending in their first year after their first conviction, compared to the 36-year-olds who had an 8.8% chance of reoffending during the same time period, and the 46-year-olds who had a 5.3% of reoffending. *Id.* at 46. *See also* PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, at 7 (2002), http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf (finding that, although 55.7% of ex-offenders aged 14–17 released in 1994 were reconvicted within three years, the percentage declined to 29.7% for ex-offenders aged 45 and older who were released the same year).

Consideration of an applicant's age at the time the offense occurred or at his release from prison would benefit older individuals and, therefore, would not violate the Age Discrimination in Employment Act of 1967, *as amended,* 29 U.S.C. § 621 *et seq*. *See* Age Discrimination in Employment Act, 29 C.F.R. § 1625.2 ("Favoring an older individual over a younger individual because of age is not unlawful discrimination under the ADEA, even if the younger individual is at least 40 years old."); *see also* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (concluding that the ADEA does not preclude an employer from favoring an older employee over a younger one within the protected age group).

[123] *See* Laura Moskowitz, *Statement of Laura Moskowitz, Staff Attorney, National Employment Law Project's Second Chance Labor Project*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/11-20-08/moskowitz.cfm (last visited April 23, 2012) (stating that one of the factors that is relevant to the assessment of an ex-offender's risk to a workplace and to the business necessity analysis, is the "length and consistency of the person's work history, including whether the person has been recently employed"; also noting that various studies have "shown a strong relationship between employment and decreases in crime and recidivism"). *But see* Stephen J. Tripodi et al., *Is Employment Associated With Reduced Recidivism?: The Complex Relationship Between Employment and Crime*, 54 INT'L J. OF OFFENDER THERAPY AND COMP. CRIMINOLOGY 716, 716 (2010) (finding that "[b]ecoming employed after incarceration, although apparently providing initial motivation to desist from crime, does not seem to be on its own sufficient to prevent recidivism for many parolees").

[124] *See* WENDY ERISMAN & JEANNE BAYER CONTARDO, INST. FOR HIGHER EDUC. POLICY, LEARNING TO REDUCE RECIDIVISM: A 50 STATE ANALYSIS OF POSTSECONDARY CORRECTIONAL EDUCATION 5 (2005), http://www.ihep.org/assets/files/publications/g-l/LearningReduceRecidivism.pdf (finding that increasing higher education for prisoners enhances their prospects for employment and serves as a cost-effective approach to reducing recidivism); *see also* John H. Laud & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 17–24 (2001), http://www.ncjrs.gov/pdffiles1/Digitization/192542-192549NCJRS.pdf (stating that factors associated with personal rehabilitation and social

stability, such as stable employment, family and community involvement, and recovery from substance abuse, are correlated with a decreased risk of recidivism).

[125] Some employers have expressed a greater willingness to hire ex-offenders who have had an ongoing relationship with third party intermediary agencies that provide supportive services such as drug testing, referrals for social services, transportation, child care, clothing, and food. *See* Amy L. Solomon et al., *From Prison to Work: The Employment Dimensions of Prisoner Reentry*, 2004 URBAN INST. 20, http://www.urban.org/UploadedPDF/411097_From_Prison_to_Work.pdf. These types of services can help ex-offenders avoid problems that may interfere with their ability to obtain and maintain employment. *Id.*; *see generally* Victoria Kane, *Transcript of 7-26-11 Meeting*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#kane (last visited April 23, 2012) (describing why employers should partner with organizations that provide supportive services to ex-offenders).

[126] *See generally* REENTRY MYTHBUSTER! ON FEDERAL BONDING PROGRAM, *supra* note 16; *Work Opportunity Tax Credit (WOTC)*, EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, http://www.doleta.gov/business/incentives/opptax/ (last visited April 3, 2012); *Directory of State Bonding Coordinators*, EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, http://www.doleta.gov/usworkforce/onestop/FBPContact.cfm (last visited April 3, 2012); *Federal Bonding Program - Background*, U.S. DEP'T OF LABOR, http://www.bonds4jobs.com/program-background.html (last visited April 3, 2012); *Bureau of Prisons: UNICOR's Federal Bonding Program*, http://www.bop.gov/inmate_programs/itb_bonding.jsp (last visited April 3, 2012).

[127] This example is loosely based on a study conducted by Alfred Blumstein and Kiminori Nakamura measuring the risk of recidivism for individuals who have committed burglary, robbery, or aggravated assault. *See* Blumstein & Nakamura, *supra* note 118.

[128] 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C). *See also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988).

[129] *See* Exec. Order No. 12,067, 3 C.F.R. 206 (1978 Comp.).

[130] *See* 49 U.S.C. §§ 44935(e)(2)(B), 44936(a)(1), (b)(1). The statute mandates a criminal background check.

[131] *See* 5 U.S.C. § 7371(b) (requiring mandatory removal from employment of law enforcement officers convicted of felonies).

[132] *See* 42 U.S.C. § 13041(c) ("Any conviction for a sex crime, an offense involving a child victim, or a drug felony may be grounds for denying employment or for dismissal of an employee. . . .").

[133] 12 U.S.C. § 1829.

[134] 46 U.S.C. § 70105(c).

[135] Other jobs and programs subject to federally-imposed restrictions based on criminal convictions include the business of insurance (18 U.S.C. § 1033(e)), employee benefits employee (29 U.S.C. § 1111(a)), participation in Medicare and state health care programs (42 U.S.C. § 1320a-7(a)–(b)), defense contractor (10 U.S.C. § 2408(a)), prisoner transportation (42 U.S.C. § 13726b(b)(1)), and court-imposed occupational restrictions (18 U.S.C. §§ 3563(b)(5), 3583(d)). This list is not meant to be exhaustive.

[136] *See, e.g.*, federal statutes governing commercial motor vehicle operator's licenses (49 U.S.C. § 31310(b)-(h)), locomotive operator licenses (49 U.S.C. § 20135(b)(4)(B)), and certificates, ratings, and authorizations for pilots, flight instructors, and ground instructors (49 U.S.C. §§ 44709(b)(2), 44710(b), 4711(c); 14 C.F.R. § 61.15).

[137] *See, e.g.*, federal statutes governing loan originator licensing/registration (12 U.S.C. § 5104(b)(2)), registration of brokers and dealers (15 U.S.C. § 78o(b)(4)(B)), registration of commodity dealers (7 U.S.C. § 12a(2)(D), (3)(D), (E), (H)), and registration of investment advisers (15 U.S.C. § 80b-3(e)(2)-(3), (f)).

[138] *See, e.g.*, custom broker's licenses (19 U.S.C. § 1641(d)(1)(B)), export licenses (50 U.S.C. App. § 2410(h)), and arms export (22 U.S.C. § 2778(g)).

[139] *See, e.g.*, grain inspector's licenses (7 U.S.C. § 85), merchant mariner's documents, licenses, or certificates of registry (46 U.S.C. § 7503(b)), licenses to import, manufacture, or deal in explosives or permits to use explosives (18 U.S.C. § 843(d)), and farm labor contractor's certificates of registration (29 U.S.C. § 1813(a)(5)). This list of federally-imposed restrictions on occupational licenses and registrations for individuals with certain criminal convictions is not meant to be exhaustive. For additional information, please consult the relevant federal agency or department.

[140] *See* 12 U.S.C. § 1829(a)(1). The statute imposes a ten-year ban for individuals who have been convicted of certain financial crimes such as corruption involving the receipt of commissions or gifts for procuring loans (18 U.S.C. § 215), embezzlement or theft by an officer/employee of a lending, credit, or insurance institution (18 U.S.C § 657), false or fraudulent statements by an officer/employee of the federal reserve or a depository institution (18 U.S.C. § 1005), or fraud by wire, radio, or television that affects a financial institution (18 U.S.C. § 1343), among other crimes. *See* 12 U.S.C. § 1829(a)(2)(A)(i)(I), (II). Individuals who have either been convicted of the crimes listed in § 1829(a)(2)(A), or conspiracy to commit those crimes, will not receive an exception to the application of the 10-year ban from the FDIC. 12 U.S.C. § 1829(a)(2)(A).

[141] *See* FED. DEPOSIT INS. CORP., FDIC STATEMENT OF POLICY FOR SECTION 19 OF THE FDI ACT, § C, "PROCEDURES" (amended May 13, 2011), http://www.fdic.gov/regulations/laws/rules/5000-1300.html [hereinafter FDIC POLICY]; *see also*

Statement of Policy, 63 Fed. Reg. 66,177, 66,184 (Dec. 1, 1998); Clarification of Statement of Policy, 76 Fed. Reg. 28,031 (May 13, 2011) (clarifying the FDIC's Statement of Policy for Section 19 of the FDI Act).

"Approval is automatically granted and an application [for a waiver] will not be required where [an individual who has been convicted of] the covered offense [criminal offenses involving dishonesty, breach of trust, or money laundering] . . . meets all of the ["*de minimis*"] criteria" set forth in the FDIC's Statement of Policy. FDIC POLICY, *supra*, § B (5). These criteria include the following: (1) there is only one conviction or program of record for a covered offense; (2) the offense was punishable by imprisonment for a term of one year or less and/or a fine of $1,000 or less, and the individual did not serve time in jail; (3) the conviction or program was entered at least five years prior to the date an application would otherwise be required; and (4) the offense did not involve an insured depository institution or insured credit union. *Id.* Additionally, an individual's conviction for writing a "bad" check will be considered a *de minimis* offense, even if it involved an insured depository institution or insured credit union, if: (1) all other requirements of the *de minimis* offense provisions are met; (2) the aggregate total face value of the bad or insufficient funds check(s) cited in the conviction was $1000 or less; and (3) no insured depository institution or insured credit union was a payee on any of the bad or insufficient funds checks that were the basis of the conviction. *Id.*

[142] *See* FDIC POLICY, *supra* note 141, § C, "PROCEDURES."

[143] *Id. But cf.* NAT'L H.I.R.E. NETWORK, PEOPLE WITH CRIMINAL RECORDS WORKING IN FINANCIAL INSTITUTIONS: THE RULES ON FDIC WAIVERS, http://www.hirenetwork.org/FDIC.html ("Institutions rarely seek a waiver, except for higher level positions when the candidate is someone the institution wants to hire. Individuals can only seek FDIC approval themselves if they ask the FDIC to waive the usual requirement. Most individuals probably are unaware that they have this right."); FED. DEPOSIT INSUR. CORP. 2010 ANNUAL REPORT, § VI.A: KEY STATISTICS, FDIC ACTIONS ON FINANCIAL INSTITUTION APPLICATIONS 2008–2010 (2011), http://www.fdic.gov/about/strategic/report/2010annualreport/chpt6-01.html (reporting that between 2008 and 2010, the FDIC approved a total of 38 requests for consent to employ individuals with covered offenses in their background; the agency did not deny any requests during this time period).

[144] FDIC POLICY, *supra* note 141, § D, "EVALUATION OF SECTION 19 APPLICATIONS" (listing the factors that are considered in this waiver review process, which include: (1) the nature and circumstances underlying the offense; (2) "[e]vidence of rehabilitation including the person's reputation since the conviction . . . the person's age at the time of conviction . . . and the time which has elapsed since the conviction"; (3) the position to be held in the insured institution; (4) the amount of influence/control the individual will be able to exercise over management affairs; (5) management's ability to control and supervise the individual's activities; (6) the degree of ownership the individual will have in the insured institution; (7) whether the institution's fidelity bond coverage applies to the individual; (8) the opinion of the applicable federal and/or state regulators; and (9) any other relevant factors).

[145] *See* 49 C.F.R. §§ 1515.7 (describing the procedures for waiver of criminal offenses, among other standards), 1515.5 (explaining how to appeal the Initial Determination of Threat Assessment based on a criminal conviction). In practice, some worker advocacy groups have criticized the TWIC appeal process due to prolonged delays, which leaves many workers jobless; especially workers of color. *See generally* MAURICE EMSELLEM ET AL., NAT'L EMP'T LAW PROJECT, A SCORECARD ON THE POST-911 PORT WORKER BACKGROUND CHECKS: MODEL WORKER PROTECTIONS PROVIDE A LIFELINE FOR PEOPLE OF COLOR, WHILE MAJOR TSA DELAYS LEAVE THOUSANDS JOBLESS DURING THE RECESSION (2009), http://nelp.3cdn.net/2d5508b4cec6e13da6_upm6b20e5.pdf.

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6201, 124 Stat. 721 (2010) (the Act) includes a process to appeal or dispute the accuracy of information obtained from criminal records. The Act requires participating states to perform background checks on applicants and current employees who have direct access to patients in long-term care facilities, such as nursing homes, to determine if they have been convicted of an offense or have other disqualifying information in their background, such as a finding of patient or resident abuse, that would disqualify them from employment under the Social Security Act or as specified by state law. *See* 42 U.S.C. § 1320a-7l(a)(3)(A), (a)(4)(B), (6)(A)–(E). The background check involves an individualized assessment of the relevance of a conviction or other disqualifying information. The Act protects applicants and employees in several ways, for example, by: (1) providing a 60-day provisional period of employment for the prospective employee, pending the completion of the criminal records check; (2) providing an independent process to appeal or dispute the accuracy of the information obtained in the criminal records check; and (3) allowing the employee to remain employed (subject to direct on-site supervision) during the appeals process. 42 U.S.C. § 1320a-7l(a)(4)(B)(iii), (iv).

[146] *See* 46 U.S.C. § 70105(d); *see generally* TWIC Program, 49 C.F.R. § 1572.103 (listing the disqualifying offenses for maritime and land transportation security credentials, such as convictions and findings of not guilty by reason of insanity for espionage, murder, or unlawful possession of an explosive; also listing temporarily disqualifying offenses, within seven years of conviction or five years of release from incarceration, including dishonesty, fraud, or misrepresentation (expressly excluding welfare fraud and passing bad checks), firearms violations, and distribution, intent to distribute, or importation of controlled substances).

[147] 46 U.S.C. § 70105(c)(1)(A)–(B).

[148] 46 U.S.C. § 70105(c)(1)(B)(iii).

[149] *See* 46 U.S.C. § 70105(c)(1)(A)(iv) (listing "Federal crime of terrorism" as a permanent disqualifying offense); *see also* 18 U.S.C. § 2332b(g)(5)(B) (defining "Federal crime of terrorism" to include the use of weapons of mass destruction under § 2332a).

[150] *See* 49 C.F.R. § 1515.7(a)(i) (explaining that only certain applicants with disqualifying crimes in their backgrounds may apply for a waiver; these applicants do not include individuals

who have been convicted of a Federal crime of terrorism as defined by 18 U.S.C. § 2332b(g)).

[151] These positions are defined as "national security positions" and include positions that "involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States" or "require regular use of, or access to, classified information." 5 C.F.R. § 732.102(a)(1)–(2). The requirements for "national security positions" apply to competitive service positions, Senior Executive Service positions filled by career appointment within the Executive Branch, and excepted service positions within the Executive Branch. *Id.* § 732.102(b). The head of each Federal agency can designate any position within that department or agency as a "sensitive position" if the position "could bring about, by virtue of the nature of the position, a material adverse effect on the national security." *Id.* § 732.201(a). Designation of a position as a "sensitive position" will fall under one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive. *Id.*

[152] *See* Exec. Order No. 12,968, § 3.1(b), 3 C.F.R. 391 (1995 Comp.):

> [E]ligibility for access to classified information shall be granted only to employees who are United States citizens for whom an appropriate investigation has been completed and whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honestly, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information. A determination of eligibility for access to such information is a discretionary security decision based on judgments by appropriately trained adjudicative personnel. Eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.

[153] 42 U.S.C. § 2000e-2(g); *see, e.g.*, Bennett v. Chertoff, 425 F.3d 999, 1001 (D.C. Cir. 2005) ("[E]mployment actions based on denial of a security clearance are not subject to judicial review, including under Title VII."); Ryan v. Reno, 168 F.3d 520, 524 (D.C. Cir. 1999) ("[A]n adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII.").

[154] *See Policy Guidance on the use of the national security exception contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as amended*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, § II, *Legislative History* (May 1, 1989), http://www.eeoc.gov/policy/docs/national_security_exemption.html ("[N]ational security requirements must be applied equally without regard to race, sex, color, religion or national origin."); *see also* Jones v. Ashcroft, 321 F. Supp. 2d 1, 8 (D.D.C. 2004) (indicating that the

national security exception did not apply because there was no evidence that the government considered national security as a basis for its decision not to hire the plaintiff at any time before the commencement of the plaintiff's lawsuit, where the plaintiff had not been forthright about an arrest).

[155] Federal contractor employees may challenge the denial of a security clearance with the EEOC or the Office of Contract Compliance Programs when the denial is based on race, color, religion, sex, or national origin. *See generally* Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965 Comp.).

[156] 42 U.S.C. § 2000e-16(a).

[157] Robert H. Shriver, III, *Written Testimony of Robert H. Shriver, III, Senior Policy Counsel for the U.S. Office of Personnel Management*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/7-26-11/shriver.cfm (last visited April 23, 2012) (stating that "with just a few exceptions, criminal convictions do not automatically disqualify an applicant from employment in the competitive civil service"); *see also* REENTRY MYTHBUSTER! ON FEDERAL HIRING POLICIES, *supra* note 16 ("The Federal Government employs people with criminal records with the requisite knowledge, skills and abilities."). *But see supra* note 110, listing several federal statutes that prohibit individuals with certain convictions from working as federal law enforcement officers or port workers, or with private prisoner transport companies.

[158] OPM has jurisdiction to establish the federal government's suitability policy for competitive service positions, certain excepted service positions, and career appointments in the Senior Executive Service. *See* 5 C.F.R. §§ 731.101(a) (stating that OPM has been directed "to examine 'suitability' for competitive Federal employment"), 731.101(b) (defining the covered positions within OPM's jurisdiction); *see also* Shriver, *supra* note 157.

OPM is also responsible for establishing standards that help agencies decide whether to grant their employees and contractor personnel long-term access to federal facilities and information systems. *See* Homeland Security Presidential Directive 12: Policy for a Common Identification Standard for Federal Employees and Contractors, 2 PUB. PAPERS 1765 (Aug. 27, 2004) ("establishing a mandatory, Government-wide standard for secure and reliable forms of identification issued by the Federal Government to its employees and contractors [including contractor employees]"); *see also* Exec. Order No. 13,467, § 2.3(b), 3 C.F.R. 196 (2009 Comp.) ("[T]he Director of [OPM] . . . [is] responsible for developing and implementing uniform and consistent policies and procedures to ensure the effective, efficient, and timely completion of investigations and adjudications relating to determinations of suitability and eligibility for logical and physical access."); *see generally* Shriver, *supra* note 157.

[159] 5 C.F.R. § 731.101(a).

[160] *See* 5 C.F.R. §§ 731.205(a) (stating that if an agency finds applicants unsuitable based on the factors listed in 5 C.F.R. § 731.202, it may, in its discretion, bar those applicants from federal employment for three years), § 731.202(b) (disqualifying factors from federal civilian

employment may include: misconduct or negligence in employment; material, intentional false statement, or deception or fraud in examination or appointment; refusal to furnish testimony as required by 5 C.F.R. § 5.4; alcohol abuse without evidence of substantial rehabilitation; illegal use of narcotics, drugs, or other controlled substances; and knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force).

[161] *See id.* § 731.202(c).

[162] *Id.*

[163] *See generally* Shriver, *supra* note 157. *See also* REENTRY MYTHBUSTER! ON FEDERAL HIRING POLICIES, *supra* note 16 ("Consistent with Merit System Principles, [federal] agencies [and departments] are required to consider people with criminal records when filling positions if they are the best candidates and can comply with requirements.").

[164] *See generally EEOC Informal Discussion Letter* (March 19, 2007), http://www.eeoc.gov/eeoc/foia/letters/2007/arrest_and_conviction_records.html#N1 (discussing the EEOC's concerns with changes to OPM's suitability regulations at 5 CFR part 731).

[165] *See* Stephen Saltzburg, *Transcript of 7-26-11 Meeting*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#saltzburg (last visited April 23, 2012) (discussing the findings from the American Bar Association's (ABA) Collateral Consequences of Conviction Project, which found that in 17 states that it has examined to date, 84% of the collateral sanctions against ex-offenders relate to employment). For more information about the ABA's project, visit: Janet Levine, *ABA Criminal Justice Section Collateral Consequences Project*, INST. FOR SURVEY RESEARCH, TEMPLE UNIV., http://isrweb.isr.temple.edu/projects/accproject/ (last visited April 20, 2012). In April 2011, Attorney General Holder sent a letter to every state Attorney General, with a copy to every Governor, asking them to "evaluate the collateral consequences" of criminal convictions in their state, such as employment-related restrictions on ex-offenders, and "to determine whether those [consequences] that impose burdens on individuals . . . without increasing public safety should be eliminated." Letter from Eric H. Holder, Jr., Att'y Gen., Dep't of Justice, to state Attorney Generals and Governors (April 18, 2011), http://www.nationalreentryresourcecenter.org/documents/0000/1088/Reentry_Council_AG_Letter.pdf.

Most states regulate occupations that involve responsibility for vulnerable citizens such as the elderly and children. *See* STATE CRIMINAL HISTORY, *supra* note 37, at 10 ("Fifty states and the District of Columbia reported that criminal history background checks are legally required" for several occupations such as nurses/elder caregivers, daycare providers, caregivers in residential facilities, school teachers, and nonteaching school employees). For example, Hawaii's Department of Human Services may deny applicants licensing privileges to operate a childcare facility if: (1) the applicant or any prospective employee has been convicted of a crime other than a minor traffic violation or has been confirmed to have abused or neglected a child or threatened harm; and (2) the department finds that the criminal history or child abuse record of

the applicant or prospective employee may pose a risk to the health, safety, or well-being of children. *See* HAW. REV. STAT. § 346-154(e)(1)–(2).

166 42 U.S.C. § 2000e-7.

167 *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 210 (1991) (noting that "[i]f state tort law furthers discrimination in the workplace and prevents employers from hiring women who are capable of manufacturing the product as efficiently as men, then it will impede the accomplishment of Congress' goals in enacting Title VII"); Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 380 (2d Cir. 2006) (affirming the district court's conclusion that "the mandates of state law are no defense to Title VII liability").

U.S. Equal Employment Opportunity Commission

		Number
EEOC	***NOTICE***	915.003
		Date
		June 25, 2015

SUBJECT: EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues

PURPOSE: This transmittal covers the issuance of the Enforcement Guidance on Pregnancy Discrimination and Related Issues. This document provides guidance regarding the Pregnancy Discrimination Act and the Americans with Disabilities Act as they apply to pregnant workers.

EFFECTIVE DATE: Upon receipt.

EXPIRATION DATE: This Notice will remain in effect until rescinded or superseded.

OBSOLETE DATA: This Enforcement Guidance supersedes the Enforcement Guidance on Pregnancy Discrimination and Related Issues dated July 14, 2014. Most of this revised guidance remains the same as the prior version, but changes have been made to Sections I.B.1 (Disparate Treatment), and I.C.1 (Light Duty) in response to the Supreme Court's decision in *Young v. United Parcel Serv., Inc.*, --- U.S. ---, 135 S.Ct. 1338 (2015). Section I A.5 of the July 14, 2014 guidance has also been deleted in response to *Young*.

ORIGINATOR: Office of Legal Counsel.

Jenny R. Yang
Chair

ENFORCEMENT GUIDANCE:
PREGNANCY DISCRIMINATION AND RELATED ISSUES

Table of Contents

PREGNANCY DISCRIMINATION AND RELATED ISSUES

OVERVIEW OF STATUTORY PROTECTIONS

Pregnancy Discrimination Act

Congress enacted the Pregnancy Discrimination Act (PDA) in 1978 to make clear that discrimination based on pregnancy, childbirth, or related medical conditions is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 (Title VII).[1] Thus, the PDA extended to pregnancy Title VII's goals of "'[achieving] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.'"[2]

By enacting the PDA, Congress sought to make clear that "[p]regnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working."[3] The PDA requires that pregnant employees be treated the same as non-pregnant employees who are similar in their ability or inability to work.[4]

Fundamental PDA Requirements

1) An employer[5] may not discriminate against an employee[6] on the basis of pregnancy, childbirth, or related medical conditions; and

2) Women affected by pregnancy, childbirth, or related medical conditions must be treated the same as other persons not so affected but similar in their ability or inability to work.

In the years since the PDA was enacted, charges alleging pregnancy discrimination have increased substantially. In fiscal year (FY) 1997, more than 3,900 such charges were filed with the Equal Employment Opportunity Commission (EEOC) and state and local Fair Employment Practices Agencies, but in FY 2013, 5,342 charges were filed.

In 2008, a study by the National Partnership for Women & Families found that pregnancy discrimination complaints have risen at a faster rate than the steady influx of women into the workplace.[7] This suggests that pregnant workers continue to face inequality in the workplace.[8] Moreover, the study found that much of the increase in these complaints has been fueled by an increase in charges filed by women of color. Specifically, pregnancy discrimination claims filed by women of color increased by 76% from FY 1996 to FY 2005, while pregnancy discrimination claims overall increased 25% during the same time period.

The issues most commonly alleged in pregnancy discrimination charges have remained relatively consistent over the past decade. The majority of charges include allegations of discharge based on pregnancy. Other charges include allegations of disparate terms and conditions of employment based on pregnancy, such as closer scrutiny and harsher discipline than that administered to non-pregnant employees, suspensions pending receipt of medical releases, medical examinations that are not job related or consistent with business necessity, and forced leave.[9]

Americans with Disabilities Act (ADA)

Title I of the ADA protects individuals from employment discrimination on the basis of disability, limits when and how an employer may make medical inquiries or require medical examinations of employees and applicants for employment, and requires that an employer provide reasonable accommodation for an employee or applicant with a disability.[10] While pregnancy itself is not a disability, pregnant workers and job applicants are not excluded from the protections of the ADA. Changes to the definition of the term "disability" resulting from enactment of the ADA Amendments Act of 2008 (ADAAA) make it much easier for pregnant workers with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADA.[11] Reasonable accommodations available to pregnant workers with impairments that constitute disabilities might include allowing a pregnant worker to take more frequent breaks, to keep a water bottle at a work station, or to use a stool; altering how job functions are performed; or providing a temporary assignment to a light duty position.

Part I of this document provides guidance on Title VII's prohibition against pregnancy discrimination. It describes the individuals to whom the PDA applies, the ways in which violations of the PDA can be demonstrated, and the PDA's requirement that pregnant employees be treated the same as employees who are not pregnant but who are similar in their ability or inability to work (with a particular emphasis on light duty and leave policies). Part II addresses the impact of the ADA's expanded definition of "disability" on employees with pregnancy-related impairments, particularly when employees with pregnancy-related impairments would be entitled to reasonable accommodation, and describes some specific accommodations that may help pregnant workers. Part III briefly describes other requirements unrelated to the PDA and the ADA that affect pregnant workers. Part IV contains best practices for employers.

I. THE PREGNANCY DISCRIMINATION ACT

A. PDA Coverage

In passing the PDA, Congress intended to prohibit discrimination based on "the whole range of matters concerning the childbearing process,"[12] and gave women "the right . . . to be financially and legally protected before, during, and after [their] pregnancies."[13] Thus, the PDA covers all aspects of pregnancy and all aspects of employment, including hiring, firing, promotion, health insurance benefits, and treatment in comparison with non-pregnant persons similar in their ability or inability to work.

Extent of PDA Coverage

Title VII, as amended by the PDA, prohibits discrimination based on the following:

- **Current Pregnancy**
- **Past Pregnancy**
- **Potential or Intended Pregnancy**
- **Medical Conditions Related to Pregnancy or Childbirth**

1. Current Pregnancy

The most familiar form of pregnancy discrimination is discrimination against an employee based on her current pregnancy. Such discrimination occurs when an employer refuses to hire, fires, or takes any other adverse action against a woman because she is pregnant, without regard to her ability to perform the duties of the job.[14]

a. Employer's Knowledge of Pregnancy

If those responsible for taking the adverse action did not know the employee was pregnant, there can be no finding of intentional pregnancy discrimination.[15] However, even if the employee did not inform the decision makers about her pregnancy before they undertook the adverse action, they nevertheless might have been aware of it through, for example, office gossip or because the pregnancy was obvious. Since the obviousness of pregnancy "varies, both temporally and as between different affected individuals,"[16] an issue may arise as to whether the employer knew of the pregnancy.[17]

EXAMPLE 1
Knowledge of Pregnancy

When Germaine learned she was pregnant, she decided not to inform management at that time because of concern that such an announcement would affect her chances of receiving a bonus at the upcoming anniversary of her employment. When she was three months pregnant, Germaine's supervisor told her that she would not receive a bonus. Because the pregnancy was not obvious and the evidence indicated that the decision makers did not know of Germaine's pregnancy at the time of the bonus decision, there is no reasonable cause to believe that Germaine was subjected to pregnancy discrimination.

b. Stereotypes and Assumptions

Adverse treatment of pregnant women often arises from stereotypes and assumptions about their job capabilities and commitment to the job. For example, an employer might refuse to hire a pregnant woman based on an assumption that she will have attendance problems or leave her job after the child is born.

Employment decisions based on such stereotypes or assumptions violate Title VII.[18] As the Supreme Court has explained, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[19] Such decisions are unlawful even when an employer relies on stereotypes unconsciously or with a belief that it is acting in the employee's best interest.

EXAMPLE 2
Stereotypes and Assumptions

Three months after Maria told her supervisor that she was pregnant, she was absent several days due to an illness unrelated to her pregnancy. Soon after, pregnancy complications kept her out of the office for two additional days. When Maria returned to work, her supervisor said her body was trying to tell her something and that he needed someone who would not have attendance problems. The following day, Maria was discharged. The investigation reveals that Maria's attendance record was comparable to, or better than, that of non-pregnant co-workers who remained employed. It is reasonable to conclude that her discharge was attributable to the supervisor's stereotypes about pregnant workers' attendance rather than to Maria's actual attendance record and, therefore, was unlawful.[20]

EXAMPLE 3
Stereotypes and Assumptions

Darlene, who is visibly pregnant, applies for a job as office administrator at a campground. The interviewer tells her that July and August are the busiest months of the year and asks whether she will be available to work during that time period. Darlene replies that she is due to deliver in late September and intends to work right up to the delivery date. The interviewer explains that the campground cannot risk that she will decide to stop working earlier and, therefore, will not hire her. The campground's refusal to hire Darlene on this basis constitutes pregnancy discrimination.

2. Past Pregnancy

An employee may claim she was subjected to discrimination based on past pregnancy, childbirth, or related medical conditions. The language of the PDA does not restrict claims to those based on current pregnancy. As

one court stated, "It would make little sense to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place."[21]

A causal connection between a claimant's past pregnancy and the challenged action more likely will be found if there is close timing between the two.[22] For example, if an employee was discharged during her pregnancy-related medical leave (i.e., leave provided for pregnancy or recovery from pregnancy) or her parental leave (i.e., leave provided to bond with and/or care for a newborn or adopted child), and if the employer's explanation for the discharge is not believable, a violation of Title VII may be found.[23]

EXAMPLE 4
Unlawful Discharge During Pregnancy or Parental Leave

Shortly after Teresa informed her supervisor of her pregnancy, he met with her to discuss alleged performance problems. Teresa had consistently received outstanding performance reviews during her eight years of employment with the company. However, the supervisor now for the first time accused Teresa of having a bad attitude and providing poor service to clients. Two weeks after Teresa began her pregnancy-related medical leave, her employer discharged her for poor performance. The employer produced no evidence of customer complaints or any other documentation of poor performance. The evidence of outstanding performance reviews preceding notice to the employer of Teresa's pregnancy, the lack of documentation of subsequent poor performance, and the timing of the discharge support a finding of unlawful pregnancy discrimination.

A lengthy time difference between a claimant's pregnancy and the challenged action will not necessarily foreclose a finding of pregnancy discrimination if there is evidence establishing that the pregnancy, childbirth, or related medical conditions motivated that action.[24] It may be difficult to determine whether adverse treatment following an employee's pregnancy was based on the pregnancy as opposed to the employee's new childcare responsibilities. If the challenged action was due to the employee's caregiving responsibilities, a violation of Title VII may be established where there is evidence that the employee's gender or another protected characteristic motivated the employer's action.[25]

3. Potential or Intended Pregnancy

The Supreme Court has held that Title VII "prohibit[s] an employer from discriminating against a woman because of her capacity to become pregnant."[26] Thus, women must not be discriminated against with regard to job opportunities or benefits because they might get pregnant.

a. Discrimination Based on Reproductive Risk

An employer's concern about risks to the employee or her fetus will rarely, if ever, justify sex-specific job restrictions for a woman with childbearing capacity.[27] This principle led the Supreme Court to conclude that a battery manufacturing company violated Title VII by broadly excluding all fertile women — but not similarly excluding fertile men — from jobs in which lead levels were defined as excessive and which thereby potentially posed hazards to unborn children.[28]

The policy created a facial classification based on sex, according to the Court, since it denied fertile women a choice given to fertile men "as to whether they wish[ed] to risk their reproductive health for a particular job."[29] Accordingly, the policy could only be justified if the employer proved that female infertility was a bona fide occupational qualification (BFOQ).[30] The Court explained that, "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents."[31]

b. Discrimination Based on Intention to Become Pregnant

Title VII similarly prohibits an employer from discriminating against an employee because of her intention to become pregnant.[32] As one court has stated, "Discrimination against an employee because she intends to, is trying to, or simply has the potential to become pregnant is . . . illegal discrimination."[33] In addition, Title VII prohibits employers from treating men and women differently based on their family status or their intention to have children.

Because Title VII prohibits discrimination based on pregnancy, employers should not make inquiries into whether an applicant or employee intends to become pregnant. The EEOC will generally regard such an inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.[34]

EXAMPLE 5
Discrimination Based on Intention to Become Pregnant

Anne, a high-level executive who has a two-year-old son, told her manager she was trying to get pregnant. The manager reacted with displeasure, stating that the pregnancy might interfere with her job responsibilities. Two weeks later, Anne was demoted to a lower paid position with no supervisory responsibilities. In response to Anne's EEOC charge, the employer asserts it demoted Anne because of her inability to delegate tasks effectively. Anne's performance evaluations were consistently outstanding, with no mention of such a concern. The timing of the demotion, the manager's reaction to Anne's disclosure, and the documentary evidence refuting the employer's explanation make clear that the employer has engaged in unlawful discrimination.

c. Discrimination Based on Infertility Treatment

Employment decisions related to infertility treatments implicate Title VII under limited circumstances. Because surgical impregnation is intrinsically tied to a woman's childbearing capacity, an inference of unlawful sex discrimination may be raised if, for example, an employee is penalized for taking time off from work to undergo such a procedure.[35] In contrast, with respect to the exclusion of infertility from employer-provided health insurance, courts have generally held that exclusions of all infertility coverage for all employees is gender neutral and does not violate Title VII.[36] Title VII may be implicated by exclusions of particular treatments that apply only to one gender.[37]

d. Discrimination Based on Use of Contraception

Depending on the specific circumstances, employment decisions based on a female employee's use of contraceptives may constitute unlawful discrimination based on gender and/or pregnancy. Contraception is a means by which a woman can control her capacity to become pregnant, and, therefore, Title VII's prohibition of discrimination based on potential pregnancy necessarily includes a prohibition on discrimination related to a woman's use of contraceptives.[38] For example, an employer could not discharge a female employee from her job because she uses contraceptives.[39]

Employers can violate Title VII by providing health insurance that excludes coverage of prescription contraceptives, whether the contraceptives are prescribed for birth control or for medical purposes.[40] Because prescription contraceptives are available only for women, a health insurance plan facially discriminates against women on the basis of gender if it excludes prescription contraception but otherwise provides comprehensive coverage.[41] To comply with Title VII, an employer's health insurance plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy.[42] For example, if an employer's health insurance plan covers preventive care for medical conditions other than pregnancy, such as vaccinations, physical examinations, prescription drugs that prevent high blood pressure or to lower cholesterol levels, and/or preventive dental care, then prescription contraceptives also must be covered.

4. Medical Condition Related to Pregnancy or Childbirth

a. In General

Title VII prohibits discrimination based on pregnancy, childbirth, or a related medical condition. Thus, an employer may not discriminate against a woman with a medical condition relating to pregnancy or childbirth and must treat her the same as others who are similar in their ability or inability to work but are not affected by pregnancy, childbirth, or related medical conditions.[43]

EXAMPLE 6
Uniform Application of Leave Policy

> Sherry went on medical leave due to a pregnancy-related condition. The employer's policy provided four weeks of medical leave to employees who had worked less than a year. Sherry had worked for the employer for only six months and was discharged when she did not return to work after four weeks. Although Sherry claims the employer discharged her due to her pregnancy, the evidence showed that the employer applied its leave policy uniformly, regardless of medical condition or sex and, therefore, did not engage in unlawful disparate treatment.[44]

Title VII also requires that an employer provide the same benefits for pregnancy-related medical conditions as it provides for other medical conditions.[45] Courts have held that Title VII's prohibition of discrimination based on sex and pregnancy does not apply to employment decisions based on costs associated with the medical care of employees' offspring.[46] However, taking an adverse action, such as terminating an employee to avoid insurance costs arising from the pregnancy-related impairment of the employee or the impairment of the employee's child, would violate Title I of the ADA if the employee's or child's impairment constitutes a "disability" within the meaning of the ADA.[47] It also might violate Title II of the Genetic Information Nondiscrimination Act (GINA)[48] and/or the Employee Retirement Income Security Act (ERISA).[49]

b. Discrimination Based on Lactation and Breastfeeding

There are various circumstances in which discrimination against a female employee who is lactating or breastfeeding can implicate Title VII. Lactation, the postpartum production of milk, is a physiological process triggered by hormones.[50] Because lactation is a pregnancy-related medical condition, less favorable treatment of a lactating employee may raise an inference of unlawful discrimination.[51] For example, a manager's statement that an employee was demoted because of her breastfeeding schedule would raise an inference that the demotion was unlawfully based on the pregnancy-related medical condition of lactation.[52]

To continue producing an adequate milk supply and to avoid painful complications associated with delays in expressing milk,[53] a nursing mother will typically need to breastfeed or express breast milk using a pump two or three times over the duration of an eight-hour workday.[54] An employee must have the same freedom to address such lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions. For example, if an employer allows employees to change their schedules or use sick leave for routine doctor appointments and to address non-incapacitating medical conditions,[55] then it must allow female employees to change their schedules or use sick leave for lactation-related needs under similar circumstances.

Finally, because only women lactate, a practice that singles out lactation or breastfeeding for less favorable treatment affects only women and therefore is facially sex-based. For example, it would violate Title VII for an employer to freely permit employees to use break time for personal reasons except to express breast milk.[56]

Aside from protections under Title VII, female employees who are breastfeeding also have rights under other laws, including a provision of the Patient Protection and Affordable Care Act that requires employers to provide reasonable break time and a private place for hourly employees who are breastfeeding to express milk.[57] For more information, see Section III C., *infra*.

c. Abortion

Title VII protects women from being fired for having an abortion or contemplating having an abortion.[58] However, Title VII makes clear that an employer that offers health insurance is not required to pay for coverage of abortion except where the life of the mother would be endangered if the fetus were carried to term or medical complications have arisen from an abortion.[59] The statute also makes clear that, although not required to do so, an employer is permitted to provide health insurance coverage for abortion.[60] Title VII would similarly prohibit adverse employment actions against an employee based on her decision not to have an abortion. For example, it would be unlawful for a manager to pressure an employee to have an abortion, or not to have an abortion, in order to retain her job, get better assignments, or stay on a path for advancement.[61]

B. Evaluating PDA-Covered Employment Decisions

Pregnancy discrimination may take the form of disparate treatment (pregnancy, childbirth, or a related medical condition is a motivating factor in an adverse employment action) or disparate impact (a neutral policy or practice has a significant negative impact on women affected by pregnancy, childbirth, or a related medical condition, and either the policy or practice is not job related and consistent with business necessity or there is a less discriminatory alternative and the employer has refused to adopt it).

1. Disparate Treatment

The PDA defines discrimination because of sex to include discrimination because of or on the basis of pregnancy. As with other claims of discrimination under Title VII, an employer will be found to have discriminated on the basis of pregnancy if an employee's pregnancy, childbirth, or related medical condition was all or part of the motivation for an employment decision. Intentional discrimination under the PDA can be proven using any of the types of evidence used in other sex discrimination cases. Discriminatory motive may be established directly, or it can be inferred from the surrounding facts and circumstances.

The PDA further provides that discrimination on the basis of pregnancy includes failure to treat women affected by pregnancy "the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work." Employer policies that do not facially discriminate on the basis of pregnancy may nonetheless violate this provision of the PDA where they impose significant burdens on pregnant employees that cannot be supported by a sufficiently strong justification.[62]

As with any other charge, investigators faced with a charge alleging disparate treatment based on pregnancy, childbirth, or a related medical condition should examine the totality of evidence to determine whether there is reasonable cause to believe the particular challenged action was unlawfully discriminatory. All evidence should be examined in context, and the presence or absence of any particular kind of evidence is not dispositive.

Evidence indicating disparate treatment based on pregnancy, childbirth, or related medical conditions includes the following:

- An explicit policy[63] or a statement by a decision maker or someone who influenced the challenged decision that on its face demonstrates pregnancy bias and is linked to the challenged action.
  - In *Deneen v. Northwest Airlines, Inc.*,[64] a manager stated the plaintiff would not be rehired "because of her pregnancy complication." This statement directly proved pregnancy discrimination.[65]
- Close timing between the challenged action and the employer's knowledge of the employee's pregnancy, childbirth, or related medical condition.
  - In *Asmo v. Keane, Inc.,*[66] a two-month period between the time the employer learned of the plaintiff's pregnancy and the time it decided to discharge her raised an inference that the plaintiff's pregnancy and discharge were causally linked.[67]
- More favorable treatment of employees of either sex[68] who are not affected by pregnancy, childbirth, or related medical conditions but are similar in their ability or inability to work.
  - In *Wallace v. Methodist Hospital System*,[69] the employer asserted that it discharged the plaintiff,a pregnant nurse, in part because she performed a medical procedure without a physician's knowledge or consent. The plaintiff produced evidence that this reason was pretextual by showing that the employer merely reprimanded a non-pregnant worker for nearly identical misconduct.[70]
- Evidence casting doubt on the credibility of the employer's explanation for the challenged action.
  - In *Nelson v. Wittern Group*,[71] the defendant asserted it fired the plaintiff not because of her pregnancy but because overstaffing required elimination of her position. The court found a reasonable jury could conclude this reason was pretextual where there was evidence that the plaintiff and her co-workers had plenty of work to do, and the plaintiff's supervisor assured her prior to her parental leave that she would not need to worry about having a job when she got back. [72]
- Evidence that the employer violated or misapplied its own policy in undertaking the challenged action.
  - In *Cumpiano v. Banco Santander Puerto Rico*,[73] the court affirmed a finding of pregnancy discrimination where there was evidence that the employer did not enforce the conduct policy on which it relied to justify the discharge until the plaintiff became pregnant.[74]
- Evidence of an employer policy or practice that, although not facially discriminatory, significantly burdens pregnant employees and cannot be supported by a sufficiently strong justification.
  - In *Young v. United Parcel Serv., Inc.*,[75] the Court said that evidence of an employer policy or practice of providing light duty to a large percentage of nonpregnant employees while failing to provide light duty to a large percentage of pregnant workers might establish that the policy or practice significantly burdens pregnant employees. If the employer's reasons for its actions are not sufficiently strong to justify the burden, that will "give rise to an inference of intentional discrimination." [76]

a. Harassment

Title VII, as amended by the PDA, requires employers to provide a work environment free of harassment based on pregnancy, childbirth, or related medical conditions. An employer's failure to do so violates the statute. Liability can result from the conduct of a supervisor, co-workers, or non-employees such as customers or business partners over whom the employer has some control.[77]

Examples of pregnancy-based harassment include unwelcome and offensive jokes or name-calling, physical assaults or threats, intimidation, ridicule, insults, offensive objects or pictures, and interference with work performance motivated by pregnancy, childbirth, or related medical conditions such as breastfeeding. Such motivation is often evidenced by the content of the remarks but, even if pregnancy is not explicitly referenced, Title VII is implicated if there is other evidence that pregnancy motivated the conduct. Of course, as with harassment on any other basis, the conduct is unlawful only if the employee perceives it to be hostile or abusive and if it is sufficiently severe or pervasive to alter the terms and conditions of employment from the perspective of a reasonable person in the employee's position.[78]

Harassment must be analyzed on a case-by-case basis, by looking at all the circumstances in context. Relevant factors in evaluating whether harassment creates a work environment sufficiently hostile to violate Title VII may include any of the following (no single factor is determinative):

- The frequency of the discriminatory conduct;
- The severity of the conduct;
- Whether the conduct was physically threatening or humiliating;
- Whether the conduct unreasonably interfered with the employee's work performance; and
- The context in which the conduct occurred, as well as any other relevant factor.

The more severe the harassment, the less pervasive it needs to be, and vice versa. Accordingly, unless the harassment is quite severe, a single incident or isolated incidents of offensive conduct or remarks generally do not create an unlawful hostile working environment. Pregnancy-based comments or other acts that are not sufficiently severe standing alone may become actionable when repeated, although there is no threshold number of harassing incidents that gives rise to liability.

EXAMPLE 7
Hostile Environment Harassment

Binah, a black woman from Nigeria, claims that when she was visibly pregnant with her second child, her supervisors increased her workload and shortened her deadlines so that she could not complete her assignments, ostracized her, repeatedly excluded her from meetings to which she should have been invited, reprimanded her for failing to show up for work due to snow when others were not reprimanded, and subjected her to profanity. Binah asserts the supervisors subjected her to this harassment because of her pregnancy status, race, and national origin. A violation of Title VII would be found if the evidence shows that the actions were causally linked to Binah's pregnancy status, race, and/or national origin.[79]

b. Workers with Caregiving Responsibilities

After an employee's child is born, an employer might treat the employee less favorably not because of the prior pregnancy, but because of the worker's caregiving responsibilities. This situation would fall outside the parameters of the PDA. However, as explained in the Commission's Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007),[80] although caregiver status is not a prohibited basis under the federal equal employment opportunity statutes, discrimination against workers with caregiving responsibilities may be actionable when an employer discriminates based on sex or another characteristic protected by federal law. For example, an employer violates Title VII by denying job opportunities to women -- but not men -- with young children, or by reassigning a woman recently returned from pregnancy-related medical leave or parental leave to less desirable work based on the assumption that, as a new mother, she will be less committed to her job. An employer also violates Title VII by denying a male caregiver leave to care for an infant but granting such leave to a female caregiver, or by discriminating against a Latina working mother based on stereotypes about working mothers and hostility towards Latinos generally.[81] An employer violates the ADA by treating a worker less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily because the worker also cares for a child with a disability.[82]

c. Bona Fide Occupational Qualification (BFOQ) Defense

In some instances, employers may claim that excluding pregnant or fertile women from certain jobs is lawful because non-pregnancy is a bona fide occupational qualification (BFOQ).[83] The defense, however, is an extremely narrow exception to the general prohibition of discrimination on the basis of sex. An employer who seeks to prove a BFOQ must show that pregnancy actually interferes with a female employee's ability to perform the job,[84] and the defense must be based on objective, verifiable skills required by the job rather than vague, subjective standards.[85]

Employers rarely have been able to establish a pregnancy-based BFOQ. The defense cannot be based on fears of danger to the employee or her fetus, fears of potential tort liability, assumptions and stereotypes about the employment characteristics of pregnant women such as their turnover rate, or customer preference.[86]

Without showing a BFOQ, an employer may not require that a pregnant worker take leave until her child is born or for a predetermined time thereafter, provided she is able to perform her job.[87]

2. Disparate Impact

Title VII is violated if a facially neutral policy has a disproportionate adverse effect on women affected by pregnancy, childbirth, or related medical conditions and the employer cannot show that the policy is job related for the position in question and consistent with business necessity.[88] Proving disparate impact ordinarily requires a statistical showing that a specific employment practice has a discriminatory effect on workers in the protected group. However, statistical evidence might not be required if it could be shown that all or substantially all pregnant women would be negatively affected by the challenged policy.[89]

The employer can prove business necessity by showing that the requirement is "necessary to safe and efficient job performance."[90] If the employer makes this showing, a violation still can be found if there is a less discriminatory alternative that meets the business need and the employer refuses to adopt it.[91] The disparate impact provisions of Title VII have been used by pregnant plaintiffs to challenge, for example, weight lifting requirements,[92] light duty limitations,[93] and restrictive leave policies.[94]

EXAMPLE 8
Weight Lifting Requirement

Carol applied for a warehouse job. At the interview, the hiring official told her the job requirements and asked if she would be able to meet them. One of the requirements was the ability to lift up to 50 pounds. Carol said that she could not meet the lifting requirement because she was pregnant but otherwise would be able to meet the job requirements. She was not hired. The employer asserts that it did not select Carol because she could not meet the lifting requirement and produces evidence that it treats all applicants the same with regard to this hiring criterion. If the evidence shows that the lifting requirement disproportionately excludes pregnant applicants, the employer would have to prove that the requirement is job related for the position in question and consistent with business necessity.[95]

C. Equal Access to Benefits

An employer is required under Title VII to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other employees similar in their ability or inability to work, whether by providing modified tasks, alternative assignments, or fringe benefits such as disability leave and leave without pay.[96] In addition to leave, the term "fringe benefits" includes, for example, medical benefits and retirement benefits.

1. Light Duty

a. Disparate Treatment

i. Evidence of Pregnancy-Related Animus

If there is direct evidence that pregnancy-related animus motivated an employer's decision to deny a pregnant employee light duty, it is not necessary for the employee to show that another employee was treated more favorably than she was.

EXAMPLE 9
Evidence of Pregnancy-Related Animus Motivating Denial of Light Duty

An employee requests light duty because of her pregnancy. The employee's supervisor is aware that the employee is pregnant and knows that there are light duty positions available that the pregnant employee could perform.

Nevertheless, the supervisor denies the request, telling the employee that having a pregnant worker in the workplace is just too much of a liability for the company. It is not necessary in this instance that the pregnant worker produce evidence of a non-pregnant worker similar in his or her ability or inability to work who was given a light duty position.

ii. Proof of Discrimination Through *McDonnell Douglas* Burden-Shifting Framework

A plaintiff need not resort to the burden shifting analysis set out in *McDonnell Douglas Corp. v. Green*[97] in order to establish an intentional violation of the PDA where there is direct evidence that pregnancy-related animus motivated the denial of light duty. Absent such evidence, however, a plaintiff must produce evidence that a similarly situated worker was treated differently or more favorably than the pregnant worker to establish a prima facie case of discrimination.

According to the Supreme Court's decision in *Young v. United Parcel Serv., Inc.*,[98] a PDA plaintiff may make out a prima facie case of discrimination by showing "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[99] As the Court noted, "[t]he burden of making this showing is not 'onerous.'"[100] For purposes of the prima facie case, the plaintiff does not need to point to an employee that is "similar in all but the protected ways."[101] For example, the plaintiff could satisfy her prima facie burden by identifying an employee who was similar in his or her ability or inability to work due to an impairment (e.g., an employee with a lifting restriction) and who was provided an accommodation that the pregnant employee sought.

Once the employee has established a prima facie case, the employer must articulate a legitimate, non-discriminatory reason for treating the pregnant worker differently than a non-pregnant worker similar in his or her ability or inability to work. "That reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates."[102]

Even if an employer can assert a legitimate non-discriminatory reason for the different treatment, the pregnant worker may still show that the reason is pretextual. *Young* explains that

> [t]he plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather-when considered along with the burden imposed-give rise to an inference of intentional discrimination.[103]

An employer's policy of accommodating a large percentage of nonpregnant employees with limitations while denying accommodations to a large percentage of pregnant employees may result in a significant burden on pregnant employees.[104] For example, in *Young* the Court noted that a policy of accommodating most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations would present a genuine issue of material fact.[105]

b. Disparate Impact

A policy of restricting light duty assignments may also have a disparate impact on pregnant workers.[106] If impact is established, the employer must prove that its policy was job related and consistent with business necessity.[107]

EXAMPLE 10
Light Duty Policy - Disparate Impact

Leslie, who works as a police officer, requested light duty when she was six months pregnant and was advised by her physician not to push or lift over 20 pounds. The request was not granted because the police department had a policy limiting light duty to employees injured on the job. Therefore, Leslie was required to use her accumulated leave for the period during which she could not perform her normal patrol duties. In her subsequent lawsuit, Leslie proved that since substantially all employees denied light duty were pregnant women, the police department's light duty policy had an adverse impact on pregnant officers. The police department claimed that state law required it to pay officers

injured on the job regardless of whether they worked and that the light duty policy enabled taxpayers to receive some benefit from the salaries paid to those officers. However, there was evidence that an officer not injured on the job was assigned to light duty. This evidence contradicted the police department's claim that it truly had a business necessity for its policy.[108]

This policy may also be challenged on the ground that it impermissibly distinguishes between pregnant and non-pregnant workers who are similar in their ability or inability to work based on the cause of their limitations.

2. Leave

a. Disparate Treatment[109]

An employer may not compel an employee to take leave because she is pregnant, as long as she is able to perform her job. Such an action violates Title VII even if the employer believes it is acting in the employee's best interest.[110]

EXAMPLE 11
Forced Leave

Lena worked for a janitorial service that provided after hours cleaning in office spaces. When she advised the site foreman that she was pregnant, the foreman told her that she would no longer be able to work since she could harm herself with the bending and pushing required in the daily tasks. She explained that she felt fine and that her doctor had not mentioned that she should change any of her current activities, including work, and did not indicate any particular concern that she would have to stop working. The foreman placed Lena immediately on unpaid leave for the duration of her pregnancy. Lena's leave was exhausted before she gave birth and she was ultimately discharged from her job. Lena's discharge was due to stereotypes about pregnancy.[111]

A policy requiring workers to take leave during pregnancy or excluding all pregnant or fertile women from a job is illegal except in the unlikely event that an employer can prove that non-pregnancy or non-fertility is a bona fide occupational qualification (BFOQ).[112] To establish a BFOQ, the employer must prove that the challenged qualification is "reasonably necessary to the normal operation of [the] particular business or enterprise."[113]

While employers may not force pregnant workers to take leave, they must allow women with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work.[114] Thus, an employer could not fire a pregnant employee for being absent if her absence fell within the provisions of the employer's sick leave policy.[115] An employer may not require employees disabled by pregnancy or related medical conditions to exhaust their sick leave before using other types of accrued leave if it does not impose the same requirement on employees who seek leave for other medical conditions. Similarly, an employer may not impose a shorter maximum period for pregnancy-related leave than for other types of medical or short-term disability leave. Title VII does not, however, require an employer to grant pregnancy-related medical leave or parental leave or to treat pregnancy-related absences more favorably than absences for other medical conditions.[116]

EXAMPLE 12
Pregnancy-Related Medical Leave - Disparate Treatment

Jill submitted a request for two months of leave due to pregnancy- related medical complications. The employer denied her request, although its sick leave policy permitted such leave to be granted. Jill's supervisor had recommended that the company deny the request, arguing that her absence would present staffing problems and noting that this request could turn into additional leave requests if her medical condition did not improve. Jill was unable to report to work due to her medical condition, and was discharged. The evidence shows that the alleged staffing problems were not significant and that the employer had approved requests by non-pregnant employees for extended sick leave under similar circumstances. Moreover, the employer's concern that Jill would likely request additional leave was based on a stereotypical assumption about pregnant workers.[117] This evidence is

sufficient to establish that the employer's explanation for its difference in treatment of Jill and her non-pregnant co-workers is a pretext for pregnancy discrimination.[118]

EXAMPLE 13
Medical Leave Policy -- No Disparate Treatment

Michelle requests two months of leave due to pregnancy-related medical complications. Her employer denies the request because its policy providing paid medical leave requires employees to be employed at least 90 days to be eligible for such leave. Michelle had only been employed for 65 days at the time of her request. There was no evidence that non-pregnant employees with less than 90 days of service were provided medical leave. Because the leave decision was made in accordance with the eligibility rules, and not because of Michelle's pregnancy, there is no evidence of pregnancy discrimination under a disparate treatment analysis.[119] For the same reason, if the employer had granted leave under the Family and Medical Leave Act to another employee with a serious health condition, it would not be required to provide a pregnant worker with the same leave if she had not attained eligibility by working with the employer for the requisite number of hours during the preceding 12 months.[120]

b. Disparate Impact

A policy that restricts leave might disproportionately impact pregnant women. For example, a 10-day ceiling on sick leave and a policy denying sick leave during the first year of employment have been found to disparately impact pregnant women.[121]

If a claimant establishes that such a policy has a disparate impact, an employer must prove that the policy is job related and consistent with business necessity. An employer must have supporting evidence to justify its policy. Business necessity cannot be established by a mere articulation of reasons. Thus, one court refused to find business necessity where the employer argued that it provided no leave to employees who had worked less than one year because it had a high turnover rate and wanted to allow leave only to those who had demonstrated "staying power," but provided no supporting evidence.[122] The court also found that an alternative policy denying leave for a shorter time period might have served the same business goal, since the evidence showed that most of the first year turnover occurred during the first three months of employment.[123]

3. Parental Leave

For purposes of determining Title VII's requirements, employers should carefully distinguish between leave related to any physical limitations imposed by pregnancy or childbirth (described in this document as pregnancy-related medical leave) and leave for purposes of bonding with a child and/or providing care for a child (described in this document as parental leave).

Leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions.[124] However, parental leave must be provided to similarly situated men and women on the same terms.[125] If, for example, an employer extends leave to new mothers beyond the period of recuperation from childbirth (e.g. to provide the mothers time to bond with and/or care for the baby), it cannot lawfully fail to provide an equivalent amount of leave to new fathers for the same purpose.

EXAMPLE 14
Pregnancy-Related Medical Leave and Parental Leave Policy - No Disparate Treatment

An employer offers pregnant employees up to 10 weeks of paid pregnancy-related medical leave for pregnancy and childbirth as part of its short-term disability insurance. The employer also offers new parents, whether male or female, six weeks of parental leave. A male employee alleges that this policy is discriminatory as it gives up to 16 weeks of leave to women and only six weeks of leave to men. The employer's policy does not violate Title VII. Women and men both receive six weeks of parental leave, and women who give birth receive up to an additional 10 weeks of leave for recovery from pregnancy and childbirth under the short-term disability plan.

EXAMPLE 15
Discriminatory Parental Leave Policy

In addition to providing medical leave for women with pregnancy-related conditions and for new mothers to recover from childbirth, an employer provides six additional months of paid leave for new mothers to bond with and care for their new baby. The employer does not provide any paid parental leave for fathers. The employer's policy violates Title VII because it does not provide paid parental leave on equal terms to women and men.

4. Health Insurance

a. Generally

As with other fringe benefits, employers who offer employees health insurance must include coverage of pregnancy, childbirth, and related medical conditions. [126]

Employers who have health insurance benefit plans must apply the same terms and conditions for pregnancy-related costs as for medical costs unrelated to pregnancy.[127] For example:

- If the plan covers pre-existing conditions, then it must cover the costs of an insured employee's pre-existing pregnancy.[128]
- If the plan covers a particular percentage of the medical costs incurred for non-pregnancy-related conditions, it must cover the same percentage of recoverable costs for pregnancy-related conditions.
- If the medical benefits are subject to a deductible, pregnancy-related medical costs may not be subject to a higher deductible.
- The plan may not impose limitations applicable only to pregnancy-related medical expenses for any services, such as doctor's office visits, laboratory tests, x-rays, ambulance service, or recovery room use.
- The plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy.[129]

The following principles apply to pregnancy-related medical coverage of employees and their dependents:

- Employers must provide the same level of medical coverage to female employees and their dependents as they provide to male employees and their dependents.
- Employers need not provide the same level of medical coverage to their employees' wives as they provide to their female employees.

b. Insurance Coverage of Abortion

The PDA makes clear that if an employer provides health insurance benefits, it is not required to pay for health insurance coverage of abortion except where the life of the mother would be endangered if the fetus were carried to term. If complications arise during the course of an abortion, the health insurance plan is required to pay the costs attributable to those complications.[130]

The statute also makes clear that an employer is not precluded from providing abortion benefits directly or through a collective bargaining agreement. If an employer decides to cover the costs of abortion, it must do so in the same manner and to the same degree as it covers other medical conditions.[131]

5. Retirement Benefits and Seniority

Employers must allow women who are on pregnancy-related medical leave to accrue seniority in the same way as those who are on leave for reasons unrelated to pregnancy. Therefore, if an employer allows employees who take medical leave to retain their accumulated seniority and to accrue additional service credit during their leaves, the employer must treat women on pregnancy-related medical leave the same way. Similarly, employers must treat pregnancy-related medical leave the same as other medical leave in calculating the years of service that will be credited in evaluating an employee's eligibility for a pension or for early retirement.[132]

II. AMERICANS WITH DISABILITIES ACT[133]

Title I of the ADA protects individuals from employment discrimination on the basis of disability. Disability

discrimination occurs when a covered employer or other entity treats an applicant or employee less favorably because she has a disability or a history of a disability, or because she is believed to have a physical or mental impairment.[134] Discrimination under the ADA also includes the application of qualification standards, tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class or individuals with disabilities, unless the standard, test, or other selection criterion is shown to be job related for the position in question and consistent with business necessity.[135] The ADA forbids discrimination in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, and any other term or condition of employment. Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is limited.[136] The law also requires that an employer provide reasonable accommodation to an employee or job applicant with a disability unless doing so would cause undue hardship, meaning significant difficulty or expense for the employer.[137]

A. Disability Status

The ADA defines the term "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having a disability.[138] Congress made clear in the ADA Amendments Act of 2008 (ADAAA) that the question of whether an individual's impairment is a covered disability should not demand extensive analysis and that the definition of disability should be construed in favor of broad coverage. The determination of whether an individual has a disability must be made without regard to the ameliorative effects of mitigating measures, such as medication or treatment that lessens or eliminates the effects of an impairment.[139] Under the ADAAA, there is no requirement that an impairment last a particular length of time to be considered substantially limiting.[140] In addition to major life activities that may be affected by impairments related to pregnancy, such as walking, standing, and lifting, the ADAAA includes the operation of major bodily functions as major life activities. Major bodily functions include the operation of the neurological, musculoskeletal, endocrine, and reproductive systems, and the operation of an individual organ within a body system.

Prior to the enactment of the ADAAA, some courts held that medical conditions related to pregnancy generally were not impairments within the meaning of the ADA, and so could not be disabilities.[141] Although pregnancy itself is not an impairment within the meaning of the ADA,[142] and thus is never on its own a disability, [143] some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended. An impairment's cause is not relevant in determining whether the impairment is a disability.[144] Moreover, under the amended ADA, it is likely that a number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though they are only temporary.[145]

Some impairments of the reproductive system may make a pregnancy more difficult and thus necessitate certain physical restrictions to enable a full term pregnancy, or may result in limitations following childbirth. Disorders of the uterus and cervix may be causes of these complications.[146] For instance, someone with a diagnosis of cervical insufficiency may require bed rest during pregnancy. One court has concluded that multiple physiological impairments of the reproductive system requiring an employee to give birth by cesarean section may be disabilities for which an employee was entitled to a reasonable accommodation.[147]

Impairments involving other major bodily functions can also result in pregnancy-related limitations. Some examples include pregnancy-related anemia (affecting normal cell growth); pregnancy-related sciatica (affecting musculoskeletal function); pregnancy-related carpal tunnel syndrome (affecting neurological function); gestational diabetes (affecting endocrine function); nausea that can cause severe dehydration (affecting digestive or genitourinary function); abnormal heart rhythms that may require treatment (affecting cardiovascular function); swelling, especially in the legs, due to limited circulation (affecting circulatory function); and depression (affecting brain function). [148]

In applying the ADA as amended, a number of courts have concluded that pregnancy-related impairments may be disabilities within the meaning of the ADA, including: pelvic inflammation causing severe pain and difficulty walking and resulting in a doctor's recommendation that an employee have certain work restrictions and take early pregnancy-related medical leave;[149] symphysis pubis dysfunction causing post-partum complications and requiring physical therapy;[150] and complications related to a pregnancy in a breech presentation that required visits to the emergency room and bed rest.[151] In another case, the court concluded that there was a triable issue on the question of whether the plaintiff had a disability within the meaning of the amended ADA, where her doctor characterized the pregnancy as "high risk" and recommended that the plaintiff limit her work hours and not lift heavy objects, even though the doctor did not identify a specific impairment.[152]

EXAMPLE 16
Pregnancy-Related Impairment Constitutes ADA Disability Because It Substantially Limits a Major Life Activity

In Amy's fifth month of pregnancy, she developed high blood pressure, severe headaches, abdominal pain, nausea, and dizziness. Her doctor diagnosed her as having preeclampsia and ordered her to remain on bed rest through the remainder of her pregnancy. This evidence indicates that Amy had a disability within the meaning of the ADA, since she had a physiological disorder that substantially limited her ability to perform major life activities such as standing, sitting, and walking, as well as major bodily functions such as functions of the cardiovascular and circulatory systems. The effects that bed rest may have had on alleviating the symptoms of Amy's preeclampsia may not be considered, since the ADA Amendments Act requires that the determination of whether someone has a disability be made without regard to mitigating measures.

An employer discriminates against a pregnant worker on the basis of her record of a disability when it takes an adverse action against her because of a past substantially limiting impairment.

EXAMPLE 17
Discrimination Against a Job Applicant Because of Her Record of a Disability

A county police department offers an applicant a job as a police officer. It then asks her to complete a post-offer medical questionnaire and take a medical examination.[153] On the questionnaire, the applicant indicates that she had gestational diabetes during her pregnancy three years ago, but the condition resolved itself following the birth of her child. The police department will violate the ADA if it withdraws the job offer based on this past history of gestational diabetes when the applicant has no current impairment that would affect her ability to perform the job safely.

Finally, an employer regards a pregnant employee as having a disability if it takes a prohibited action against her (e.g., termination or reassignment to a less desirable position) based on an actual or perceived impairment that is not transitory (lasting or expected to last for six months or less) and minor.[154]

EXAMPLE 18
Pregnant Employee Regarded as Having a Disability

An employer reassigns a welder who is pregnant to a job in its factory's tool room, a job that requires her to keep track of tools that are checked out for use and returned at the end of the day, and to complete paperwork for any equipment or tools that need to be repaired. The job pays considerably less than the welding job and is considered by most employees to be "make work." The manager who made the reassignment did so because he believed the employee was experiencing pregnancy-related "complications" that "could very possibly result in a miscarriage" if the employee was allowed to continue working in her job as a welder. The employee was not experiencing pregnancy-related complications, and her doctor said she could have continued to work as a welder. The employer has regarded the employee as having a disability, because it took a prohibited action (reassigning her to a less desirable job at less pay) based on its belief that she had an impairment that was not both transitory and minor. The employer also is liable for discrimination because there is no evidence that the employee was unable to do the essential functions of her welder position or that she would have posed a direct threat to her own or others' safety in that job. Since the evidence indicated that the employee was able to perform her job, the employer is also liable under the PDA.[155]

B. Reasonable Accommodation

A pregnant employee may be entitled to reasonable accommodation under the ADA for limitations resulting from pregnancy-related conditions that constitute a disability or for limitations resulting from the interaction of the pregnancy with an underlying impairment.[156] A reasonable accommodation is a change in the workplace or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment.[157] An employer may only deny a reasonable accommodation to an employee with a disability if it would result in an undue hardship.[158] An undue hardship is defined as an action requiring significant difficulty or expense.[159]

EXAMPLE 19
Conditions Resulting from Interaction of Pregnancy and an Underlying Disability

Jennifer had been successfully managing a neurological disability with medication for several years. Without the medication, Jennifer experienced severe fatigue and had difficulty completing a full work day. However, the combination of medications she had been prescribed allowed her to work with rest during the breaks scheduled for all employees. When she became pregnant, her physician took her off some of these drugs due to risks they posed during pregnancy. Adequate substitutes were not available. She began to experience increased fatigue and found that rest during short breaks in the day and lunch time was insufficient. Jennifer requested that she be allowed more frequent breaks during the day to alleviate her fatigue. Absent undue hardship, the employer would have to grant such an accommodation.

Examples of reasonable accommodations that may be necessary for a disability caused by pregnancy-related impairments include, but are not limited to, the following:[160]

- Redistributing marginal functions that the employee is unable to perform due to the disability. Marginal functions are the non-fundamental (or non-essential) job duties.

  Example: The manager of an organic market is given a 20-pound lifting restriction for the latter half of her pregnancy due to pregnancy-related sciatica. Usually when a delivery truck arrives with the daily shipment, one of the stockers unloads and takes the produce into the store. The manager may need to unload the produce from the truck if the stocker arrives late or is absent, which may occur two to three times a month. Since one of the cashiers is available to unload merchandise during the period of the manager's lifting restrictions, the employer is able to remove the marginal function of unloading merchandise from the manager's job duties.

- Altering how an essential or marginal job function is performed (e.g., modifying standing, climbing, lifting, or bending requirements).

  Example: A warehouse manager who developed pregnancy-related carpal tunnel syndrome was advised by her physician that she should avoid working at a computer key board. She is responsible for maintaining the inventory records at the site and completing a weekly summary report. The regional manager approved a plan whereby at the end of the week, the employee's assistants input the data required for the summary report into the computer based on the employee's dictated notes, with the employee ensuring that the entries are accurate.

- Modification of workplace policies.

  Example: A clerk responsible for receiving and filing construction plans for development proposals was diagnosed with a pregnancy-related kidney condition that required that she maintain a regular intake of water throughout the work day. She was prohibited from having any liquids at her work station due to the risk of spillage and damage to the documents. Her manager arranged for her to have a table placed just outside the file room where she could easily access water.

- Purchasing or modifying equipment and devices.

  Example: A postal clerk was required to stand at a counter to serve customers for most of her eight-hour shift. During her pregnancy she developed severe pelvic pain caused by relaxed joints that required her to be seated most of the time due to instability. Her manager provided her with a stool that allowed her to work comfortably at the height of the counter.

- Modified work schedules.

  Example: An employee with depression found that her condition worsened during her pregnancy because she was taken off her regular medication. Her physician provided documentation indicating that her symptoms could be alleviated by a counseling session each week. Since appointments for the counseling sessions were available only during the day, the employee requested that she be able to work an hour later in the afternoon to cover the time. The manager concluded that, because the schedule change would not adversely affect the employee's ability to meet with customers and clients and that some of the employee's duties, such as sending out shipments and preparing reports, could be done later in the day, the accommodation would not be an undue hardship.

- Granting leave (which may be unpaid leave if the employee does not have accrued paid leave) in addition to what an employer would normally provide under a sick leave policy for reasons related to the disability.

  Example: An account representative at a bank was diagnosed during her pregnancy with a cervical abnormality and was ordered by her physician to remain on bed rest until she delivered the baby. The

employee has not worked at the bank long enough to qualify for leave under the Family and Medical Leave Act, and, although she has accrued some sick leave under the employer's policy, it is insufficient to cover the period of her recommended bed rest. The company determines that it would not be an undue hardship to grant her request for sick leave beyond the terms of its unpaid sick leave policy.

- Temporary assignment to a light duty position.[161]

  Example: An employee at a garden shop was assigned duties such as watering, pushing carts, and lifting small pots from carts to bins. Her physician placed her on lifting restrictions and provided her with documentation that she should not lift or push more than 20 pounds due to her pregnancy-related pelvic girdle pain, which is caused by hormonal changes to pelvic joints. The manager approved her for a light duty position at the cash register.

III. OTHER REQUIREMENTS AFFECTING PREGNANT WORKERS

A. Family and Medical Leave Act (FMLA)

Although Title VII does not require an employer to provide pregnancy-related or child care leave if it provides no leave for other temporary illness or family obligations, the FMLA does require covered employers to provide such leave.[162] The FMLA covers private employers with 50 or more employees in 20 or more workweeks during the current or preceding calendar year, as well as federal, state, and local governments.[163]

Under the FMLA, an eligible employee[164] may take up to 12 workweeks of leave during any 12-month period for one or more of the following reasons:

(1) the birth and care of the employee's newborn child;
(2) the placement of a child with the employee through adoption or foster care;
(3) to care for the employee's spouse, son, daughter, or parent with a serious health condition; or
(4) to take medical leave when the employee is unable to work because of a serious health condition.[165]

The FMLA also specifies that:

- an employer must maintain the employee's existing level of coverage under a group health plan while the employee is on FMLA leave as if the employee had not taken leave;
- after FMLA leave, the employer must restore the employee to the employee's original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment;
- spouses employed by the same employer are not entitled to more than 12 weeks of family leave between them for the birth and care of a healthy newborn child, placement of a healthy child for adoption or foster care, or to care for a parent who has a serious health condition; and
- an employer may not interfere with, restrain, or deny the exercise of any right provided by FMLA; nor may it discriminate against any individual for opposing any practice prohibited by the FMLA, or being involved in any FMLA related proceeding.

B. Executive Order 13152 Prohibiting Discrimination Based on Status as Parent

Executive Order 13152[166] prohibits discrimination in federal employment based on an individual's status as a parent. "Status as a parent" refers to the status of an individual who, with respect to someone under age 18 or someone 18 or older who is incapable of self-care due to a physical or mental disability, is:

(1) a biological parent;
(2) an adoptive parent;
(3) a foster parent;
(4) a stepparent;
(5) a custodian of a legal ward;
(6) in loco parentis over such an individual; or
(7) actively seeking legal custody or adoption of such an individual.

C. Reasonable Break Time for Nursing Mothers[167]

Section 4207 of the Patient Protection and Affordable Care Act[168] provides the following: [169]

- Employers must provide "reasonable break time" for breastfeeding employees to express breast milk until the child's first birthday.
- Employers must provide a private place, other than a bathroom, for this purpose.
- An employer need not pay an employee for any work time spent for this purpose. [170]
- Hourly employees who are not exempt from the overtime pay requirements of the Fair Labor Standards Act are entitled to breaks to express milk.

- Employers with fewer than 50 employees are not subject to these requirements if the requirements "would impose an undue hardship by causing significant difficulty or expense when considered in relation to the size, nature, or structure of the employer's business."
- Nothing in this law preempts a state law that provides greater protections to employees.[171]

D. State Laws

Title VII does not relieve employers of their obligations under state or local laws except where such laws require or permit an act that would violate Title VII.[172] Therefore, employers must comply with state or local provisions regarding pregnant workers unless those provisions require or permit discrimination based on pregnancy, childbirth, or related medical conditions.[173]

In *California Fed. Sav. & Loan Ass'n v. Guerra*,[174] the Supreme Court held that the PDA did not preempt a California law requiring employers in that state to provide up to four months of unpaid pregnancy disability leave. Cal Fed claimed the state law was inconsistent with Title VII because it required preferential treatment of female employees disabled by pregnancy, childbirth, or related medical conditions. The Court disagreed, concluding that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop - not a ceiling above which they may not rise."[175]

The Court, in *Guerra*, stated that "[i]t is hardly conceivable that Congress would have extensively discussed only its intent not to require preferential treatment if in fact it had intended to prohibit such treatment."[176] The Court noted that the California statute did not compel employers to treat pregnant women better than employees with disabilities. Rather, the state law merely established benefits that employers were required, at a minimum, to provide pregnant workers. Employers were free, the Court stated, to give comparable benefits to other employees with disabilities, thereby treating women affected by pregnancy no better than others not so affected but similar in their ability or inability to work.[177]

IV. BEST PRACTICES

Legal obligations pertaining to pregnancy discrimination and related issues are set forth above. Below are suggestions for best practices that employers may adopt to reduce the chance of pregnancy-related PDA and ADA violations and to remove barriers to equal employment opportunity.

Best practices are proactive measures that may go beyond federal non-discrimination requirements or that may make it more likely that such requirements will be met. These policies may decrease complaints of unlawful discrimination and enhance employee productivity. They also may aid recruitment and retention efforts.

General

- Develop, disseminate, and enforce a strong policy based on the requirements of the PDA and the ADA.
  - Make sure the policy addresses the types of conduct that could constitute unlawful discrimination based on pregnancy, childbirth, and related medical conditions.
  - Ensure that the policy provides multiple avenues of complaint.
- Train managers and employees regularly about their rights and responsibilities related to pregnancy, childbirth, and related medical conditions.
  - Review relevant federal, state, and local laws and regulations, including Title VII, as amended by the PDA, the ADA, as amended, the FMLA, as well as relevant employer policies.
- Conduct employee surveys and review employment policies and practices to identify and correct any policies or practices that may disadvantage women affected by pregnancy, childbirth, or related medical conditions or that may perpetuate the effects of historical discrimination in the organization.
- Respond to pregnancy discrimination complaints efficiently and effectively. Investigate complaints promptly and thoroughly. Take corrective action and implement corrective and preventive measures as necessary to resolve the situation and prevent problems from arising in the future.
- Protect applicants and employees from retaliation. Provide clear and credible assurances that if applicants or employees internally or externally report discrimination or provide information related to discrimination based on pregnancy, childbirth, or related medical conditions, the employer will protect them from retaliation. Ensure that these anti-retaliation measures are enforced.

Hiring, Promotion, and Other Employment Decisions

- Focus on the applicant's or employee's qualifications for the job in question. Do not ask questions about the applicant's or employee's pregnancy status, children, plans to start a family, or other related issues during interviews or performance reviews.
- Develop specific, job related qualification standards for each position that reflect the duties, functions, and competencies of the position and minimize the potential for gender stereotyping and for discrimination on the basis of pregnancy, childbirth, or related medical conditions. Make sure these standards are consistently applied when choosing among candidates.

- Ensure that job openings, acting positions, and promotions are communicated to all eligible employees.
- Make hiring, promotion, and other employment decisions without regard to stereotypes or assumptions about women affected by pregnancy, childbirth, or related medical conditions.
- When reviewing and comparing applicants' or employees' work histories for hiring or promotional purposes, focus on work experience and accomplishments and give the same weight to cumulative relevant experience that would be given to workers with uninterrupted service.
- Make sure employment decisions are well documented and, to the extent feasible, are explained to affected persons. Make sure managers maintain records for at least the statutorily required periods. *See* 29 C.F.R. § 1602.14.
- Disclose information about fetal hazards to applicants and employees and accommodate resulting requests for reassignment if feasible.[178]

Leave and Other Fringe Benefits

- Leave related to pregnancy, childbirth, or related conditions can be limited to women affected by those conditions. Parental leave must be provided to similarly situated men and women on the same terms.
- If there is a restrictive leave policy (such as restricted leave during a probationary period), evaluate whether it disproportionately impacts pregnant workers and, if so, whether it is necessary for business operations. Ensure that the policy notes that an employee may qualify for leave as a reasonable accommodation.
- Review workplace policies that limit employee flexibility, such as fixed hours of work and mandatory overtime, to ensure that they are necessary for business operations.
- Consult with employees who plan to take pregnancy and/or parental leave in order to determine how their job responsibilities will be handled in their absence.
- Ensure that employees who are on leaves of absence due to pregnancy, childbirth, or related medical conditions have access to training, if desired, while out of the workplace.[179]

Terms and Conditions of Employment

- Monitor compensation practices and performance appraisal systems for patterns of potential discrimination based on pregnancy, childbirth, or related medical conditions. Ensure that compensation practices and performance appraisals are based on employees' actual job performance and not on stereotypes about these conditions.
- Review any light duty policies. Ensure light duty policies are structured so as to provide pregnant employees access to light duty equal to that provided to people with similar limitations on their ability to work.
- Temporarily reassign job duties that employees are unable to perform because of pregnancy or related medical conditions if feasible.
- Protect against unlawful harassment. Adopt and disseminate a strong anti-harassment policy that incorporates information about pregnancy-related harassment; periodically train employees and managers on the policy's contents and procedures; incorporate into the policy and training information about harassment of breastfeeding employees; vigorously enforce the anti-harassment policy.
- Develop the potential of employees, supervisors, and executives without regard to pregnancy, childbirth, or related medical conditions.
- Provide training to all workers, including those affected by pregnancy or related medical conditions, so all have the information necessary to perform their jobs well.[180]
- Ensure that employees are given equal opportunity to participate in complex or high-profile work assignments that will enhance their skills and experience and help them ascend to upper-level positions.
- Provide employees with equal access to workplace networks to facilitate the development of professional relationships and the exchange of ideas and information.

Reasonable Accommodation

- Have a process in place for expeditiously considering reasonable accommodation requests made by employees with pregnancy-related disabilities, and for granting accommodations where appropriate.
- State explicitly in any written reasonable accommodation policy that reasonable accommodations may be available to individuals with temporary impairments, including impairments related to pregnancy.
- Make any written reasonable accommodation procedures an employer may have widely available to all employees, and periodically remind employees that the employer will provide reasonable accommodations to employees with disabilities who need them, absent undue hardship.
- Train managers to recognize requests for reasonable accommodation and to respond promptly to all requests. Given the breadth of coverage for pregnancy-related impairments under the ADA, as amended, managers should treat requests for accommodation from pregnant workers as requests for accommodation under the ADA unless it is clear that no impairment exists.
- Make sure that anyone designated to handle requests for reasonable accommodations knows that the definition of the term "disability" is broad and that employees requesting accommodations, including employees with pregnancy-related impairments, should not be required to submit more than reasonable documentation to establish that they have covered disabilities. Reasonable documentation means that the employer may require only the documentation needed to establish that a person has an ADA disability, and

that the disability necessitates a reasonable accommodation. The focus of the process for determining an appropriate accommodation should be on an employee's work-related limitations and whether an accommodation could be provided, absent undue hardship, to assist the employee.
- If a particular accommodation requested by an employee cannot be provided, explain why, and offer to discuss the possibility of providing an alternative accommodation.

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[1] The text of the PDA is as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e(k).

[2] *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 288 (1987) (*quoting Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971)).

[3] S. Rep. No. 95-331, at 4 (1977), *as reprinted in* Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor and Human Resources), at 41 (1980). The PDA was enacted to supersede the Supreme Court's decisions in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (excluding pregnancy-related disabilities from disability benefit plans did not constitute discrimination based on sex absent indication that exclusion was pretext for sex discrimination), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (policy of denying sick leave pay to employees disabled by pregnancy while providing such pay to employees disabled by other non-occupational sickness or injury does not violate Title VII unless the exclusion is a pretext for sex discrimination).

[4] *California Fed. Sav. & Loan Ass'n*, 479 U.S. at 290.

[5] The term "employer" in this document refers to any entity covered by Title VII, including labor organizations and employment agencies.

[6] Use of the term "employee" in this document includes applicants for employment or membership in labor organizations and, as appropriate, former employees and members.

[7] Nat'l Partnership for Women & Families, *The Pregnancy Discrimination Act: Where We Stand 30 Years Later* (2008), *available at* http://qualitycarenow.nationalpartnership.org/site/DocServer/Pregnancy_Discrimination_Act_-_Where_We_Stand_30_Years_L.pdf?docID=4281 (last visited May 5, 2014).

[8] While there is no definitive explanation for the increase in complaints, and there may be several contributing factors, the National Partnership study indicates that women today are more likely than their predecessors to remain in the workplace during pregnancy and that some managers continue to hold negative views of pregnant workers. *Id.* at 11.

[9] Studies have shown how pregnant employees and applicants experience negative reactions in the workplace that can affect hiring, salary, and ability to manage subordinates. *See* Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty,* 59 HASTINGS L.J. 1359 (2008)*; see also* Stephen Benard, *Written Testimony of Dr. Stephen Benard*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/2-15-12/benard.cfm (last visited April 29, 2014) (discussing studies examining how an identical woman would be treated when pregnant versus when not pregnant);Sharon Terman, *Written Testimony of Sharon Terman*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/2-15-12/terman.cfm (last visited April 29, 2014)*;* Joan Williams, *Written Testimony of Joan Williams*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm (last visited April 29, 2014) (discussing the types of experiences reported by pregnant employees seeking assistance from advocacy groups).

[10] 42 U.S.C. § 12112.

[11] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). The expanded definition of "disability" under the ADA also may affect the PDA requirement that pregnant workers with limitations be treated the same as employees who are not pregnant but who are similar in their ability or inability to work by expanding

the number of non-pregnant employees who could serve as comparators where disparate treatment under the PDA is alleged.

[12] H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 5, *reprinted in* 5 U.S.C.C.A.N. 4749, 4753 (1978).

[13] 124 Cong. Rec. 38574 (daily ed. Oct. 14, 1978) (statement of Rep. Sarasin, a manager of the House version of the PDA).

[14] *See, e.g., Asmo v. Keane*, *Inc.*, 471 F.3d 588, 594-95 (6th Cir. 2006) (close timing between employer's knowledge of pregnancy and the discharge decision helped create a material issue of fact as to whether employer's explanation for discharging plaintiff was pretext for pregnancy discrimination); *Palmer v. Pioneer Inn Assocs., Ltd*., 338 F.3d 981, 985 (9th Cir. 2003) (employer not entitled to summary judgment where plaintiff testified that supervisor told her that he withdrew his job offer to plaintiff because the company manager did not want to hire a pregnant woman); *cf. Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 642 (1974) (state rule requiring pregnant teachers to begin taking leave four months before delivery due date and not return until three months after delivery denied due process).

[15] *See, e.g., Prebilich-Holland v. Gaylord Entm't Co*., 297 F.3d 438, 444 (6th Cir. 2002) (no finding of pregnancy discrimination if employer had no knowledge of plaintiff's pregnancy at time of adverse employment action); *Miller v. Am. Family Mut. Ins. Co*., 203 F.3d 997, 1006 (7th Cir. 2000) (claim of pregnancy discrimination "cannot be based on [a woman's] being pregnant if [the employer] did not know she was"); *Haman v. J.C. Penney Co.,* 904 F.2d 707, 1990 WL 82720, at *5 (6th Cir. 1990) (unpublished) (defendant claimed it could not have discharged plaintiff due to her pregnancy because the decision maker did not know of it, but evidence showed plaintiff's supervisor had knowledge of pregnancy and had significant input into the termination decision).

[16] *Geraci v. Moody-Tottrup, Int'l, Inc*., 82 F.3d 578, 581(3d Cir. 1996).

[17] *See, e.g., Griffin v. Sisters of Saint Francis, Inc.*, 489 F.3d 838, 844 (7th Cir. 2007) (disputed issue as to whether employer knew of plaintiff's pregnancy where she asserted that she was visibly pregnant during the time period relevant to the claim, wore maternity clothes, and could no longer conceal the pregnancy). Similarly, a disputed issue may arise as to whether the employer knew of a past pregnancy or one that was intended. *See Garcia v. Courtesy Ford, Inc.*, 2007 WL 1192681, at *3 (W.D. Wash. Apr. 20, 2007) (unpublished) (although supervisor may not have been aware of plaintiff's pregnancy at time of discharge, his knowledge that she was attempting to get pregnant was sufficient to establish PDA coverage).

[18] *See, e.g., Asmo v. Keane, Inc*., 471 F.3d at 594-95 (manager's silence after employee announced that she was pregnant with twins, in contrast to congratulations by her colleagues, his failure to discuss with her how she planned to manage her heavy business travel schedule after the twins were born, and his failure even to mention her pregnancy during the rest of her employment could be interpreted as evidence of discriminatory animus and, thus, a motive for plaintiff's subsequent discharge); *Laxton v. Gap Inc*., 333 F.3d 572, 584 (5th Cir. 2003) (where supervisor negatively reacted to news of plaintiff's pregnancy and expressed concern about having others fill in around time of the delivery date, it was reasonable to infer that supervisor harbored stereotypical presumption about plaintiff's inability to fulfill job duties as result of her pregnancy); *Wagner v. Dillard Dep't Stores, Inc*., 17 Fed. Appx. 141, 149 (4th Cir. 2001) (unpublished) (evidence did not support defendant's stereotypical assumption that plaintiff could not or would not come to work because of her pregnancy or in the wake of the anticipated childbirth); *Maldonado v. U.S. Bank*, 186 F.3d 759, 768 (7th Cir.1999) (employer could not discharge pregnant employee "simply because it 'anticipated' that she would be unable to fulfill its job expectations"); *Duneen v. Northwest Airlines, Inc*., 132 F.3d 431, 436 (8th Cir. 1998) (evidence of discrimination shown where employer assumed plaintiff had pregnancy-related complication that prevented her from performing her job and therefore decided not to permit her to return to work).

[19] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

[20] These facts were drawn from the case of *Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378 (1st Cir. 1998). The court in *Troy* found the jury was not irrational in concluding that stereotypes about pregnancy and not actual job attendance were the cause of the discharge. *See also* Joan Williams, *Written Testimony of Joan Williams*, *supra* note 9 (discussing examples of statements that may be evidence of stereotyping).

[21] *Donaldson v. Am. Banco Corp., Inc*., 945 F. Supp. 1456, 1464 (D. Colo. 1996)*; see also Piraino v. Int'l Orientation Res., Inc*., 84 F.3d 270, 274 (7th Cir. 1996) (rejecting "surprising claim" by defendant that no pregnancy discrimination can be shown where challenged action occurred after birth of plaintiff's baby); *Pacourek v. Inland Steel* Co., 858 F. Supp. 1393, 1402 (N.D. Ill. 1994) (quoting Legislative History of the PDA at 124 Cong. Rec. 38574 (1978)) ("[T]he PDA gives a woman 'the right . . . to be financially and legally protected before, during, and after her pregnancy.'").

[22] *See, e.g.*, *Neessen v. Arona Corp.*, 2010 WL 1731652, at *7 (N.D. Iowa Apr. 30, 2010) (plaintiff was in PDA's protected class where defendant allegedly failed to hire her because, at the time of her application, she had recently been pregnant and given birth).

[23] *See, e.g.*, *Shafrir v. Ass'n of Reform Zionists of Am.*, 998 F. Supp. 355, 363 (S.D.N.Y. 1998) (allowing plaintiff to proceed with pregnancy discrimination claim where she was fired during parental leave and replaced by non-pregnant female, supervisor had ordered plaintiff to return to work prior to end of her leave knowing she could not comply, and supervisor allegedly expressed doubts about plaintiff's desire and ability to continue working after having child).

[24] *See Solomen v. Redwood Advisory Co*., 183 F. Supp. 2d 748, 754 (E.D. Pa. 2002) ("a plaintiff who was not pregnant at or near the time of the adverse employment action has some additional burden in making out a prima facie case").

[25] For a discussion of disparate treatment of workers with caregiving responsibilities, *see* Section I B.1.b., *infra*; the EEOC's Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), *available at* http://www.eeoc.gov/policy/docs/caregiving.html (last visited May 5, 2014); and the EEOC's *Employer Best Practices for Workers with Caregiving Responsibilities*, *available at* http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (last visited May 5, 2014).

[26] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 206 (1991); *see also Kocak v. Cmty. Health Partners of Ohio*, 400 F.3d 466, 470 (6th Cir. 2005) (plaintiff "cannot be refused employment on the basis of her potential pregnancy"); *Krauel v. Iowa Methodist Med. Ctr*., 95 F.3d 674, 680 (8th Cir. 1996) ("Potential pregnancy . . . is a medical condition that is sex-related because only women can become pregnant.").

[27] *Johnson Controls*, 499 U.S. at 206.

[28] *Id*. at 209.

[29] *Id.* at 197; *see also Spees v. James Marine, Inc*., 617 F.3d 380, 392-94 (6th Cir. 2010) (finding genuine issue of material fact as to whether employer unlawfully transferred pregnant welder to tool room because of perceived risks of welding while pregnant); *EEOC v. Catholic Healthcare West*, 530 F. Supp. 2d 1096, 1105-07 (C.D. Cal. 2008) (hospital's policy prohibiting pregnant nurses from conducting certain medical procedures was facially discriminatory); *Peralta v. Chromium Plating & Polishing*, 2000 WL 34633645 (E.D.N.Y. Sept. 15, 2000) (unpublished) (employer violated Title VII when it instructed plaintiff that she could not continue to pack and inspect metal parts unless she provided letter from doctor stating that her work would not endanger herself or her fetus).

[30] *Johnson Controls,* 499 U.S. at 200. For a discussion of the BFOQ defense, *see* Section I B.1.c., *infra*.

[31] *Id*. at 206.

[32] For examples of cases finding evidence of discrimination based on an employee's stated or assumed intention to become pregnant, see *Walsh v. National Computer Sys, Inc*., 332 F.3d 1150, 1160 (8th Cir. 2003) (judgment and award for plaintiff claiming pregnancy discrimination upheld where evidence included the following remarks by supervisor after plaintiff returned from parental leave: "I suppose you'll be next," in commenting to plaintiff about a co-worker's pregnancy; "I suppose we'll have another little Garrett [the name of plaintiff's son] running around," after plaintiff returned from vacation with her husband; and "You better not be pregnant again!" after she fainted at work); *Santiago-Ramos v. Centennial P.R. Wireless Corp*., 217 F.3d 46, 55-6 (1st Cir. 2000) (manager's expressions of concern about the possibility of plaintiff having a second child, along with other evidence of sex bias and lack of evidence supporting the reasons for discharge, raised genuine issue of material fact as to whether explanation for discharge was pretextual).

[33] *Pacourek v. Inland Steel Co.,* 858 F. Supp. 1393, 1401 (N.D. Ill.1994); *see also Batchelor v. Merck & Co., Inc*., 651 F. Supp. 2d 818, 830-31(N.D. Ind. 2008) (plaintiff was member of protected class under PDA where her supervisor allegedly discriminated against her because of her stated intention to start a family); *Cleese v. Hewlett-Packard Co*., 911 F. Supp. 1312, 1317-18 (D. Or. 1995) (plaintiff, who claimed defendant discriminated against her because it knew she planned to become pregnant, fell within PDA's protected class).

[34] See Section II, *infra*, for information about prohibited medical inquiries under the ADA.

[35] *See Hall v. Nalco Co*., 534 F.3d 644, 648-49 (7th Cir. 2008) (employee terminated for taking time off to undergo in vitro fertilization was not fired for gender-neutral condition of infertility but rather for gender-specific quality of childbearing capacity); *Pacourek*, 858 F. Supp. at 1403-04 (plaintiff stated Title VII claim where she alleged that she was undergoing in vitro fertilization and her employer disparately applied its sick leave policy to her).

Employment decisions based on infertility also may implicate the Americans with Disabilities Act, since infertility that is, or results from, an impairment may be found to substantially limit the major life activity of reproduction and thereby qualify as a disability. For further discussion regarding coverage under the ADA, see Section II, *infra*.

[36] *See Saks v. Franklin Covey, Inc.*, 316 F.3d 337, 346 (2d Cir. 2003) ("[i]nfertility is a medical condition that afflicts men and women with equal frequency"); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) ("because the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender-neutral," it does not violate Title VII); *cf. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 198 (1991) (finding that employer's policy impermissibly classified on the basis of gender and childbearing capacity "rather than fertility alone").

In *Krauel*, the Eighth Circuit also rejected the plaintiff's argument that exclusion of benefits for infertility treatments had an unlawful disparate impact on women since the plaintiff did not provide statistical evidence showing that female plan participants were disproportionately harmed by the exclusion. 95 F.3d at 681; *see also Saks*, 316 F.3d at 347 (exclusion of surgical impregnation procedures does not discriminate against female employees since such procedures are used to treat both male and female infertility, and therefore, infertile male and female employees are equally disadvantaged by exclusion).

[37] *See, e.g.*, *Commission Decision on Coverage of Contraception* (Dec. 14, 2000) (because prescription contraceptives are available only for women, employer's explicit refusal to offer insurance coverage for them is, by definition, a sex-based exclusion), *available at* http://www.eeoc.gov/policy/docs/decision-contraception.html (last visited May 5, 2014).

[38] *Id.; see also Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979, 984 (E.D. Mo. 2003) ("[A]s only women have the potential to become pregnant, denying a prescription medication that allows women to control their reproductive capacity is necessarily a sex-based exclusion."); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271-72 (W.D. Wash. 2001) (exclusion of prescription contraceptives from employer's generally comprehensive prescription drug plan violated PDA). The Eighth Circuit's assertion in *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 942 (2007), that contraception is not "related to pregnancy" because "contraception is a treatment that is only indicated prior to pregnancy" is not persuasive because it is contrary to the *Johnson Controls* holding that the PDA applies to potential pregnancy.

[39] The Religious Freedom Restoration Act (RFRA) provides for religious exemption from a federal law, even if the law is of general applicability and neutral toward religion, if it substantially burdens a religious practice and the government is unable to show that its application would further a compelling government interest and is the least restrictive means of furthering the interest. 42 U.S.C. § 2000bb-1. In a case decided in June 2014, *Burwell v. Hobby Lobby Stores, Inc., et al.*, --- U.S. ---, 134 S. Ct. 2751 (2014), the Supreme Court ruled that the Patient Protection and Affordable Care Act's contraceptive mandate violated the RFRA as applied to closely held family for-profit corporations whose owners had religious objections to providing certain types of contraceptives. The Supreme Court did not reach the question whether owners of such businesses can assert that the contraceptive mandate violates their rights under the Constitution's Free Exercise Clause. This enforcement guidance explains Title VII's prohibition of pregnancy discrimination; it does not address whether certain employers might be exempt from Title VII's requirements under the First Amendment or the RFRA.

[40] *See, e.g., Commission Decision on Coverage of Contraception, supra* note 37*; see also* Section 2713(a)(4) of the Public Health Service Act, as amended by the Patient Protection and Affordable Care Act, PL 111-148, 124 Stat. 119 (2010) (requiring that non-grandfathered group or individual insurance coverage provide benefits for women's preventive health services without cost sharing). On August 1, 2011, the Health Resources and Services Administration released guidelines requiring that contraceptive services be included as women's preventive health services. These requirements became effective for most new and renewed health plans in August 2012. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R. § 147.130(b)(1) (plans and insurers must cover a newly recommended preventive service starting with the first plan year that begins on or after the date that is one year after the date on which the new recommendation is issued). The Departments of Treasury, Labor, and Health and Human Services issued regulations clarifying the criteria for the religious employer exemption from contraceptive coverage, accommodations with respect to the contraceptive coverage requirement for group health plans established or maintained by eligible organizations (and group health insurance coverage provided in connection with such plans), and student health insurance coverage arranged by eligible organizations that are institutions of higher education. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39869 (July 2, 2013) (to be codified at 26 C.F.R. Part 54; 29 C.F.R. Parts 2510 and 2590; 45 C.F.R. Parts 147 and 1560). *But see supra* note 39.

[41] *See Commission Decision on Coverage of Contraception, supra* note 37; *Erickson*, 141 F. Supp. 2d at 1272 ("In light of the fact that prescription contraceptives are used only by women, [defendant's] choice to exclude that particular benefit from its generally applicable benefit plan is discriminatory.").

[42] *See supra* note 37. The Commission disagrees with the conclusion in *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007), that contraception is gender-neutral because it applies to both men and women. *Id.* at 942. The court distinguished the EEOC's decision on coverage of contraception by noting that the Commission decision involved a health insurance policy that denied coverage of prescription contraception but included coverage of vasectomies and tubal ligations while the employer in *Union Pacific* excluded all contraception for women and men, both prescription and surgical, when used solely for contraception and not for other medical purposes. However, the EEOC's decision was not based on the fact that the plan at issue covered vasectomies and tubal ligations. Instead, the Commission reasoned that excluding prescription contraception while providing benefits for drugs and devices used to prevent other medical conditions is a sex-based exclusion because prescription contraceptives are available only for women. *See also Union Pacific*, 479 F.3d at 948-49 (Bye, J., dissenting) (contraception is "gender-specific, female issue because of the adverse health consequences of an unplanned pregnancy"; therefore, proper comparison is between preventive health coverage provided to each gender).

[43] *See, e.g., Miranda v. BBII Acquisition*, 120 F. Supp. 2d 157, 167 (D. Puerto Rico 2000) (finding genuine issue of fact as to whether plaintiff's discharge was discriminatory where discharge occurred around one half hour after plaintiff told supervisor she needed to extend her medical leave due to pregnancy-related complications, there was no written documentation of the process used to determine which employees would be terminated, and plaintiff's position was not initially selected for elimination).

[44] The facts in this example were drawn from the case of *Kucharski v. CORT Furniture Rental,* 342 Fed. Appx. 712, 2009 WL 2524041 (2d Cir. Aug. 19, 2009) (unpublished). Although the plaintiff in *Kucharski* did not allege disparate impact, an argument could have been made that the restrictive medical leave policy had a disparate impact on pregnant workers. For a discussion of disparate impact, see Section I B.2., *infra*.

If the employer made exceptions to its policy for non-pregnant workers who were similar to Sherry in their ability or inability to work, denying additional leave to Sherry because she worked for the employer for less than a year would violate the PDA. *See* Section I C., *infra*. Additionally, if the pregnancy-related condition constitutes a disability within the meaning of the ADA, then the employer would have to make a reasonable accommodation of extending the maximum four weeks of leave, absent undue hardship, even though the employee has been working for only six months. *See* Section II B., *infra*.

[45] For a discussion of the PDA's requirements regarding health insurance, see Section I C.4., *infra*.

[46] *Fleming v. Ayers & Assocs.*, 948 F.2d 993, 997 (6th Cir. 1991) ("It seems to us obvious that the reference in the Act to 'women affected by . . . related medical conditions' refers to related medical conditions of the pregnant women, not conditions of the resulting offspring. Both men and women are 'affected by' medical conditions of the resulting offspring."); *Barnes v. Hewlett Packard Co*., 846 F. Supp. 442, 445 (D. Md.1994) ("There is, in sum, a point at which pregnancy and immediate post-partum requirements - clearly gender-based in nature-end and gender-neutral child care activities begin.").

[47] *See* 42 U.S.C. § 12112(b)(3), (4); Appendix to 29 C.F.R. § 1630.15(a) ("The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums or workers' compensation costs to increase, would not be a legitimate non-discriminatory reason justifying disparate treatment of an individual with a disability."); EEOC *Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance* (June 8, 1993), *available at* http://www.eeoc.gov/policy/docs/health.html (last visited May 5, 2014) ("decisions about the employment of an individual with a disability cannot be motivated by concerns about the impact of the individual's disability on the employer's health insurance plan")*; see also Trujillo v. PacifiCorp*, 524 F.3d 1149, 1156-57 (10th Cir. 2008) (employees raised inference that employer discharged them because of their association with their son whose cancer led to significant healthcare costs); *Larimer v. Int'l Bus. Machs. Corp*., 370 F.3d 698, 700 (7th Cir. 2004) (adverse action against employee due to medical cost arising from disability of person associated with employee falls within scope of associational discrimination section of ADA).

[48] Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff *et seq*., prohibits basing employment decisions on an applicant's or employee's genetic information. Genetic information includes information about the manifestation of a disease or disorder in a family member of the applicant or employee (i.e., family medical history). It also includes genetic tests such as amniocentesis and newborn screening tests for conditions such as Phenylketonuria (PKU). The statute prohibits discriminating against an employee or applicant because of his or her child's medical condition. *See* 42 U.S.C. §§ 2000ff-(3) (defining "family member"), 2000ff-(4) (defining "genetic information"); 29 C.F.R. § 1635.3(a)-(c) (definitions of "family member," "family medical history," and "genetic information"), 1635.4 (prohibited practices under GINA). Employment decisions based on high health care costs resulting from an employee's current pregnancy-related medical conditions do not violate GINA, though they may violate the ADA and the PDA.

[49] *Fleming*, 948 F.2d at 997 (ERISA makes it unlawful to discharge or otherwise penalize a plan participant or beneficiary for exercising his or her rights under the plan).

[50] *See generally* ARTHUR C. GUYTON, TEXTBOOK OF MED. PHYSIOLOGY 1039-40 (2006) (describing physiological processes by which milk production occurs).

[51] *EEOC v. Houston Funding II, Ltd*., 717 F.3d 425 (5th Cir. 2013) (lactation is a related medical condition of pregnancy for purposes of the PDA, and an adverse employment action motivated by the fact that a woman is lactating clearly imposes upon women a burden that male employees need not suffer).

[52] Whether the demotion was ultimately found to be unlawful would depend on whether the employer asserted a legitimate, non-discriminatory reason for it and, if so, whether the evidence revealed that the asserted reason was pretextual.

[53] *Overcoming Breastfeeding Problems*, U.S. NAT'L LIBRARY OF MED., http://www.nlm.nih.gov/medlineplus/ency/article/002452.htm (last visited May 5, 2014); *see also,* DIANE WIESSINGER, THE WOMANLY ART OF BREASTFEEDING 385 (8th ed. 2010).

[54] *Breastfeeding,* U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.womenshealth.gov/breastfeeding/going-back-to-work/ (last visited May 5, 2014).

[55] The Commission disagrees with the conclusion in *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991) (table), that protection of pregnancy-related medical conditions is "limited to incapacitating conditions for which medical care or treatment is usual and normal." The PDA requires that a woman affected by pregnancy, childbirth, or related medical conditions be treated the same as other workers who are similar in their "ability or inability to work." Nothing limits protection to incapacitating pregnancy-related medical conditions. *See Notter v. North Hand Prot.*, 1996 WL 342008, at *5 (4th Cir. June 21, 1996) (unpublished) (concluding that PDA includes no requirement that "related medical condition" be "incapacitating," and therefore medical condition resulting from caesarian section delivery was covered under PDA even if it was not incapacitating).

[56] *See Houston Funding II, Ltd*., 717 F.3d at 430. The Commission disagrees with the decision in *Wallace v. Pyro Mining Co.*, 789 F. Supp. at 869, which, relying on *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), concluded that denial of personal leave for breastfeeding was not sex-based because it merely removed one situation from those for which leave would be granted. *Cf. Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 310-11 (S.D.N.Y. 1999) (discrimination based on breastfeeding is not cognizable as sex discrimination as there can be no corresponding subclass of men, i.e., men who breastfeed, who are treated more favorably). As explained in *Newport News Shipbuilding Co. v. EEOC*, 462 U.S. 669 (1983), when Congress passed the PDA, it rejected not only the holding in *Gilbert* but also the reasoning. Thus, denial of personal leave for breastfeeding discriminates on the basis of sex by limiting the availability of personal leave to women but not to men. *See also Allen v. Totes/Isotoner*, 915 N.E. 2d 622, 629 (Ohio 2009) (O'Connor, J., concurring) (concluding that gender discrimination claims involving lactation are cognizable under Ohio Fair Employment Practices Act and rejecting other courts' reliance on *Gilbert* in evaluating analogous claims under other statutes, given Ohio legislature's "clear and unambiguous" rejection of *Gilbert* analysis).

[57] Pub. L. No. 111-148, amending Section 7 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 207.

[58] 42 U.S.C. § 2000e(k). *See Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Question 34 (1979) ("An employer cannot discriminate in its employment practices against a woman who has had or is contemplating having an abortion."); H.R. Conf. Rep. No. 95-1786, at 4 (1978), *as reprinted in* 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766 ("Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion."); *see also, Doe v. C.A.R.S. Protection Plus, Inc*., 527 F.3d 358, 364 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 576 (2008) (PDA prohibits employer from discriminating against female employee because she has exercised her right to have an abortion); *Turic v. Holland Hospitality, Inc*., 85 F.3d 1211, 1214 (6th Cir. 1996) (discharge of pregnant employee because she contemplated having abortion violated PDA).

[59] 42 U.S.C. § 2000e(k) ("This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.").

[60] *Id.*

[61] *Velez v. Novartis Pharmaceuticals Corp*., 244 F.R.D. 243 (S.D.N.Y. 2007) (declaration by a female employee that she was encouraged by a manager to get an abortion was anecdotal evidence supporting a class claim of pregnancy discrimination).

[62] *See Young v. United Parcel Serv., Inc.*, --- U.S. ---, 135 S.Ct. 1338, 1354-55 (2015); *see also* Section I C., *infra*.

[63] *See, e.g.*, *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 197-98 (1991) (employer's policy barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding certain threshold, facially discriminated against women based on their capacity to become pregnant).

[64] 132 F.3d 431, 436 (8th Cir. 1998).

[65] *See also Maldonado v. U.S. Bank*, 186 F.3d 759, 766 (7th Cir.1999) (company vice president's remark to plaintiff that she was being fired "due to her condition" on the day after the plaintiff informed the vice president of her pregnancy directly proved pregnancy discrimination); *Sheehan v. Donlen Corp*., 173 F.3d 1039, 1044-45 (7th Cir. 1999) (supervisor's comment when discharging pregnant plaintiff that the discharge would hopefully give her time at home with her children and his similar comment the following day proved discrimination despite manager's lack of specific statement that plaintiff's pregnancy was reason for discharge); *Flores v. Flying J., Inc*., 2010 WL 785969, at *3 (S.D. Ill. Mar. 4, 2010) (manager's alleged statement to plaintiff on her last day of employment that she could no longer work because she was pregnant raised material issue of fact as to whether discharge was due to pregnancy discrimination).

[66] 471 F.3d 588, 593-94 (6th Cir. 2006).

[67] *Compare with Gonzalez v. Biovail Corp. Int'l*, 356 F. Supp. 2d 68, 80 (D. Puerto Rico 2005) (temporal link between discharge and plaintiff's pregnancy was too far removed to establish claim where discharge occurred six months after plaintiff's parental leave ended). *See also Piraino v. Int'l Orientation Res., Inc.*, 84 F.3d 270, 274 (7th Cir. 1996) (timing "suspicious" where less than two months after newly hired employee disclosed her pregnancy, defendant issued policy restricting maternity leave to employees who had worked at least one year); *Kalia v. Robert Bosch Corp*., 2008 WL 2858305, at *10 (E.D. Mich. Jul. 22, 2008) (unpublished) (plaintiff showed prima facie link between her pregnancy and discharge where supervisor started keeping written notes of issues with plaintiff the day after disclosure of pregnancy and discharge occurred the following month).

[68] *See EEOC v. Ackerman, Hood & McQueen, Inc.*, 956 F.2d 944, 948 (10th Cir. 1992) (clear language of PDA requires comparison between pregnant and non-pregnant workers, not between men and women).

[69] 271 F.3d 212, 221 (5th Cir. 2001).

[70] The *Wallace* court nevertheless affirmed judgment as a matter of law for the employer because the plaintiff was unable to rebut the employer's other reason for the discharge, i.e., that she falsified medical records. *Id.* at 221-22; *see also Carreno v. DOJI, Inc.,* 668 F. Supp. 2d 1053, 1062 (M.D. Tenn. 2009) (plaintiff set forth prima facie case of pregnancy discrimination based in part on evidence that she was discharged while similarly situated non-pregnant co-workers were demoted and given opportunities to improve their behavior); *Brockman v. Avaya*, 545 F. Supp. 2d 1248, 1255-56 (M.D. Fla. 2008) (employer's motion for summary judgment denied because plaintiff, who was pregnant when she was discharged, was treated less favorably than non-pregnant female who replaced her).

[71] 140 F. Supp. 2d 1001 (S.D. Iowa 2001).

[72] *Id.* at 1008; *see also Zisumbo v. McLeodUSA Telecomm. Servs., Inc.*, 154 Fed. Appx. 715, 724 (10th Cir. 2005) (unpublished) (finding material issue of fact regarding employer's explanation for demoting pregnant worker where explanation it advanced in court was dramatically different than the one it asserted to EEOC); *Kerzer v. Kingly Mfg.,* 156 F.3d 396, 403-04 (2d Cir. 1998) (evidence of pretext in discriminatory discharge claim under PDA included alleged statement by company president that an employer could easily get away with firing pregnant worker by stating the position was eliminated, president's alleged unfriendliness toward plaintiff following plaintiff's announcement of pregnancy, and plaintiff's discharge shortly before her scheduled return from maternity leave).

[73] 902 F.2d 148, 157-58 (1st Cir. 1990).

[74] *See also DeBoer v. Musashi Auto Parts,* 124 Fed. Appx. 387, 392-93 (6th Cir. 2005) (unpublished) (circumstantial evidence of pregnancy discrimination included employer's alleged failure to follow its disciplinary policy before demoting plaintiff).

[75] --- U.S. ---, 135 S.Ct. 1338 (2015).

[76] *Id.* at 1354-55.

[77] For more detailed guidance on what constitutes unlawful harassment and when employers can be held liable for unlawful harassment, *see* EEOC Enforcement Guidance*: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html (last visited May 5, 2014); *Enforcement Guidance on Harris v. Forklift Sys., Inc.* (Mar, 8, 1994), *available at* http://www.eeoc.gov/policy/docs/harris.html (last visited May 5, 2014); EEOC *Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19,1990), *available at* http://www.eeoc.gov/policy/docs/currentissues.html (last visited May 5, 2014); 29 C.F.R. § 1604.11.

[78] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Harassment may also violate Title VII if it results in a tangible employment action. To date, we are aware of no decision in which a court has found that pregnancy based harassment resulted in a tangible employment action.

[79] These facts were drawn from the case of *Iweala v. Operational Technologies Services, Inc.,* 634 F. Supp. 2d 73 (D.D.C. 2009). The court in that case denied the employer's motion for summary judgment on the plaintiff's hostile environment claim. *See also Dantuono v. Davis Vision, Inc*., 2009 WL 5196151, at *9 (E.D.N.Y. Dec. 29, 2009) (unpublished) (finding material issue of fact as to hostile environment based on pregnancy where plaintiff alleged that manager, after learning of her intention to become pregnant, was "snippy" and "short" with her, "talked down" to her, "scolded" her, "bad mouthed" her to other executives, communicated through email rather than in person, and banished her from the manager's office when the manager was speaking with others); *Zisumbo,* 154 Fed. Appx. at 726-27 (overturning summary judgment for defendant on hostile environment claim where there was evidence that plaintiff's supervisor was increasingly rude and demeaning to her after learning of her pregnancy, frequently referred to her as "prego," told her to quit or "go on disability" if she could not handle the stress of her pregnancy, and demoted her for alleged performance problems despite her positive job evaluations); *Walsh v. National Computer Sys, Inc*., 332 F.3d 1150, 1160 (8th Cir. 2003) (affirming finding that plaintiff was subjected to hostile environment due to her potential to become pregnant where evidence showed supervisor's hostility towards plaintiff immediately following her maternity leave, supervisor made several discriminatory remarks regarding plaintiff's potential future pregnancy, and supervisor set more burdensome requirements for plaintiff as compared to co-workers).

[80] Detailed guidance on this subject is set forth in EEOC's Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, *supra,* note 25.

[81] For further discussion of childcare leave issues, *see* Section I C.3., *infra*.

[82] The ADA is violated in these circumstances because the statute prohibits discrimination based on the disability of an individual with whom an employee has a relationship or association, such as the employee's child. For more information, *see* EEOC's *Questions and Answers About the Association Provision of the ADA, available at* http://www.eeoc.gov/facts/association_ada.html (last visited May 5, 2014).

[83] 42 U.S.C. § 2000e-2(e).

[84] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 204 (1991).

[85] *Id.* at 201.

[86] *Johnson Controls,* 499 U.S. at 206-07 and 208-211 (no BFOQ based on risk to employee or fetus, nor on fear of tort liability); 29 C.F.R. § 1604.2(a) (1972) (no BFOQ based on stereotypes or customer preference). One court found that non-pregnancy was a BFOQ for unmarried employees at an organization whose mission included pregnancy prevention. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987). However, the dissent to the order denying rehearing en banc argued that the court should have conducted "a more searching examination of the facts and circumstances . . . ." 840 F.2d at 584-86.

[87] *Cleveland Board of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Carney v. Martin Luther Home, Inc*., 824 F.2d 643 (8th Cir. 1987).

[88] 42 U.S.C. § 2000e-2(k). *See also* 42 U.S.C. § 2000e-2(a)(2); Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co*., 401 U.S. 424, 431 (1971).

[89] *Garcia v. Woman's Hosp. of Tex*., 97 F.3d 810, 813 (5th Cir. 1996) (finding that if all or substantially all pregnant women would be advised by their obstetrician not to lift 150 pounds, then they would certainly be disproportionately affected by this job requirement and statistical evidence would be unnecessary).

[90] *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977). By requiring an employer to show that a policy that has a discriminatory effect is job related and consistent with business necessity, Title VII ensures that the policy does

not operate as an "artificial, arbitrary, and unnecessary barrier[]" to the employment of pregnant workers. *See Griggs*, 401 U.S. at 431.

[91] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (k)(1)(C).

[92] *Garcia*, 97 F.3d at 813.

[93] *Spivey v. Beverly Enters.*, 196 F.3d 1309, 1314 (11th Cir. 1999). For a discussion of light duty, see Section I C.1., *infra*.

[94] *Abraham v. Graphic Arts. Int'l. Union*, 660 F.2d 811, 819 (D.C. Cir. 1981). For a discussion of restrictive leave policies, see Section I C.2., *infra*.

[95] The facts in this example were adapted from the case of *Garcia v. Woman's Hospital of Texas*, 97 F.3d 810 (5th Cir. 1996).

[96] 42 U.S.C. § 2000e(k).

[97] 411 U.S. 792, 802 (1973); *see also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-256 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 504-510 (1983); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 (2003).

[98] --- U.S. ---, 135 S.Ct. 1338 (2015).

[99] *Id.* at 1354.

[100] *Id*. (citing *Texas Dep't of Community Affairs v. Burdine*, 430 U.S. 248, 253 (1981)).

[101] *Id*. (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

[102] *Id.*

[103] *Id.* at 1354.

[104] *See id.* at 1354-55.

[105] *Id.* at 1354.

[106] Courts have disagreed as to how disparate impact is established in the context of light duty policies. *Compare Germain*, 2009 WL 1514513, at *4 (to establish a prima facie case of disparate impact, pregnant women must be compared to all others similar in their ability or inability to work, without regard to the cause of the inability to work), *with Woodard v. Rest Haven Christian Servs.*, 2009 WL 703270, at *7 (N.D. Ill. Mar. 16, 2009) (unpublished) (because pregnancy discrimination is sex discrimination, proper comparison would appear to be between the percentage of females who have been disparately affected and the percentage of males, though even if the comparison is between pregnant women and males, plaintiff failed to establish evidence of disparate impact). The EEOC agrees with *Germain's* holding that the appropriate comparison is between pregnant women and all others similar in their ability or inability to work, and disagrees with *Woodard's* holding that all women or all pregnant women should be compared to all men. As the *Germain* court recognized (*Germain*, 2009 WL 1514513, at *4), the Supreme Court has held that, "[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated *with respect to their ability to work*." *Int'l Union v. Johnson Controls*, 499 U.S. 187, 204-05 (1991) (emphasis added). That statutory language applies to disparate impact as well as to disparate treatment claims.

[107] 42 U.S.C. § 2000e-2(k)(1)(A)(i). *See, e.g., Germain*, 2009 WL 1514513, at *4 (denying summary judgment based on genuine issue of material fact as to business necessity).

[108] These facts were adapted from the case of *Lehmuller v. Incorporated Village of Sag Harbor*, 944 F. Supp. 1087 (E.D.N.Y. 1996). The court in that case found material issues of fact precluding summary judgment. These facts could also be analyzed as disparate treatment discrimination.

[109] This subsection addresses leave issues that arise under the PDA. For a discussion of the interplay between leave requirements under the PDA and the Family and Medical Leave Act, see Section III A., *infra*.

[110] *See Johnson Controls*, 499 U.S. at 200 ("The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) ….").

[111] *See* Sharon Terman, *Written Testimony of Sharon Terman*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 9 (citing Stephanie Bornstein, *Poor, Pregnant and Fired: Caregiver Discrimination Against Low-Wage Workers* (UC Hastings Center for WorkLife Law 2011)).

[112] In the past, airlines justified mandatory maternity leave for flight attendants or mandatory transfer of them to ground positions at a certain stage of pregnancy based on evidence that side effects of pregnancy can impair a flight attendant's ability to perform emergency functions. *See*, *e.g.*, *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (5th Cir. 1984) (mandatory leave was justified by business necessity as the policy was neither unrelated to airline safety concerns, nor a manifestly unreasonable response to these concerns); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) (mandatory leave was justified as a bona fide occupational qualification based on the safety risks posed by pregnancy). These decisions predated, and are inconsistent with, the Supreme Court's decision in *Johnson Controls*, 499 U.S. at 198-205. Moreover, the Commission agrees with the position taken by the Federal Aviation Administration (FAA) that, as long as a flight attendant can perform her duties, no particular stage of pregnancy renders her unfit. *See* Department of Transportation Federal Aviation Administration Memo (5/5/1980) and confirming e-mail (3/5/2010) (on file with EEOC, Office of Legal Counsel).

[113] 42 U.S.C. § 2000e-2(e)(1). For further discussion of the BFOQ defense, see Section I B.1.c., *supra*.

[114] *See, e.g.*, *Orr v. City of Albuquerque*, 531 F.3d 1210, 1216 (10th Cir. 2008) (reversing summary judgment for defendants where plaintiffs presented evidence that they were required to use sick leave for their maternity leave while others seeking non-pregnancy FMLA leave were routinely allowed to use vacation or compensatory time); *Maddox v. Grandview Care Ctr., Inc.*, 780 F.2d 987, 991 (11th Cir. 1986) (affirming finding in favor of plaintiff where employer's policy limited maternity leave to three months while leave of absence for "illness" could be granted for indefinite duration).

[115] *See Byrd v. Lakeshore Hosp.*, 30 F.3d 1380, 1383 (11th Cir. 1994) (rejecting employer's argument that plaintiff, who was discharged partly due to her use of accumulated sick leave for pregnancy-related reasons, additionally was required to show that non-pregnant employees with similar records of medical absences were treated more favorably; the court noted that an employer is presumed to customarily follow its own sick leave policy and, if the employer commonly violates the policy, it would have the burden of proving the unusual scenario).

[116] *See Stout v. Baxter Healthcare*, 282 F.3d 856, 859-60 (5th Cir. 2002) (discharge of plaintiff due to pregnancy-related absence did not violate PDA where there was no evidence she would have been treated differently if her absence was unrelated to pregnancy); *Armindo v. Padlocker*, 209 F.3d 1319, 1321 (11th Cir. 2000) (PDA does not require employer to treat pregnant employee who misses work more favorably than non-pregnant employee who misses work due to a different medical condition); *Marshall v. Am. Hosp. Ass'n*, 157 F.3d 520 (7th Cir. 1998) (upholding summary judgment for employer due to lack of evidence it fired her because of her pregnancy rather than her announced intention to take eight weeks of leave during busiest time of her first year on the job).

Note that although Title VII does not require pregnancy-related leave, the Family and Medical Leave Act does require covered employers to provide such leave under specified circumstances. *See* Section III A., *infra*.

[117] For further information about stereotypes and assumptions regarding pregnancy, *see* Section I A.1.b., *supra*.

[118] These facts were drawn from *EEOC v. Lutheran Family Services in the Carolinas*, 884 F. Supp. 1022 (E.D.N.C. 1994). The court in that case denied the defendant's motion for summary judgment.

[119] If Michelle's pregnancy-related complications are disabilities within the meaning of the ADA, the employer will have to consider whether granting the leave, in spite of its policy, or some other reasonable accommodation is possible without undue hardship. *See* Section II B., *infra*.

[120] See Section III A, *supra* for additional information on the Family and Medical Leave Act.

[121] *See Abraham v. Graphic Arts. Int'l. Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (10-day absolute ceiling on sick leave drastically affected female employees of childbearing age, an impact males would not encounter); *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 655 (N.D. Ill. 1991) (requiring employees to work for a full year before being eligible for sick leave had a disparate impact on pregnant workers and was not justified by business necessity); 29 C.F.R. § 1604.10(c) ("Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."); *cf. Maganuco v. Leyden Cmty. High Sch. Dist. 212*, 939 F.2d 440, 444 (7th Cir. 1991) (court noted that PDA claimant challenging leave policy on basis of disparate impact might have been able to establish that women disabled by pregnancy accumulated more sick days than men, or than women who have not experienced pregnancy-related disability, but plaintiff never offered such evidence).

The Commission disagrees with *Stout v. Baxter Healthcare*, 282 F.3d 856 (5th Cir. 2002), in which the court refused to find a prima facie case of disparate impact despite the plaintiff's showing that her employer's restrictive leave policy for probationary workers adversely affected all or substantially all pregnant women who gave birth during or near their probationary period, on the ground that "to [allow disparate impact challenges to leave policies] would be to transform the PDA into a guarantee of medical leave for pregnant employees." The Commission believes that the Fifth Circuit erroneously conflated the issue of whether the plaintiff has made out a prima facie case with the ultimate issue of whether the policy is unlawful. As noted, an employer is not required to eliminate or modify the policy if it is job related and consistent with business necessity and the plaintiff fails to present an equally effective less discriminatory alternative. *See Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 813 (5th Cir. 1996) ("[t]he PDA does not mandate preferential treatment for pregnant women"; the plaintiff loses if the employer can justify the policy).

[122] *Warshawsky*, 768 F. Supp. at 655.

[123] *Id.*

[124] *See California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987) (The state could require employers to provide up to four months of medical leave to pregnant women where "[t]he statute is narrowly drawn to cover only the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions."); *Johnson v. Univ. of Iowa*, 431 F.3d 325, 328 (8th Cir. 2005) ("If the leave given to biological mothers is granted due to the physical trauma they sustain giving birth, then it is conferred for a valid reason wholly separate from gender.").

[125] *See Johnson*, 431 F.3d at 328 (if leave given to mothers is designed to provide time to care for and bond with newborn, "then there is no legitimate reason for biological fathers to be denied the same benefit"); EEOC Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, supra* note 25. Although Title VII does not require an employer to provide child care leave if it provides no leave for other family obligations, the Family and Medical Leave Act requires covered employers to provide such leave. *See* Section III A., *infra*.

[126] The legislative history of the PDA makes clear that the statute "in no way requires the institution of any new programs where none currently exist." H.R.Rep. No. 95-948, p. 4 (1978), Leg. Hist. 150, U.S. Code Cong. & Admin. News 1978, pp. 4749, 4752. The application of the non-discrimination principle to infertility and contraception is discussed at Section I A.3.c. and I A.3.d., *supra*.

[127] 29 C.F.R. § 1604.10(b) ("Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment.").

[128] The Patient Protection and Affordable Care Act (also known as Health Care Reform), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code) contains provisions regarding insurance coverage of pre-existing conditions. Effective January 1, 2014, insurers can no longer exclude coverage for treatments based on such conditions.

[129] For further discussion of discrimination based on use of contraceptives, *see* Section I A.3.d., *supra*; *see also supra* note 39.

[130] *See Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Question 36 (1979).

[131] 42 U.S.C. § 2000e(k); *see also Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Question 37 (1979).

[132] However, prior to the passage of the PDA, it did not violate Title VII for an employer's seniority system to allow women on pregnancy-related medical leave to earn less seniority credit than workers on other forms of short-term medical leave. Because the PDA is not retroactive, an employer is not required to adjust seniority credits for pregnancy-related medical leave that was taken prior to the effective date of the PDA (April 29, 1979), even if pregnancy-related medical leave was treated less favorably than other forms of short-term medical leave. *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009).

[133] The principles set forth in this section also apply to claims arising under Section 501 of the Rehabilitation Act. 29 U.S.C. § 791.

[134] Under the ADA, an "employer" includes a private sector employer, and a state or local government employer, with 15 or more employees. 42 U.S.C. § 12111(5)(A). The term "employer" in this document refers to any entity covered by the ADA including labor organizations and employment agencies.

[135] *See* 42 U.S.C. §§ 12112(b)(6), 12113(a); 29 C.F.R. § 1630.10.

[136] 42 U.S.C. § 12112(d); 29 C.F.R. § 1630.13.

[137] 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9.

[138] 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).

[139] Pub. L. No. 110-325, §§ 2(b)(5), 4(a), 122 Stat. 3553 (2008); 29 C.F.R. §§ 1630.1(c)(4), 1630.2(j)(1)(vi). Plaintiffs seeking to show that their pregnancy-related impairments are covered disabilities should provide specific evidence of symptoms and impairments and the manner in which they are substantially limiting.

[140] 29 C.F.R. § 1630.2(j)(1)(ix).

[141] *See, e.g., Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970, 976 (S.D. Iowa 2002), *aff'd,* 340 F.3d 543 (8th Cir. 2003) (periodic nausea, vomiting, dizziness, severe headaches, and fatigue were not disabilities within the meaning of the ADA because they are "part and parcel of a normal pregnancy"); *Gudenkauf v. Stauffer Commc'ns, Inc.*, 922 F. Supp. 465, 473 (D. Kan. 1996) (morning sickness, stress, nausea, back pain, swelling, and headaches or physiological changes related to a pregnancy are not impairments unless they exceed normal ranges or are attributable to a disorder); *Tsetseranos v. Tech Prototype, Inc.,* 893 F. Supp. 109, 119 (D.N.H. 1995) ("pregnancy and related medical conditions do not, without unusual circumstances, constitute a 'physical or mental impairment' under the ADA").

[142] 29 C.F.R. pt. 1630 app. § 1630.2(h).

[143] *See, e.g.*, *Walker v. Fred Nesbit Distrib. Co*., 331 F. Supp. 2d 780, 790 (S.D. Iowa 2004) (routine pregnancy is not a disability under ADA); *Gover v. Speedway Super America, LLC*, 254 F. Supp. 2d 695, 705 (S.D. Ohio 2002) (same).

[144] The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. 29 C.F.R. pt. 1630 app. §1630.2(j). The ADA includes a functional rather than a medical definition of disability. 136 Cong. Rec. H1920 H1921 (daily ed. May 1, 1990) (Statement of Rep. Bartlett).

[145] *See* 29 C.F.R. § 1630.2(j)(ix) (impairments lasting fewer than six months can be disabilities).

[146] *See Insufficient Cervix,* U.S. NAT'L LIBRARY OF MED., http://www.nlm.nih.gov/medlineplus/ency/patientinstructions/000595.htm (last visited April 30, 2014) (general information about insufficient cervix). Uterine fibroids (non-cancerous tumors that grow in and around the wall of the uterus) may cause severe localized abdominal pain, carry an increased of risk of miscarriage, or cause preterm or breech birth and may necessitate a cesarean delivery. *See* Hee Joong Lee, MD et al., *Contemporary Management of Fibroids in Pregnancy*, REVIEWS IN OBSTETRICS & GYNECOLOGY (2010), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2876319/ (last visited Apr. 30, 2014).

[147] *Price v. UTi, U.S., Inc*., 2013 WL 798014, at *2 (E.D. Mo. Mar. 5, 2013), *reconsideration denied in Price v. UTi, U.S., Inc.*, 2013 WL 1411547 (E.D. Mo. Apr. 08, 2013) (denying summary judgment to employer who terminated employee three weeks after she gave birth by cesarean section).

[148] Nausea causing severe vomiting resulting in dehydration may be a condition known as hyperemesis gravidarum. Excessive swelling due to fluid retention, edema, may require rest and elevation of legs. Abnormal heart rhythms may require further monitoring. *See Pregnancy*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://womenshealth.gov/pregnancy/you-are-pregnant/pregnancy-complications.html (last visited Apr. 30, 2014).

[149] *McKellips v. Franciscan Health Sys.*, 2013 WL 1991103, at *4 (W.D. Wash. May 13, 2013) (plaintiff's allegations that she suffered severe pelvic inflammation and immobilizing pain that necessitated workplace adjustments to reduce walking and early pregnancy-related medical leave were sufficient to allow her to amend her complaint to include an ADA claim).

[150] *Nayak v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 2013 WL 121838, at *3 (S.D. Ind. Jan. 9, 2013) (denying defendant's motion to dismiss plaintiff's ADA claim).

[151] *Mayorga v. Alorica, Inc.*, 2012 WL 3043021, at *6 (S.D. Fla. July 25, 2012) (unpublished) (denying defendant's motion to dismiss where plaintiff claimed impairments related to her pregnancy included premature uterine contractions, irritation of the uterus, increased heart rate, severe morning sickness, severe pelvic bone pains, severe back pain, severe lower abdominal pain, and extreme headaches). Several recent district court decisions that have concluded that impairments related to pregnancy are not disabilities have been based either on a lack of any facts describing how the impairment limited major life activities, or on the incorrect application of

the more stringent requirements for establishing that an impairment constitutes a disability that existed prior to the effective date of the ADA Amendments Act (ADAAA). *See Wanamaker v. Westport Board of Education*, 899 F. Supp. 2d 193 (D. Conn. 2012) (plaintiff did not allege facts that would demonstrate that the spinal injury, transverse myelitis, she suffered in childbirth substantially limited a major life activity); *Selkow v. 7-Eleven, Inc.*, 2012 WL 2054872 (M.D. Fla. June 7, 2012) (without acknowledging the ADAAA, which applied at the time of plaintiff's termination, the court held that plaintiff presented no evidence to withstand summary judgment on whether her weakened back constituted the type of "severe complication" related to pregnancy required to establish a disability); *Sam-Sekur v. Whitmore Group, LTD*, 2012 WL 2244325 (E.D.N.Y. June 15, 2012) (relying on case law pre-dating the ADAAA, the court held that "temporary impairments, pregnancies, and conditions arising from pregnancy are not typically disabilities," but allowed the *pro se* plaintiff to amend her complaint to allege facts concerning the duration of her chronic cholecystitis, which required removal of her gall bladder, and how the condition was linked to pregnancy).

[152] *Heatherly v. Portillo's Hot Dogs, Inc.,* 2013 WL 3790909, at *6 (N.D. Ill. July 19, 2013).

[153] Prior to an offer of employment, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job. After an applicant is given a conditional offer, but before she starts work, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category. After employment begins, an employer may make disability-related inquiries and require medical examinations only if they are job related and consistent with business necessity. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. 42 U.S.C. § 12112(d)(4); 29 C.F.R. §§ 1630.13, 1630.14; EEOC Enforcement Guidance: *Preemployment Disability-Related Questions and Medical Examinations* (Oct. 10, 1995), *available at*http://www.eeoc.gov/policy/docs/preemp.html (last visited May 5, 2014); *see also EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, at question 1, (July 27, 2000), *available at* http://www.eeoc.gov/policy/docs/guidance-inquiries.html (last visited May 5, 2014).

[154] 29 C.F.R. § 1630.2(l)(1).

[155] These facts were drawn from the case of *Spees v. James Marine, Inc.,* 617 F.3d 380, 398 (6th Cir. 2010). The court's decision that the employer regarded the pregnant employee as having a disability because she had complications with previous pregnancies was made under the more stringent "regarded as" standard in place prior to the ADAAA.

[156] *See* Job Accommodation Network, "Accommodation Ideas for Pregnancy," *available at* https://askjan.org/soar/other/preg.html (last visited May 5, 2014).

[157] 29 C.F.R. § 1630.2(o); s*ee* EEOC Revised Enforcement Guidance: *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Oct. 17, 2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html (last visited May 5, 2014).

[158] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9.

[159] *See* 29 C.F.R. § 1630.2(p). Factors that may be considered in determining whether an accommodation would impose an undue hardship include the nature and cost of the accommodation, the overall financial resources of the facility or entity, and the type of operation of the entity.

[160] *See supra* note 157.

[161] *See EEOC Enforcement Guidance: Workers' Compensation and the ADA*, at Q&A 28, (Sept.10, 1996), available at http://www.eeoc.gov/policy/docs/workcomp.html (last visited May 5, 2014). For further discussion of light duty issues, see Section I C.1., *supra*.

[162] The Department of Labor (DOL) enforces the FMLA. Recently revised DOL regulations under the FMLA can be found at 29 C.F.R. Part 825. Additional information about the interaction between the FMLA and the laws enforced by the EEOC can be found in the EEOC's *Fact Sheet on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964, available at* http://www.eeoc.gov/policy/docs/fmlaada.html (last visited May 5, 2014).

[163] In comparison, Title VII covers employers with 15 or more employees for each working day in each of 20 or more calendar weeks in the same calendar year as, or in the calendar year prior to when, the alleged discrimination occurred. Title VII also covers governmental entities.

[164] Employees are "eligible" for FMLA leave if they: (1) have worked for a covered employer for at least 12 months; (2) had at least 1,250 hours of service during the 12 months immediately preceding the start of leave;

and (3) work at a location where the employer employs 50 or more employees within 75 miles. 29 C.F.R. § 825.110. Special hours of service requirements apply to flight crew members. Airline Flight Crew Technical Corrections Act, Pub. L. No. 111-119, 123 Stat. 3476 (codified as amended at 29 U.S.C. § 2611(2)(D)).

[165] The FMLA also provides military family leave entitlements to employees with family members in the armed forces in circumstances not likely to be relevant to pregnancy-related leave, or leave to care for a newborn child, a newly adopted child, or a child newly placed in foster care.

[166] 65 Fed. Reg. 26115 (May 4, 2000). The Office of Personnel Management is charged with issuing guidance pursuant to this order.

[167] For a discussion of discrimination based on lactation and breastfeeding, *see* Section I A.4.b., *supra*.

[168] Pub. L. No. 111-148, amending Section 7 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 207. Because the Affordable Care Act provides no specific effective date, the new break time law for nursing mothers was effective on the date of enactment - March 23, 2010.

[169] DOL has published a Fact Sheet providing general information on the break time requirement for nursing mothers. The Fact Sheet can be found at http://www.dol.gov/whd/regs/compliance/whdfs73.htm (last visited May 5, 2014).

[170] The DOL Fact Sheet explains that, where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way other employees are compensated for break time.

[171] Currently, 24 states, Puerto Rico, and the District of Columbia have legislation setting workplace requirements related to breastfeeding.

[172] Section 708 of Title VII provides: "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 42 U.S.C. § 2000e-7.

Section 1104 of Title XI, applicable to all titles of the Civil Rights Act, provides: "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of the Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. § 2000h-4.

[173] Some states, including Alaska, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, New Jersey, Texas, Minnesota, and West Virginia, have passed laws requiring that employers provide some reasonable accommodation for a pregnant worker. For instance, in the state of Maryland an employee with a disability contributed to or caused by pregnancy may request reasonable accommodation and the employer must explore "all possible means of providing the reasonable accommodation." The law lists various options to consider such as changing job duties, changing work hours, providing mechanical or electrical aids, transferring employees to less strenuous or less hazardous positions, and providing leave. Md. Code Ann., State Gov't Article, §20-609.

[174] 479 U.S. 272 (1987).

[175] *Id.* at 280 (citation omitted).

[176] *Id.* at 287.

[177] *Id.* at 291.

[178] *See* Section I A.3.a., *supra*.

[179] Employers should consider, however, how the pay provisions of the Fair Labor Standards Act could be implicated by an employee's involvement in training while on leave. Under U.S. Department of Labor regulations, certain training activities outside of working hours need not be treated as compensable time. *See* 29 C.F.R. §§ 785.11-785.32.

[180] *Id.*

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NYC COMMISSION ON HUMAN RIGHTS
Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63 (2015)

The New York City Human Rights Law (the "NYCHRL") prohibits discrimination in employment, public accommodations, and housing. It also prohibits discriminatory harassment and bias-based profiling by law enforcement. The NYCHRL, pursuant to the 2005 Civil Rights Restoration Act, must be construed "independently from similar or identical provisions of New York state or federal statutes," such that "similarly worded provisions of federal and state civil rights laws [are] a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."[1]

The New York City Commission on Human Rights (the "Commission") is the City agency charged with enforcing the NYCHRL. Individuals interested in vindicating their rights under the NYCHRL can choose to file a complaint with the Commission's Law Enforcement Bureau within one (1) year of the discriminatory act or file a complaint in New York State Supreme Court within three (3) years of the discriminatory act. The NYCHRL covers employers with four or more employees.

The Fair Chance Act ("FCA"), effective October 27, 2015, amends the NYCHRL by making it an unlawful discriminatory practice for most employers, labor organizations, and employment agencies to inquire about or consider the criminal history of job applicants until after extending conditional offers of employment. If an employer wishes to withdraw its offer, it must give the applicant a copy of its inquiry into and analysis of the applicant's conviction history, along with at least three business days to respond.

I. LEGISLATIVE INTENT

The FCA reflects the City's view that job seekers must be judged on their merits before their mistakes. The FCA is intended to level the playing field so that New Yorkers who are part of the approximately 70 million adults residing in the United States who have been arrested or convicted of a crime[2] "can be considered for a position among other equally qualified candidates," and "not overlooked during the hiring process simply because they have to check a box."[3]

Even though New York Correction Law Article 23-A ("Article 23-A") has long protected people with criminal records from employment discrimination,[4] the City determined that such discrimination still occurred when applicants were asked about their records before completing the hiring process because many employers were not weighing

1 Local Law No. 85 (2005). "The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably worded to provisions of this title have been so construed." N.Y.C. Admin. Code § 8-130.

2 Gov'tl Affairs Division of the N.Y. City Council, Committee Report on Int. No. 318-A, S. 2015-5, at 2 (June 9, 2015) ("Civil Rights Committee's Report"), *available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=3815856&GUID=59D912BA-68B5-429C-BF39-118EB4DFAAF5.

3 Testimony of Gale A. Brewer, Manhattan Borough President on Int. No. 318 to Prohibit Employment Discrimination Based on One's Arrest Record or Criminal Conviction at 2 (Dec. 3, 2014) (emphasis in original), *available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=3410802&GUID=7D143B7E-C532-41EF-9A97-04FD17854ED7.

4 Violating Article 23-A is an unlawful discriminatory practice under the NYCHRL. N.Y.C. Admin. Code § 8-107(10).

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the factors laid out in Article 23-A.[5] For that reason, the FCA prohibits any discussion or consideration of an applicant's criminal history until after a conditional offer of employment. Certain positions are exempt from the FCA, as described in Section VII of this Guidance.

While the FCA does not require employers to hire candidates whose convictions are directly related to a job or pose an unreasonable risk, it ensures that individuals with criminal histories are considered based on their qualifications before their conviction histories. If an employer is interested enough to offer someone a job, it can more carefully consider whether or not that person's criminal history makes her or him unsuitable for the position. If the employer wishes to nevertheless withdraw its offer, it must first give the applicant a meaningful opportunity to respond before finalizing its decision.

II. Definitions

The FCA applies to both licensure and employment, although this Guidance focuses on employment. The term "**applicant**," as used in this Guidance, refers to both potential and current employees. The FCA applies to all decisions that affect the terms and conditions of employment, including hiring, termination, transfers, and promotions; where this Guidance describes the "**hiring process**," it includes the process for making all of these employment decisions. Any time the FCA or this Guidance requires notices and disclosures to be printed or in writing, they may also be communicated by email, if such method of communication is mutually agreed on in advance by the employer and the applicant.

For the purpose of this Guidance, the following key terms are defined as follows:

Article 23-A Analysis

The evaluation process mandated by New York Correction Law Article 23-A.

Article 23-A Factors

The factors employers must consider concerning applicants' criminal conviction history under Section 753 of New York Correction Law Article 23-A.

Conditional Offer of Employment

An offer of employment that can only be revoked based on:

1) The results of a criminal background check;
2) The results of a medical exam in situations in which such exams are permitted by the Americans with Disabilities Act;[6] or
3) Other information the employer could not have reasonably known before the conditional offer if, based on the information, the employer would not have made the offer and the employer can show the information is material to job performance.

For temporary help firms, a conditional offer is the offer to be placed in a pool of applicants from which the applicant may be sent to temporary positions.

5 Transcript of the Minutes of the Committee on Civil Rights at 10 (Dec. 3, 2014) (statement of Council Member Jumaane Williams), *available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=3410594&GUID=5FE2433E-1A95-4FAA-AECC-D60D4016F3FB.

6 The Americans with Disabilities Act ("ADA") prohibits employers from conducting medical exams until after a conditional offer of employment. 42 U.S.C. § 12112(d)(3). To comply with the FCA and the ADA, employers may condition an offer of employment on the results of a criminal background check and then, after the criminal background check, a medical examination.

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Conviction History
A previous conviction of a crime, either a felony or misdemeanor under New York law,[7] or a crime as defined by the law of another state.

Criminal Background Check
When an employer, orally or in writing, either:

1) Asks an applicant whether or not she or he has a criminal record; or
2) Searches public records, including through a third party, such as a consumer reporting agency ("CRA"), for an applicant's criminal history.

Criminal History
A previous record of criminal convictions or non-convictions or a currently pending criminal case.

Fair Chance Process
The post-conditional offer process mandated by the FCA, as outlined in Section V of this Guidance.

Inquiry
Any question, whether made in writing or orally, asked for the purpose of obtaining an applicant's criminal history, including, without limitation, questions in a job interview about an applicant's criminal history; and any search for an applicant's criminal history, including through the services of a third party, such as a consumer reporting agency.

Non-convictions
A criminal action, not currently pending, that was concluded in one of the following ways:

1) Termination in favor of the individual, as defined by New York Criminal Procedure Law ("CPL") § 160.50, even if not sealed;
2) Adjudication as a youthful offender, as defined by CPL § 720.35, even if not sealed;
3) Conviction of a non-criminal violation that has been sealed under CPL § 160.55; or
4) Convictions that have been sealed under CPL § 160.58.

Statement
Any words, whether made in writing or orally, for the purpose of obtaining an applicant's criminal history, including, without limitation, stating that a background check is required for a position.

Temporary Help Firms
A business which recruits, hires, and assigns its own employees to perform work at or services for other organizations, to support or supplement the other organization's workforce, or to provide assistance in special work situations such as, without limitation, employee absences, skill shortages, seasonal workloads, or special assignments or projects.[8]

7 A misdemeanor is an offense, other than a "traffic infraction," for which a person may be incarcerated for more than 15 days and less than one year. N.Y. Pen. L. § 10.00(4). A felony is an offense for which a person may be incarcerated for more than one year. *Id.* § 10.00(5).

8 N.Y. Lab. L. § 916(5).

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III. *Per Se* Violations of the FCA

As of October 27, 2015, the following acts are separate, chargeable violations of the NYCHRL:

1. Declaring, printing, or circulating – or causing the declaration, printing, or circulation of – any solicitation, advertisement, or publication for employment that states any limitation or specification regarding criminal history, *even if no adverse action follows*. This includes, without limitation, advertisements and employment applications containing phrases such as: "no felonies," "background check required," and "must have clean record."
2. Making any statement or inquiry, as defined in Section II of this Guidance, before a conditional offer of employment, *even if no adverse action follows*.
3. Withdrawing a conditional offer of employment based on an applicant's criminal history before completing the Fair Chance Process as outlined in Section V of this Guidance. Each of the following is a separate, chargeable violation of the NYCHRL:
   a) Failing to disclose to the applicant a written copy of any inquiry an employer conducted into the applicant's criminal history;
   b) Failing to share with the applicant a written copy of the employer's Article 23-A analysis;
   c) Failing to hold the prospective position open for at least three business days, from an applicant's receipt of both the inquiry and analysis, to allow the applicant to respond.
4. Taking an adverse employment action because of an applicant's non-conviction.[9]

IV. The Criminal Background Check Process Under the FCA

The FCA does not change what criminal history information employers may consider. Instead, it changes when employers may consider this information. No employer may seek, obtain, or base an adverse employment action on a non-conviction.[10] No employer may seek, obtain, or base an adverse employment action on a criminal conviction until after extending a conditional offer of employment. After a conditional offer of employment, an employer can only withdraw the offer after evaluating the applicant under Article 23-A and finding that the applicant's conviction history poses a direct relationship or unreasonable risk.

A. Before a Conditional Offer

The FCA prohibits the discovery and use of criminal history before a conditional offer of employment. During this time, an employer must not seek or obtain an applicant's criminal history. Consistent with Article 23-A, an employer's focus must instead be on an applicant's qualifications.

The following are examples of common hiring practices that are affected by the FCA.

i. Solicitations, advertisements, and publications for employment cannot mention criminal history.

The FCA now explicitly prohibits employers from expressing any limitation or specification based on criminal history in their job advertisements,[11] even though

9 The FCA updates the NYCHRL's protections regarding non-conviction discrimination to match the New York State Human Rights Law. *See* Section XI of this Guidance.

10 Employers of police and peace officers can consider all non-convictions, except criminal actions terminated in favor of the applicant, as defined by New York Criminal Procedure Law § 160.50. N.Y.C. Admin. Code §§ 8-107(11)(a),(b).

11 *Id.* § 8-107(11-a)(a)(1).

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such advertisements are already illegal under the existing NYCHRL.[12] Ads cannot say, for example, "no felonies," "background check required," or "clean records only." Solicitations, advertisements, and publications encompass a broad variety of items, including, without limitation, employment applications, fliers, handouts, online job postings, and materials distributed at employment fairs and by temporary help firms and job readiness organizations. Employment applications cannot ask whether an applicant has a criminal history or a pending criminal case or authorize a background check.

ii. Employers cannot inquire about criminal history during the interview process.

The FCA prohibits employers from making any inquiry or statement related to an applicant's criminal history until after a conditional offer of employment. Examples of prohibited statements and inquiries include, without limitation:

- Questions, whether written or oral, during a job interview about criminal history;
- Assertions, whether written or oral, that individuals with convictions, or certain convictions, will not be hired or cannot work at the employer; and
- Investigations into the applicant's criminal history, including using public records or the Internet, whether conducted by an employer or for an employer by a third party.

The FCA does not prevent employers from otherwise looking into an applicant's background and experience to verify her or his qualifications for a position, including asking for resumes and references and performing general Internet searches (e.g., Google, LinkedIn, etc.). Searching an applicant's name is legal, but trying to discover an applicant's conviction history is not. In connection with an applicant, employers cannot search for terms such as, "arrest," "mugshot," "warrant," "criminal," "conviction," "jail," or "prison." Nor can employers search websites that contain or purport to contain arrest, warrant, conviction, or incarceration information.

The FCA allows an applicant to refuse to respond to any prohibited inquiry or statement. Such refusal or response to an illegal question shall not disqualify the applicant from the prospective employment.

iii. Inadvertent disclosures of criminal record information before a conditional offer of employment do not create employer liability.

The FCA prohibits any inquiry or statement made for the purpose of obtaining an applicant's criminal history. If a legitimate inquiry not made for that purpose leads an applicant to reveal criminal history, the employer should continue its hiring process. It may not examine the applicant's conviction history information until after deciding whether or not to make a conditional offer of employment.

If the applicant raises her or his criminal record voluntarily, the employer should not use that as an opportunity to explore an applicant's criminal history further. The employer should state that, by law, it will only consider the applicant's record if it decides to offer her or him a job. Similarly, if an applicant asks an employer during the interview if she or he will be subject to a criminal background check, the employer may state that a criminal background check will be conducted only after a conditional offer of employment. It must then move the conversation to a different topic. Employers who make a good faith effort to exclude information regarding criminal history before extending a conditional offer of employment will not be liable under the FCA.

12 Advertisements excluding people who have been arrested violate the NYCHRL's complete ban on employment decisions based on an arrest that did not lead to a criminal conviction. *Id.* § 8-107(11). Employers whose advertisements exclude people with criminal convictions are not engaging in the individual analysis required by Article 23-A. *Id.* § 8-107(10).

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B. After the Conditional Offer of Employment

After extending a conditional offer of employment, as defined in Section II of this Guidance, an employer may make the same inquiries into, and statements about, an applicant's criminal history as before the FCA became effective. An employer may:

- Ask, either orally or in writing, whether an applicant has a criminal conviction history or a pending criminal case;
- Run a background check itself or, after giving the applicant notice and getting her or his permission, use a consumer reporting agency to do so;[13] and
- Once an employer knows about an applicant's conviction, ask her or him about the circumstances that led to it and begin to gather information relevant to every Article 23-A factor.

Employers must never inquire about or act on non-conviction information, however. To guard against soliciting or considering non-conviction information, employers may frame inquiries by using the following language after a conditional offer is made:

> Have you ever been convicted of a misdemeanor or felony? Answer "NO" if your conviction: (a) was sealed, expunged, or reversed on appeal; (b) was for a violation, infraction, or other petty offense such as "disorderly conduct;" (c) resulted in a youthful offender or juvenile delinquency finding; or (d) if you withdrew your plea after completing a court program and were not convicted of a misdemeanor or felony.

If an employer hires an applicant after learning about her or his conviction history, the FCA does not require it to do anything more. An employer that wants to withdraw its conditional offer of employment, however, must first consider the Article 23-A factors. If, after doing so, an employer still wants to withdraw its conditional offer, it must follow the Fair Chance Process.

C. Evaluating the Applicant Using Article 23-A

Under Article 23-A, an employer cannot deny employment unless it can:

1. Draw a direct relationship between the applicant's criminal record and the prospective job; or
2. Show that employing the applicant "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."[14]

An employer that cannot show the applicant meets at least one of the exceptions to Article 23-A cannot withdraw the conditional offer because of the applicant's criminal record.

An employer cannot simply presume a direct relationship or unreasonable risk exists because the applicant has a conviction record.[15] The employer must evaluate the Article 23-A factors using the applicant's specific information before reaching either conclusion.

- To claim the direct relationship exception, an employer must first draw some connection between the nature of conduct that led to the conviction(s) and the

13 The consumer report cannot contain credit information. Under the Stop Credit Discrimination in Employment Act, employers, labor organizations, and employment agencies cannot request or use the consumer credit history of an applicant or employee for the purpose of making any employment decisions, including hiring, compensation, and other terms and conditions of employment. *Id.* §§ 8-102(29); 8-107(24).

14 N.Y. Correct. L. § 752.

15 *Bonacorsa v. Van Lindt,* 71 N.Y.2d 605, 613-14 (N.Y. 1988).

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potential position. If a direct relationship exists, an employer must evaluate the Article 23-A factors to determine whether the concerns presented by the relationship have been mitigated.[16]

- To claim the unreasonable risk exception, an employer must begin by assuming that no risk exists and then show how the Article 23-A factors combine to create an unreasonable risk.[17] Otherwise, this exception would cover all convictions not directly related.

The Article 23-A factors are:

- That New York public policy encourages the licensure and employment of people with criminal records;
- The specific duties and responsibilities of the prospective job;
- The bearing, if any, of the person's conviction history on her or his fitness or ability to perform one or more of the job's duties or responsibilities;
- The time that has elapsed since the occurrence of the events that led to the applicant's criminal conviction, not the time since arrest or conviction;
- The age of the applicant when the events that led to her or his conviction occurred, not the time since arrest or conviction;
- The seriousness of the applicant's conviction history;[18]
- Any information produced by the applicant, or produced on the applicant's behalf, regarding her or his rehabilitation or good conduct;
- The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.

Employers must also consider a certificate of relief from disabilities or a certificate of good conduct, which shall create a presumption of rehabilitation regarding the relevant conviction.[19]

Employers must carefully conduct the Article 23-A analysis. Before extending a conditional offer of employment, employers must define the job's duties and responsibilities, as required by Article 23-A. Employers cannot alter the job's duties and responsibilities after making a conditional offer of employment. Once an employer extends a conditional offer and learns of an applicant's criminal record, it must solicit the information necessary to properly consider each Article 23-A factor, including the applicant's evidence of rehabilitation.

The Commission will review private employers' adverse employment decisions to ensure that they correctly consider the Article 23-A factors and properly apply the exceptions. The Commission will begin with the purpose of Article 23-A: to create "a fair opportunity for a job is a matter of basic human fairness," one that should not be "frustrated by senseless discrimination."[20] The Commission will also consider Article

16 *Id.* at 613-14; *see Soto v. N.Y. State Office of Mental Retardation & Developmental Disabilities,* 907 N.Y.S.2d 104, 26 Misc. 3d 1215(A) at *9 (N.Y. Sup. Ct. 2010) (citing *Marra v. City of White Plains,* 467 N.Y.S.2d 865, 870 (N.Y. App. Div. 1983)).

17 *Bonacorsa,* 71 N.Y.2d at 613; *Exum v. N.Y. City Health & Hosps. Corp.,* 964 N.Y.S.2d 58, 37 Misc. 3d 1218(A) at *6 (N.Y. Sup. Ct. 2012) .

18 Employers may judge the seriousness of an applicant's criminal record based on the number of felony and misdemeanor convictions, along with whether the acts underlying those convictions involved violence or theft.

19 N.Y. Correct. L. § 753(2). An employer may not disfavor an applicant because she or he does not possess a certificate.

20 Governor's Approval Mem., Bill Jacket, L. 1976, ch. 931.

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23-A case law.[21] Employers must evaluate each Article 23-A factor; they cannot ignore evidence favorable to the applicant;[22] and they cannot disproportionately weigh any one factor over another.[23] Employers should consider applicants' successful performance of their job duties in past employment, along with evidence that they have addressed the causes of their criminal activity.[24]

V. The Fair Chance Process

If, after evaluating the applicant according to Article 23-A, an employer wishes to decline employment because a direct relationship or unreasonable risk exists, it must follow the Fair Chance Process:

1. Disclose to the applicant a written copy of any inquiry it conducted into the applicant's criminal history;
2. Share with the applicant a written copy of its Article 23-A analysis; and
3. Allow the applicant at least three business days, from receipt of the inquiry and analysis, to respond to the employer's concerns.

A. Disclosing the Inquiry

The Commission requires an employer to disclose a complete and accurate copy of every piece of information it relied on to determine that an applicant has a criminal record, along with the date and time the employer accessed the information. The applicant must be able to see and challenge the same criminal history information relied on by the employer.

Employers who hire consumer reporting agencies to conduct background checks can fulfill this obligation by supplying a copy of the CRA's report on the applicant.[25] Because CRAs can be held liable for aiding and abetting discrimination under the NYCHRL, they should ensure that their customers only request criminal background reports after a conditional offer of employment. Employers who rely on criminal record information beyond what is contained in a criminal background report must also give that information to the applicant.

Employers who search the Internet to obtain criminal histories must print out the pages they relied on, and such printouts must identify their source so that the applicant can verify them. Employers who check public records must provide copies of those records. Employers who rely on oral information must provide a written summary of their conversation. The summary must contain the same information the employer relied on in reaching its determination, and it should identiy whether that information was provided by the applicant.

21 Nearly all reported cases concern public agencies' employment decisions, which cannot be reversed unless "arbitrary and capricious." N.Y. Correct. L. § 755; *see* C.P.L.R. § 7803(3). The "arbitrary and capricious" standard does not apply to private employers.

22 *Gallo v. N.Y. State Office of Mental Retardation & Developmental Disabilities,* 830 N.Y.S.2d 796, 798 (N.Y. App. Div. 2007).

23 *Soto,* 26 Misc. 3d 1215(A) at *7.

24 *Odems v. N.Y.C. Dep't of Educ.,* No. 400637/09 at *4, 2009 WL 5225201, at *5, 2009 N.Y. Misc. LEXIS 6480, at *5 (N.Y. Sup. Ct. Dec. 16, 2009); *El v. N.Y.C. Dep't of Educ.,* 23 Misc.3d 1121(A), at *4-5 (N.Y. Sup. Ct. 2009).

25 15 U.S.C. § 1681d; N.Y. Gen. Bus. L. § 380-b(b).

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B. Sharing the Fair Chance Notice

The FCA directs the Commission to determine the manner in which employers inform applicants under Article 23-A and provide a written copy of that analysis to applicants.[26] The Commission has prepared a Fair Chance Notice (the "Notice")[27] that employers may use to comply with this requirement. As long as the material substance – considering specific facts in the Article 23-A analysis – does not change, the Notice may be adapted to an employer's preferred format.

The Notice requires employers to evaluate each Article 23-A factor and choose which exception – direct relationship or unreasonable risk – the employer relies on. The Notice also contains space for the employer to articulate its conclusion.[28] Boilerplate denials that simply list the Article 23-A factors violate the FCA. For example, an employer cannot simply say it considered the time since conviction; it must identify the years and/or months since the conviction. An employer also cannot list specific facts for each factor but then fail to describe how it concluded that the applicant's record met either the direct relationship or unreasonable risk exceptions to Article 23-A.

Finally, the Notice informs the applicant of her or his time to respond and requests evidence of rehabilitation and good conduct. The Notice provides examples of such information. Employers may identify specific examples of rehabilitation and good conduct that would be most relevant to the prospective position, but examples must be included.

C. Allowing Time to Respond

Employers must give applicants a reasonable time, which shall be no less than three business days, to respond to the employer's inquiry and Notice. During this time, the employer may not permanently place another person in the applicant's prospective position. This time period begins running when an applicant receives both the inquiry and Notice. Employers may therefore wish to confirm receipt, either by disclosing the information in person, electronically, or by registered mail. Such method of communication must be mutually agreed on in advance by the applicant and employer. Otherwise, the Commission will credit an applicant's recollection as to when she or he received the inquiry and Notice.

By giving an applicant at least three business days to respond, the FCA contemplates a process in which employers discuss their reasons for finding that an applicant's record poses a direct relationship or unreasonable risk. The process allows an applicant to respond either orally or in writing and provide additional information relevant to any of the Article 23-A factors.[29] After receiving additional information from an applicant, an employer must examine whether it changes its Article 23-A analysis. Employers may offer an applicant a similar position that mitigates the employer's concerns. If, after communicating with an applicant, the employer decides not to hire her or him, it must relay that decision to the applicant.

The three-day time period to respond also provides an opportunity for the applicant to address any errors on the employer's background report, including any discrepancies between the convictions she or he disclosed and the results of the background check. As detailed below, a discrepancy could be due to an error on the report or an applicant's intentional misrepresentation.

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26 N.Y.C. Admin. Code § 8-107(11-a)(b)(ii).

27 The Notice is available on the Commission's website, http://www.nyc.gov/FairChanceNYC.

28 N.Y. Correct. L. § 753(1)(h).

29 N.Y.C. Admin. Code § 8-107(11-a)(b).

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i. Handling Errors in the Background Check

An error on a background check might occur because, for example, it contains information that pertains to another person or is outdated. If an applicant is able to demonstrate an error on the background report, the employer must conduct the Article 23-A analysis based on the corrected conviction history information to ensure its decision is not tainted by the previous error. If the employer then finds a direct relationship or unreasonable risk and intends to take an adverse action on that basis, it must follow the Fair Chance Process: the applicant must be given a copy of the corrected inquiry, the employer's Article 23-A analysis, at least three business days to respond, with an opportunity to provide any additional information for the employer to review and re-examine its analysis.

ii. Handling Applicants' Misrepresentations of Their Conviction Histories

If an applicant cannot or does not demonstrate that any discrepancy between the information she or he disclosed and the employer's background report is due to an error, the employer can choose not to hire the individual based on the applicant's misrepresentation. It need not evaluate the applicant's record under Article 23-A.

VI. Temporary Help Firms Under the Fair Chance Act

Temporary help firms employ individuals, either as direct or joint employers, and place them in job assignments at the firms' clients. The FCA applies the same way to temporary help firms as it does to any other employer. The only difference is that, for these firms, a conditional offer of employment is an offer to place an applicant in the firm's labor pool, from which the applicant may be sent on job assignments to the firm's clients. Before a temporary help firm withdraws a conditional offer of employment after discovering an applicant's conviction history, it must follow the Fair Chance Process, according to Section V of this Guidance. To evaluate the job duties, a temporary help firm may only consider the basic skills necessary to be placed in its applicant pool.

Employers who accept placements from temporary help firms, and who wish to inquire about temporary workers' criminal histories, must follow the Fair Chance Act. They may not make any statements or inquiries about an applicant's criminal record until after the worker is assigned to the employer, and they must follow the Fair Chance Process if they wish to decline employment because of an applicant's criminal record.

As with any other type of discrimination, temporary help firms will be liable if they aid and abet an employer's discriminatory hiring preferences. For example, a temporary help firm cannot, based on an employer's instructions, refer only temporary workers who do not have criminal histories or who have "less serious" criminal histories.

VII. Positions Exempt from the FCA

Consistent with the Local Civil Rights Restoration Act of 2005,[30] all exemptions to coverage under the FCA's anti-discrimination provisions are to be construed narrowly. Employers may assert the application of an exemption to defend against liability, and they have the burden of proving the exemption by a preponderance of the evidence. Other than the employers described in Subsections C and D of this Section, the Commission does not assume that an entire employer or industry is exempt and will investigate how an exemption applies to a particular position or role. Positions that are exempt from the FCA are not necessarily exempt from Article 23-A.

30 N.Y.C. Local Law No. 85 (2005); N.Y.C. Admin. Code § 8-130.

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A. Employers hiring for positions where federal, state, or local law requires criminal background checks or bars employment based on certain criminal convictions

The FCA does not apply to the actions of employers or their agents that are taken pursuant to any state, federal, or local law that requires criminal background checks for employment purposes or bars employment based on criminal history.[31] The purpose of this exemption is to not delay a criminal background inquiry when the results of that inquiry might legally prohibit an employer from hiring an applicant.

A network of federal, state, and local laws creates employment barriers for people with criminal records. The Commission characterizes these barriers as either mandatory or discretionary. Mandatory barriers require a licensing authority or employer to deny applicants with certain convictions enumerated in law. Discretionary barriers allow, but do not require, a licensing authority or employer to deny applicants with criminal records, and may or may not enumerate disqualifying convictions. The FCA controls any time an employer's decision is discretionary, meaning it is not explicitly mandated by law.

For example, state law contains mandatory barriers for – and requires background checks of – applicants to employers regulated by the state Department of Health ("DOH"), Office of Mental Health ("OMH"), and Office of People with Developmental Disabilities ("OPWDD").[32] These agencies require the employers they regulate to conduct background checks because the agencies are charged by state law to ensure that individuals with certain convictions are not hired to work with vulnerable people.[33] Employers regulated by DOH, OMH, and OPWDD are therefore exempt from the FCA when hiring for positions where a criminal history check is required by law. For positions that do not require a criminal history check, however, such employers have to follow the FCA.

The FCA applies when an employer hires people who require licensure, or approval by a government agency, even if the license has mandatory barriers. In that case, an employer can only ask whether an applicant has the required license or can obtain one within an acceptable period of time. Any inquiry into the applicant's criminal record – before a conditional offer of employment – is not allowed. An applicant who has a license has already passed any criminal record barriers and been approved by a government agency. An applicant who cannot, because of her or his conviction record, obtain a required license may have her or his conditional offer withdrawn or employment terminated for such legitimate nondiscriminatory reason.

B. Employers Required by a Self-Regulatory Organization to Conduct a Criminal Background Check of Regulated Persons

Employers in the financial services industry are exempt from the FCA when complying with industry-specific rules and regulations promulgated by a self-regulatory organization ("SRO").[34] This exemption only applies to those positions regulated by SROs; employment decisions regarding other positions must still comply with the FCA.

C. Police and Peace Officers, Law Enforcement Agencies, and Other Exempted City Agencies

Police and peace officers are limited to their definitions in CPL §§ 1.20(34) and 2.10, respectively. Employment decisions about such officers are exempt from the FCA, as

31 N.Y.C. Admin. Code § 8-107(11-a)(e).

32 N.Y. Exec. L. § 845-b.

33 *Id.* at 845-b(5)(a).

34 15 U.S.C. § 78c(a)(26).

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are decisions about positions in law enforcement agencies exempted under New York Correction Law Article 23-A.[35]

As of the date of this Guidance, the following City agencies are also exempt from the FCA: the New York City Police Department, Fire Department, Department of Correction, Department of Investigation, Department of Probation, the Division of Youth and Community Development, the Business Integrity Commission, and the District Attorneys' offices in each borough.

D. City Positions Designated by the Department of Citywide Administrative Services ("DCAS") as Exempt

This exemption gives the Commissioner of DCAS the discretion to determine that employment decisions about some City positions, not already exempted pursuant to another provision, need not comply with the FCA because the position involves law enforcement; is susceptible to bribery or other corruption; or entails the provision of services to, or the safeguarding of, people vulnerable to abuse.

Once DCAS exempts a position, applicants may be asked about their conviction history at any time during the hiring process. Under this exemption, however, applicants who are denied employment because of their conviction history must receive a written copy of the DCAS's Article 23-A analysis.[36]

VIII. Best Practices for Employers

An employer claiming an exemption must be able to show that the position falls under one of the categories in Section VII of this Guidance. Employers availing themselves of exemptions to the FCA should inform applicants of the exemption they believe applies and keep a record of their use of such exemptions for a period of five (5) years from the date an exemption is used. Keeping an exemption log will help the employer respond to Commission requests for information.

The exemption log should include the following:

- Which exemption(s) is claimed;
- How the position fits into the exemption and, if applicable, the federal, state, or local law or rule allowing the exemption under Sections VII(A) or (B) of this Guidance;
- A copy of any inquiry, as defined by Section V(A) of this Guidance, along with the name of the employee who made it;
- A copy of the employer's Article 23-A analysis and the name of any employees who participated in it; and
- The final employment action that was taken based on the applicant's criminal history.

Employers may be required to share their exemption log with the Commission. Prompt responses to Commission requests may help avoid a Commission-initiated investigation into employment practices.

The Commission recommends that the results of any inquiry into an applicant's criminal history be collected and maintained on separate forms and kept confidential. An applicant's criminal history should not be used, distributed, or disseminated to any persons other than those involved in making an employment decision about an applicant.[37]

35 N.Y. Correct. L. § 750(5).

36 N.Y.C. Admin. Code § 8-107(11-a)(f)(2).

37 After hire, the employee's supervisor or manager may also be informed of the applicant's criminal record.

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IX. Enforcement

The Commission will vigorously enforce the FCA. The amount of a civil penalty will be guided by the following factors, among others:

- The severity of the particular violation;
- The existence of additional previous or contemporaneous violations;
- The employer's size, considering both the total number of employees and its revenue; and
- Whether or not the employer knew or should have known about the FCA.

These penalties are in addition to the other remedies available to people who successfully resolve or prevail on claims under the NYCHRL, including, but not limited to, back and front pay, along with compensatory and punitive damages.

The Commission will presume, unless rebutted, that an employer was motivated by an applicant's criminal record if it revokes a conditional offer of employment, as defined in Section II of this Guidance. Consistent with that definition, the Commission will presume that any reason known to the employer before its conditional offer is not a legitimate reason to later withdraw the offer.

X. Criminal Record Discrimination in Obtaining Credit

The FCA additionally prohibits inquries and adverse actions based on non-convictions when a person is seeking credit.

XI. Parity of Coverage with the State Human Rights Law

The FCA updates the NYCHRL's prohibition against discrimination based on non-convictions, linking the NYCHRL's protections to the New York State Human Rights Law's ("NYSHRL") protections. The NYCHRL now prohibits the same types of non-conviction discrimination as the NYSHRL. For employment,[38] licensing,[39] and credit[40] purposes, no person may make any inquiry, in writing or otherwise, or deny or take an adverse action against a person based on a non-conviction. Neither the NYCHRL nor the NYSHRL protections apply to firearm licenses and employment as a police or peace officer, nor does either law prohibit basing an employment decision on a pending criminal proceeding.

Parity in coverage does not mean parity in interpretation. While the NYCHRL has the same substantive prohibitions on non-conviction discrimination as the NYSHRL, the NYCHRL must be interpreted independently from state and federal employment discrimination laws, pursuant to the 2005 Civil Rights Restoration Act.

38 N.Y.C. Admin. Code § 8-107(11).

39 *Id.*

40 *Id.* § 8-107(11-b).

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NYC COMMISSION ON HUMAN RIGHTS
Legal Enforcement Guidance on the
Stop Credit Discrimination in Employment Act, N.Y.C. Admin. Code §§ 8-102(29), 8-107(9)(d), (24); Local Law No. 37 (2015)

The New York City Human Rights Law (hereinafter the "NYCHRL") prohibits discrimination in employment, public accommodations, and housing. It also prohibits discriminatory harassment and bias-based policing by law enforcement. The NYCHRL, pursuant to the 2005 Civil Rights Restoration Act, must be construed "independently from similar or identical provisions of New York state or federal statutes," such that "similarly worded provisions of federal and state civil rights laws [are] a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."[1]

The New York City Commission on Human Rights (the "Commission") is the City agency charged with enforcing the NYCHRL. Individuals interested in vindicating their rights under the NYCHRL can choose to file a complaint with the Commission's Law Enforcement Bureau within one (1) year of the discriminatory act or file a complaint at New York State Supreme Court within three (3) years of the discriminatory act. The NYCHRL covers employers with four or more employees.

The Stop Credit Discrimination in Employment Act ("SCDEA"), which goes into effect on September 3, 2015, amends the NYCHRL by making it an unlawful discriminatory practice for employers, labor organizations, and employment agencies to request or use the consumer credit history of an applicant or employee for the purpose of making any employment decisions, including hiring, compensation, and other terms and conditions of employment. N.Y.C. Admin. Code §§ 8-102(29), 8-107(24). The SCDEA also makes it an unlawful discriminatory practice for a City agency to request or use, for licensing or permitting purposes, information contained in the consumer credit history of an applicant, licensee or permittee. *Id.* at § 8-107(9)(d)(1). As of September 3, 2015, this document serves as the Commission's interpretative enforcement guidance of the SCDEA's protections.[2]

I. LEGISLATIVE INTENT

The SCDEA reflects the City's view that consumer credit history is rarely relevant to employment decisions, and consumer reports should not be requested for individuals seeking most positions in New York City. In enacting the SCDEA, the City Council intended for it to "be the strongest bill of its type in the country prohibiting discriminatory employment credit checks."[3]

The SCDEA is intended to stop employers from using consumer credit history when making employment decisions—a practice that has a disproportionately negative effect on unemployed people, low income communities, communities of color, women, domestic violence survivors, families with children, divorced individuals, and

1 *Local Law No. 85 (2005); see also N.Y.C. Admin. Code § 8-130 ("The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title have been so construed.").*

2 *The Commission does not have jurisdiction to enforce federal and state fair credit reporting laws, which require employers to give applicants notice and get their permission before obtaining a consumer report about them. 15 U.S.C. § 1681d; N.Y. Gen. Bus. L. § 380-b(b).*

3 *Council Member Brad S. Lander, Hearing Transcript of the New York City Council Stated Meeting, 63 (Apr. 16, 2015), available at http://legistar.council.nyc.gov/Legislation.aspx (last accessed Aug. 12, 2015).*

Commission on Human Rights

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Mayor

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Commissioner/Chair

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those with student loans and/or medical bills. The City Council noted that multiple studies have failed to demonstrate any correlation between individuals' credit history and their job performance.[4]

II. Definitions

The SCDEA defines ***"consumer credit history"*** to mean an individual's "credit worthiness, credit standing, credit capacity, or payment history, as indicated by:

(a) a consumer credit report;

(b) credit score; or

(c) information an employer obtains directly from the individual regarding

1. details about credit accounts, including the individual's number of credit accounts, late or missed payments, charged-off debts, items in collections, credit limit, prior credit report inquiries, or
2. bankruptcies, judgments or liens." N.Y.C. Admin. Code § 8-102(29).

Under the SCDEA, a ***consumer credit report*** includes "any written or other communication of any information by a consumer reporting agency that bears on a consumer's creditworthiness, credit standing, credit capacity or credit history." *Id*. Companies that provide reports containing information about people's payment history to creditors, the amount of people's credit and credit consumption, and information from debt buyers and collectors are considered consumer reporting agencies for purposes of the SCDEA, though the definition of a "consumer reporting agency" is not confined to such companies. ***"Consumer reporting agency"*** includes any person or entity that, for monetary fees, dues, or on a cooperative nonprofit basis, engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports or investigative consumer reports to third parties. Note that, unlike the definition of a "consumer reporting agency" under the New York State Fair Credit Reporting Act ("FCRA"), a person need not *regularly* engage in assembling or evaluating consumer credit history in order to be a "consumer reporting agency" under the SCDEA.

III. Violations of the SCDEA

After September 2, 2015, the following acts will be separate chargeable violations of the NYCHRL:

1. Requesting consumer credit history from job applicants or potential or current employees, either orally or in writing;
2. Requesting or obtaining consumer credit history of a job applicant or potential or current employee from a consumer reporting agency; and
3. Using consumer credit history in an employment decision or when considering an employment action.

All of the above are unlawful discriminatory practices, even if such practices do not lead to an adverse employment action. Whether or not an adverse employment action occurred as a result of considering credit history can be considered when determining damages or penalties, but is not relevant for finding liability.

The SCDEA does not prevent employers from researching potential employees' background and experience, evaluating their résumés and references, and conducting online searches (e.g., Google and LinkedIn).

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4 Report of the Governmental Affairs Division, Committee on Civil Rights, 4 (April 14, 2015) (available through http://legistar.council.nyc.gov/Legislation.aspx, last accessed Aug. 28, 2015).

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IV. Positions that are Exempted from the SCDEA's Anti-discrimination Provisions

Consistent with the broad scope of the NYCHRL, all exemptions to coverage under the SCDEA's anti-discrimination provisions are to be construed narrowly. Employers may claim an exemption to defend against liability, and they have the burden of proving the exemption by a preponderance of the evidence. No exemption applies to an entire employer or industry. Exemptions apply to positions or roles, not individual applicants or employees.

A. Employers Required by State or Federal Law or Regulations or by a Self-Regulatory Organization to Use an Individual's Consumer Credit History for Employment Purposes.

Employers in the financial services industry are exempt from the SCDEA when complying with industry-specific rules and regulations promulgated by a self-regulatory organization ("SRO"). This exemption only applies to those positions regulated by SROs; employment decisions regarding other positions must still comply with the SCDEA.

As of the date of this interpretive guidance, the only New York law requiring the evaluation of a current or potential employee's consumer credit history applies to licensed mortgage loan originators. N.Y. Bank. L. § 559-d(9). This law was enacted to comply with the requirements of the federal SAFE Mortgage Licensing Act of 2008. 12 U.S.C. § 5104(a)(2)(A).

B. Police officers, peace officers, or positions with a law enforcement or investigative function at the Department of Investigation ("DOI").

Police and peace officers are limited to their definitions in New York Criminal Procedure Law §§ 1.20(34) and 2.10, respectively. The SCDEA's anti-discrimination provisions still apply when making employment decisions about civilian positions; only positions for police or peace officers are exempt from the SCDEA.

The DOI has several positions that do not serve investigative functions. Certain operations and communications positions are examples of positions to which the SCDEA's anti-discrimination provisions still apply.

C. Positions subject to a DOI background investigation.

For certain positions with the City of New York, the DOI conducts background checks that involve collecting consumer credit history from the job applicant. The DOI may provide some of the information collected from the background check to the City agency interviewing or hiring the job applicant. Under the SCDEA, City agencies may not request or use consumer credit history collected by the DOI in making employment decisions unless:

1. The position is appointed; and
2. The position requires a high degree of public trust.

The Commission currently defines only the following positions as involving a ***high degree of public trust:***

- Commissioner titles, including Assistant, Associate, and Deputy Commissioners;
- Counsel titles, including General Counsel, Special Counsel, Deputy General Counsel, and Assistant General Counsel, that involve high-level decision-making authority;
- Chief Information Officer and Chief Technology Officer titles; and
- Any position reporting to directly to an agency head.

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D. Positions requiring bonding under federal, state, or City law or regulation.

In order for this exemption to apply, the specific position must be required to be bonded under City, state, or federal law, and bonding must be legally required, not simply permitted, by statute. For example, the following positions must be bonded: Bonded Carriers for U.S. Customs, 19 C.F.R. § 112.23; Harbor Pilot, N.Y. Nav. L. § 93; Pawnbrokers, N.Y. Gen. Bus. L. § 41; Ticket Sellers & Resellers, N.Y. Arts & Cult. Aff. L. §§ 25.15, 25.07; Auctioneers, N.Y. City Admin. Code § 20-279; and Tow Truck Drivers, § 20-499.

E. Positions requiring security clearance under federal or state law.

This exception only applies when the review of consumer credit history will be done by the federal or state government as part of evaluating a person for security clearance, and that security clearance is legally required for the person to fulfill the job duties. Having "security clearance" means the ability to access classified information, and does not include any other vetting process utilized by a government agency.

F. Non-clerical positions having regular access to trade secrets, intelligence information, or national security information.

The SCDEA defines ***"trade secrets"*** as "information that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means, by other persons who can obtain economic value from its disclosure or use;

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; and

(c) Can reasonably be said to be the end product of significant innovation."

The SCDEA limits the trade secret definition to exclude "general proprietary company information such as handbooks and policies" and "access to or the use of client, customer, or mailing lists."

Consistent with this definition and the broad scope of the NYCHRL, "trade secrets" do not include information such as recipes, formulas, customer lists, processes, and other information regularly collected in the course of business or regularly used by entry-level and non-salaried employees and supervisors or managers of such employees.

The SCDEA defines ***"intelligence information"*** as "records and data compiled for the purpose of criminal investigation or counterterrorism, including records and data relating to the order or security of a correctional facility, reports of informants, investigators or other persons, or from any type of surveillance associated with an identifiable individual, or investigation or analysis of potential terrorist threats." Positions having regular access to intelligence information shall be narrowly construed to include those law enforcement roles that must routinely utilize intelligence information.

The SCDEA defines ***"national security information"*** as "any knowledge relating to the national defense or foreign relations of the United States, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States government and is defined as such by the United States government and its agencies and departments." Positions having regular access to national security information shall be narrowly construed to include those government or government contractor roles that require high-level security clearances.

The intelligence and national security exemptions encompass those few occupations not already subject to exemptions for police and peace officers or where credit checks are required by law.

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G. Positions involving responsibility for funds or assets worth $10,000 or more.

In general, this exemption includes only executive-level positions with financial control over a company, including, but not limited to, Chief Financial Officers and Chief Operations Officers. This exemption does not include all staff in a finance department.

H. Positions involving digital security systems.

This exemption includes positions at the executive level, including, but not limited to, Chief Technology Officer or a senior information technology executive who controls access to all parts of a company's computer system. The exemption does not include any person who may access a computer system or network available to employees, nor does it include all staff in an information technology department.

V. Employers' Record of Exemption Use

An employer claiming an exemption must show that the position or role falls under one of the eight (8) exemptions in Part IV above. Employers availing themselves of exemptions to the SCDEA's anti-discrimination provisions should inform applicants or employees of the claimed exemption. Employers should also keep a record of their use of such exemptions for a period of five (5) years from the date an exemption is used. Keeping an exemption log will help the employer respond to Commission requests for information.

The exemption log should include the following:

1. The claimed exemption;
2. Why the claimed exemption covers the exempted position;
3. The name and contact information of all applicants or employees considered for the exempted position;
4. The job duties of the exempted position;
5. The qualifications necessary to perform the exempted position;
6. A copy of the applicant's or employee's credit history that was obtained pursuant to the claimed exemption;
7. How the credit history was obtained; and
8. How the credit history led to the employment action.

Employers may be required to share their exemption log with the Commission upon request. Prompt responses to Commission requests may help avoid a Commission-initiated investigation into employment practices.

VI. Penalties for administrative actions

The Commission takes seriously the SCDEA's prohibitions against asking about or using consumer credit history for employment purposes and will impose civil penalties up to $125,000 for violations, and up to $250,000 for violations that are the result of willful, wanton or malicious conduct. The amount of a civil penalty will be guided by the following factors, among others:

- The severity of the violation;
- The existence of subsequent violations;
- The employer's size, considering both the total number of employees and its revenue; and
- The employer's actual or constructive knowledge of the SCDEA.

These penalties are in addition to the other remedies available to people who successfully resolve or prevail on claims under the NYCHRL, including, but not limited to, back and front pay, along with compensatory and punitive damages.

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LAW ENFORCEMENT BUREAU

OFFICE OF THE CHAIRPERSON

The Office of the Chairperson (OC) directs several important areas of the Commission, and is headed by the Chair and Commissioner of the Commission. The OC performs three major functions of the Commission: organizational, adjudicatory, and policy.

ORGANIZATIONAL

- Administrative development of the agency, including supervision of the General Counsel, Deputy Commissioner of the Community Relations Bureau, Executive Director of Communications and Marketing, and Special Counsel to the Chairperson, and administrative supervision of the Deputy Commissioner for the Law Enforcement Bureau (the OC does not supervise the Deputy Commissioner for the Law Enforcement Bureau regarding enforcement functions or actions).
- Convenes gatherings of the other commissioners appointed to the Commission.
- Consults and works with other commissioners appointed to the Commission on programming, initiatives, and community relations outreach.
- Works with the Office of General Counsel to develop and approve internal Commission policies and procedures.

ADJUDICATORY

- Receives and reviews requests to appeal the Law Enforcement Bureau's No Probable Cause Determinations.
- Remands appropriate matters back to the Law Enforcement Bureau for continued investigation or prosecution.
- Issues final orders affirming No Probable Cause Determinations.
- Receives and reviews *de novo* Reports and Recommendations issued by OATH administrative law judges.
- Issues final Decisions and Orders in administratively filed actions (not civil actions filed in state or federal court).

POLICY

- Develops and implements Commission policy.
- Develops and implements interpretative guidance on the New York City Human Rights Law.
- Propagates rules and regulations regarding the Commission and the New York City Human Rights Law.
- Works with other City agencies, Mayoral offices, elected officials, other government offices and community stakeholders on legislation and intergovernmental affairs.

THE CCHR COMPLAINT PROCESS

LEB Investigation and Prosecution

After a complaint is filed, the Commission's Law Enforcement Bureau (LEB) investigates the allegations. After investigation, LEB determines whether probable cause exists to credit the allegation(s) of unlawful discrimination. LEB then issues a Determination of Probable Cause or No Probable Cause. All decisions related to LEB intake, investigations, determinations and its other enforcement operations are made exclusively within LEB and are made independently from any other Commission office or administrative agency.

Complainants receiving LEB No Probable Cause Determinations may request to appeal such determinations. These appeal requests are reviewed by the Commission's Office of the Chairperson (OC), which is not involved in LEB enforcement operations. After reviewing requests, the OC may remand appropriate matters back to LEB for continued investigation or prosecution, or issue final orders affirming No Probable Cause Determinations.

Opportunity for Mediation

At any time during the above stage of the process, the complainant (the person filing the complaint with LEB) may seek to withdraw her/his complaint to end the action, or the complainant and respondent(s) may request the opportunity to mediate the matter instead of continuing with litigation. If (1) the complainant and respondent request mediation, and (2) LEB approves the matter for mediation, the matter is transferred to the Commission's Office of Mediation and Conflict Resolution (OMCR) to discuss and schedule mediation. OMCR's mediation functions are independent from any other Commission office or administrative agency. Suggestions or proposals of an OMCR mediator are not binding on any party – the complainant, respondent or LEB. If the mediation does not successfully resolve the matter, the complainant may seek to withdraw her/his complaint to end the action, or the matter may continue to litigation.

LEB Referral of Case to OATH for Trial

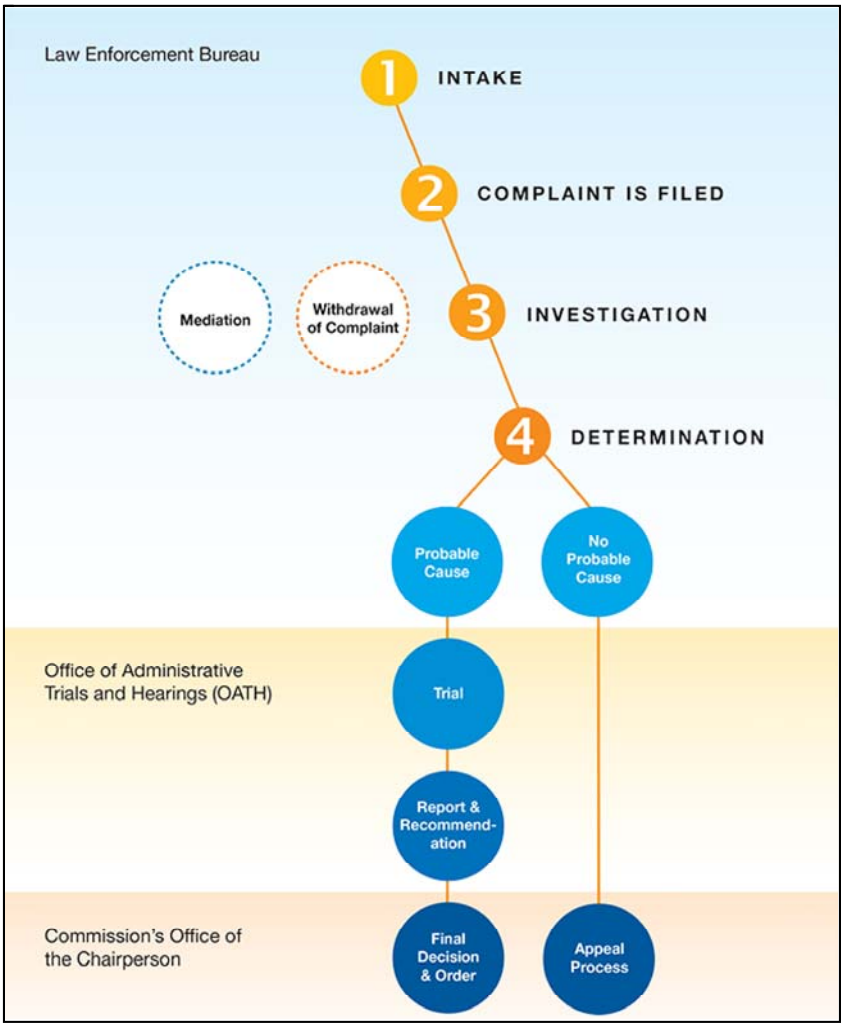
After LEB issues a Determination of Probable Cause, LEB refers the matter to the Office of Administrative Trials and Hearings (OATH), where the matter is assigned to an OATH administrative law judge (ALJ) to preside over a trial and issue a recommended decision and order (also referred to as a "Report and Recommendation"). OATH is a separate City agency from the Commission, and is overseen by OATH's Commissioner and Chief Administrative Law Judge. If litigation continues at OATH, LEB is the party prosecuting the matter against the respondent, the party defending against the action; and the action is tried before an OATH ALJ, who serves as a neutral adjudicator. At OATH, the complainant may serve as a witness or may seek to "intervene" as a third party consistent with OATH's Rules of Practice. If the complainant requests to intervene and the ALJ grants the request, the complainant becomes a party to the litigation along with LEB and respondent. At any point during this process, the parties can decide to resolve the matter through settlement, and/or LEB can also decide to withdraw the case.

Final Decision & Order Issued by the Commission

After the trial, the ALJ issues a Report and Recommendation, which may include findings of fact, decisions of law, and recommendations on damages and civil penalties. The Commission's Office of General Counsel gathers the Report and Recommendation, along with any post-trial comments or objections submitted by the parties, and provides the information to the OC for a final Decision and Order. The OC reviews the matter, including the trial transcripts, evidence presented at trial, ALJ's Report and Recommendation and any post-trial comments or objections *de novo*, and then issues its Decision and Order, adopting or rejecting – in whole or in part – the ALJ's Report and Recommendation.

THE CCHR COMPLAINT PROCESS

A complaint filed with the Commission's Law Enforcement Bureau (LEB) starts with investigation by LEB. Before there is a final order, there are several additional stages involving other governmental entities and judicial bodies independent from LEB:



LEARN MORE

NYC

Commission on Human Rights

The NYC Commission on Human Rights fights discrimination on behalf of people living in, working in, or visiting New York City. The Commission investigates and prosecutes claims of discrimination and provides training and public education.

To report discrimination, request a training, or to learn more about the Commission's services, dial **311** or visit **nyc.gov/cchr**.

BILL DE BLASIO, Mayor
CARMELYN P. MALALIS, Commissioner/Chair

WORKPLACE

In New York City, it is illegal to discriminate against employees, interns, and job seekers on the basis of:

- AGE
- RACE
- COLOR
- RELIGION/CREED
- NATIONAL ORIGIN
- GENDER
- GENDER IDENTITY
- PREGNANCY
- DISABILITY
- SEXUAL ORIENTATION
- MARITAL OR PARTNERSHIP STATUS
- ALIENAGE OR CITIZENSHIP STATUS
- ARREST OR CONVICTION RECORD
- STATUS AS VICTIM OF DOMESTIC VIOLENCE, SEXUAL VIOLENCE, OR STALKING
- UNEMPLOYMENT STATUS
- CREDIT HISTORY

HOUSING

In New York City, it is illegal to discriminate against tenants, apartment seekers, and mortgage applicants on the basis of:

- AGE
- RACE
- COLOR
- RELIGION/CREED
- NATIONAL ORIGIN
- GENDER
- GENDER IDENTITY
- PREGNANCY
- DISABILITY
- SEXUAL ORIENTATION
- MARITAL OR PARTNERSHIP STATUS
- ALIENAGE OR CITIZENSHIP STATUS
- LAWFUL SOURCE OF INCOME (including housing subsidies)
- LAWFUL OCCUPATION
- THE PRESENCE OF CHILDREN

PUBLIC ACCOMMODATIONS

In New York City, it is illegal to discriminate in public spaces like stores, restaurants, parks, libraries, or taxis on the basis of:

- AGE
- RACE
- COLOR
- RELIGION/CREED
- NATIONAL ORIGIN
- GENDER
- GENDER IDENTITY
- PREGNANCY
- DISABILITY
- SEXUAL ORIENTATION
- MARITAL OR PARTNERSHIP STATUS
- ALIENAGE OR CITIZENSHIP STATUS

The law also prohibits retaliation, bias-related harassment (including cyberbullying), and bias-based profiling.

NYCCommissionOnHumanRights @NYCCHR

NEW YORK CITY is a family friendly city with a strong and vibrant workforce, including pregnant women and people with children. The **NYC COMMISSION ON HUMAN RIGHTS** wants to help you keep your workforce strong and your job secure.

The City Human Rights Law requires employers to provide reasonable accommodations to address the needs of an employee for her pregnancy, childbirth or related medical condition; and also requires employers to provide written notice of employees' rights under the law.

EMPLOYERS

Take the time to work with your employee to agree on a reasonable accommodation that:

- Values your employee's contributions to the workplace
- Helps your employee satisfy the essential requisites of her job
- Keeps her in the workplace for as long as she is able and wants to continue working
- Is right for your employee & doesn't cause undue hardship in the conduct of your business

Ignoring a request for a reasonable accommodation or firing your employee after she requests one can expose you to damages and civil penalties. Stay informed about your obligations under the law – contact the Commission for more information, including how you must notify employees about their rights under the law.

EMPLOYEES

If you need a reasonable accommodation to continue working or remain employed, you can request one. Examples include:

- Breaks (e.g. to use the bathroom, facilitate increased water intake, or provide necessary rest)
- Assistance with manual labor
- Changes to your work environment
- Time off for prenatal appointments
- A private, clean space and breaks for expressing breast milk
- Light duty or a temporary transfer to a less strenuous or hazardous position
- Time off to recover from medical conditions related to childbirth

If your request for a reasonable accommodation has been ignored or denied without an appropriate alternative, speak with someone at the Commission.

The type of reasonable accommodation appropriate for an employee should be tailored to the needs of the employee and the employer. Call the Commission to help keep women in the workplace.

NYC Commission on Human Rights

www.nyc.gov/cchr or call **311**

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Bill de Blasio, Mayor • Carmelyn P. Malalis, Commissioner/Chair

ESPAÑOL (SPANISH)

Si crees que un empleador ha discriminado en contra tuya en base a tu historial de crédito, ponte en contacto con la Comisión de Derechos Humanos llamando al 311 y visite nyc.gov/derechoshumanos

中文 (CHINESE)

如果您認為自己因為信用歷史記錄而遭到雇主歧視，請致電 311 和造訪 nyc.gov/humanrights 與人權局聯絡。

বাংলা (BENGALI)

যদি আপনার বিশ্বাস থাকে যে কোনো নিয়োগকর্তা আপনাকে আপনার ক্রেডিটের ইতিহাসের ভিত্তিতে আপনার সঙ্গে বৈষম্যতা করছেন তাহলে 311 নম্বরে কল করে বা nyc.gov/humanrights-এর মাধ্যমে মানবাধিকার কমিশনের সঙ্গে যোগাযোগ করুন

한국어 (KOREAN)

고용주로부터 신용 기록에 기반을 둔 차별을 당하였다고 판단될 경우, 311번으로 전화를 걸어주시거나 nyc.gov/humanrights를 방문하시어 인권위원회에 문의하여 주십시오.

KREYÒL AYISYEN (HAITIAN CREOLE)

Si ou kwè yon patwon te pratike diskriminasyon kont ou akòz istwa kredi ou, kontakte Komisyon pou Dwa Moun rele 311 epi ale sou sitwèb nyc.gov/humanrights

РУССКИЙ (RUSSIAN)

Если вы считаете, что из-за вашей кредитной истории работодатель проявил дискриминацию по отношению к вам, то обратитесь в Комиссию по правам человека г. Нью-Йорка (New York City Commission on Human Rights), позвонив по номеру 311, а также посетите сайт nyc.gov/humanrights

FRANÇAIS (FRENCH)

Si vous estimez avoir été victime d'une discrimination de la part d'un employeur basée sur vos antécédents de crédit, veuillez contacter la Commission des droits de l'homme (Commission on Human Rights) en appelant le 311 et visitez le site nyc.gov/humanrights

العربية (ARABIC)

إذا كنت تعتقد أن هناك صاحب عمل قام بالتمييز ضدك بناءً على التاريخ الائتماني الخاص بك، تواصل مع لجنة حقوق الإنسان من خلال الاتصال على الرقم 311 و زيارة الموقع الإلكتروني nyc.gov/humanrights

اردو (URDU)

اگر آپ کو آپ کے کریڈٹ رپورٹ کی بنیاد پر کمپنی کی جانب سے آپ کے خلاف کسی تعصب کا یقین ہے تو 311 پر کال کرکے اور nyc.gov/humanrights ملاحظہ کرکے Commission on Human Rights (انسانی حقوق پر کمیشن) سے رابطہ کریں

NYC.gov/HumanRights

#NYCCHR

#CreditCheckLawNYC

YOU ARE MORE THAN YOUR CREDIT SCORE

INSIDE:

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中文 (Chinese)
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한국어 (Korean)
Kreyòl Ayisyen (Haitian Creole)
Русский (Russian)
Français (French)
(Arabic) العربية
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#CreditCheckLawNYC

NYC Commission on Human Rights

YOU ARE MORE THAN YOUR CREDIT SCORE

There's no evidence linking credit history to job performance. That's why NYC made it illegal to use credit reports in employment decisions. For most jobs in New York City, employers cannot run your credit report; ask you about debt, child support, foreclosures, loans, and bankruptcies; use a consumer reporting agency to obtain your consumer credit history; or use your credit history in an employment decision. The NYC Commission on Human Rights has resources for both job seekers and employers to understand their rights and obligations under the law.

If you believe an employer discriminated against you based on your credit history, contact the Commission on Human Rights by calling 311 and visit nyc.gov/humanrights

NYC Commission on Human Rights

#CreditCheckLawNYC

TÚ VALES MÁS QUE TU HISTORIAL DE CRÉDITO — ESPAÑOL | SPANISH

No hay evidencia que conecte tu historial de crédito con tu desempeño laboral. Es por eso que la Ciudad de Nueva York hizo ilegal el uso de historiales de crédito en las decisiones de empleo. Para la mayoría de los puestos de trabajo en la Ciudad de Nueva York los empleadores no pueden ejecutarle un historial de crédito, preguntarle acerca de deuda, manutención de menores, hipotecas, préstamos y quiebras; utilizar una agencia para obtener su historial de crédito o usar su historial de crédito en una decisión de empleo. La Comisión de Derechos Humanos de Nueva York tiene recursos para que tanto solicitantes de empleo y empleados como empleadores conozcan sus derechos y deberes según la ley.

信用評分並非衡量標準 — 中文 | CHINESE

沒有證據顯示信用報告與工作表現之間有所關聯。這也是紐約市將使用信用報告做出聘雇決定列為非法行為的原因。對於紐約市的大多數工作，雇主不得調查您的信用報告，詢問您關於債務、子女撫養費、贖回權、貸款和破產等問題，透過消費者報告機構取得您的消費者信用歷史記錄或使用您的信用歷史記錄來做出聘雇決定。紐約市人權局 (NYC Commission on Human Rights) 可為求職者和雇主提供資源，讓雙方瞭解其根據法律可享有的權利和應履行的義務。

আপনার ক্রেডিট স্কোরের থেকে আপনার প্রতিভা অনেক বেশী — বাংলা | BENGALI

এমন কোনো প্রমাণ নেই যা আপনার ক্রেডিট রিপোর্ট এবং কাজের পারফরমেন্সের মধ্যে সংযোগ দেখাবে। সেই কারণে NYC-তে কর্মসংস্থানের সিদ্ধান্তের ক্ষেত্রে ক্রেডিট রিপোর্ট ব্যবহার করা বেআইনী করা হয়েছে। New York শহরে বেশীর ভাগ কাজের ক্ষেত্রে, নিয়োগকর্তারা আপনার ক্রেডিট রিপোর্ট ব্যবহার করতে পারবেন না; আপনার ঋণ সম্পর্কে, শিশু সহায়তা, ফোরক্লোজার, লোন এবং দেউলিয়া সম্পর্কে জিজ্ঞাসা করতে পারবেন না; আপনার কনজিউমার ক্রেডিট ইতিহাস সম্পর্কে জানতে কোনো কনজিউমার রিপোর্টিং সংস্থার দ্বারস্থ হবেন না বা কর্মসংস্থানের সিদ্ধান্তের ক্ষেত্রে আপনার ক্রেডিট ইতিহাস ব্যবহার করতে পারবেন না। NYC মানবধিকার কমিশনের (NYC Commission on Human Rights) কাছে আইন অনুসারে কর্মপ্রার্থী এবং নিয়োগকর্তা উভয়ের জন্য অধিকার ও বাধ্যবাধকতা সম্পর্কিত সংস্থান আছে।

여러분의 능력은 신용 점수 그 이상입니다 — 한국어ß | KOREAN

신용 보고서와 업무 성과의 연관성을 보여주는 증거는 존재하지 않습니다. 이 때문에 뉴욕 시는 신용 보고서에 기반을 둔 고용 결정을 불법화했습니다. 뉴욕 시 대부분의 일자리에 대해 고용주는 신용 조회를 할 수 없으며, 채무, 양육비, 압류 대출 및 파산 상태에 대해 질문을 할 수도 없고, 귀하의 소비자 신용 기록을 얻거나 고용 결정에 귀하의 신용 기록을 활용하기 위하여 소비자 신용 보고 회사를 고용할 수도 없습니다. 뉴욕 시 인권위원회 (NYC Commission on Human Rights)는 동법에 의거한 권리 및 책임에 대하여 구직자와 고용주 모두의 이해를 돕기 위한 자원을 보유하고 있습니다.

OU SE PLIS PASE ESKÒ KREDI OU — KREYÒL AYISYEN | HAITIAN CREOLE

Pa gen prèv ki pwouve yon koneksyon ant rapò kredi yo ak pèfòmans nan djòb. Se rezon sa a ki fè NYC te konsidere li ilegal pou itilize rapò kredi nan desizyon pou bay travay. Pou pifò djòb ki nan Vil New York, patwon yo pa kapab tcheke rapò kredi ou; yo pa kapab poze ou kesyon sou dèt ou genyen, sou sipò timoun, sou sezi-ipotèk, sou prè ou fè, ak sou fayit ou deklare; yo pa kapab itilize yon ajans evalyasyon kredi pou jwenn istwa kredi konsomatè ou oswa itilize istwa kredi ou nan yon desizyon pou ba ou travay. Komisyon NYC pou Dwa Moun (NYC Commission on Human Rights) gen resous pou moun k ap chèche djòb ak patwon y pou yo konprann dwa yo ak obligasyon yo anba lalwa.

ВЫ-ЭТО БОЛЬШЕ, ЧЕМ ВАШ КРЕДИТНЫЙ РЕЙТИНГ — РУССКИЙ | RUSSIAN

Нет никаких доказательств того, что кредитный рейтинг влияет на производительность труда. Именно поэтому город Нью-Йорк признал незаконным использование кредитных отчетов при принятии решения о найме. Рассматривая вас на большую часть вакансий в Нью-Йорке, работодатели не имеют права просматривать ваш кредитный отчет, задавать вопросы о ваших долгах, выплате алиментов, отчуждении заложенной недвижимости, кредитах или банкротстве, пользоваться услугами агентства по сбору и предоставлению информации о кредитоспособности потребителей, чтобы получить информацию о вашей кредитной истории, или опираться на данные из вашей кредитной истории при принятии решения о найме. Комиссия по правам человека г. Нью-Йорка (NYC Commission on Human Rights) располагает ресурсами, необходимыми как соискателям, так и работодателям для понимания своих прав и обязанностей.

VOUS VALEZ BIEN PLUS QUE VOTRE COTE DE SOLVABILITÉ — FRANÇAIS | FRENCH

Rien ne prouve qu'il existe un lien entre les rapports de solvabilité et les performances au travail. C'est pourquoi la ville de New York a décrété illégal l'examen des rapports de solvabilité dans le cadre des décisions d'embauche. Pour la plupart des emplois dans la ville de New York, les employeurs n'ont pas le droit de consulter votre rapport de solvabilité, de vous demander des renseignements à propos de vos dettes, vos enfants à charge, vos saisies, vos emprunts et vos situations d'insolvabilité. Ils n'ont pas non plus le droit de faire appel à une agence de renseignement sur les consommateurs pour connaître vos antécédents de crédit ni d'utiliser ces derniers dans le cadre d'une décision d'embauche. La Commission des droits de l'homme de la ville de New York (NYC Commission on Human Rights) possède les ressources permettant aux demandeurs d'emploi et aux employeurs de comprendre leurs droits et leurs obligations légales.

ARABIC | العربية

تقييمك الائتماني لا يحددك

ليس هناك دليل على وجود ارتباط بين تقارير الائتمان وأداء الشخص في الوظيفة. هذا ما جعل مدينة نيويورك تجرم استخدام تقارير الائتمان في اتخاذ قرارات التوظيف. في معظم الوظائف في مدينة نيويورك، لا يستطيع أصحاب العمل أن يطّلعوا على تقارير الائتمان الخاصة بك؛ أو أن يسألوك عن الديون ونفقات إعالة الطفل والحجوزات العقارية والقروض وحالات الإفلاس؛ أو أن يستخدموا وكالات تقدير الأهلية الائتمانية للعملاء للحصول على تاريخ الائتمان الاستهلاكي الخاص بك أو الاستعانة بتاريخك الائتماني عند اتخاذ قرار التوظيف. لدى لجنة حقوق الإنسان بمدينة نيويورك موارد لكل من الباحثين عن وظيفة وأصحاب العمل لفهم حقوقهم والتزاماتهم في إطار القانون.

URDU | اردو

آپ اپنے کریڈٹ اسکور سے بڑھ کر ہیں

ایسی کوئی شہادت موجود نہیں ہے جو کریڈٹ رپورٹس اور ملازمت کی کارکردگی کے درمیان ایک تعلق دکھائے- اسی وجہ سے NYC نے ملازمت کے فیصلوں میں کریڈٹ رپورٹس کے استعمال کو غیر قانونی قرار دیا ہے- نیو یارک سٹی میں زیادہ تر ملازمتوں کیلئے، کمپنیاں آپ کی کریڈٹ رپورٹ نہیں چلا سکتی ہیں، آپ سے قرضہ، بچوں کا تعاون، تالا بندی کی کارروائی، لونز اور دیوالیوں کے بارے میں سوال نہیں کر سکتی ہیں، ملازمت کے فیصلے میں اپنے صارف کی کریڈٹ ہسٹری حاصل کرنے کیلئے صارف کو رپورٹ کرنے والی کسی ایجنسی کا استعمال یا ملازمت کے فیصلے میں آپ کی کریڈٹ ہسٹری کا استعمال نہیں کر سکتی ہیں
NYC Commission on Human Rights (انسانی حقوق پر کمیشن) کے پاس دونوں، ملازمت تلاش کرنے والوں اور آجروں کو قانون کے تحت ان کے حقوق اور ذمہ داریوں کو سمجھنے کیلئے وسائل موجود ہیں-

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Employment Law and Litigation Blog

November 20, 2015

The Commission Speaks: Guidance for Employers Regarding the New York City Fair Chance Act

By Jill L. Rosenberg, James McQuade and Mark Thompson

On June 29, 2015, New York City Mayor Bill de Blasio signed into law the Fair Chance Act (the "Act"), which prohibits employers from inquiring into the criminal backgrounds of certain job applicants in the initial stages of the employment application process. You can read more about the Act here. The New York City Commission on Human Rights (the "Commission"), the agency charged with enforcement of the Act, recently issued "Legal Enforcement Guidance" (the "Guidance") regarding the Act. As summarized below, the Guidance provides clarity regarding various aspects of the Act, including definitions of key terms, *per se* violations and exemptions from the Act.

Definitions

The Act makes it an unlawful discriminatory practice to "[m]ake any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the process of applying for employment with such employer or agent thereof until after such employer or agent thereof has extended a conditional offer of employment to the applicant." The Guidance defines several terms in this key component of the Act, including the terms "inquiry", "statement" and "conditional offer of employment", providing further guidance regarding the prohibition.

The Guidance defines "inquiry" as "[a]ny question, whether made in writing or orally, asked for the purpose of obtaining an applicant's criminal history, including, without limitation, questions in a job interview about an applicant's criminal history; and any search for an applicant's criminal history, including through the services of a third party, such as a consumer reporting agency." The Guidance defines the term "statement" as "[a]ny words, whether made in writing or orally, for the purpose of obtaining an applicant's criminal history, including, without limitation, stating that a background check is required for a position." These definitions make clear that the Commission views the Act's prohibitions on soliciting an applicant's criminal history very broadly and that, unless an exemption applies, employers may not seek to obtain an applicant's criminal history via any method prior to a conditional offer of employment. In fact, later in the Guidance, the Commission demonstrates how expansive it believes this prohibition is, stating that employers are prohibited from even using search tools such as Google to search for terms such as, "arrest," "mugshot," "warrant," "criminal," "conviction," "jail," or "prison" with respect to an applicant.

The Guidance also defines the term "conditional offer of employment" as "[a]n offer of employment that can only be revoked based on: (1) "[t]he results of a criminal background check"; (2) "[t]he results of a medical exam in situations in which such exams are permitted by the Americans with Disabilities Act"; or (3) "[o]ther information the

employer could not have reasonably known before the conditional offer if, based on the information, the employer would not have made the offer and the employer can show the information is material to job performance." In accord with this definition, in the "Enforcement" section of the Guidance, the Commission states that it will presume, unless rebutted, that an employer was motivated by an applicant's criminal record if it revokes a conditional offer of employment and that it will also presume that any reason known to the employer before its conditional offer is not a legitimate reason to later withdraw the offer.

Per Se Violations of the Act

The Guidance details what it refers to as *per se* violations of the Act. The Guidance states that making any inquiry or statement related to criminal history of an applicant is a *per se* violation. It is also a *per se* violation to declare, print or circulate any solicitation, advertisement, or publication for employment that states any limitation or specification regarding criminal history. For example, an advertisement or an employment application that stated "no felonies," "background check required," or "must have clean record" would be a violation of the Act. The Guidance concerning *per se* violations also makes clear that such violations are not contingent upon a showing that an adverse action was taken against the applicant. The employer is liable for such offenses even if the applicant is ultimately hired.

Under the Act, after a conditional offer of employment has been made, an employer may seek to obtain the criminal history of an applicant and may take adverse action based on that information, provided that the employer follows the various steps proscribed by the Act, including completing the multi-factor analysis under Article 23-A of the New York State Corrections Law ("Article 23-A"). The Guidance makes clear that an employer's failure to properly complete any of the steps required by the Act, constitutes a *per se* violation of the Act.

In addition, the Guidance provides that taking an adverse employment action because of an applicant's "non-conviction" constitutes a *per se* violation of the Act. The Guidance defines "non-conviction" as (1) a termination of a criminal action in favor of the employee; (2) a juvenile conviction; or (3) a conviction under seal. To guard against soliciting or considering non-conviction information, the Guidance provides the following sample language, which may be used after a conditional offer is made:

Have you ever been convicted of a misdemeanor or felony? Answer "NO" if your conviction: (a) was sealed, expunged, or reversed on appeal; (b) was for a violation, infraction, or other petty offense such as "disorderly conduct;" (c) resulted in a youthful offender or juvenile delinquency finding; or (d) if you withdrew your plea after completing a court program and were not convicted of a misdemeanor or felony.

Article 23-A and The "Fair Chance Process"

If, after obtaining an applicant's criminal history, an employer wants to withdraw its conditional offer of employment, to comply with the Act, the employer must consider the Article 23-A factors and then follow several steps, which the Guidance refers to as the "Fair Chance Process." These steps as detailed in the Act and in the Guidance are as follows:

1. Disclose to the applicant a written copy of any inquiry it conducted into the applicant's criminal history;
2. Share with the applicant a written copy of its Article 23-A analysis; and
3. Allow the applicant at least three business days, from receipt of the inquiry and analysis, to respond to the employer's concerns.

The Act directs the Commission to determine the manner in which employers inform applicants under Article 23-A and provide a written copy of that analysis to applicants. In accord with this, the Commission has published a

model Fair Chance Act Notice for employers to use. It is available here. The notice may be adapted to an employer's preferred format as long as the material substance of the model form does not change.

Although not addressed in the Guidance, to the extent employers utilize a third party to conduct the criminal background check, employers are reminded that they still need to comply with the notice and consent requirements of the federal and New York State Fair Credit Reporting Acts.

Misrepresentations by the Employee Regarding Criminal History

The Guidance states that, if an applicant misrepresents his or her criminal history, and if the applicant cannot or does not demonstrate that any discrepancy between the information he or she disclosed and the employer's background report is due to an error, an employer may disqualify the applicant and choose not to hire him or her, and is not required to perform an Article 23-A analysis before making such a decision.

Positions Exempt from the Act

The Guidance states that all exemptions to the Act are to be construed narrowly. With respect to the exception for employers hiring for positions where federal, state, or local law requires criminal background checks or bars employment based on certain criminal convictions, the Guidance makes clear that the exception does not apply where the federal, state or local law is discretionary rather than mandatory in nature. The Guidance also provides that an employer is only exempt from the Act when hiring for positions where a criminal history check is required by law. For positions that do not require a criminal history check, employers have to follow the Act.

The Guidance further provides that employers required by a self-regulatory organization ("SRO") to conduct a criminal background check are only exempt with respect to those positions regulated by SROs; employment decisions regarding other unregulated positions must still comply with the Act.

Best Practices

The Guidance sets forth a list of best practices for employers. To the extent an employer seeks to claim an exemption, the Commission recommends that the employer keep an exception log, which should be retained for five (5) years, and include the following:

- Which exemption(s) is claimed;
- How the position fits into the exemption and, if applicable, the federal, state, or local law or rule allowing the exemption;
- A copy of any criminal history inquiry, along with the name of the employee who made it;
- A copy of the employer's Article 23-A analysis and the name of any employees who participated in it; and
- The final employment action that was taken based on the applicant's criminal history.

The Guidance also recommends that the results of any criminal history inquiry be maintained separately from other information and kept confidential and should not be used, distributed, or disseminated to any persons other than those involved in making an employment decision about an applicant.

Pending Criminal Charges

The Guidance makes clear that the prohibition on criminal history inquiries prior to the conditional offer of employment not only includes criminal convictions, but also includes pending criminal charges. However, the Guidance also states that neither the New York City nor New York State Human Rights Law prohibits basing an employment decision on a pending criminal proceeding. Thus, it appears that employers may continue to reject

an applicant based on pending criminal charges, provided that no inquiry or decision is made based on such charges prior to the conditional offer of employment.

Email

The Guidance provides that any notices and disclosures required by the Act and the Guidance may be communicated by email, if such a method of communication is mutually agreed on in advance by the employer and the applicant.

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Employment Law and Litigation Blog

October 26, 2015

New York State Expands Equal Pay Law and Other Workplace Protections for Women

By Jill L. Rosenberg

On October 21, 2015, New York State Governor Andrew Cuomo signed a group of eight bills, referred to as the Women's Equality Agenda, which expand protections for women in the workplace and elsewhere in New York State. The changes that will affect New York employers include an expansion of the existing State equal pay law, the addition of familial status as a protected category and the express requirement that employers reasonably accommodate pregnancy-related conditions.

The new laws affecting the workplace are as follows:

Amendment of Equal Pay Law

Following the lead of California, which strengthened its own equal pay act earlier this month with enactment of the Fair Pay Act, Governor Cuomo has signed the Achieve Pay Equity bill. This bill makes several important amendments to the State's equal pay law (Section 194(1) of the New York Labor Law), which until now, closely tracked the Federal Equal Pay Act (EPA). Section 194(1), like the EPA, requires employers to provide equal pay to men and women in the "same establishment" for "equal work," defined as work requiring "equal skill, effort and responsibility" and "performed under similar working conditions." However, an employer can defend wage differentials if they are based on: (a) a seniority system, (b) a merit system, (c) a system that measures earnings by quantity or quality of production, or (d) any other factor other than sex.

The new law amends Section 194(1) as follows:

First, the law broadens the meaning of "same establishment" by defining it to include workplaces located in the "same geographic region" (but no larger than a county), taking into account population distribution, economic activity and/or the presence of municipalities. Thus, the comparison of employee wages may go beyond a single location, for example, two retail stores of a company in the same city or in different cities but in the same county. It remains to be seen how much flexibility employers will have to apply the stated factors to determine what constitutes the "same geographic region."

Second, the law replaces the "any other factor other than sex" defense to a wage differential and with the potentially more limited and ambiguous defense of "a *bona fide* factor other than sex, *such as* education, training, or experience (emphasis added)." The law further provides the employer must demonstrate that this factor:

- is not based on or derived from a sex-based differential in compensation

- is job-related with respect to the position in question; and
- is consistent with a business necessity (defined as "a factor that bears a manifest relationship to the employment in question").

However, even if the employer can satisfy its burden with respect to these three elements, the defense will not be allowed if the employee can then demonstrate that:

- the employer uses an employment practice that causes a disparate impact on the basis of sex
- an alternative employment practice exists that would serve the same purpose without causing a disparate impact; and
- the employer has refused to adopt the alternative practice.

The amended New York law is similar to the California Fair Pay Act in placing a greater burden on employers to justify wage differentials. However, the California law goes even further by requiring employers to pay employees of the opposite sex equally for "substantially similar work" when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions, rather than for "equal work," which remains the standard in New York. The different standards for employers in New York and California will create challenges for employers with operations in both states. (For an in-depth examination of the California Fair Pay Act, see our prior blog post and article by colleagues, Gary R. Siniscalco and Lauri Damrell.)

The Achieve Pay Equity bill makes two additional revisions affecting pay claims in New York:

Pay Transparency: The bill provides that employers may not prohibit employees from inquiring about, discussing or disclosing wage information, except under very limited circumstances. Many New York employees already have similar protections, including those employed by federal contractors, who are subject to Executive Order 13665, and employees covered by Section 7 of the National Labor Relations Act.

Increased Damages: The bill increases the amount of liquidated damages that may be awarded under the Labor Law for failure to pay wages, including a violation of Section 194, from 100% of the wages due to 300% of wages due, but only in the case of a willful violation.

Family Status Discrimination

The End Family Status Discrimination bill adds familial status to the characteristics and groups of individuals protected from employment discrimination under the New York State Human Rights Law (HRL). Prior to the amendment, the HRL only protected individuals against discrimination based on familial status in housing and credit. "Familial status" is defined under the HRL as a person who is pregnant, or has a child, or is in the process of securing legal custody of any individual, under the age of eighteen. While the new law was intended to protect women who are affected by stereotypes about their ability to work due to their status as a parent or guardian of children, the law applies equally to men and women as parents or guardians.

Accommodation of Pregnant Employees

The Protect Women from Pregnancy Discrimination bill clarifies the Human Rights to expressly require that employers provide reasonable accommodations for pregnancy-related conditions, unless to do so would cause an undue hardship to the employer.

Sexual Harassment Coverage for Small Employers

The Protect Victims of Sexual Harassment bill amends the HRL to protect all employees from sexual harassment in the workplace regardless of employer size by eliminating the current four-employee coverage threshold under the HRL. However, the expanded coverage applies only to sexual harassment claims and not to other protections of the HRL.

Attorneys' Fees for Prevailing Plaintiffs

The Remove Barriers to Remedying Discrimination bill amends the HRL to permit a prevailing plaintiff in an employment or credit discrimination case based on sex to recover reasonable attorneys' fees. The bill also permits a prevailing respondent in such a case to recover its reasonable attorneys' fees, but only if the respondent can show that the action was frivolous. The bill does not change the law with respect to other types of employment discrimination claims under the HRL, which precludes any party from recovering attorneys' fees.

All of the bills become effective on January 19, 2016, 90 days after enactment.

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Employment Law and Litigation Blog

October 9, 2015

NYCCHR's Enforcement Guidance on NYC Credit Check Law: Answers and New Questions

By Jill L. Rosenberg

On September 2, 2015, the New York City Commission on Human Rights (NYCCHR or Commission) issued Enforcement Guidance (Guidance) on the New York City Stop Credit Discrimination in Employment Act (SCDEA), which took effect on September 3, 2015. As detailed in our earlier blog post, the NYCCHR has been charged with enforcing the SCDEA, which amends the New York City Human Rights Law (NYCHRL) to prohibit employers from requesting or using consumer credit history in hiring and other employment decisions, except in limited circumstances.

The Guidance is the Commission's initial effort to provide interpretative guidance on the key provisions of the SCDEA. The Guidance answers many questions as to how the NYCCHR is likely to interpret the law, but raises others. At a recent public briefing on the new law and the Commission's Guidance, Paul Keefe, a Supervising Attorney in the Enforcement Bureau, indicated[1] that the Guidance is preliminary in nature and will likely be further clarified through FAQs which the NYCCHR has begun to post, as well as formal rules, which the NYCCHR plans to issue through notice and comment rule making.

A theme that resonates throughout the Guidance is the legislative intent to severely limit the use of credit checks in employment decisions and narrowly construe the law's exemptions. That said, several provisions of the Guidance appear to be at odds with the plain text of the law. At the recent public briefing, Mr. Keefe noted the Commission's interest in hearing from the employer community and other interested parties regarding areas that may warrant further guidance and/or clarification.

Set forth below is a summary of the Guidance.

What is a Consumer Reporting Agency?

The Guidance adds to the SCDEA's definition of "consumer credit history" and a "consumer credit report" a definition of a "consumer reporting agency", which is defined to include "any person or entity that, for monetary fees, dues, or on a cooperative nonprofit basis, engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports or investigative consumer reports to third parties." The Guidance notes that a person need not *regularly* engage in these activities in order to be a consumer reporting agency under the SCDEA.

What is a Violation of the SCDEA?

Under the Guidance, any of the following acts, regardless of whether they lead to an adverse employment action, will constitute a violation of the SCDEA:

- Requesting consumer credit history from applicants or employees, orally or in writing;
- Requesting or obtaining consumer credit history of an applicant or employee from a consumer reporting agency; and
- Using consumer credit history in an employment decision or action.

According to the Guidance, the SCDEA does not prevent employers from conducting their own research on potential employees' background and experience, including public records and online searches using Google, LinkedIn and other online tools. However, broad internet searches present the risk of obtaining other types of personal information about a candidate that an employer may not consider in the hiring process.

What Positions are Exempt from the SCDEA?

According to the Guidance, the exemptions to coverage under the SCDEA are to be construed narrowly and apply to certain positions or roles, as opposed to an entire employer or industry. Further, an employer claiming an exemption, if challenged, will have the burden of proving same by a preponderance of the evidence.

Employers Required to Use Credit History by Law, Regulation or a Self-Regulatory Organization

The SCDEA explicitly exempts employers who are required to use an individual's consumer credit history for employment purposes by "state or federal law or regulations or by a self-regulatory organization [SRO] as defined in section 3(a)(26) of the securities exchange act of 1934." With regard to the SRO exemption, the Guidance covers only FINRA members making employment decisions about individuals who are required to register with FINRA. The Guidance makes no mention of other SROs, like the National Futures Association (NFA), which has its own registration and financial disclosure requirements for individuals who transact in certain financial products and services regulated by the NFA.

In addition, while the Guidance correctly states that the SCDEA excludes "employment decisions about people who are required to register with FINRA," which would include registered investment professionals, the Guidance supports this statement by citing to a recent FINRA Rule (Rule 1230) that relates solely to the registration of certain covered operations professionals who perform "back office" functions.

Given the intent of the SCDEA to exempt securities brokers and similar professionals who invest clients' money, it is hoped that the NYCCHR will amend and/or clarify its Guidance on these points.

Police and Peace Officers

Police and Peace Officers (as defined by New York Criminal Procedure Law) are exempt from the SCDEA. The Guidance makes clear, however, that civilian positions (which would include private security employees) are not exempt.

Positions Requiring Bonding

The SCDEA exempts positions for which bonding is required under federal, state or City law or regulation. The Guidance provides examples of positions that must be bonded by law or regulation, including auctioneers and ticket sellers and resellers.

Access to Trade Secrets

The SCDEA exempts non-clerical positons having regular access to trade secrets. "Trade secrets" have a specific definition under the SCDEA and exclude "general proprietary company information" like handbooks, policies, and client, customer or mailing lists. The Guidance interprets this exclusion from the definition of "trade secrets" to also include information like "recipes, formulas, customer lists, processes regularly used by entry-level and non-salaried employees and supervisors or managers of such employees."

Positions Involving Responsibility for Funds or Assets Worth $10,000 or More

The SCDEA exempts positions (1) having signing authority over third party funds or assets valued at $10,000 or more or (2) that involve a fiduciary duty to the employer with the authority to enter financial agreements valued at $10,000 or more on behalf of the employer.

The Guidance does not specifically address the third-party signing authority exception. With respect to the exemption for positions with authority to enter agreements on behalf of the employer, the Guidance suggests that it should apply only to executive level positions, like CFOs and COOs. However, this narrow interpretation seems at odds with the express language that the exemption should apply to any individuals who have the authority to bind the employer regarding financial agreements valued at $10,000 or more. During the recent public briefing, Mr. Keefe suggested that the exemption could apply to employees below the executive level if they in fact have the requisite signing authority, as might be the case in a larger organization. For example, a company policy might require two signatures on a check of $10,000 or more. In that case, both signatories, not just the most senior of the two, would be subject to the exemption.

Positions Involving Digital Security Systems

The SCDEA exempts employees whose regular duties allow them to modify digital security systems established to prevent the unauthorized use of the employer's networks or databases. According to the Guidance, this exemption includes positions at the executive level, such as a chief technology or senior information technology executive that controls access to all parts of a company's computer system. The Commission's Guidance appears to be more narrowly drawn than the law itself. In many large organizations, there may be professionals below the executive level who are responsible for cybersecurity and have the ability to access and modify the company's digital security systems. During the recent public briefing, Mr. Keefe suggested that the exemption might apply to these individuals as well.

Documenting the Exemption

According to the Guidance, an employer claiming one of the exemptions from the law should:

- Inform applicants of the exemption that applies prior to conducting the credit check; and
- Maintain a record (an "exemption log") that includes, among other things, applicants/employees who are subject an exemption, the applicable exemption, the job duties and qualifications for the exempted position, the basis for the claimed exemption, information about any other applicants/employees considered for the position, a copy of the credit history obtained by the employer, and where applicable, how the credit history led to the employment action.

The Commission expects employers to share this information with them upon request.

Penalties for Violation of the SCDEA

The Guidance sets out specific monetary penalties that the NYCCHR will impose for violations of the SCDEA. These include civil penalties of up to $125,000 for violations, and up to $250,000 for violations that are determined to be the result of "willful, wanton or malicious conduct."

While the scope and other details of the SCDEA are likely to continue to evolve, employers should review their hiring processes and relevant policies now for compliance with this new law.

[1] Statements of Paul Keefe, Supervising Attorney, Law Enforcement Bureau, at public briefing held on September 28, 2015 at Proskauer LLP.

Mach Mining v. EEOC: Will the Supreme Court's Recent Decision Reduce or Increase Court Oversight of the EEOC's Administrative Practices?

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I. INTRODUCTION

Before the Equal Employment Opportunity Commission (EEOC) may sue an employer for discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), it must first investigate the charge and find reasonable cause and then "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[1] With few exceptions, the EEOC may file suit only after conciliation efforts have failed.[2] Courts and commentators, though, have criticized the agency for failing to adequately comply with these litigation prerequisites, thereby resulting in an agency prematurely pursuing litigation.[3]

In *Mach Mining, LLC v. EEOC*, the United States Supreme Court recently considered the twin issues of whether and how courts may review one of the EEOC's statutorily required litigation prerequisites: conciliation negotiations with employers *after* the agency's investigation and a finding of reasonable cause.[4] Ultimately, the unanimous Court held that although courts can review whether the EEOC satisfied its obligation to attempt conciliation before filing suit, the scope of such review is "narrow, thus recognizing the EEOC's extensive discretion to determine the kind and amount of communication with an employer that may be appropriate in any given

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[1] 42 U.S.C. § 2000e–5(b).

[2] *Id.* § 2000e–5(f)(1).

[3] *See, e.g.*, EEOC v. CRST Van Expedited, Inc., 679 F.3d 657 (8th Cir. 2012) (criticizing the EEOC's litigation approach); EEOC Meeting of the Commission, Public Input into the Development of EEOC's Strategic Enforcement Plan, Written Testimony of Gary Siniscalco (July 18, 2012), http://www.eeoc.gov/eeoc/meetings/7-18-12/siniscalco.cfm [hereinafter, "Siniscalco Testimony"] (same).

[4] 135 S. Ct. 1645, 1649 (2015).

case."[5] Nevertheless, post-*Mach Mining* decisions—including the remand to the Seventh Circuit—illustrate there remains room for debate and litigation over the level of permissible judicial scrutiny.

Moreover, *Mach Mining* dealt only with the EEOC's conciliation duties for Title VII cases. It left open the extent to which Title VII's other litigation prerequisites of investigation and reasonable cause are subject to court review. In *EEOC v. Sterling Jewelers*, *Inc.* for instance, the Second Circuit expressed its view that *Mach Mining* applies beyond conciliation.[6] Other courts in sister circuits have taken a different view, and although these decisions are pre-*Mach Mining*, they remain good law.[7] Moreover, at least two district courts have considered *Mach Mining*'s applicability to EEOC actions arising under other anti-discrimination statutes, such as the Age Discrimination in Employment Act (ADEA).[8]

This paper discusses the Court's holding in *Mach Mining* as well as lower courts' interpretation of the ruling. It also explores the fundamental differences between the EEOC's obligation to engage in conciliation efforts and Title VII's other litigation prerequisites, and challenges the rationale for applying *Mach Mining* outside the conciliation context in light of these differences. This paper further addresses the importance to practitioners of scrutinizing all of the EEOC's administrative conduct as a prelude to any enforcement action. Section II lays the foundation regarding the history of the EEOC and Title VII's litigation prerequisites, while Section III analyzes the Court's decision in *Mach Mining*. Section IV then surveys how lower courts have interpreted the Court's ruling as it relates to conciliation. Section V discusses judicial oversight of EEOC's other litigation prerequisites, including investigation and finding of reasonable cause. Section VI analyzes the applicability of *Mach Mining* to actions arising under the ADEA. Section VII concludes.

II. A Brief History Of The EEOC And Title VII's Relevant Provisions

A. *The Creation and Role of the EEOC*

In passing Title VII of the Civil Rights Act of 1964, Congress created the EEOC to enforce the Act's prohibitions on workplace discrimination.[9] Importantly, Congress would not have passed Title VII without the compromised support of many legislators who were wary of federal regulation of private business.[10] As a result, the EEOC was tasked with conducting investigations, determining if there was reasonable cause to believe statutory violations occurred, and trying to gain voluntary compliance to eradicate workplace discrimination—rather than

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[5] *Id.*
[6] *See* EEOC v. Sterling Jewelers Inc., 2015 WL 5233636, at *1 (2d Cir. Sept. 9, 2015).
[7] *See, e.g.*, *CRST Van Expedited, Inc.*, 679 F.3d at 657; EEOC v. Pierce Packing Co., 669 F.2d 605 (9th Cir. 1982).
[8] *See, e.g.*, EEOC v. Blinded Veterans Ass'n, 2015 WL 5148737, at *8 (D.D.C. July 7, 2015).
[9] *See* 42 U.S.C. § 2000e–4 (outlining the EEOC's creation and composition).
[10] H.R. Rep. No. 88-914, at 29 (1963).

proceed directly to litigation.[11] Consequently, even when the EEOC gained litigation enforcement authority in 1972, the administrative resolution process remained untouched.[12]

B. *Title VII's Litigation Prerequisites*

Title VII sets forth a multi-step procedure by which the EEOC enforces its legislative duties.[13] Under Section 706 of Title VII, the EEOC must fulfill certain prerequisites before bringing suit against a private employer.[14] First, a "person claiming to be aggrieved" must file a charge with the EEOC.[15] At that point, the EEOC notifies the employer of the charge.[16] If the EEOC believes no reasonable cause exists for the charge after investigating the claim, it notifies the parties of dismissal, and the complainant receives a right-to-sue letter to pursue a private lawsuit.[17]

If the EEOC does find reasonable cause, however, it must "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[18] To maintain confidentiality and encourage settlements, "Nothing said or done during and as a part of such informal endeavors" may be publicized by the EEOC or used as evidence in a subsequent proceeding without prior written consent.[19] Notably, the requirement of confidentiality and the evidentiary bar in subsequent proceedings starkly contrast to the investigation and reasonable cause stages, where evidence uncovered during those stages can be used in subsequent proceedings.[20] When the EEOC is unable to secure from the respondent a conciliation agreement "acceptable to the Commission," the EEOC may then bring suit.[21]

C. *Criticism of the EEOC's Enforcement Efforts*

Members of Congress, the courts, and employee and employer advocates alike variously have questioned whether in recent years the EEOC has improperly disregarded its pre-litigation

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[11] *Id. See discussion* Michael W. Disotell, Comment, *Interpreting Title VII: The Discord Between Legisprudence and Jurisprudence and Its Impact on Small Businesses*, 9 OHIO ST. ENTREP. BUS. L.J. 35, 36–37 (2014).
[12] 42 U.S.C. § 2000e-5 (1970), *amended by* 86 Stat. 113 (1972).
[13] *See generally* 42 U.S.C. § 2000e–5.
[14] *See id.*
[15] *Id.* § 2000e–5(b).
[16] *Id.*
[17] *Id.* § 2000e–5(b), (f)(1).
[18] *Id.* § 2000e–5(b).
[19] *Id.*
[20] EEOC v. CRST Van Expedited, Inc., 679 F.3d 657, 675 (8th Cir. 2012).
[21] 42 U.S.C. § 2000e–5(f)(1). The EEOC has not promulgated any regulations to define its duties to conciliate, other than providing it will "notify the respondent in writing" when it determines further conciliation attempts are futile. 29 C.F.R. § 1601.25.

obligations.[22] While EEOC Chair Jenny Yang has testified that "litigation truly is the last resort for the agency,"[23] the EEOC General Counsel has recognized a need for more effective enforcement procedures. During a Senate hearing in May 2015, EEOC General Counsel P. David Lopez admitted that the EEOC has made mistakes in pursuing litigation enforcement before adequately investigating the facts.[24] Lopez further stated that he has tried to build a "culture of examining 'lessons learned' [at the EEOC] in order to carry out [the EEOC's] law enforcement mission more effectively and efficiently."[25]

Likewise, the EEOC's Strategic Enforcement Plan for FY 2013–2016 ("The Plan"), which sets forth the Commission's enforcement priorities and aims to better integrate enforcement responsibilities, contemplated the need for better execution of the EEOC's pre-litigation obligations.[26] The Plan requires the EEOC's field investigators to communicate and consult with the EEOC's lawyers during the investigation and conciliation processes, and recognizes that "[h]aving a seamless, integrated effort between the staff who investigate and

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[22] *See, e.g.*, Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1650 (2015); EEOC v. Bloomberg L.P., 967 F. Supp. 2d 802, 806 (S.D.N.Y. 2013). *See also* "EEOC Officials Respond to GOP Criticisms During Senate Oversight Hearing," Bloomberg BNA, 44 EDR 594, May 26, 2015; Richard T. Seymour, "Common-Sense Suggestions to the EEOC" (June 20, 2015), http://www.rickseymourlaw.com/common-sense-suggestions-to-the-eeoc (discussing techniques the EEOC should adopt to correct longstanding problems); Brief for CRST Van Expedited, Inc. v. EEOC, Equal Employment Advisory Council and the National Federation of Independent Business Small Business Legal Center as Amici Curiae, Supporting for Petitioner, No. 14-1375 (U.S. June 2015), *available at* http://www.eeac.org/briefs/CRSTvEEOC.pdf (arguing the EEOC's "recurring pattern […] of resorting to litigation prior to first satisfying its pre-suit responsibilities provides compelling support for utilizing the sanction of attorney's fees as a deterrent against inexcusable dereliction of the agency's compliance with Title VII.").

[23] *Senate Hearing before the Committee on Health, Education, Labor and Pensions*, 114th Cong. (2015) (statement of Jenny Yang, Chair, U.S. Equal Employment Opportunity Commission), *available at* http://www.help.senate.gov/download/testimony/testttetes; *see also Senate Hearing before the Committee on Health, Education, Labor and Pensions*, 114th Cong. 6 (2015) (statement of P. David Lopez, General Counsel, U.S. Equal Employment Opportunity Commission), *available at* http://www.help.senate.gov/imo/media/doc/Lopez3.pdf ("While it's my job as General Counsel to be the Agency's chief litigator, let me be clear: I believe litigation should be the enforcement tool of last resort. I do not believe in suing first, and asking questions later—and our statutory authority does not contemplate or permit this.") [hereinafter, "Lopez Testimony"].

[24] *See* Lopez Testimony, *supra* note 23, at 5.

[25] *Id.*

[26] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STRATEGIC ENFORCEMENT PLAN FY 2013–2016, at 17 (Sept. 4, 2012), *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm ("The Commission also expects that the Quality Control Plan, required by Performance Measure 2 of the Strategic Plan for all investigations and conciliations, will further support measures to improve coordination between investigative and legal enforcement functions. The Commission

conciliate charges and staff who litigate cases on behalf of the Commission is paramount."[27] Further, the Plan insists that "pursuit of any investigation or case must be premised on the strength of the evidence and its potential as a strong vehicle for meaningful law enforcement," and recognizes that "[c]harges or cases should not be pursued, even if they fall within a priority category, unless a rigorous assessment of the merits determines significant law enforcement potential."[28]

Despite these mandates by the EEOC Commissioners, empirical evidence indicates an unmistakable divide between the EEOC's enforcement efforts and the actions of its investigative officers. Inadequate investigations and deficient cause determinations may be one reason why the EEOC continues to report thousands of unsuccessful conciliations each year.[29] Further, over the last eighteen years, the EEOC consistently has litigated only a small fraction of the charges where it found reasonable cause but did not settle during informal conciliation.[30] In slightly over 90 percent of unsettled cause findings, the EEOC's own attorneys did not bring a lawsuit even though the EEOC's field directors found "reasonable cause" that discrimination occurred.[31] While there may be myriad reasons for the EEOC's decision not to initiate enforcement, based on commentators' observations discussed above, a substantial reason has been due to lack of agency oversight into competent and adequate investigations. Practitioners should continue to vigilantly scrutinize whether the EEOC is conducting adequate investigations to warrant effective conciliation. This tension formed the backdrop to *Mach Mining v. EEOC*.

III. THE COURT INTERPRETS THE EEOC'S CONCILIATION DUTIES IN *MACH MINING V. EEOC*

A. *Mach Mining at the Supreme Court*

Ultimately, the Court in *Mach Mining* focused only on the last of the prerequisites to enforcement and held: (1) a court may review whether the EEOC has satisfied its statutory obligation to attempt conciliation with an employer, as a prerequisite to a Title VII action; (2) the scope of such review is narrow; and (3) failure to conciliate should result *not* in dismissal of the action, but instead in a stay until the EEOC fulfills its conciliation obligation.[32] The case began when a woman filed a charge with the EEOC claiming Mach Mining, LLC had refused to hire

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believes that an integrated approach will increase quality and timeliness in the investigation of priority issues as investigative and legal staff work collaboratively on such charges.").

[27] *Id.* at 16.

[28] *Id.* at 11.

[29] *See* APPENDIX A & APPENDIX B.

[30] *Id.*

[31] According to the EEOC's statistics, between the years of 1997 and 2014 an average of 9.69% of cases that were not settled during conciliation resulted in a lawsuit being filed. Data points available at: http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm; and http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm

[32] Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1649 (2015).

her as a coal miner because of her sex.[33] After investigating the charge, the EEOC District Director determined reasonable cause existed to believe the company had discriminated against a class of women who applied for mining jobs.[34] The District office then sent a letter inviting Mach Mining and the complainant to participate in informal conciliation proceedings and notified them that a representative would soon begin the process.[35] About a year later, the EEOC sent Mach Mining another letter stating that it had determined that conciliation efforts had been unsuccessful and that further efforts would be futile.[36] The EEOC then proceeded to sue Mach Mining in federal court for sex discrimination during the hiring process.[37]

In its answer, Mach Mining asserted that the EEOC had not attempted to conciliate "in good faith."[38] In response, the EEOC contended its conciliation efforts were not subject to judicial review.[39] Alternatively, the EEOC argued that the two letters it sent to Mach Mining provided adequate proof that it had fulfilled its statutory duty.[40] The district court initially agreed with Mach Mining.[41] The U.S. Court of Appeals for the Seventh Circuit reversed, however, holding that the EEOC's statutory conciliation obligation was not reviewable.[42] This created a true circuit split—although other Courts of Appeals had differed on what level of review was appropriate.[43]

The U.S. Supreme Court unanimously reversed the Seventh Circuit. Justice Elena Kagan delivered the opinion for the Court. She agreed with Mach Mining there is a "strong presumption" in favor of judicial review of administrative action which can only be overcome by clear statutory language to the contrary.[44] The Court noted Congress preferred the EEOC to choose "cooperation and voluntary compliance" to achieve its goal of "bringing employment discrimination to an end."[45] The Court then stressed the EEOC "*shall* endeavor to eliminate [an] alleged unlawful employment method by informal methods of conference, conciliation, and

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[33] *Id.* at 1650.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] EEOC v. Mach Mining, LLC, 2013 WL 319337 (Jan. 28, 2013).
[42] EEOC v. Mach Mining, LLC, 738 F.3d 171 (7th Cir. 2013).
[43] *Compare* EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1259 (11th Cir. 2003) (applying a reasonableness standard to the EEOC's conciliation efforts) *with* EEOC v. Keco Indus., Inc., 748 F.2d 1097, 1102 (6th Cir. 1984) (applying a good faith standard to the EEOC's conciliation efforts).
[44] *Mach Mining*, 135 S. Ct. at 1651 (citing Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986); Block v. Community Nutrition Inst., 467 U.S. 340, 349, 351 (1984)).
[45] *Id.* (quoting Ford Motor Co. EEOC, 458 U.S. 219, 228 (1982)).

persuasion," and this statutory obligation was "mandatory, not precatory."[46] Therefore, the Court concluded conciliation is a necessary prerequisite the agency must fulfill before filing a lawsuit, and courts may review whether the EEOC has met such a condition precedent.[47]

The Court then turned to the more controversial issue of the proper scope of judicial review. The EEOC argued judicial review should entail only a cursory review of EEOC letters; Mach Mining, on the other hand, argued the Court should apply a good faith standard similar to the way courts review collective bargaining agreements between employers and unions.[48] The Supreme Court adopted neither position. Instead, it established a "manageable standard" for reviewing the informal methods of conference, conciliation, and persuasion, which must:

> [I]nvolve communication between parties, including the exchange of information and views. . . . That communication, moreover, concerns a particular thing: the "alleged unlawful employment practice." So the EEOC, to meet the statutory condition, must tell the employer about the claim—essentially, *what practice has harmed which person or class*—and must provide the employer with an *opportunity* to discuss the matter in an effort to achieve voluntary compliance. If the Commission does not take those specified actions, it has not satisfied Title VII's requirement to attempt conciliation.[49]

In expounding on this standard, the Court noted, "Such limited review respects the expansive discretion that Title VII gives to the EEOC over the conciliation process, while still ensuring that the Commission follows the law."[50] To only take the EEOC's bookend letters at face value, the Court reasoned, would undermine a court's ability to verify the EEOC's actions.[51] To require a court to take a "deep dive"[52] into the conciliation process, however, similar to the procedure set forth in the National Labor Relations Act (NLRA), would vitiate the confidentiality of the parties' negotiations and necessitate the disclosure of the information gained during negotiations in subsequent lawsuits.[53] As the Court explained: "The maximum results from the

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[46] *Id.* (citing National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 109 (2002) (noting that the word "shall" admits of no discretion)) (emphasis in original).
[47] *Id.* at 1651–53 ("That ordinary part of Title VII litigation—see a prerequisite to suit, enforce a prerequisite to suit—supports judicial review of the EEOC's compliance with the law's conciliation provision.").
[48] *See id.* at 1653; *see* 29 U.S.C. § 158(d) (imposing a duty on employers and unions to bargain "in good faith with respect to . . . terms and conditions of employment").
[49] *Mach Mining*, 135 S. Ct. at 1652 (internal citations omitted) (emphasis added).
[50] *Id.* at 1653.
[51] *Id.*
[52] Specifically, Mach Mining argued the EEOC should: (1) let the employer know the "minimum . . . it would take to resolve" the claim; (2) inform the employer of "the factual and legal basis for" all of the EEOC's positions, including the calculations underlying any monetary request; and (3) refrain from making "take-it-or-leave-it" offers. *Id.* at 1654.
[53] *Id.* at 1655.

voluntary approach will be achieved if the parties know that statements they make cannot come back to haunt them in litigation."[54] In support of this conclusion, the Court expressly cited to the statutory prescription regarding non-disclosure of such efforts.[55] The Court also noted the NLRA's standard was a poor analogy for judicial review of the conciliation process because, among other considerations, the NLRA contemplates a procedural "sphere of bargaining" while Title VII contemplates "substantive results" in the pursuit towards eliminating workplace discrimination.[56]

The Court then left lower courts with some parting advice about the sufficiency of evidence parties must submit to demonstrate compliance with conciliation attempts. In addressing whether court review of agency conduct is appropriate, Justice Kagan noted:

> Absent such review, the Commission's compliance with the law would rest in the Commission's hands alone. We need not doubt the EEOC's trustworthiness, or its fidelity to the law, to shy away from the result. We need only know – and know that Congress knows – that legal lapses and violations occur, and especially so when they have no consequences. That is why this court has so long applied a strong presumption favoring judicial review of administrative action.[57]

It determined that a sworn affidavit from the EEOC stating it has performed its conciliation duties will "usually suffice" to meet the conciliation requirement.[58] If the employer provides credible evidence indicating the EEOC did not provide the requisite information about the charge or attempt to engage in a conciliation discussion, however, a court must conduct fact finding to decide the dispute.[59] If a court finds the EEOC's conciliation efforts lacking, "the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance" by issuing a stay of the action.[60] The Court then vacated the Seventh Circuit's decision and remanded the case for further proceedings.[61]

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[54] *Id.*
[55] *Id.* (internal citations omitted) (quotation marks omitted). *See also id.* at 1656 ("[R]eview can occur consistent with the statute's non-disclosure provision, because a court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (*i.e.*, statements made or positions taken) during those discussion.").
[56] *Id.* at 1654.
[57] *Id.* at 1655.
[58] *Id.* at 1656 (citing United States v. Clarke, 134 S. Ct. 2361, 2367 (2014) ("[A]bsent contrary evidence, the [agency] can satisfy [the relevant] standard by submitting a simple affidavit from" the agency representative involved)).
[59] *Id.*
[60] *Id.* (citing 42 U.S.C. § 2000e-5(f)(1)).
[61] *Id.*

B. *Mach Mining on Remand*

On remand to the Seventh Circuit, the EEOC argued that while a court may review whether conciliation occurred, it cannot review the sufficiency of the parties' negotiations.[62] It further argued that the EEOC's letter of determination identifying a "class of female applicants [Mach Mining] failed to recruit and hire" provided sufficient notice of the "person or class" which had been harmed to satisfy the *Mach Mining* Court's directive.[63] Conversely, Mach Mining urged the Seventh Circuit to remand the case to the lower court for further fact finding because the existing record did not conclusively indicate whether conciliation occurred under the scope of review established by the Supreme Court.[64] Ultimately, the Seventh Circuit rejected the EEOC's argument that the available facts met the standard of review and remanded the case to the lower court for fact finding.[65]

Following the Seventh Circuit's remand to the district court, the EEOC filed a renewed motion for summary judgment in its favor notwithstanding the Seventh Circuit's ruling.[66] In the motion, the EEOC stressed the Supreme Court's "narrow" review language. The agency then asserted it complied with *Mach Mining*'s mandate because "[t]hat letter [finding reasonable cause] identified the practice at issue (recruiting and hiring discrimination on the basis of sex) and defined the scope of the class (Charging Party and female applicants)."[67] The EEOC further elaborated:

> Under *Mach Mining*, that is sufficient. Title VII does not require the EEOC to inform the employer of the size of the class to issue individual cause findings with respect to all class members, or to identify all class members during the conciliation process. Had the *Mach Mining* Court intended that [the] EEOC provide notice as to the identity of all class members in the Letter of Determination, it could have said that proper notice includes identifying the employees affected by the unlawful practice and nothing more, omitting the reference to identifying a class. . . . [T]he Court's approving use of the phrase "or class of employees," implicitly endorsed the Letter of Determination the EEOC issued in *Mach Mining*.[68]

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[62] Brief of Plaintiff-Appellant, EEOC v. Mach Mining, No. 13-2456, at 4–5 (7th Cir. June 22, 2015).
[63] *Id.* at 5.
[64] Brief of Defendant-Appellee, EEOC v. Mach Mining, No. 13-2456, at 1 (7th Cir. June 22, 2015).
[65] EEOC v. Mach Mining, No. 13-2456 (7th Cir. June 26, 2015).
[66] Renewed Motion for Partial Summary Judgment, EEOC v. Mach Mining, No. 13-2456 (S.D. Ill. Sept. 17, 2015).
[67] *Id.* at 7.
[68] *Id.*

These arguments ignore, however, the language in Justice Kagan's opinion where she explicitly held the EEOC's "two bookend letters" were insufficient to fulfill the EEOC's conciliation obligation.[69] In this regard, the renewed motion indicates that, at least at the district court level, the EEOC is continuing on its path of premature litigation without first exhausting the required administrative prerequisites. Further, although the EEOC acknowledged the unfavorable *OhioHealth* decision from the Southern District of Ohio, discussed *infra* Section IV, it simply contended "that case was wrongly decided."[70] In its attempt to distinguish the decision, the EEOC noted the *OhioHealth* Court (1) applied a good faith standard rejected in *Mach Mining*;[71] and (2) required a damages calculation which would "impinge on [the EEOC's] latitude" and "extensive discretion" to "achieve voluntary compliance" with Title VII.[72]

The EEOC also filed a motion to strike the section of Mach Mining's opposition to its original motion for partial summary judgment discussing the parties' conciliation negotiations, arguing it would violate the conciliation provision's confidentiality requirements.[73] Mach Mining has opposed the motion to strike, arguing such a section in its argument outlines not "what was said or done during conciliation" but rather, "what was absent from conciliation."[74] Thus, while the *Mach Mining* case has been remanded back to its original court, it still remains unclear how "deep" of a "dive" lower courts may take. Furthermore, the EEOC and employer-side advocates alike claim victory in the decision.[75]

IV. LOWER COURT INTERPRETATIONS OF THE CONCILIATION REVIEW PROCESS AFTER *MACH MINING*

In the wake of *Mach Mining*, courts have reached divergent conclusions over whether the EEOC has fulfilled its conciliation duties to provide employers with an opportunity to voluntarily comply with Title VII. As described below, one court found the failure of the EEOC to provide employers a damages calculation renders the conciliation process a "sham."[76] Similarly, another court found the agency's failure to provide notice of aggrieved employees in departments other

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[69] *Mach Mining*, 135 S. Ct. at 1653.
[70] Renewed Motion for Partial Summary Judgment, EEOC v. Mach Mining, No. 13-2456, at 7 (S.D. Ill. Sept. 17, 2015).
[71] *Id.* (citing EEOC v. OhioHealth Corp., 2015 WL 3952339, at *1, *3 (S.D. Oh. June 29, 2015)).
[72] *Id.* (quoting Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1649, 1652, 1656 (2015)) (citing EEOC v. OhioHealth Corp., 2015 WL 3952339, at *4 (S.D. Oh. June 29, 2015)).
[73] Plaintiff EEOC's Motion to Strike "Section F" of Defendant Mach Mining's Memorandum in Opposition to EEOC's Motion for Partial Summary Judgment And to Bar Any Future Submission of "Anything Said Or Done During Conciliation," EEOC v. Mach Mining, No. 13-2456, at 1 (S.D. Ill. Sept. 10, 2015).
[74] Defendant Mach Mining, LLC's Opposition to EEOC's Motion to Strike, EEOC v. Mach Mining, No. 13-2456, at 1 (S.D. Ill. Sept. 28, 2015).
[75] *See, e.g.*, Kevin McGowan, "Mach Mining's Meaning Lies in the Eyes of the Beholder," BNA DAILY LAB. REPORT (Nov. 9, 2015) (summarizing the debate between Gary Siniscalco of Orrick, Herrington & Sutcliffe, LLP and Martin Ebel of the EEOC).
[76] EEOC v. OhioHealth Corp., 2015 WL 3952339, at *5 (S.D. Oh. June 29, 2015).

than the charging party's did not provide the employer meaningful notice of the claims it was attempting to conciliate.[77] Conversely, at least one court has maintained that the Court's pronouncement of "narrow" judicial review prevented it from examining the sufficiency of parties' negotiations.[78] Despite their different outcomes, these cases at the very least suggest that the EEOC—even after its rebuke in *Mach Mining*—is still prematurely pursuing litigation in some instances.

In *EEOC v. OhioHealth Corp.*, the agency alleged OhioHealth Corp. failed to provide one of its employees a reasonable accommodation for her disability and then terminated her because of that disability.[79] After an investigation and reasonable cause finding, the agency sent OhioHealth a letter inviting it to engage in conciliation efforts.[80] The EEOC provided the court with a declaration stating it had sought to engage in conciliation efforts but failed.[81] OhioHealth argued, however, that the EEOC: (1) only presented settlement offers as a "take-it-or-leave-it proposition;" (2) never provided a final offer to the company; (3) failed to provide OhioHealth with a calculation of its damages figure even though the EEOC letter indicated it would; and (4) declared conciliation efforts had failed although OhioHealth was still ready and willing to negotiate the matter.[82]

In considering the EEOC's duty after *Mach Mining*, Judge Gregory L. Frost noted that although the EEOC had presented some evidence that it had fulfilled its conciliation duties, OhioHealth sufficiently rebutted this evidence by showing there was a factual dispute as to whether the EEOC's efforts were actually unsuccessful.[83] As a result, the court determined, "All of this supports finding the conciliation condition precedent unsatisfied because if the proceedings were for appearances only, then there never was a real attempt to engage in conciliation as the law requires."[84] The court further took exception with the EEOC's failure to give the employer the damages calculation it promised, noting this rendered the conciliation process a "sham" because it failed to give OhioHealth "an opportunity to remedy the allegedly discriminatory practice."[85] While the court stayed the action and ordered the EEOC to engage in good faith conciliation efforts, it gave a stern warning to the agency in its parting words: "[I]f the EEOC continues down this dangerous path and fails to engage in good faith efforts at conciliation as ordered, this Court will impose any or all consequences available, including but not limited to contempt and dismissal of this action."[86]

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[77] EEOC v. GNLV Corp., 2015 WL 3467092, at *8 (D. Nev. June 1, 2015).
[78] EEOC v. Celadon Trucking Servs., Inc., 2015 WL 3961180, at *30 (S.D. Ind. June 30, 2015).
[79] *OhioHealth Corp.*, 2015 WL 3952339, at *1.
[80] *Id.* at *2.
[81] *Id.*
[82] *Id.* at *3
[83] *Id.*
[84] *Id.*
[85] *Id.* at *5 (quoting Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1656 (2015)).
[86] *Id.* at *5–6.

Therefore, despite Justice Kagan's suggestion that lack of good faith conciliation should not be grounds for dismissal, continued disregard by the Commission's investigators combined with court oversight may, in fact, constitute grounds for dismissal in some instances. Additionally, while not mentioned by the *OhioHealth* Court, the rationale and outcome of the decision are consistent with Justice Kagan's explanation in *Mach Mining* that the EEOC must tell the employer "what practice harmed which person or class," which presumably includes the dollar amounts due each such person.[87] Failure to provide such detail in a determination may effectively undercut any claim of good faith conciliation if the respondent does not know which person or class allegedly was harmed, and in what amount.

Similarly, in *EEOC v. GNLV Corp.*, Judge Robert C. Jones in the District of Nevada held that the EEOC's conciliation efforts did not provide the company with sufficient notice that the agency was conciliating on behalf of an individual who worked in a different department than the other aggrieved employees.[88] Specifically, a table-games dealer at the defendant's casino filed an initial charge with the EEOC alleging his employer subjected him to a racially hostile work environment and retaliated against him after he complained.[89] The EEOC's investigation uncovered five other employees—four table-games dealers and one kitchen staff member—who alleged they also were subjected to the same hostile work environment.[90] Consequently, the EEOC filed a pattern-or-practice lawsuit against the casino on behalf of all six employees.[91] While the casino acknowledged the EEOC had conducted an investigation and negotiations had taken place, it argued the EEOC did not give the company sufficient notice of the kitchen aide's allegations during the negotiations.[92] In response, the EEOC argued the court could not consider the sufficiency of the conciliation efforts.[93]

In finding the EEOC satisfied its conciliation duties with respect to the other table-games dealers but failed to engage in conciliation efforts with respect to the kitchen aide, the *GNLV* court reasoned, "Since conciliation efforts are insufficient if they do not give the employer an opportunity to remedy the discrimination, i.e. by informing the employer where the discrimination is occurring, . . . the evidence indicates the possibility that 'the EEOC did not provide the requisite information' about [the kitchen aide's] charge."[94]

By contrast, in *EEOC v. Celadon Trucking Services, Inc.*, Judge Sarah Evans Barker in the Southern District of Indiana cited *Mach Mining* in concluding that a court may conduct only a "barebones review" of the conciliation process.[95] The employer in *Celadon* was a multi-national

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[87] *See* Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1652 (2015).
[88] EEOC v. GNLV Corp., 2015 WL 3467092, at *7–8 (D. Nev. June 1, 2015).
[89] EEOC v. GNLV Corp., 2015 WL 3467092, at *1 (D. Nev. June 1, 2015).
[90] *Id.*
[91] *Id.*
[92] *Id.* at *7.
[93] *Id.*
[94] *Id.* at *8 (citing Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1656 (2015)).
[95] EEOC v. Celadon Trucking Servs., Inc., 2015 WL 3961180, at *30 (S.D. Ind. June 30, 2015).

trucking company whose drivers the U.S. Department of Transportation (DOT) required to pass DOT-approved medical exams.[96] Nevertheless, the EEOC brought suit on behalf of 29 applicants who were denied employment for not passing various parts of the medical exam on the theory the company was discriminating against the drivers based on disability.[97] The employer argued the EEOC acted in bad faith during the course of conciliation discussions by misrepresenting whether the agency had medical certifications on hand for each of the class members and by substituting additional class members whenever it dropped an original class member.[98] The EEOC, on the other hand, argued it fulfilled its conciliation duties by issuing the company written notices (Letter of Determination) describing what the employer had done and which class of employees had been harmed.[99]

The district court agreed with the EEOC.[100] In support of this conclusion, the court reasoned the letters were supported by other memoranda in the record indicating the EEOC engaged the employer in some form of negotiation, albeit unsuccessfully.[101] Noting *Mach Mining* required judicial review to be limited to these two requirements, the court determined that it could do no more than conduct a "barebones review" of the conciliation process.[102] Nevertheless, the court noted in dicta there may be ways to challenge the sufficiency of the EEOC's conciliation; specifically, it opined: "[The employer] does not assert that it was misinformed as to the nature of the violations of which it was accused, nor does it deny that it engaged in conciliation discussions with the EEOC."[103]

Similarly, Judge Christine M. Arguello in the District of Colorado ruled in *EEOC v. JetStream Ground Services, Inc.* that the agency met its conciliation duty before filing suit against the company.[104] The EEOC brought an action on behalf of a group of Muslim women who requested a religious accommodation to the company's uniform policy requiring employees to wear company-issued pants and a cap.[105] After the EEOC investigation and reasonable cause determination, the parties exchanged written conciliation proposals five times and met in person once.[106] When the conciliation failed, the company argued the EEOC did not engage in sincere conciliation attempts because the EEOC did not give it individualized settlement counter-offers

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[96] *Id.* at *1.
[97] *Id.* at *3. Although the lawsuit was brought under the Americans with Disabilities Act (ADA) for disability discrimination, the ADA incorporates Title VII's conciliation process by reference. *Id.* at *30.
[98] *Id.* at *31.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at *32.
[104] EEOC v. JetStream Ground Servs., Inc., No. 1:13-cv-02340, 2015 WL —, at 1 (D. Colo. Sept. 29, 2015).
[105] *Id.* at 3.
[106] *Id.* at 11.

to match its own.[107] Applying the "limited scope of *Mach Mining*," the court reasoned these objections to the EEOC's conciliation efforts related to the substantive terms of the bargaining rather than the existence of conciliation itself.[108] The court reasoned, "*Mach Mining* . . . specifically stays this Court's hand, and provides . . . that it may not police the details of the offers and counteroffers between [employer] and [agency]."[109] As a result, it concluded the EEOC had satisfied its conciliation efforts and denied the company's motion for summary judgment.[110]

V. *MACH MINING*'S EFFECT ON TITLE VII'S INVESTIGATION AND REASONABLE CAUSE PREREQUISITES

As mentioned *supra* in Section II.C, Congress, the courts, and practitioners have taken the EEOC to task not only for failing to meet the agency's obligation to conciliate, but also for its failure to comply with the investigation and reasonable cause prerequisites.[111] These shortcomings in EEOC district offices may stem from a lack of agency oversight.[112] Moreover, the EEOC's failure to properly identify the scope of the class and the harm involved as part of its investigation and its reasonable cause determinations may be the cause of the EEOC's lackluster record regarding settlements following a reasonable cause finding.[113] As one of the authors of this article previously testified before EEOC, field investigators have been "consistently inconsistent," and agency supervision over investigation has been deplorable.[114]

In fact, several companies before *Mach Mining* successfully challenged the EEOC's enforcement techniques for failure to investigate the charges against them. While courts seem to agree they may review whether an investigation has occurred, there is disagreement over whether

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[107] *Id.* at 17.
[108] *Id.* at 21.
[109] *Id.*
[110] *Id.* at 22.
[111] *See, e.g.*, Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1650 (2015); EEOC v. Bloomberg L.P., 967 F. Supp. 2d 802, 806 (S.D.N.Y. 2013). *See also* "EEOC Officials Respond to GOP Criticisms During Senate Oversight Hearing," Bloomberg BNA, 44 EDR 594, May 26, 2015; Richard T. Seymour, "Common-Sense Suggestions to the EEOC" (June 20, 2015), http://www.rickseymourlaw.com/common-sense-suggestions-to-the-eeoc (discussing techniques the EEOC should adopt to correct longstanding problems); Brief for CRST Van Expedited, Inc. v. EEOC, Equal Employment Advisory Council and the National Federation of Independent Business Small Business Legal Center as Amici Curiae, Supporting for Petitioner, No. 14-1375 (U.S. June 2015), *available at* http://www.eeac.org/briefs/CRSTvEEOC.pdf (arguing the EEOC's "recurring pattern […] of resorting to litigation prior to first satisfying its pre-suit responsibilities provides compelling support for utilizing the sanction of attorney's fees as a deterrent against inexcusable dereliction of the agency's compliance with Title VII.").
[112] *See* Siniscalco Testimony, *supra* note 3; Seymour, *supra* note 22.
[113] *See* APPENDIX A & APPENDIX B.
[114] Siniscalco Testimony, *supra* note 3.

a court may examine the sufficiency of the EEOC's investigation. Several courts have criticized the EEOC's lackluster investigation techniques and have engaged in a factual scrutiny of the EEOC's investigation process.[115] On the other hand, others courts had been more restricted in their review.[116]

A. *Applying Mach Mining To Title VII's Investigation And Reasonable Cause Requirements*

Since *Mach Mining*, two courts have applied the Court's "narrow" standard of judicial review regarding conciliation efforts to Title VII's other litigation prerequisites of investigation and reasonable cause.[117] The courts appear to have ignored, however, the fact that *Mach Mining* dealt *only* with conciliation efforts, which are fundamentally different from investigation and reasonable cause prerequisites. For example, no party may disclose information that was a part of conciliation negotiations without written consent, and it may not be used as evidence in future proceedings.[118] This confidentiality requirement and evidentiary bar are similar to the manner in which the Federal Rules of Civil Procedure generally treat evidence of settlement offers and negotiations in civil litigation.[119] Findings made during an investigation and reasonable cause determination, on the other hand, are not subject to the same confidentiality requirements, and may be used during the course of the ensuing litigation.[120] Because the *Mach Mining* Court justified the narrow scope of judicial review applicable to the EEOC's conciliation efforts in part on their confidential nature, this rationale does not apply to the investigation and reasonable cause prerequisites.[121]

Further, the decisions seem to contradict the *Mach Mining* Court's more general guidance: "[T]he EEOC, to meet the statutory condition, must tell the employer about the claim—essentially, *what practice has harmed which person or class*—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary

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[115] *See, e.g.*, EEOC v. Bass Pro Outdoor World, LLC, 2014 WL 838477 (S.D. Tex. Mar. 4, 2014); EEOC v. Bloomberg L.P., 967 F. Supp. 2d 802, 813 (S.D.N.Y. 2013); EEOC v. Dillard's Inc., 2011 WL 2784516 (S.D. Cal. July 14, 2011); EEOC v. CRST Van Expedited, Inc., 2009 WL 2524402 (N.D. Iowa Aug. 13, 2009); EEOC. v. Jillian's of Indianapolis, IN, Inc., 279 F. Supp. 2d 974, 979 (S.D. Ind. 2003).

[116] *See, e.g.*, EEOC v. Caterpillar, Inc., 409 F.3d 831, 832–33 (7th Cir. 2005).

[117] *See* EEOC v. Sterling Jewelers Inc., 2015 WL 5233636, at *1 (2d Cir. Sept. 9, 2015); EEOC v. AutoZone, Inc., 2015 WL 6710851, at *5 (N.D. Ill. Nov. 2, 2015), *order amended and superseded*, (N.D. Ill. Nov. 4, 2015).

[118] 42 U.S.C. § 2000e–5(b).

[119] Fed. R. Civ. P. 408.

[120] *See Bass Pro Outdoor World, LLC*, 2014 WL 838477, at *21 ("[T]he EEOC can bring an enforcement action only with regard to unlawful conduct that was discovered and disclosed in the pre-litigation process.") (internal quotation marks omitted).

[121] Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1653, 1655 (2015).

[122] *Id.* at 1652 (internal citations omitted) (emphasis added).

compliance."[122] Thus, even assuming *Mach Mining*'s limited review could apply to the investigation and reasonable cause prerequisites, a court *must* examine the sufficiency of the EEOC's investigation; a cursory review is not enough.

Specifically, the Second Circuit in *EEOC v. Sterling Jewelers* applied *Mach Mining* to hold that while courts may engage in a narrow review of the EEOC's investigation efforts, they may not review the sufficiency of the investigation.[123] In *Sterling Jewelers*, the EEOC alleged the employer engaged in a nationwide practice of sex-based pay and promotion discrimination after receiving 19 individual charges from women employed across 9 states.[124] The EEOC investigated the charges and issued a letter of determination, but conciliation efforts with the employer failed, and the EEOC then sued.[125] After discovery, the magistrate judge in the case determined the EEOC failed to satisfy its obligation to conduct a pre-suit investigation and further found the agency failed to show evidence it investigated a nationwide class.[126] The Second Circuit reversed, however, adopting a "narrow" scope of review, reasoning:

> [Although] *Mach Mining* did not address the EEOC's obligation to investigate, [ ] we conclude that judicial review of an EEOC investigation is similarly limited: The sole question for judicial review is whether the EEOC conducted an investigation. . . . Here, the EEOC's complaint against Sterling alleged nationwide discrimination; accordingly, the agency must show that it undertook to investigate whether there was a basis for alleging such widespread discrimination. The EEOC need not, however, describe in detail every step it took or the evidence it uncovered. As with the conciliation process, an affidavit from the EEOC, stating that it performed its investigative obligations and outlining the steps taken to investigate the charges, will usually suffice.[127]

Notwithstanding the purported narrow scope of review articulated by the Second Circuit, the description of the review actually undertaken by the court was quite meaningful and extensive. For example, the court noted that the assigned EEOC investigator: (1) reviewed all of the individual files and reviewed all of the charges as class charges; (2) compiled a 2,600-page investigative file; and (3) relied on an expert analysis finding significant pay and promotion disparity for the company's female employees.[128] Alternatively, the court determined that because the EEOC used information from individuals across nine states and asked for information regarding the employer's nationwide pay practices for its expert analysis, the agency gave the company sufficient notice of a nationwide investigation.[129]

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[123] *See Sterling Jewelers Inc.*, 2015 WL 5233636, at *1.
[124] *Id.*
[125] *Id.* at *2.
[126] *Id.*
[127] *Id.* at *3–4.
[128] *Id.* at *5.
[129] *Id.* at *5–6.

The court further justified its conclusion that only a narrow review of the EEOC's investigation was appropriate by distinguishing the case before it from other cases finding the investigation inadequate.[130] It expressly noted that sister circuits based their decisions on the fact the EEOC had failed to conduct any investigation at all.[131] Therefore, the Second Circuit seemed to endorse dismissal if the EEOC fails to show it made *any* investigation. It ultimately vacated the lower court's decision and remanded the case for further proceedings.[132]

Similarly, in *EEOC v. AutoZone, Inc.*, Judge Robert M. Dow, Jr. determined the court could only review whether an investigation occurred, not the sufficiency of the investigation.[133] In *AutoZone*, the EEOC brought suit on behalf of three individuals and a class of other employees throughout the employer's U.S. stores alleging the auto parts retailer's attendance policy discriminated against disabled employees by failing to make reasonable accommodations.[134] The company challenged the EEOC's investigation, arguing the EEOC did not conduct an adequate nationwide investigation and that its claims could only be brought on behalf of employees from the same stores as the individual aggrieved employees.[135]

The court applied *Mach Mining*'s guidance to conclude, "'the proper scope of judicial review' of the EEOC's pre-suit investigation should 'match[ ] the terms of Title VII's' provisions concerning investigation."[136] Noting Title VII does not mandate any particular investigative technique and relying upon previous Seventh Circuit precedent, the court found it could only review whether an investigation occurred—not the sufficiency of an investigation itself.[137] In applying this standard, the court found the investigation was adequate because the EEOC investigator reviewed the information he collected and sent the employer a letter of determination stating the agency believed the company discriminated against the charging parties "and a class of other employees at its stores throughout the United States."[138] Therefore, the employer had adequate notice of the charges being investigated. In reaching this conclusion, the court incorporated reasoning from the Second Circuit's opinion in *Sterling Jewelers*, but also noted the Second Circuit may have overanalyzed the EEOC's investigation by subsequently reviewing the EEOC investigator's testimony and investigative file.[139] In the *Autozone* Court's eyes, this was unnecessary under *Mach Mining*.

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[130] *Id.* at *5.
[131] *Id.* (citing EEOC v. CRST Van Expedited, Inc., 679 F.3d 657 (8th Cir. 2012); EEOC v. Pierce Packing Co., 669 F.2d 605 (9th Cir. 1982)).
[132] *Id.* at *7. Sterling Jewelers has petitioned the Second Circuit for en banc review, however.
[133] EEOC v. AutoZone, Inc., 2015 WL 6710851, at *5 (N.D. Ill. Nov. 2, 2015), *order amended and superseded*, (N.D. Ill. Nov. 4, 2015).
[134] *Id.* at *1.
[135] *Id.* at *2.
[136] *Id.* at *4 (quoting Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1655 (2015)).
[137] *Id.*
[138] *Id.*
[139] *Id.* at *5.

B. *Investigation and Reasonable Cause Cases Before Mach Mining Engaged in Extensive Judicial Review and Have Not been Overruled*

As noted by the Second Circuit, sister courts have reached a different result, based on a review of the sufficiency of the EEOC's investigation.[140] These courts often base their decisions on a lack of employer notice regarding the "person or class" harmed, consistent with the language eventually recognized by the Supreme Court in *Mach Mining*.[141] After *Mach Mining*, these cases appear to remain good law and offer direction on the appropriate scope of judicial review of the required EEOC investigation.

In *EEOC v. CRST Van Expedited*, the Eighth Circuit determined the EEOC failed to conduct a sufficient investigation into the specific allegations of additional individuals added to the class.[142] The case originally began when a single plaintiff alleged the employer had discriminated against her because of her sex, but the EEOC found it had reasonable cause to believe "a class of employees" was also subjected to sex discrimination after the company submitted relevant records and information to the agency.[143] In finding the district court did not abuse its discretion in dismissing the action, the Eighth Circuit concluded the employer had no meaningful opportunity to conciliate the claims lodged against it on behalf of the additional class members.[144] Specifically, the court noted that the EEOC did not interview any witnesses or subpoena any documents to determine whether discrimination allegations were in fact true.[145] In fact, in the Court's view, the EEOC did not identify any of the sixty-seven allegedly aggrieved persons as members of the class until *after* it filed the complaint.[146] Instead, the Court found the EEOC merely used discovery in the original single plaintiff charge to conduct a "fishing expedition" to uncover more violations.[147]

Likewise, in *EEOC v. Pierce Packing Co.,* the Ninth Circuit found that the EEOC failed to conduct an investigation where it relied solely on a Department of Labor (DOL) investigation and settlement to find reasonable cause.[148] Initially, one of the signatories to the DOL settlement agreement alleged the company had violated the agreement. As a result, an EEOC investigator conducted an on-site compliance review and determined the company was continuing to engage

[140] EEOC v. Sterling Jewelers Inc., 2015 WL 5233636, at *5 (2d Cir. Sept. 9, 2015) (citing EEOC v. CRST Van Expedited, Inc., 679 F.3d 657 (8th Cir. 2012); EEOC v. Pierce Packing Co., 669 F.2d 605 (9th Cir. 1982)).
[141] *See* Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1652 (2015).
[142] EEOC v. CRST Van Expedited, Inc., 679 F.3d 657, 664 (8th Cir. 2012).
[143] *Id.* at 666–67.
[144] *Id.* at 676.
[145] *Id.* at 673.
[146] *Id.*
[147] *Id.* at 675. The appellate court is reconsidering the decision in light of *Mach Mining*, and the case remains at the briefing stage.
[148] EEOC v. Pierce Packing Co., 669 F.2d 605, 606 (9th Cir. 1982).

in discrimination.[149] While the EEOC alleged it sent the employer a letter attempting to conciliate the matter, the employer disclaimed ever receiving the letter.[150] In finding the EEOC had not engaged in a genuine investigation, the court noted, "The EEOC acted improvidently when it attempted to use the [DOL] settlement agreement as a springboard to court enforcement [in the EEOC action]. . . . The requirements of Title VII are not vitiated by a previous settlement agreement. . . . [N]ot once has the EEOC conducted its own statutorily mandated investigation nor has it made a reasonable cause determination."[151] Therefore, the court affirmed the district court's dismissal for lack of jurisdiction.[152]

In *EEOC v. Bloomberg L.P.* (a district court opinion, but notably within the Second Circuit), the EEOC began its initial investigation into Bloomberg after three women filed sex/pregnancy discrimination charges with the EEOC.[153] After the EEOC received company information regarding hundreds of other women who had taken maternity leave and held similar positions to the charging parties, it determined Bloomberg also discriminated against 29 additional women.[154] The EEOC sent a letter of determination to the employer finding cause as to the three initial charging parties as well as to a "class of similarly-situated women based on their sex/pregnancy."[155] When conciliation efforts proved futile, the EEOC sued in federal court. Chief Judge Loretta Preska of Southern District of New York began her analysis by noting, "[P]re-litigation requirements represent *sequential steps in a unified scheme* for securing compliance with Title VII."[156] Turning to the sufficiency of the EEOC's investigation, she concluded, "Nowhere in the [letter of determination] . . . does the EEOC mention the names of any individual claimants other than the Charging Parties. . . . Allowing the EEOC to subvert its pre-litigation obligations with respect to individual claims by yelling far and wide about class claims would undermine the statutory policy goal of encouraging conciliation."[157] Because the EEOC only investigated class claims rather than the individual claims of additional aggrieved parties, it did not provide the employer with an opportunity to tailor its class-based conciliation efforts to the "breadth of *legitimate* claims it might face."[158] In making this finding, the court dismissed the EEOC's complaint and allowed the employer to seek attorney's fees, stating, "Allowing the EEOC to revisit conciliation at this stage . . . already has and would further prejudice [the employer]" and would be in "contravention of Title VII's emphasis on voluntary

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[149] *Id.*
[150] *Id.* at 607.
[151] *Id.* at 608.
[152] *Id.*
[153] EEOC v. Bloomberg L.P., 967 F. Supp. 2d 802, 806 (S.D.N.Y. 2013).
[154] *Id.*
[155] *Id.* at 807.
[156] *Id.* at 810. (citations omitted) (emphasis in original).
[157] *Id.* at 812–13.
[158] *Id.* at 813 (emphasis in original).
[159] *Id.* at 816.

proceedings and informal conciliation."[159] Although the EEOC initially appealed the decision to the Second Circuit, the appeal was later withdrawn.[160]

Finally, in *EEOC v. Bass Pro Outdoor World, LLC*, the court determined the EEOC was required to share with the employer an outline of the class and provide the employer with information on individual claims so it could adequately engage in the conciliation process.[161] The EEOC informed the employer it had reason to believe Bass Pro had discriminated against applicants on the basis of race at Bass Pro Shops' retail stores and facilities nationwide.[162] The parties attempted conciliation, but they were "many million[s of] dollars apart."[163] As the court noted, the failed conciliation was due in part to the EEOC "consistently refusing to provide all that the employer was seeking, and settlement offers, at least monetary ones, that reflected a fundamental disagreement" over the size of the class.[164] Ultimately, Judge Keith P. Ellison held that while the EEOC did not have to conduct conciliation for each individual claim, he noted that Bass Pro deserved better information regarding the individual alleged victims.[165] Although the court was hesitant to impose any "arbitrary requirements as to what the EEOC must *always* do,"[166] the court offered several possibilities for compliance. For instance, the EEOC could have provided information regarding the different racial compositions of the class or provided a better breakdown of the compensatory damages sought for the individual claims.[167] As a result, the court stayed the action so the parties could conduct adequate conciliation attempts.[168] Currently, the case is on appeal before the Fifth Circuit, where the parties have filed briefs regarding *Mach Mining*'s application to Title VII's other litigation prerequisites.[169]

VI. *MACH MINING*'S EFFECT ON THE ADEA'S LITIGATION PREREQUISITES

Although the genesis of *Mach Mining* was a Title VII gender discrimination action, two district courts have considered whether the Court's ruling applies to cases arising under other anti-discrimination statutes the EEOC is charged with enforcing, such as the ADEA. Notably, the ADEA contains a similar conciliation requirement as Title VII: "Before instituting any action. . . the [EEOC] shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of [the ADEA] through informal methods of

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[160] EEOC v. Bloomberg L.P., 967 F. Supp. 2d 802 (S.D.N.Y. 2013), *appeal withdrawn*, No. 13-3861 (2d Cir. Feb. 6, 2014).
[159] *Id.* at 816.
[161] EEOC v. Bass Pro Outdoor World, LLC, 1 F. Supp. 3d 647, 664–66 (S.D. Tex. 2014).
[162] *Id.* at 650–51.
[163] *Id.* at 651.
[164] *Id.*
[165] *Id.* at 664.
[166] *Id.* at 665 (emphasis in original).
[167] *Id.* at 666.
[168] *Id.* at 667.
[169] *See, e.g.*, Brief of Plaintiff-Appellee, EEOC v. Bass Pro Outdoor World, LLC, No. 15-20078, at 42–57 (5th Cir. 2015).

conciliation, conference, and persuasion."[170]

In *EEOC v. Blinded Veterans Association* for example, the EEOC alleged the company discriminated against two long-time employees on the basis of age.[171] After determining there was reasonable cause to believe the company had violated the ADEA, the EEOC invited the company to conciliate by asking for injunctive relief and a monetary award for the aggrieved employees.[172] While the parties reached an agreement as to the injunctive relief, the parties did not reach an agreement as to the monetary relief, and the EEOC notified the company conciliation efforts were unsuccessful.[173] When the EEOC filed suit in the U.S. District Court for the District of Columbia, the company argued the EEOC (1) did not make a good faith attempt to conciliate and (2) did not make an independent investigation of the discrimination charges at issue.[174]

To begin the court's analysis, Judge Randolph D. Moss noted that both parties agreed that in light of the "similar language and strong parallels between the two statutes, the standard of review used in Title VII cases applies as well to the ADEA's conciliation requirements."[175] Therefore, the court assumed *Mach Mining* applied to the action according to the parties' stipulation and determined "the EEOC has done more than enough to survive 'relatively barebones review.' It communicated the claims to [the employer], allowed [the employer] to respond, engaged in discussions, and decreased its requests for monetary relief in response to [the employer's] counter-offer."[176] However, the court noted in dicta that even this breadth of review may have been unnecessary, reasoning, "[B]ecause the ADEA does not incorporate the same confidentiality requirements applicable to Title VII actions . . . the Court has addressed the materials that are before it. The Court recognizes, however, that a less substantial review of the record of negotiations may be sufficient and appropriate."[177] Without further discussion of this dicta, the court concluded the EEOC afforded the employer the opportunity to discuss and rectify the alleged discriminatory practice, and therefore it had satisfied its conciliation obligation.[178]

Turning to the issue of whether the EEOC had conducted an adequate investigation of the claims, the EEOC argued the ADEA does not impose an investigation obligation upon the agency because the ADEA (1) merely empowers the EEOC "to make investigations" if it chooses

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[170] *Compare* 29 U.S.C. § 626(b) (the ADEA) *with* 42 U.S.C. § 2000e–5 (requiring the EEOC under Title VII to "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.").
[171] EEOC v. Blinded Veterans Ass'n, 2015 WL 5148737, at *1 (D.D.C. July 7, 2015).
[172] *Id.*
[173] *Id.* at *2.
[174] *Id.* at *1.
[175] *Id.* at *7.
[176] *Id.* (quoting Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1652 (2015)).
[177] *Id.* at *9.
[178] *Id.* at *8.

and (2) does not list investigation among the statute's litigation prerequisites.[179] Without addressing the EEOC's arguments, the court assumed the EEOC has an investigation duty under the ADEA but determined the EEOC had nonetheless satisfied this requirement.[180] In particular, the court noted the EEOC had gathered information, conducted interviews, reviewed the charges, and issued letters of determination based on its collected record.[181] Moreover, the court opined, "Even if satisfaction of the ADEA's investigation requirement were subject to judicial review, it seems safe to assume that, as in Title VII cases, the role of the courts would not, and ought not, extend to second-guessing quintessentially executive judgments about who to interview or what information to gather in the course of an investigation."[182] Therefore, the EEOC had fulfilled its assumed investigation requirement.

However, in *EEOC v. CollegeAmerica Denver, Inc.*, Judge Lewis T. Babcock limited the applicability of *Mach Mining* to Title VII conciliation attempts alone.[183] In *CollegeAmerica*, the EEOC alleged the employer's separation agreements denied employees the full exercise of their rights under the ADEA.[184] The EEOC's letter of determination requested the company revise its separation agreements to comply with the ADEA; however, the EEOC did not reference the separation agreements in the section stating its finding of unlawful practices.[185] Thus, the court concluded before *Mach Mining* was issued that the letter of determination failed to provide the employer with clear notice the separation agreements were part of the EEOC's investigation.[186]

In the wake of *Mach Mining*, the court agreed to review its order to consider whether *Mach Mining* dictated a different conclusion.[187] The court determined it did not. In reaching this conclusion, the court reasoned, "[T]he *Mach Mining* case does not address Title VII's notice requirement which is comparable to that of the ADEA. . . . To the extent that notice is referenced in [*Mach Mining*], it is only with respect to the fulfillment of the EEOC's duty to attempt conciliation of a [Title VII] discrimination charge."[188] Alternatively, the court noted that even if *Mach Mining* did apply, the EEOC's conciliation efforts were inadequate because the agency failed to provide evidence the separation agreements were part of the parties' conciliation

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[179] *Id.* at *9 (citing 29 U.S.C. § 626(a), (b)).
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] EEOC v. CollegeAmerica Denver, Inc., 2015 WL 6437863, at *3 (D. Colo. Oct. 23, 2015).
[184] *Id.* at *1.
[185] *Id.* at *2.
[186] *Id.*
[187] *Id.* at *3.
[188] *Id. Compare* 42 U.S.C. § 2000e–5(b) ("Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer . . . within ten days, and shall make an investigation thereof.") *with* 29 U.S.C. § 626(d)(2) ("Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge

discussion so as to give the employer an opportunity to respond to the charges.[189] Further, the court determined that dismissal of the EEOC action was appropriate, distinguishing the remedy in an ADEA action from the *Mach Mining* Court's language that a stay is the appropriate remedy in a Title VII action.[190] Ultimately, as the *Blinded Veterans Association* and *CollegeAmerica* decisions illustrate, an open issue remains regarding whether *Mach Mining* extends beyond the Title VII context.

VII. CONCLUSION

The Court in *Mach Mining* and lower courts in their review seem to require the EEOC to give employers notice of the claims brought against them, as well as a description of the harm and the class aggrieved in order to have a meaningful opportunity to voluntarily comply with Title VII. Furthermore, the EEOC's own compliance and enforcement guidance rebukes an application of *Mach Mining*'s narrow scope of review to the investigation and reasonable cause prerequisites. As the EEOC itself observed in its 2012 Strategic Enforcement Plan, field compliance officers and legal staffs *must* consult and collaborate on investigations so that "strong vehicles for meaningful law enforcement" are premised on "the strength of the evidence" in the investigation.[191] The EEOC itself recognizes the need and has mandated better investigations and stronger evidence before a District Director issues a reasonable cause determination: "Charges or cases should not be pursued, even if they fall within a priority category, unless a *rigorous* assessment of the merits determines *significant* law enforcement potential."[192] A more rigorous process likely will benefit charging parties, respondents and more effective Title VII compliance. Likewise, it will clarify the EEOC's litigation prerequisites regarding other anti-discrimination statutes the EEOC is charged with enforcing. Therefore, *Mach Mining* is a significant employment law decision because it underscores the importance to practitioners of scrutinizing all of the EEOC's administrative conduct as a prelude to any enforcement action.

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as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.").

[189] *Id.*

[190] *Id.* (citing Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1656 (2015)).

[191] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STRATEGIC ENFORCEMENT PLAN FY 2013–2016, *supra* note 26.

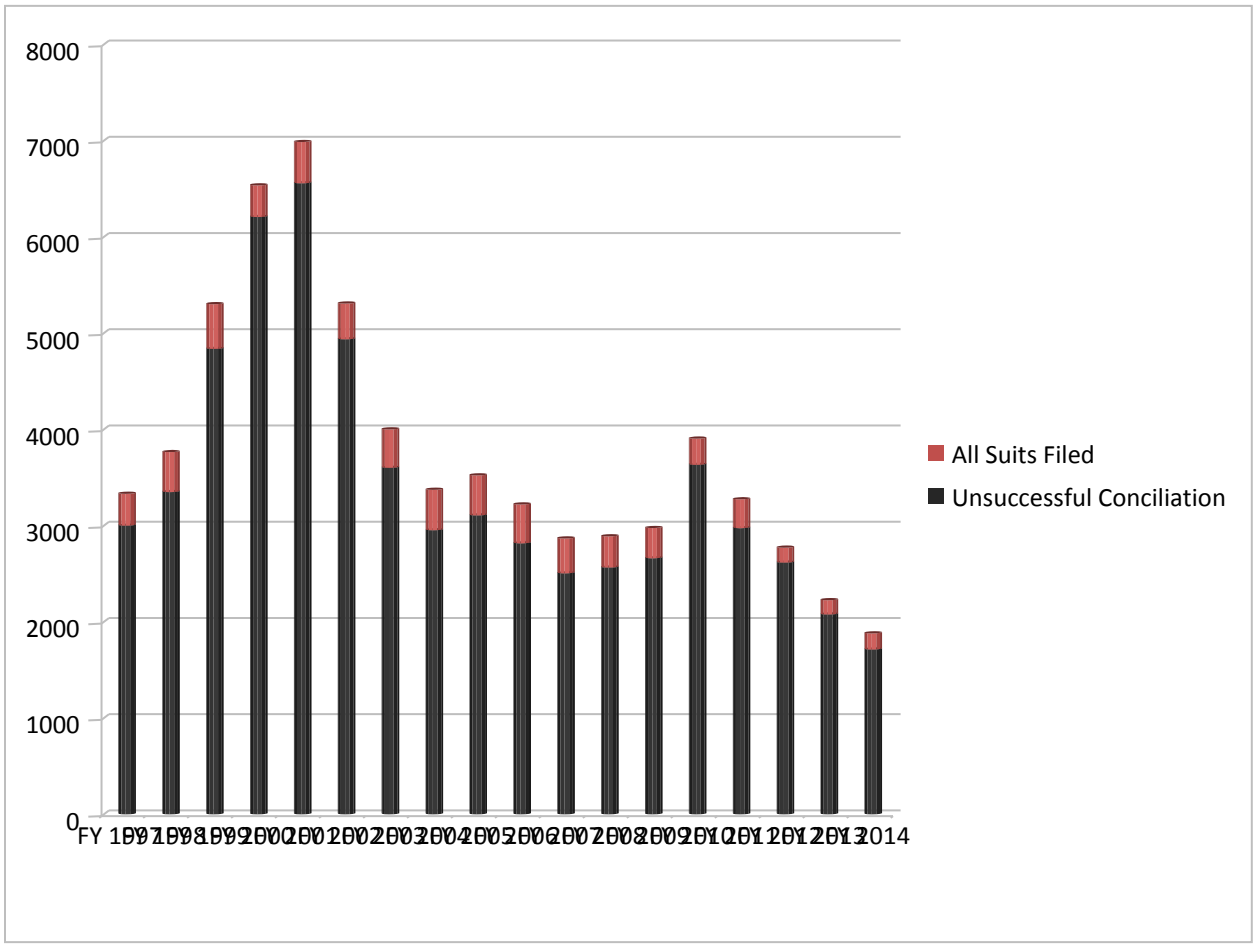
[192] *Id.* (emphasis added).

APPENDIX A: UNSUCCESSFUL EEOC CONCILIATIONS RESULTING IN LITIGATION (TABLE)

	Unsuccessful Conciliations[193]	All Suits Filed[194]	Percentage of Unsettled "Just Cause" Determinations that were Litigated
FY 1997	3000	332	11.07%
FY 1998	3350	414	12.36%
FY 1999	4837	465	9.61%
FY 2000	6208	329	5.30%
FY 2001	6559	428	6.53%
FY 2002	4938	370	7.49%
FY 2003	3601	400	11.11%
FY 2004	2952	421	14.26%
FY 2005	3107	416	13.39%
FY 2006	2817	403	14.31%
FY 2007	2505	362	14.45%
FY 2008	2565	325	12.67%
FY 2009	2662	314	11.80%
FY 2010	3633	271	7.46%
FY 2011	2974	300	10.09%
FY 2012	2616	155	5.93%
FY 2013	2078	148	7.12%
FY 2014	1714	167	9.74%

APPENDIX B: UNSUCCESSFUL EEOC CONCILIATIONS RESULTING IN LITIGATION (BAR GRAPH)

[193] All Statutes FY 1997-FY 2014, EEOC Statistics, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm.
[194] EEOC Litigation Statistics, FY 1997-FY 2014, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.


8000
7000
6000
5000
4000
3000
2000
1000
0
All Suits Filed
Unsuccessful Conciliation