

EEOC Announces 2008 Enforcement Initiatives

The Equal Employment Opportunity Commission (EEOC) is responsible for enforcement of a number of federal laws, including Title VII of the Civil Rights Act of 1964 (CRA), the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). Together, these three laws prohibit discrimination based upon race, color, religion, gender, or national origin (CRA); disability, in the case of those otherwise qualified (ADA); and age, in the case of those 40 or older (ADEA). As a part of its enforcement process, the EEOC issues regulations regarding its interpretation of the laws that it enforces. It also periodically implements education and enforcement campaigns, typically referred to as “initiatives,” focused on specific concerns it deems worthy of special consideration.

One of the more prominent initiatives currently being pursued by the EEOC is the “Eradicating Racism and Colorism from Employment (E-RACE) Initiative. The EEO reports that the most frequently filed claims with the EEOC are allegations of race discrimination, racial harassment, or retaliation arising from opposition to race discrimination. In Fiscal Year 2006, 27,238 charges alleging race-based discrimination accounted for 36% of the charges filed. The EEOC notes a return of overt racial discrimination involving nooses, KKK propaganda, and other racist insignia in the workplace. It also reports an increased reliance on arrest and conviction records, employment and personality tests, and credit scores, all of which may disparately impact people of color. Finally, the EEOC identifies reliance by employers on new technology in job searches, such as video resumes, as potentially leading to intentional race or color discrimination based on appearance or a disproportionate exclusion of applicants of color who may not have access to broadband-equipped computers or video cameras.

Another prominent initiative is the Employment Tests and Selection Procedures Initiative. Here, the EEOC found it appropriate to respond to the increased use of pre-employment testing prompted largely by post-9/11 security concerns and increased concerns about workplace violence, safety, and liability. The EEOC reports that the number of discrimination charges raising issues of employment testing, and exclusions based on criminal background checks, credit reports, and other selection procedures, reached a high point in FY 2007. Pre-employment testing potentially implicates the CRA, the ADA, and the ADEA.

Title VII of the CRA prohibits employers from using neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, where the tests or selection procedures are not “job-related and consistent with business necessity.” When hiring, the ADA provides that an employer may not ask questions about disability or require medical examinations until after it makes a conditional job offer to the applicant. After making a job offer (but before the person starts working), the ADA allows an employer to ask disability-related questions and conduct medical examinations as long as it does so for all individuals entering the same job category. The ADEA prohibits disparate treatment discrimination, i.e., intentional discrimination based on age. For example, an employer may not give a physical agility test only to applicants over age 50, based on a belief that they are less able physically to perform a particular job without testing younger applicants. The ADEA also prohibits employers from using neutral tests or selection procedures that have a discriminatory

impact on persons 40 or older, unless the challenged employment action is based on a reasonable factor other than age. Thus, if a test or other selection procedure has a disparate impact based on age, the employer must show that the test or device chosen was a reasonable one.

Supervisors must constantly be alert to the potential for disparate impact of neutral employment selection criteria, such as credit reports and criminal background checks, upon members of protected classes. Tests, whether mental or physical in nature, in the hiring process should be used only after consultation with Human Resources and the Office of Counsel.