

Advocacy groups seek EEOC investigation into want ads barring applicants with criminal backgrounds

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Bank of America Corp. and the Manpower Inc. staffing agency could be in legal hot water over hundreds of job postings that allegedly warn applicants with criminal backgrounds not to bother applying.

That's what a dozen civil rights and worker advocacy groups told the Equal Employment Opportunity Commission (EEOC) on Tuesday when they alerted the federal agency about alleged discriminatory hiring practices at Manpower, Bank of America and the One-Stop Career Center in Alameda, Calif. The advocates, who requested a federal investigation, allege that those companies may be illegally blocking otherwise qualified African-American and Latino applicants from jobs by explicitly barring those with felony or misdemeanor records from applying for jobs.

The allegation revolves around recent job announcements for more than 600 clerical and administrative positions at Bank of America that were posted widely throughout the San Francisco Bay Area. After asking prospective applicants "Are you looking for a fun job?," the one-page flier goes on to state that qualified candidates must be able to pass a background check and have no felonies or misdemeanors. It

does not distinguish between arrests or convictions.

The advocacy groups argue that such absolute prohibitions violate Title VII of the Civil Rights Act of 1964 and long-standing EEOC hiring guidelines.

"It's an enormous chilling effect. They're not only saying 'We're not going to hire you,' but the message is you can't even apply for these jobs," said attorney Laura Moskowitz of the National Employment Law Project, a employee advocacy group that is among the groups pushing for EEOC intervention.

In pressing the issue, Moskowitz is one of several lawyers who helped draft a letter that was sent today to EEOC Chairman Stuart Ishimaru, who is being called on to issue a rare commissioner's charge to trigger an investigation into the job announcements.

"A Commissioner's Charge will permit an investigation into whether one of the nation's largest employers, one of the world's largest staffing agencies, and a state office have violated Title VII, and it will focus much-needed attention on a widespread, illegal employment practice engaged in by more and more employers and affecting growing numbers of workers," the groups stated in the letter.



AKIN GUMP'S DON LIVINGSTON

Officials at the EEOC said that EEOC commissioners do have the authority to issue a commissioner's charge, but that they could not comment on any specific allegations.

Bank of America and Manpower were contacted for this story, but were unavailable as of press time.

Management-side lawyers, meanwhile, say that the allegations are weak and overreaching and do not warrant a full-blown federal investigation.

"A very ambiguous flier doesn't justify public assassination of a company [in the media]....I think this is extremely vague, and it's a very thin thread to justify the reaction," said Donald Livingston, a partner at Akin Gump Strauss Hauer & Feld, and a former general counsel of the EEOC.

Livingston, who represents employers in discrimination cases, said that the advocacy groups “have a point to make,” but that they lack the evidence to prove discriminatory hiring practices at Bank of America and Manpower.

“These groups don’t have any idea what the practices are at Bank of America or Manpower. There’s nothing they say about the flier which gives you any information about what the company does with respect to its background check,” Livingston said. “This is an extraordinary step to take to try to assert political pressure on the EEOC to undertake an investigation where they have no facts.”

As for the use of background checks in the workplace, Livingston said that while there is a growing concern among employers that their background checks will be held against them, the law is on their side. He said employers do have a right to hold misdemeanor and felony convictions against job applications under certain circumstances, such as showing that the nature of the offense is job related.

Steve Miller of Chicago’s Fisher and Phillips, who also represents employers in discrimination cases, echoed similar sentiments. He said that while the EEOC has found that the use of arrest records in some cases can lead to a disparate impact on minorities, most

employers understand that and will tie in the criminal record to the nature of the job.

For example, he said, if someone has a fraud conviction or a history of bad check writing, that would bear upon his or her ability to work around money. He noted that employers also have a wide range of state laws to abide by when using background checks.

“Some states will outright prohibit the use of arrest records in considering employment decisions. Others will restrict how many years back you can go. And other states restrict what kinds of things you can raise inquiries into,” Miller said. “The one guidance employers can fall back on is: You still have a right to use these things, but if you’re going to use them, make sure they’re job related.”

In recent years, as criminal background checks have gained popularity in the workplace, the EEOC has taken legal action to make sure that minority workers are not being denied jobs due to overly broad and arbitrary criminal background restrictions. Currently, the EEOC has a lawsuit pending in Michigan against another major staffing firm, Peoplemark Inc., alleging that Peoplemark unlawfully maintained a policy of denying employment to people with criminal records. Similar charges also have been filed by private and nonprofit

lawyers against other major employers, including Comcast Corp., Lowe’s Cos. Inc. and Madison Square Garden.

According to Moskowitz, the issue is not about whether employers have a right to ask job applicants about their criminal backgrounds; it’s more about how employers treat a spotty background, and what weight they give it when considering someone for a job. She believes criminal background checks especially hurt minorities.

“Because of the racial discrimination in the criminal justice system, that’s going to have a disparate impact [on minorities],” Moskowitz said. “The EEOC has said that an absolute bar to hiring individuals with arrests or convictions has a disproportionate impact on minorities....[Employers] need to have a business necessity for looking at an arrest and conviction history.”

And perhaps more importantly, she added, “Give the person a chance to explain.”

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