

**EMPLOYMENT**

**Even Banks Can Violate  
New EEOC Guidelines on  
Criminal Background Checks**

By  
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This spring Pepsi® entered into a \$3.1 million dollar settlement with the EEOC over

its refusal to hire anyone with an arrest or conviction record. Because Blacks and Hispanics are statistically arrested and convicted of crimes at a much greater rate than whites, the EEOC found Pepsi’s practice to have a discriminatory impact on all applicants in those protected classes. Following the settlement, the EEOC released updated guidelines for the use of criminal background checks, which have application to the banking industry (even in light of existing federal regulations regarding their use by banks).

Most people associate the idea of discrimination with treating someone differently on purpose because of a protected characteristic, i.e. denying a promotion to a female employee because she is likely to start a family. However, discrimination can take another form. It is also illegal to take actions that have a “disparate impact” on persons in a protected class – even if the action does not appear to be illegal on its face.

It is this disparate impact discrimination, through the use of criminal background checks, that is the focus of the EEOC’s updated guidelines. The EEOC wants to put employers on notice that they may be discriminating without realizing it. A facially neutral policy against hiring anyone with a criminal background does not appear to result in discrimination, but it can be illegal.

The guidelines begin by suggesting that no employer should use an arrest history to make a decision regarding hiring. As a basis for this advice, the EEOC relies primarily on the idea that

individuals are innocent until proven guilty and the fact that many criminal databases from which background check companies draw their information are woefully inaccurate. According to the EEOC, arrest records are often not updated with final dispositions other than conviction. Instead, the EEOC recommends that employers interview applicants to determine the underlying facts for themselves and weigh their view of those facts in the hiring decision without letting the arrest itself be a conviction.

With respect to convictions, the

EEOC warns employers against blanket restrictions. To withstand the EEOC’s scrutiny, the restrictions must be tailored to the circumstances. Employers are asked to consider: (1) the nature and gravity of the offense, (2) the time that has passed since the offense occurred, and (3) the relationship between the offense and the position at issue. In completing this analysis, the EEOC recommends an individualized evaluation in each case considering an assortment of points, which include: evidence that the in-

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## CHARTER ACTIVITY

### Louisiana BRANCHES

The **OFFICE OF THE COMPTROLLER OF THE CURRENCY** has received an application by First National Bank in De Ridder for a branch at 1838 N. Hwy. 171, Lake Charles.

The **OFFICE OF FINANCIAL INSTITUTIONS** has approved applications by IBERIABANK, Lafayette, for branches: 6235 S. Claiborne Ave., New Orleans; 822 S. Range Ave., Denham Springs; 12920 Airline Hwy., Baton Rouge; and filed/approved the consolidation of a branch at 1838 Hwy. 171 N., Lake Charles, with a branch at 284 Sam Houston Jones Pkwy., Moss Bluff.

The **OFI** has filed an application by Merchants & Farmers Bank & Trust Company, Leesville, for a branch at 975 Beglis Pkwy., Sulphur.

The **OFI** has filed applications by Fidelity Homestead Savings Bank, New Orleans, for a branch at 1450 Poydras St., Ste. 100, New Orleans; and filed to relocate a branch at 2300 N. U.S. Hwy. 190 to 2201 N. U.S. Hwy. 190, Covington.

### New Mexico BRANCHES

The **OCC** has received an application by Bank of the Rio Grande, N. A., Las Cruces, for a branch at 2101 Mountain Rd., Ste. B, Albuquerque.

The **OCC** has received applications by First National Bank Texas, Killeen, for First Convenience Bank branches: 400 Eubank Blvd. NE and 4201 Central Ave. NW, Albuquerque, and 3800 N. Lovington Hwy., Hobbs.

### Oklahoma BRANCHES

The **OCC** has approved an application by The Fort Sill National Bank, Fort Sill, for a branch at 7950 Craft Goodman Frontage Rd., Olive Branch.

### Texas BRANCHES

The **OCC** has approved an application by Guaranty Bond Bank, N. A., Mount Pleasant, for a branch at 1950 NE Loop 286, Paris.

The **OCC** has received applications by First National Bank Texas, Killeen, for First Convenience Bank branches: 200 Short Blvd., Dallas, and 2900 Renaissance Square, Fort Worth.

### MERGERS AND ACQUISITIONS

The **FEDERAL RESERVE BANK OF DALLAS** has filed an application by HaleCo Bancshares Inc., Plainview, to acquire 100% of LubCo Bancshares Inc., Slaton, and thereby indirectly acquire 100% of the outstanding shares of Citizens Bank, Slaton.

The **TEXAS DEPARTMENT OF BANKING** has approved an application by Prosperity Bank, El Campo, to merge with Community National Bank, Bellaire. ■

### Legal Phases (continued from Page 3)

dividual performed the same type of work post-conviction without incident, rehabilitation efforts, character references, the number of offenses, and the facts and circumstances surrounding the crime.

Of course, the EEOC operates in a perfect world where employers have the time to wipe away all the grime from each individual applicant to find

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## Legal Phases *(continued from Page 8)*

that one shiny nugget. This type of individualized assessment can be hard to do in every case. Fortunately for the banking industry, restrictions on hiring convicted individuals are written right into the FDIC statute. Banks are prohibited from employing anyone who has been "convicted of any criminal offense involving dishonesty or a breach of trust, or money laundering, or has agreed to enter into a pretrial diversion or other similar program in connection with a prosecution for such offense." 12 USC § 1829(a). This

prohibition lasts for 10 years from the conviction.

This leaves banks with only the responsibility to determine whether to hire individuals who have been convicted of other offenses. Although banks are not prohibited against hiring someone who has been convicted of aggravated assault, this type of conduct (especially in the recent past) probably warrants rejection if the factors outlined above weigh against it.

As a parting shot, the EEOC has made clear in its guidelines – specifically using a banking example – that it is not acceptable to apply an even

greater restriction than provided by the federal statutes. Banks should be very careful about extending prohibitions beyond the 10 year period provided by statute. In the eyes of the EEOC, the statutory period is sufficient ☝

*About the author:* **Michael Kelsheimer** is a shareholder in the Employment Law Section of Looper Reed & McGraw, PC, Dallas, TX. To view his biography and sign up for his complimentary monthly Employer Handbook, visit: [www.texasemployerhandbook.com](http://www.texasemployerhandbook.com).

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