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HIRING PRACTICES UNDER NEW SCRUTINY

Many employers' hiring practices may soon come under heightened scrutiny as a result of the EEOC's initiative, entitled "E-RACE" (Eradicating Racism and Colorism from Employment), requiring its investigators to pay special attention to how minorities are hired and promoted. Some of the practices that may need to be reviewed or reevaluated include the following:

Background Checks: Many employers obtain background checks, such as credit checks and criminal record histories, on their applicants. In addition to complying with the Fair Credit Reporting Act, which governs the procedures that must be followed in obtaining certain background checks, employers must also understand that if their background checks have a disparate impact on minorities with respect to hiring they must be able to justify that the background checks are job-related and consistent with business necessity. According to the EEOC's Compliance Manual on Race and Color Discrimination, "[a] blanket exclusion of persons convicted of any crime . . . would not be job-related and consistent with business necessity." Accordingly, credit and other background checks—particularly the criteria used for exclusion of certain applicants—may need to be tailored to specific jobs.

Employment Testing: Title VII provides that it is lawful for an employer to give and to act upon the results of any professionally developed ability test, "provided that such test, its administration or action upon the results is not designed, intended or used to discriminate on the basis of race [or other protected classes]." If an employment test results in a disparate impact on the basis of race or sex, however, the test must be "validated" to ensure that the test either



significantly predicts job performance, or is representative of the most important content of the job at issue. Further, an employment test may still violate Title VII if the employer fails to use an available alternative that serves the employer's needs equally well, yet would result in less adverse impact. Accordingly, all employment tests require substantial consideration prior to their implementation and periodic evaluation during their use.

New EEO-1 Reporting: Beginning this September 2007, private employers with 100 or more employees and federal contractors with 50 or more workers must comply with the new reporting requirements relating to ethnic and racial categories and a two-step process that first requests employees to identify whether they are Hispanic or Latino, and then if not, to identify their racial category. As a result of employers attempting to scramble to obtain the new required information, some federal contractors are choosing to modify the portion of their applications allowing applicants to voluntarily self-identify their ethnicity and race and some are resurveying employees. Both of these options require careful consideration prior to their implementation.

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