

# ENDA PASSES SENATE

On November 7, 2013, the U.S. Senate passed the Employment Non-discrimination Act (“ENDA”) with a 64-32 vote. The bill would prohibit employers from discriminating against individuals based on the individual’s sexual orientation or gender identity, similar to the way Title VII of the Civil Rights Act of 1964 prohibits other types of discrimination.

The bill now moves to the House of Representatives, where its passage is uncertain.

For more information about the Senate Bill (S.815), please [click here](#) to read our recent blog post regarding ENDA. Visit our blog for updates on ENDA and to find out whether it becomes law.

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## TENTH CIRCUIT SAYS EMPLOYEES MUST GIVE EXPRESS NOTICE OF RELIGION-WORK CONFLICT

Earlier this month, the U.S. Court of Appeals for the Tenth Circuit found that the EEOC failed to establish a prima facie case of religious discrimination where the EEOC could not show that a prospective employee expressly informed the employer of a conflict between the applicant’s religious beliefs and the employer’s dress code and of the applicant’s desire for a reasonable accommodation from that dress code.

In *EEOC v. Abercrombie and Fitch Stores, Inc.*, the Tenth Circuit reversed the lower court’s grant of summary judgment in favor of the EEOC on the EEOC’s claim that the employer failed to provide a reasonable religious accommodation for a prospective employee who wore a “hijab” (headscarf) for religious reasons. The employer, a national retail clothing company, maintains a “Look Policy” or dress code that is intended to promote and showcase the company’s clothing brand. The policy requires employees to dress in clothing that is consistent with the kinds of clothing that the company sells in its stores and prohibits employees from wearing black clothing and caps.

The employer rejected the prospective employee for employment after she wore a hijab to her job interview. The EEOC filed suit against the company, alleging that the company failed to provide the prospective employee a reasonable religious accommodation in violation of Title VII of the Civil Rights Act of 1964.

The Tenth Circuit recognized employers’ obligation under Title VII to reasonably accommodate religious practices of an employee or prospective employee unless the

employer demonstrates that the accommodation would pose an undue hardship on its business. The court found that, in this case, the EEOC had failed to establish one of the key elements of a Title VII religious accommodation claim – notice. The Tenth Circuit held that in order to succeed on such a claim, the employee or prospective employee must inform the employer that he or she engages in a religious practice that conflicts with the employer’s policy and that the employee would, therefore, require an accommodation for that religious practice.

Because the prospective employee, in this case, did not inform the employer, prior to its hiring decision that she engaged in the conflicting practice of wearing a hijab for religious reasons and that she needed an accommodation for it, the court found that the EEOC could not meet the requirements for a religious accommodation claim under Title VII.

As an employer, you should be aware of the general obligation under Title VII to reasonably accommodate religious practices of employees or prospective employees who inform you of a conflicting religious belief or practice and the need for such an accommodation. Understand, however, that the reasonable accommodation obligation is implicated *only* when there is a conflict between an employee’s religious practice and your neutral policy. If you are made aware of an employee’s religious conflict, you should take steps to obtain additional information that would allow you to determine whether an accommodation can be made available to that employee to eliminate the religious conflict without posing an undue hardship on your business. If you have questions about religious accommodation under Title VII, please contact one of our Employment Law attorneys.

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## WISCONSIN MAY “BAN THE BOX” ON EMPLOYMENT APPLICATIONS

A recent **Employment LawScene™ article** discussed the EEOC’s recent heightened efforts to crack down on employers’ use of criminal background checks in making hiring decisions. As part of its efforts, the EEOC issued guidance to employers in April 2012, in which the EEOC endorsed the policy of removing questions regarding criminal conviction history from job applications as a best practice for employers.

Following the EEOC’s lead, in what can only be described as a nationwide movement that has recently gained considerable momentum, 53 local jurisdictions and 8 states (including Minnesota) have enacted “ban-the-box” legislation that would prohibit employers from considering a job applicant’s criminal conviction record before the applicant has been selected for an interview. Two other states, California and Illinois, have adopted “ban-the-

box” policies through administrative directives rather than legislation. (Statistics courtesy of the National Employment Law Project).

Wisconsin could become the next state to “ban the box” on employment applications. On August 27, 2013, a bill that would prohibit employers from asking for information regarding an applicant’s criminal conviction record before the applicant has been selected for an interview, was introduced to the Wisconsin legislature and referred to Committee. Wisconsin Assembly Bill 342 provides that requesting an applicant for employment to supply information regarding his or her conviction record on an application form or otherwise inquiring into or considering an applicant’s conviction record before the applicant has been selected for an interview, constitutes employment discrimination under Wisconsin law. The bill would not, however, prohibit an employer from notifying applicants for employment that individuals with certain conviction records may be disqualified by law or the employer’s policies from employment in particular job positions.

Understandably, a number of employers use criminal background checks to identify job applicants who might present a risk to the employer’s business, its employees, and its customers or clients. Wisconsin employers should pay close attention to Assembly Bill 342 as it makes its way through the State legislature, as passage of this bill could result in a number of employers having to make significant changes to their hiring processes and job applications.

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## **EEOC CRACKS DOWN ON EMPLOYERS’ USE OF CRIMINAL BACKGROUND CHECKS**

Although having a criminal record in itself does not afford individuals protection under Title VII, it is the EEOC’s position that the use of criminal records in making employment decisions has a disproportionate effect on certain racial and ethnic groups, which may have a discriminatory effect on those racial or ethnic groups who *are* afforded protections under Title VII.

In April of last year, the EEOC issued guidance to employers regarding the use of arrest or conviction records in making employment decisions. The EEOC makes clear in its guidelines that the law does not expressly prohibit the use of criminal background checks, however, urges employers to conduct an individualized assessment when utilizing criminal background information to consider the nature and gravity of the crime, the time elapsed since the conviction, and whether the circumstances of the arrest or conviction are substantially related to the nature or requirements of the particular job. Employers that disproportionately

reject minority employment candidates as a result of criminal background checks may be subject to a discrimination claim based upon a disparate impact theory of discrimination.

Since the issuance of its criminal background check guidelines, the EEOC has stepped up its enforcement efforts and has begun to systematically crack-down on employers, alleging that employers' blanket policies regarding criminal background checks and arrest or conviction records constitute discriminatory hiring practices. In June 2013, the EEOC filed lawsuits against two large employers for their use of criminal background checks in making hiring decisions. The EEOC's district office in Charlotte, South Carolina filed suit against a large auto manufacturer alleging that it disproportionately screened out African Americans from jobs by implementing and utilizing a criminal conviction policy that denies facility access to employees and employees of contractors who have certain criminal convictions on their record. The EEOC's Chicago, Illinois office also filed a separate suit against a retailer alleging that its policy of conditioning all job offers on criminal background checks has a disproportionate impact on African-American applicants, and, therefore, is unlawful under Title VII.

The EEOC is not the only agency stepping up its enforcement efforts regarding employers' use of arrest and conviction records. A growing number of states and cities have recently enacted "Ban the Box" legislation that regulates the use of criminal background checks in employment decisions. The purpose of the "Ban the Box" laws is to prohibit covered employers from inquiring about a job applicant's criminal background and conviction record on a job application and delay background checks until later in the hiring process. Wisconsin has not yet enacted Ban the Box legislation.

### ***So, what does this all mean for you?***

The EEOC's guidance and the Ban the Box legislation trend can present challenges for employers who want to protect clients/customers and other employees from individuals with violent backgrounds or avoid placing people convicted of certain financial crimes in accounting positions or other positions where they are handling money. Certain employers, such as schools or health care providers, should also keep in mind the potential conflict between these laws and other legal requirements that prohibit the employer from employing individuals who have certain criminal convictions in these sensitive positions.

Employers must appropriately balance the EEOC's guiding principles with these practical considerations. Employers should carefully review their policies and practices regarding criminal background checks and the use of arrest and conviction records in making employment decisions to be sure that these policies do not contradict the EEOC's guidance or violate Title VII's prohibition against discrimination.

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# EEOC SEEKS DETERMINATION FROM SEVENTH CIRCUIT THAT ITS PRE-SUIT CONCILIATION EFFORTS CANNOT BE REVIEWED

The EEOC is statutorily obligated to enter into confidential conciliation efforts with an employer prior to commencing a lawsuit. Only if the EEOC is unable to secure a conciliation agreement acceptable to it may it bring a civil action, as conciliation is a condition precedent to the EEOC's power to sue. The purpose of this requirement is to encourage settlement of discrimination cases through voluntary compliance, rather than litigation. If the EEOC commences suit against an employer without first engaging in a good faith effort to conciliate the case, the employer may seek dismissal of the lawsuit because conciliation raises a quasi-jurisdictional issue.

Despite case law to the contrary, the EEOC has now attempted to argue that a federal district court is without authority to review the EEOC's pre-suit conciliation efforts. In *EEOC v. Mach Mining*, the EEOC has argued that an employer cannot challenge the EEOC's pre-suit conciliation efforts because Title VII prohibits disclosure of conciliation efforts in a subsequent proceeding. The federal district judge, however, was not persuaded by the EEOC's argument as he found that the prohibition was in conflict with Title VII's mandate that the EEOC must attempt to conciliate with the employer prior to bringing a civil action. Moreover, the federal district judge also held that Title VII's prohibition regarding disclosure of conciliation efforts goes to the introduction of such evidence relative to the merits of the case and not to introducing such evidence for the purpose of determining whether the EEOC first satisfied its prerequisite to bringing suit.

Nevertheless, the federal district judge granted the EEOC's motion to seek an interlocutory appeal before the Seventh Circuit because there exist a split between the federal circuits as to the scope of a court's review of the EEOC's conciliation efforts - an issue that the Seventh Circuit has not yet addressed. Some circuits employ a "deferential standard" inquiring only whether the EEOC made an attempt to conciliate whereas other circuits apply a "heightened scrutiny standard" which requires the EEOC to make a sincere and reasonable effort to negotiate by providing the employer with an explanation as to the reasonable cause for its belief that Title VII has been violated and an adequate opportunity to respond to all charges and negotiate a possible settlement.

The federal district court certified the following two questions for the Seventh Circuit on appeal: (1) Is the EEOC's conciliation process subject to judicial review?, and (2) if so, is that level of review a deferential or heightened scrutiny level of review? It would be anticipated

that the Seventh Circuit will hold that the EEOC's conciliation is subject to judicial review and will most likely find that a district court's scope of review will include a determination as to whether the EEOC in fact engaged in conciliation and whether that effort was made in good faith. We will update this blog article when the Seventh Circuit issues its decision.