CORPORATE COUNSEL

Target Flunks Hiring Test and Is Assessed $2.8M Fine

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American workers may be enjoying the last dog days of summer, but the Equal Employment Opportunity Commission isn't sitting back and taking it easy. The commission announced this week that it netted $2.8 million from Target Corp. in a settlement payout over the company's allegedly illegal hiring practices.

The company's apparent mistakes turned out to be costly. And they may be all too easy for other companies to repeat if in-house counsel don't look carefully at how legal and human resources are managing their own hiring processes.

The EEOC zeroed in on several aspects of Target's practices. The first issue was that three of the retailer's pre-employment tests appear to have had the effect of screening out applicants based on race and sex. "In a sense, this is a garden-variety disparate-impact case," said Thomas Wassel, a partner at Cullen and Dykman. Wassel told CorpCounsel.com that even where there is no disparate treatment of workers based on protected characteristics, if hiring processes have the effect of excluding certain groups, a company could very well be on the hook with the EEOC.

Companies can't be held liable for disparate impact in hiring processes if there is a reason for the hiring test or standard that is "job-related and consistent with business necessity." Target's practices apparently didn't fit that bill, at least in the commission's view.

In-house counsel who want to ensure their companies are not running afoul of the law should have their pre-employment tests and screenings certified by a third-party professional. "After getting some expert advice on impact, employers need to figure out another effective alternative that does not have the same adverse impact," said Liane Fisher, a partner at Serrins Fisher. The EEOC will expect companies to explore alternatives to a test deemed discriminatory and noncompliant.

Another problem the EEOC found was Target's failure to track whom it hired or didn't hire. Apparently, the retail giant didn't keep hiring records that were good enough to even determine whether its hiring practices had discriminatory effects. "The employer has a record-keeping obligation and if they don't fulfill it, that really hurts them," said Fisher. "There is an adverse inference drawn against employers when they are not able to present sufficient paperwork, so it

really hurts them in ways that will cost them a lot should litigation ensue."

Wassel pointed out that although keeping a record of employee data is required for such companies as Target, there is a downside to asking employees about what protected classes they may be a part of, even after they have been hired. "You can't necessarily force employees to respond to questions about their race, ethnicity or religion," Wassel said, "and, in fact, many employers would say: 'I really don't want to know.'" If an employer doesn't know about a worker's religion or national origin, for instance, the employee will have trouble claiming that unrelated adverse actions were somehow discriminatory based on one of the protected characteristics.

The third strike against Target is related to the company's handling of prospective employees under the Americans with Disabilities Act. It appears the company erred by giving psychologist-administered assessments to job applicants before they were offered the job, which is prohibited by the ADA. Fisher explained that while some job-related tests are allowed earlier in the employment screening process, there are certain boundaries that cannot be crossed until the offer is on the table. "Once you cross the line into someone's medical and psychological background, the ADA is a lot more stringent in that regard," she said.
