

ADVISORY | Employment Litigation

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EEOC ISSUES UPDATED GUIDANCE REGARDING EMPLOYER USE OF CRIMINAL HISTORY INFORMATION

On April 25, the Equal Employment Opportunity Commission (“EEOC”) issued updated guidance (“Guidance”) concerning employer use of criminal histories. The Guidance, which was approved by four EEOC commissioners over the dissent of the fifth, generally provides that the EEOC will regard as suspect blanket or automatic exclusions of individuals from employment or promotion simply based on an individual’s criminal record, particularly when the individual is an African American or a Hispanic male. However, the EEOC will accept as a defense to a Title VII claim an employer’s showing that the exclusion is job-related and consistent with business necessity *and* that the employer has made an *individualized* determination that hiring or promoting the individual in question would be likely to create a risk of improper conduct that would be detrimental to the employer’s business or workplace. As analyzed by the EEOC, an employer’s improper use of criminal background checks may violate Title VII’s prohibitions against both (i) disparate treatment on the basis of a protected characteristic and (ii) disparate impact against members of a protected group.

As to disparate *treatment* the Guidance states that it would be unlawful, for example, for an employer to “reject[] an African American applicant based on his criminal record but hire[] a similarly situated White applicant with a comparable criminal record.”¹ It would likewise be unlawful “to reject a job applicant based on racial or ethnic stereotypes about criminality – rather than qualifications and suitability for the position ...”² These interpretations are predictable and they conform with well- established law.

As to disparate *impact*, the Guidance makes clear that it would be unlawful for an employer to implement a “criminal record screening policy or practice [that] disproportionately screens out a Title VII-protected group [if] the employer does not demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity.”³ This concern is especially relevant to African-American and Hispanic men, who are arrested and incarcerated at rates disproportionate to their numbers in the general population.⁴ Indeed, the EEOC explicitly states that “[n]ational data ... supports a finding that criminal record exclusions have a disparate impact based on race and national origin.”⁵

The purposes of the Guidance are to reduce unlawful discrimination by clarifying the applicable EEOC standards and to assist arrestees and convicts – especially African-American and Hispanic men – in re-integrating into the workforce.⁶ Notably, the Guidance is an improvement over the

¹ EEOC Enforcement Guidance, “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964,” at 6 (Apr. 25, 2012) (hereinafter, “Guidance”), available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

² *Id.* at 7.

³ *Id.* at 9.

⁴ *Id.*

⁵ *Id.* at 10.

⁶ *Id.* at 3 (citing arrest and incarceration statistics).

EEOC's previous effort in 1990,⁷ which had long been outdated and was the subject of criticism for its lack of legal analysis.⁸ Nevertheless, the new Guidance also creates new uncertainties.

For employers — as many as 92% of whom use criminal background checks as part of their hiring processes⁹ — the Guidance raises several vexing issues. To illustrate, the Guidance recommends against asking about arrests and convictions on job application forms. Instead, the Guidance stresses the importance of engaging in “[i]ndividualized assessment[s]” of potential or current employees’ history of arrest and conviction.¹⁰ In making these individualized assessments, the Guidance repeatedly invokes the “Green factors,” which refer to the following factors cited by the Eighth Circuit in its *Green v. Missouri Pacific Railroad* decision in 1975:

1. The nature and gravity of the offense or conduct;
2. The time that has passed since the offense or conduct and/or completion of the sentence; and
3. The nature of the job held or sought.

Such fact-based inquiries may expose employers to greater expense and litigation risk. And, in any event, spending significant time on these inquiries may sometimes be unnecessary — as in the case of a day care center responding to the job application of an individual convicted of a criminal offense against a child.

The Guidance also introduces complexity and uncertainty into how employers should treat arrest records. With justification, the Guidance warns against an employer’s reliance on arrest records per se as a disqualifying factor, especially since many arrests do not lead to convictions or other criminal dispositions. On the other hand, the Guidance sanctions exclusion or termination of an employee where the underlying conduct is objectionable for job-related purposes, notwithstanding the fact that the arrest did not lead to a conviction or another form of punitive disposition. In other words, in making decisions, the employer’s focus needs to be on the specific nature of the underlying conduct, not the fact of the arrest.

Moreover, although compliance with federal law is a defense against a charge of discrimination, compliance with state or local law is not. The Guidance is clear on this point: “[I]f an employer’s exclusionary policy or practice is not job related and consistent with business necessity, the fact that [the policy] was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability.”¹¹ In this way, too, the Guidance injects uncertainty into how employers can lawfully use criminal background check information.

In an effort to provide some clarity, the Guidance sets forth several examples of employer conduct that would and would not be permissible under Title VII. The Guidance also offers a handful of purported “best practices for employers,” including the following:¹²

⁷ See, e.g., Kevin P. McGowan, “EEOC Updates Enforcement Guidance on Employers’ Use of Criminal Histories,” Bloomberg BNA, Daily Labor Report (Apr. 25, 2012) (“Employer representatives ... said [that] the approved EEOC guidance was an improvement over earlier versions but they were still troubled about certain aspects ...”).

⁸ See, e.g., *El v. Se. Pa. Transp. Auth. (SEPTA)*, 479 F.3d 232, 243–44 (3d Cir. 2007).

⁹ Guidance at 6 (citing a 2010 study).

¹⁰ *Id.* at 18.

¹¹ *Id.* at 24 (emphasis omitted).

¹² *Id.* at 25–26.

- Eliminate policies and practices that exclude individuals from employment based solely on their having a criminal record.
- Train decisionmakers about Title VII's prohibition against discrimination in employment.
- Develop a narrowly tailored, written policy for screening potential and current employees for criminal conduct (*i.e.*, arrests or convictions). Such a policy should, among other things, identify requirements essential to the job; enumerate specific criminal offenses that may be disqualifying; determine the necessary duration of exclusion; and provide that the employer must keep records of research that was considered in crafting the policy.
- Limit criminal history questions to matters "for which exclusion would be job related for the position in question and consistent with business necessity."
- Keep criminal records information confidential.

In addition, the EEOC issued a question-and-answer document to help employers, employees, and others understand the Guidance.¹³

It is not yet clear how much deference courts will give to the Guidance. However, the EEOC has provided clearer standards for what practices relating to criminal background checks will trigger EEOC scrutiny of potential violations of Title VII. We recommend that employers assess their current practices in light of the new Guidance in order to determine whether changes or updates are warranted for conducting criminal background checks of potential or current employees.

If you have any questions concerning the material discussed in this client advisory, please contact the following members of our employment litigation practice group:

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¹³ See Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII, available at http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.