

# CRIMINAL BACKGROUND CHECKS:

Evolution of the EEOC's Updated Guidance and Implications  
for the Employer Community

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**IMPORTANT NOTICE**

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation.

Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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# Table of Contents

SECTION / TOPIC	PAGE
I. EXECUTIVE SUMMARY	1
II. USE OF CRIMINAL RECORD CHECKS IN EMPLOYMENT	3
A. Use of Criminal Record Checks by Employers	3
B. Role of Title VII in Use of Criminal Records	4
III. THE EEOC'S APRIL 2012 UPDATED GUIDANCE ON CRIMINAL RECORDS	6
A. Overview	6
B. Disparate Treatment	6
C. Disparate Impact Claims	7
D. Relationship to Federal and State Laws and Regulations	13
E. The EEOC's Employer Best Practices	15
IV. THE ROAD TO THE UPDATED GUIDANCE—A REVIEW OF THE EEOC'S PRIOR POLICY STATEMENTS ON CRIMINAL RECORDS, RECENT CASE LAW AND OTHER DEVELOPMENTS	17
A. A Review of EEOC's Prior Policy Statements and Guidance on Use of Criminal Records	17
B. Impact of Third Circuit's Decision in <i>El v. SEPTA</i>	21
C. Other Recent Developments Supporting Ex-Offenders	23
V. EEOC MEETINGS INVOLVING CRIMINAL RECORDS	24
A. November 2008 Commission Meeting Focusing on Criminal Records	24
B. The Subsequent July 26, 2011 Commission Meeting on Criminal Records	29
VI. IMPACT OF THE EEOC'S SYSTEMIC INITIATIVE ON USE OF CRIMINAL RECORDS BY EMPLOYERS AND NOTEWORTHY LITIGATION	37
A. Significant Systemic Investigations	37
B. Noteworthy Litigation Involving Criminal Records	38
VII. PRACTICAL COMPLIANCE ISSUES DEALING WITH CRIMINAL RECORDS	40
A. State Law Restrictions	40
B. Restrictions in Hiring Individuals with Criminal Records	44
C. Negligent Hiring	47
D. FCRA and Related Compliance Issues	48
VIII. CONCLUSION	49

# Table of Contents

*(continued)*

SECTION / TOPIC	PAGE
APPENDIX A. Littler's Q & A on the EEOC's April 25, 2012 Enforcement Guidance on Criminal Records	50
APPENDIX B. Checklist of EEO and Other State and Federal Laws When Developing Hiring Policies and/or Procedures Involving Inquiries About an Applicant's Criminal Record	52
APPENDIX C. EEOC Criminal Records Guidance Resources	53
APPENDIX D. Excerpt from EEOC Enforcement Guidance on the Consideration of Use of Arrest and Conviction Records in Employment Decisions	54

# CRIMINAL BACKGROUND CHECKS:

## Evolution of the EEOC's Updated Guidance and Implications for the Employer Community

### I. EXECUTIVE SUMMARY

On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) finally issued its "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (hereinafter "Updated Guidance") concerning the use of criminal records by employers. The EEOC issued the Updated Guidance "on the heels" of its January 2012 announcement of a \$3.1 million settlement with an employer following the EEOC's finding that the employer allegedly screened out more than 300 African American job applicants due to their criminal records. Based on the EEOC's systemic initiative, the EEOC also has been intensively scrutinizing the criminal records screening policies used by employers in many different industries, including motor carriers, retailers and manufacturers. A flurry of new EEOC charges and similarly broad investigations by the Commission is virtually certain in the next 12 to 24 months. These developments set the stage for employers to closely review their hiring policies involving the consideration of criminal records in order to assess potential Title VII risk and opportunities to meaningfully reduce that risk without compromising other legitimate and even compelling business interests.

The EEOC's Updated Guidance, is intended to "update and consolidate" all of the Commission's prior policy statements about the use of criminal records and "will supersede the Commission's previous policy statements on this issue."<sup>1</sup> Further, according to the EEOC the Updated Guidance "builds on longstanding court decisions and guidance that were issued over twenty years ago."<sup>2</sup>

Aside from the EEOC's concerns about ensuring the even-handed treatment of individuals with criminal records regardless of their race and national origin (*i.e.*, intentional discrimination or "disparate treatment"), the EEOC has held the view for 25 years that an employer's policy or practice of excluding such individuals from employment has an adverse impact on African Americans and Hispanics. The EEOC has referred to statistics for national data showing that, overall, African Americans and Hispanics are convicted at a rate disproportionately greater than their representation in the population. Such a policy or practice has been viewed by the EEOC, based on a handful of court decisions from the 1970s, as unlawful under Title VII in the absence of a justifying business necessity.

According to the EEOC's long-standing policy statement, based on a finding of adverse impact, an employer could demonstrate business necessity by considering three factors: (1) the nature and gravity of the offense or offenses; (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought. The EEOC's 1987 policy statement was based on this three-prong standard, as discussed in the Eighth Circuit's decision in *Green v. Missouri Pacific Railroad*.<sup>3</sup>

1 EEOC, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000E *et seq.*, Section II (Apr. 25, 2012), available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

2 *Id.* at Sections I and II.

3 523 F.2d 1290 (8th Cir. 1975).

The EEOC's 1987 guidance was criticized in *El v. Southeastern Pennsylvania Transit Authority (SEPTA)*, in which the Third Circuit stated that the EEOC's guidelines "do not speak to whether an employer can take these factors into account when crafting a bright line policy, nor do they speak to whether an employer justifiably can decide that certain offenses are serious enough to warrant a lifetime ban." The appeals court further concluded that the EEOC's guidelines were not entitled to great deference, explaining: "[T]he EEOC gets deference in accordance with the thoroughness of its research and the persuasiveness of its reasoning. Here, the EEOC's policy guidance was rewritten to bring it in line with the *Green* case, but the policy document itself does not substantively analyze the statute."<sup>4</sup>

In response to the Third Circuit's decision in *El v. SEPTA*, the public policy debate about integrating ex-offenders into the workforce, and concerns raised about the expanded use and accuracy of pre-employment criminal background checks, the EEOC held Commission meetings in 2008 and 2011 that focused exclusively on the use criminal history records. The Updated Guidance addresses both disparate treatment and disparate impact claims. It also reviews the EEOC's approach regarding employer policies involving the use of both arrest and conviction records.

As discussed in this Littler Report, the approach to disparate treatment has not really changed. So, too, the EEOC has long taken the view that exclusion based on an arrest, standing alone, cannot be justified by business necessity; however, an employer can focus on the conduct involved in making an employment decision. In dealing with disparate impact, the EEOC will continue to rely on the "Green factors," referenced above, but it has provided more detail in explaining the three factor test to be considered by employers in justifying any exclusion based on an individual's criminal record. In addition, the EEOC's Updated Guidance refers to conducting an "individualized assessment" before disqualifying a candidate for employment, and enumerates specific factors for employers to consider. According to the EEOC, based on any adverse impact against a protected group (e.g., African Americans, Hispanics), an employer "needs to show that the policy operates to *effectively link* specific criminal conduct and its dangers with the risks inherent in the duties of a particular job."<sup>5</sup>

This Report reviews and analyzes the recently issued guidance, discusses recent EEOC enforcement activity and litigation involving criminal records, and highlights practical compliance issues that need to be considered by the employer community. This Report then reviews the EEOC's policies that have been in effect over the past decade and outlines the factors considered that led to the Updated Guidance. Employers should to take into account various compliance issues under both state and federal law, including EEO issues, as they decide on the most effective approach when considering the use of criminal records and related inquiries based on the specifics of their business and industry.

While this Report is not intended as a substitute for experienced legal counsel, it has been prepared to serve as a useful resource as employers continue to wrestle with this evolving area of the law.

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4 479 F.3d 232, 243-44 (3d Cir. 2007).

5 EEOC, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000E *et seq.*, Section V.B.4 (Apr. 25, 2012 Hereafter cited as "EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section xx (Apr. 25, 2012)."

## II. USE OF CRIMINAL RECORD CHECKS IN EMPLOYMENT

### A. Use of Criminal Record Checks by Employers

Tens of millions of criminal record checks are conducted annually.<sup>6</sup> According to a 2006 study, following the aftermath of the events of the terrorist attack of September 11, 2001, there occurred a dramatic increase in criminal record checks by employers:<sup>7</sup>

Legislation passed by Congress after the September 11 attacks requires new or expanded background checks in an array of areas, such as airline and airport personnel, port workers, and truck drivers who transport hazardous materials. Federal agencies have also recommended, rather than required, background checks as well. The Food and Drug Administration (FDA), for example, has issued nonbinding "good practice" guidelines recommending that food establishment operators conduct criminal background checks on all employees.<sup>8</sup> Even in the absence of government requirements or encouragement, many in the private sector also have expanded the extent to which they conduct criminal background checks on their employees, business partners, and customers.

A 2010 survey conducted by the Society for Human Resource Management (SHRM) indicated that criminal record checks are conducted for a number of reasons:<sup>9</sup>

- To ensure a safe work environment for employees (61%);<sup>10</sup>
- To reduce legal liability for negligent hiring (55%);
- To reduce/prevent theft and embezzlement, other criminal activity (39%);
- To comply with applicable state law requiring a background check (e.g., day care teachers, licensed medical practitioners, etc.) for a particular position (20%);
- To assess the overall trustworthiness of the job candidate (12%); or
- Other (4%).

With respect to the scope of criminal record checks for job candidates, the SHRM survey indicated as follows:

- 73% conducted criminal background checks for all positions;

6 See SEARCH The National Consortium for Justice Information and Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (Jan. 16, 2006), available at <http://www.reentry.net/library/item.93793-Report%20of%20the%20National%20Task%20Force%20on%20the%20Commercial%20Sale%20of%20Criminal>.

7 *Id.* at 1.

8 *Id.* "The FDA defines operators of a food establishment to include firms that produce, process, store, repack, relabel, distribute, or transport food or food ingredients. 'Guidance for Industry: Food Producers, Processors, and Transporters: Food Security Preventive Measures Guidance,' U.S. Dept. Of Health and Human Services, U.S. Food and Drug Administration, Center of Food Safety and Applied Nutrition (Mar. 21, 2003) (recommending that operators have 'a criminal background check performed by local law enforcement or by a contract service provider')." *Id.* at 1 n.1.

9 SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS (Jan. 22, 2010), available at [http://www.slideshare.net/shrm/background-check-criminal?from=shair\\_email](http://www.slideshare.net/shrm/background-check-criminal?from=shair_email). The SHRM findings were based on a random sample of approximately 3,000 HR professionals from SHRM members in which 433 responded. According to the sample, 65% had 500 or more employees, 28% had 100-499 employees and 7% had 1-99 employees. The SHRM survey was cited by the EEOC in its Updated Guidance on criminal history. See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section III.B.n.49 (Apr. 25, 2012)." See also Appendix C, which contains a chart of the EEOC's criminal background check guidance and policy statements and hyperlinks to the pages on the Commission's website where such materials may be found.

10 SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS (Jan. 22, 2010), at Slide 7. Respondents were asked to select the top two options that applied to their reasoning for conducting criminal background checks.

- 19% conducted criminal background checks for selected job candidates; and
- 7% did not conduct criminal background checks for any of its candidates.<sup>11</sup>

For those employers conducting criminal record checks for certain positions, the most common positions involved those with fiduciary or financial-related positions and those with access to confidential information and/or access to company or other property. The SHRM survey reported that for select candidates the categories of job candidates on which checks were conducted were as follows:

- Job candidates for positions with fiduciary and financial responsibility (e.g., handling cash, banking, accounting, compliance, technology) (78%);
- Job candidates who will have access to highly confidential employee information (e.g., salary, benefits, medical information or other personal information about employees, etc.) (68%);
- Job candidates who will have access to company or other people's property or otherwise placed in a position of financial trust (e.g., information technology, administrative services, etc.) (60%);
- Job candidates for senior executive positions (e.g., CEO, CFO, CHRO, etc.) (55%);
- Job candidates who will be employed in safety-sensitive positions (including operating heavy equipment, transportation, etc.) (48%);
- Job candidates who will have security responsibilities (e.g., security guards, etc.) (43%);
- Job candidates for position for which state law requires a background check (e.g., day care, teachers, licensed medical practitioners, etc.) (40%);
- Job candidates who will work with children, the elderly, the disabled and other vulnerable populations (33%);
- Job candidates who will work in health care or with access to drugs (e.g., hospitals, nursing homes, clinics, pharmacies, rehabilitation centers, etc.) (32%);
- Job candidates for positions involving national defense or homeland security (25%); or
- Other (15%).<sup>12</sup>

The upshot is that employers have implemented criminal record checks for a wide variety of reasons and/or for particular types of positions, including concerns of public safety, safeguarding property and/or positions of trust, and certain industries in which such background checks are mandated by applicable law.

## **B. Role of Title VII in Use of Criminal Records**

The EEOC's Updated Guidance expressly acknowledges that having a criminal record is not listed as a protected status under Title VII (or any other federal law).<sup>13</sup> Therefore, coverage under the federal discrimination laws depends on whether an individual can establish, for example, that employment was denied on the basis of his or her protected status (e.g., race, color, sex, religion or national origin) relying on one of two theories to prove discrimination: (1) disparate

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11 *Id.* at Slide 3.

12 *Id.* at Slide 4.

13 See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section III.C (Apr. 25, 2012).

treatment or (2) disparate impact—that an otherwise neutral employment practice (*i.e.*, exclusion on the basis of a criminal record) had a disparate impact based on an individual's protected status.<sup>14</sup>

In the Updated Guidance, the EEOC notes that arrest and incarceration rates are particularly high for African American and Hispanic men.<sup>15</sup> Therefore, the EEOC has concerns that reliance on criminal records creates barriers to employment based on both the disproportionate number of African Americans and Hispanics convicted of crimes and recent studies that have found a number of state and federal criminal record databases “include incomplete criminal records” or that the “criminal records may be inaccurate.”<sup>16</sup>

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14 *Id.*

15 *Id.* at Section II.

16 *Id.* at Section III.A.

### III. THE EEOC'S APRIL 2012 UPDATED GUIDANCE ON CRIMINAL RECORDS

#### A. Overview

The April 25, 2012 Enforcement Guidance is intended to “update and consolidate” all of the EEOC’s prior policy statements about the use of criminal records, and this guidance is intended to “supersede the Commission’s previous policy statements on this issue.”<sup>17</sup> While the Updated Guidance was approved based on a 4-1 vote by the Commission, Commissioner Barker did issue a dissent regarding the Updated Guidance.<sup>18</sup>

The Updated Guidance is described as being intended for use by: (1) employers considering use of criminal records in the employment process; (2) individuals who believe they have been subjected to discriminatory treatment based on employer policies or practices; and (3) EEOC staff investigating discrimination charges dealing with criminal records.<sup>19</sup> From an employer’s perspective, the guidance provides a useful “blueprint” in describing the anticipated approach when faced with a discrimination charge and potential systemic investigation by the EEOC involving criminal records. The guidance also provides what the EEOC believes are “best practices” to minimize the risk of an adverse finding against an employer by the EEOC.<sup>20</sup>

The Updated Guidance addresses both disparate treatment and disparate impact claims. As discussed below, the approach in dealing with disparate treatment has not really changed. In dealing with disparate impact, the EEOC will continue to rely on the “*Green* factors,”<sup>21</sup> but it has provided more detail in explaining the three factors to be considered by employers in justifying any exclusion based on an individual’s criminal history records. In addition, the EEOC refers to conducting an individualized assessment before disqualifying a candidate. According to the EEOC, in dealing with alleged adverse impact based on exclusions due to criminal records an employer “needs to show that the policy operates to *effectively link* specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.”<sup>22</sup>

#### B. Disparate Treatment

The EEOC essentially reiterates the basic view discussed in the 1987 guidance that employers may be liable for disparate treatment claims if individuals in a protected group are treated differently based on a comparable criminal

<sup>17</sup> See Introduction, Section II. For ease of reference, the full citation for the Updated Guidance is as follows: EEOC, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000E *et seq.* (Apr. 25, 2012), available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm). See also Appendix C, which contains a chart of the EEOC’s criminal record guidance and policy statements and hyperlinks to the pages on the Commission’s website where such materials may be found.

<sup>18</sup> Commissioner Barker’s dissent, focused on the following: (1) the Updated Guidance reflects a major change in the treatment of criminal background checks by the Commission, and the guidance essentially amounts to regulations, but the public was not given the opportunity to make comments before the guidance was voted on by the Commission; (2) the Senate Appropriations Committee, which has a primary role in approving funding for the Commission, had urged the Commission to delay a vote for a 6-month period; and (3) the Commission exceeded its authority because the Updated Guidance involves a substantive change in the law and the changes should have been submitted to Congress, rather than a mere vote by the Commissioners. *EEOC Meeting, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012) (oral testimony of Commissioner Constance Barker). At the time of publishing the meeting’s transcript is unavailable online; however, closed-captioned video of the meeting is available via the EEOC’s website, <http://www.eeoc.gov/eeoc/meetings/4-25-12/video.cfm>.

<sup>19</sup> See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section II (Apr. 25, 2012).

<sup>20</sup> *Id.* at Section VIII.

<sup>21</sup> The EEOC will rely on the three prong test discussed in *Green v Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977), as discussed above in reviewing the EEOC’s guidance issued in 1987. A detailed discussion of *Green* can be found below at Section III.C.2.c.

<sup>22</sup> See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B.4 (Apr. 25, 2012) (emphasis added).

record.<sup>23</sup> The Updated Guidance raises specific concerns regarding “stereotyped thinking,” which the EEOC refers to as the decision to “reject a job applicant based on racial or ethnic stereotypes about criminality—rather than qualifications and suitability for the position—is unlawful disparate treatment that violates Title VII.”<sup>24</sup> The EEOC provides a laundry list of evidence that it may look at in determining whether discriminatory conduct has occurred, including:

- Biased statements;
- Inconsistencies in the hiring process (e.g., more criminal record information requested of those in the protected group);
- Similarly situated comparators;
- Employment testing (i.e., testers);<sup>25</sup> and
- Statistical evidence, which may help to determine if the employer counts criminal record more heavily against members of a protected group.<sup>26</sup>

### C. Disparate Impact Claims

Similar to the 1987 guidance, the Updated Guidance reiterates the basic standard applicable to disparate impact claims—a criminal record screening policy that has a disparate impact against a protected group must be “job related for the position in question and consistent with business necessity.”<sup>27</sup>

As discussed below, the EEOC has addressed the approach it will take in dealing with an employer’s reliance on both arrest and conviction records. Based on any charge, the EEOC initially will make a determination whether the policy or practice has a disparate impact against a protected group. The employer will then be required to demonstrate that the practice is job related and consistent with business necessity.<sup>28</sup> If an employer demonstrates that its policy or practice is “job related for the position in question and consistent with business necessity,” the guidance follows the basic law discussing disparate impact claims and states, “a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory ‘alternative employment practice’ that serves the employer’s legitimate goals as effectively as the challenged practice but that the employer refused to adopt.”<sup>29</sup>

#### 1. Determining Disparate Impact

Based on the guidance, the EEOC will continue to rely on national data showing that African Americans and Hispanics have criminal conviction and criminal history records disproportionate to their numbers in the population. However, the Updated Guidance suggests that the EEOC will utilize a two-prong approach in reviewing employer policies—the guidance makes clear that the EEOC will rely on both: (1) national data and (2) specific data more closely related to the employer’s policy that results in excluding African American or Hispanic candidates from employment (or adverse employment actions).

<sup>23</sup> See *id.* at Section IV.

<sup>24</sup> *Id.*

<sup>25</sup> However, the EEOC reportedly has not yet relied on testers in dealing with criminal records.

<sup>26</sup> *Id.*

<sup>27</sup> See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V (Apr. 25, 2012).

<sup>28</sup> *Id.* at Section V.A.

<sup>29</sup> *Id.* at Sections V.A.1 and V.A.2 and V.C.

The EEOC takes the view that national data “supports” a finding that exclusion from employment as a result of a criminal record “has a disparate impact based on race and national origin.” The EEOC did not go so far as to state that there would be a “presumption” of disparate impact discrimination based on national data alone.

The Updated Guidance otherwise states that the Commission will “assess relevant evidence” when making a determination of disparate impact, including: (1) applicant flow information; (2) workforce data; (3) criminal history background check data; (4) demographic availability statistics; (5) incarceration /conviction data; and/or (6) relevant labor market statistics.<sup>30</sup>

Similar to the 1987 guidance on statistics,<sup>31</sup> an employer may show, by competent evidence, that its policy in fact does not result in a disparate impact—the employer may present, for example, “regional or local data showing that African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer’s particular geographic area.” An employer “also may use its own applicant data to demonstrate that its policy or practice did not cause a disparate impact.”<sup>32</sup>

The EEOC adds two caveats for employers: (1) the EEOC takes the view that a “bottom line” racial balance will not preclude the EEOC from finding that the employer’s policy involving criminal history records was discriminatory because the focus is the specific employment practiced in issue<sup>33</sup> and (2) the EEOC will consider whether the employer has “a reputation in the community for excluding individuals with criminal records,” thus determining whether applicants were discouraged from applying in further support of a potential adverse finding against the employer.<sup>34</sup> The Updated Guidance, however, does not explain how an employer’s “reputation” will be proven or offer assurances that “reputation” evidence will be reliably developed.

## 2. Establishing Policy is Job Related and Consistent With Business Necessity

### a. Arrests

The EEOC’s position on arrests has not substantially changed since its 1990 guidance.<sup>35</sup> In short, “an exclusion based on an arrest, in itself, is not job related and consistent with business necessity.”<sup>36</sup>

In the EEOC’s view, although an employer cannot rely on arrest records standing alone to deny employment, “an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question.”<sup>37</sup> Thus, an employer can conduct an independent investigation and elect to

30 *Id.* at Section V.A.2.

31 See EEOC, POLICY STATEMENT ON THE USE OF STATISTICS IN CHARGES INVOLVING THE EXCLUSION OF INDIVIDUALS WITH CONVICTION RECORDS FROM EMPLOYMENT (July 29, 1987), available at <http://www.eeoc.gov/policy/docs/convict2.html>.

32 EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.A.2 (Apr. 25, 2012).

33 *Id.* The EEOC cited the U.S. Supreme Court’s decision in *Connecticut v. Teal*, 457 U.S. 440, 442 (1982), for the proposition that a “bottom line” racial balance does not preclude employees from establishing a *prima facie* case of disparate impact. Therein, the Supreme Court concluded that the issue is whether the policy or practice has a disparate impact on a protected group. *Teal*, 457 U.S. at 453-54.

34 EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.A.2 (Apr. 25, 2012).

35 EEOC, POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, as amended, 42 U.S.C. §2000e *et seq.* (1982) (Sept. 7, 1990), available at [http://www.eeoc.gov/policy/docs/arrest\\_records.html](http://www.eeoc.gov/policy/docs/arrest_records.html).

36 EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B.2 (Apr. 25, 2012).

37 *Id.*

take adverse action (e.g., decision not to hire) based on the results of the investigation. Unlike the EEOC's prior guidance, the EEOC does not expressly task employers with trying to assess the likelihood that the applicant actually engaged in the alleged criminal conduct, but this obligation is implied by "Example 4" of the Updated Guidance.<sup>38</sup>

## b. Convictions

The EEOC views criminal convictions differently than arrests because a record of a conviction "will usually serve as sufficient evidence that a person engaged in particular conduct, given the procedural safeguards associated with trials and guilty pleas."<sup>39</sup> However, the EEOC recommends caution, on the grounds that "there may be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction." The Updated Guidance provided as examples a database that continues to report a conviction that was later expunged or a felony that was later reduced to a misdemeanor.<sup>40</sup>

Turning to conviction record screening policies, the guidance states that an "employer needs to show that the policy operates to *effectively link* specific criminal conduct and its dangers with the risks inherent in the duties of a particular position."<sup>41</sup> In dealing with such screening policies, the EEOC has significantly revised its guidance by identifying two circumstances in which an employer can "*consistently* meet the 'job related and consistent with business necessity' defense."<sup>42</sup>

- The employer conducts a validation study consistent with the Uniform Guidelines on Employee Selection Procedures to support its practice (although EEOC appears to recognize the very significant data challenges associated with formal validation in this context);<sup>43</sup> or
- The employer develops a "targeted screen," which the EEOC describes as a two-step process: (1) First, "considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v Missouri Pacific Railroad*"<sup>44</sup> (i.e. the "Green factors"), and (2) second, by providing an opportunity for an "individualized assessment" for the individuals excluded by the screen to demonstrate why the exclusion should not apply to them, which would then be considered by the employer before a final decision is made.<sup>45</sup>

The Updated Guidance is similar to the 1987 guidance in terms of retaining the *Green* factors. However, the additional focus on an "individualized assessment" before any final decision is made is new and will pose obvious concerns for employers who elect to model their programs on the EEOC's Updated Guidance, particularly those involved in mass hiring efforts and/or based on offenses that by their very nature clearly appear to be job related (e.g., an applicant convicted of embezzlement in recent years excluded from finance-related position with access to company funds).

38 *Id.*

39 *Id.* at Section V.B.3.

40 *Id.*

41 *Id.* at Section V.B.4.

42 EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section I (Apr. 25, 2012).

43 *See id.* As further explained in the Updated Guidance, "Although there may be social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications, . . . such studies are rare at the time of this drafting." *Id.* The EEOC's prior guidance did not refer to a validation requirement.

44 549 F.2d 1158 (8th Cir. 1977).

45 *See* EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Sections I and V.B.5 (Apr. 25, 2012).

### c. The *Green* Factors

The EEOC refers to the three *Green* factors as the “starting point” in linking an exclusion for specific criminal conduct to any particular position.<sup>46</sup> The new guidance adds context and some clarification by elaborating on the meaning of the *Green* factors. This is best illustrated by reviewing the actual text from the Updated Guidance regarding the three *Green* factors:

Excerpt from EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B.6 (April 25, 2012) (internal citations omitted).

#### 6. Detailed Discussion of the *Green* Factors and Criminal Conduct Screens

Absent a validation study that meets the Uniform Guidelines' standards, the *Green* factors provide the starting point for analyzing how specific criminal conduct may be linked to particular positions. The three *Green* factors are:

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

##### a. The Nature and Gravity of the Offense or Conduct

Careful consideration of the nature and gravity of the offense or conduct is the first step in determining whether a specific crime may be relevant to concerns about risks in a particular position. The nature of the offense or conduct may be assessed with reference to the harm caused by the crime (e.g., theft causes property loss). The legal elements of a crime also may be instructive. For example, a conviction for felony theft may involve deception, threat, or intimidation. With respect to the gravity of the crime, offenses identified as misdemeanors may be less severe than those identified as felonies.

##### b. The Time that Has Passed Since the Offense, Conduct and/or Completion of the Sentence

Employer policies typically specify the duration of a criminal conduct exclusion. While the *Green* court did not endorse a specific timeframe for criminal conduct exclusions, it did acknowledge that permanent exclusions from all employment based on any and all offenses were not consistent with the business necessity standard. Subsequently, in *El*, the court noted that the plaintiff might have survived summary judgment if he had presented evidence that “there is a time at which a former criminal is no longer any more likely to recidivate than the average person . . . .” Thus, the court recognized that the amount of time that had passed since the plaintiff's criminal conduct occurred was probative of the risk he posed in the position in question.

Whether the duration of an exclusion will be sufficiently tailored to satisfy the business necessity standard will depend on the particular facts and circumstances of each case. Relevant and

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<sup>46</sup> See *id.* at Section V.B.6.

available information to make this assessment includes, for example, studies demonstrating how much the risk of recidivism declines over a specified time.

### c. The Nature of the Job Held or Sought

Finally, it is important to identify the particular job(s) subject to the exclusion. While a factual inquiry may begin with identifying the job title, it also encompasses the nature of the job's duties (e.g., data entry, lifting boxes), identification of the job's essential functions, the circumstances under which the job is performed (e.g., the level of supervision, oversight, and interaction with co-workers or vulnerable individuals), and the environment in which the job's duties are performed (e.g., out of doors, in a warehouse, in a private home). Linking the criminal conduct to the essential functions of the position in question may assist an employer in demonstrating that its policy or practice is job related and consistent with business necessity because it "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used."

As shown above, certain *Green* factors may raise some obvious questions for employers in trying to develop policies and/or procedures that withstand scrutiny by the EEOC. Two significant issues are: (1) whether an employer can develop general across-the-board exclusions of candidates based on certain offenses and (2) what factors an employer considers in setting time frames for such offenses.

With respect to the first issue, in determining whether an employer can develop a policy or practice of excluding individuals from particular positions based on certain specified criminal conduct, the EEOC's Updated Guidance refers to such a policy or practice as a "targeted exclusion."<sup>47</sup> The Updated Guidance indicates that broad-based categories of exclusion may be permissible, but only where the "targeted exclusion" is "narrowly tailored to identify criminal conduct with a *demonstrably tight nexus* to the position in question" and explained what would be expected of employers: "Targeted exclusions are tailored to the rationale for their adoption, in light of the particular criminal conduct and jobs involved, taking into consideration fact-based evidence, legal requirements, and/or relevant and available studies."<sup>48</sup> Thus, the guidance clearly suggests that an employer needs to be thoughtful in its development of such policies by taking into account a wide variety of factors, such as those, referenced above.

A second factor that needs to be carefully considered involves setting time frames that are applied to certain offenses as a basis for excluding an applicant from employment (e.g., creating a 7 to 10 year time bar based on conviction and subsequent incarceration for certain offenses). The Updated Guidance refers to the applicable standard being tailored to the "the particular facts and circumstances of each case."<sup>49</sup> However, the guidance refers to reliance on "relevant and available information," such as "studies demonstrating how much the risk of recidivism declines over a specified time."<sup>50</sup> In footnote 118, the Commission cites the studies of various experts in the recidivism field. While retention of an expert in recidivism will likely provide defensible support for adjudications before the EEOC when developing time bars for certain offenses, reliance on available data also may provide the support needed by an employer. Specifically,

47 EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B.8 (Apr. 25, 2012).

48 See *id.* at Section V.B.8 (emphasis added).

49 See *id.* at Section V.B.6.b.

50 *Id.*

to the extent that an employer determines it wants to apply an exclusion longer than seven years, the employer most likely will need to provide additional support based on appropriate literature or support from an expert in recidivism. On the other hand, simply adopting an “off the shelf” policy or copying the policy used by another employer without good faith efforts to develop a policy may create potential exposure for employers because the employer may then not be able to explain the basis for its policy.

An employer faced with a discrimination charge involving individuals excluded from employment based on a criminal records policy should be mindful of the type of information most likely to be requested by the EEOC in any investigation, which may result in putting “front and center” various aspects of the employer’s policy, such as the factors referenced above. Based on the Updated Guidance, in investigating potential disparate impact claims, the initial focus by the EEOC may be “identifying the policy or practice,” which the EEOC described as follows:

The first step in disparate impact analysis is to identify the particular policy or practice that causes the unlawful disparate impact. For criminal conduct exclusions, relevant information includes the text of the policy or practice, associated documentation, and information about how the policy or practice was actually implemented. More specifically, such information also includes which offenses or classes of offenses were reported to the employer (e.g., all felonies, all drug offenses); whether convictions (including sealed and/or expunged convictions), arrests, charges, or other criminal incidents were reported; how far back in time the reports reached (e.g., the last five, ten, or twenty years); and the jobs for which the criminal background screening was conducted. Training or guidance documents used by the employer also are relevant, because they may specify which types of criminal history information to gather for particular jobs, how to gather the data, and how to evaluate the information after it is obtained.<sup>51</sup>

#### d. Individualized Assessment

As discussed above, aside from considering the *Green* factors, the EEOC underscores the importance of conducting an individualized assessment before making a final decision to exclude an individual from employment based on past criminal conduct. The EEOC’s Updated Guidance further explains the nature and scope of the individualized assessment and suggests a three-step process: (1) inform the applicant that he or she may be excluded based on the past criminal conduct; (2) provide an opportunity to the individual to establish that the exclusion should not apply; and (3) consider whether the individual assessment shows that the policy should not be applied to the applicant.

Here, too, an excerpt from the guidance on this issue may be helpful in further explaining the EEOC’s expectations:

Excerpt from EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B.9 (April 25, 2012) (internal citations omitted).

#### 9. Individualized Assessment

Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether

<sup>51</sup> See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.A.1 (Apr. 25, 2012).

the individual's additional information shows that the policy as applied is not job related and consistent with business necessity.

The individual's showing may include information that he was not correctly identified in the criminal record, or that the record is otherwise inaccurate. Other relevant individualized evidence includes, for example:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, *e.g.*, education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

An anticipated question for employers is whether the failure to conduct an individualized assessment, moving forward, is unlawful. The answer is no. Employers involved in mass hiring efforts, particularly those who have set up electronic application procedures, may be particularly troubled by the reference to a potential individualized assessment for each applicant. While the EEOC suggests that an employer may have exposure for not conducting an individualized assessment, the Updated Guidance clarifies that an individualized assessment is *not* required by Title VII, explaining:

Title VII . . . does not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity.<sup>52</sup>

#### **D. Relationship to Federal and State Laws and Regulations**

The Updated Guidance specifically addresses the impact of both federal and state laws and regulations that may affect employment and the impact and relationship between such laws and Title VII. Prior guidance did not address this issue.

##### **1. Federal Laws and Regulations**

The Updated Guidance acknowledges the importance of the interplay with other federal laws and regulations and expressly carves out an exception for employers, explaining: "Compliance with federal laws and/or regulations is a defense to a charge of discrimination."<sup>53</sup>

<sup>52</sup> EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B.8 (Apr. 25, 2012).

<sup>53</sup> *Id.* at Section VI.

The Updated Guidance highlights the fact that individuals with specific convictions may be barred from certain industries or positions in both the private and public sector. Examples are provided in which convictions of certain crimes over various periods of time could be a bar to employment in various jobs, such as:

- Working as a security screener or having unescorted access to secure areas of an airport;
- Federal law enforcement officers;
- Child care workers in federal agencies or facilities;
- Bank employees; and
- Port workers.<sup>54</sup>

The EEOC also stated that Title VII does not preempt federal statutes and regulations relating to certain occupational licenses and registrations, including transportation, financial services and import/export activities.<sup>55</sup>

While waivers of certain federally imposed occupational restrictions are discussed, the Updated Guidance states that Title VII “does not mandate that an employer seek such waivers,” but “where an employer does seek waivers it must do so in a nondiscriminatory manner.”<sup>56</sup> The guidance otherwise highlights exceptions related to criminal record bars based on federal security clearance.<sup>57</sup>

While referring to Title VII covering those working for the federal government, the Updated Guidance acknowledges that the Office of Personnel Management (OPM) imposes certain “suitability” requirements restricting employment based on certain types of criminal records and “mitigating criteria” that could be considered. Such criteria are viewed as consistent with the *Green* factors and provides for an individualized assessment of an applicant, consistent with the Updated Guidance.<sup>58</sup>

## 2. State Laws and Regulations

The Updated Guidance takes a completely different approach in discussing state laws and regulations, taking the view that state and local laws or regulations are “preempted” by Title VII “if they ‘purport[] to require or permit the doing of any act which would be an unlawful employment practice’ under Title VII.”<sup>59</sup> Thus, in the view of the EEOC, an employer may not automatically be able to shield itself from a Title VII investigation or lawsuit by relying on state laws or regulations. Notwithstanding, as shown by an example in the Updated Guidance, an employer may be able to effectively defend itself if it is able to demonstrate that the exclusion is job related and consistent with business necessity. Whether the EEOC’s approach will be upheld may be subject to challenge by an employer, and it remains an open question whether a particular court may find reliance on a state law or regulation to be defensible and not preempted by Title VII.

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54 *Id.*

55 *See id.* at Section VI.B.

56 *See id.* at Section VI.C.

57 *See id.* at Section VI.D.

58 *See id.* at Section VI.E.

59 *See id.* at Section VII (citing 42 U.S.C. § 2000e-7).

## E. The EEOC's Employer Best Practices

Finally, in the Updated Guidance—while not having any binding legal effect—the EEOC provided its view of “best practices” for employers to adopt to minimize liability based on any policies or procedures that may exclude individuals from employment based on criminal history records.<sup>60</sup>

Overall, employers are urged by the EEOC to develop a “narrowly tailored written policy and procedures for screening for criminal records.”<sup>61</sup> For ease of reference, the complete text of the EEOC's recommended practices are set forth below:

Excerpt from EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B.6 (April 25, 2012).

The following are examples of best practices for employers who are considering criminal record information when making employment decisions.

### *General*

- Eliminate policies or practices that exclude people from employment based on any criminal record.
- Train managers, hiring officials, and decisionmakers about Title VII and its prohibition on employment discrimination.

### *Developing a Policy*

- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
- Identify essential job requirements and the actual circumstances under which the jobs are performed.
- Determine the specific offenses that may demonstrate unfitness for performing such jobs.
  - Identify the criminal offenses based on all available evidence.
- Determine the duration of exclusions for criminal conduct based on all available evidence.
  - Include an individualized assessment.
- Record the justification for the policy and procedures.
- Note and keep a record of consultations and research considered in crafting the policy and procedures.
- Train managers, hiring officials, and decisionmakers on how to implement the policy and procedures consistent with Title VII.

<sup>60</sup> See *id.* at Section VIII.

<sup>61</sup> *Id.*

*Questions about Criminal Records*

- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

*Confidentiality*

- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.

## IV. THE ROAD TO THE UPDATED GUIDANCE—A REVIEW OF THE EEOC'S PRIOR POLICY STATEMENTS ON CRIMINAL RECORDS, RECENT CASE LAW AND OTHER DEVELOPMENTS

The Updated Guidance highlights that the EEOC “has well-established guidance applying Title VII principles to employers’ use of criminal records to screen for employment,” and “[t]his Enforcement Guidance builds on longstanding court decisions and guidance issued over twenty years ago.”<sup>62</sup> While the Commission explained that it had decided to “update and consolidate” in the new guidance all of its prior policy statements about Title VII and the use of criminal records in employment decisions, a review of prior policy guidance is helpful to understand how the Updated Guidance may impact employers.

The Commission’s decision to promulgate Updated Guidance was impacted, in part, by courts’ analyses of criminal record exclusions under Title VII. Thus, a brief summary of the most notable decision leading to the Updated Guidance, *El v. SEPTA*,<sup>63</sup> is briefly summarized below.

### A. A Review of EEOC’s Prior Policy Statements and Guidance on Use of Criminal Records

The Commission has issued guidance on this topic several times over the past decade:<sup>64</sup>

- In 1987, the Commission issued a policy statement on the issue of conviction records under Title VII<sup>65</sup> and a statement on the use of statistics and charges involving the exclusion of individuals with conviction records from employment.<sup>66</sup>
- In 1990, the Commission issued guidance on the consideration of arrest records in employment decisions under Title VII.<sup>67</sup>
- The Commission also discussed the use of arrest and conviction records in the Compliance Manual adopted by the Commission, and in particular, in the updated section on Race and Color Discrimination.<sup>68</sup>

<sup>62</sup> *Id.* at Section II.

<sup>63</sup> 479 F.3d 232 (3rd Cir. 2007).

<sup>64</sup> In the EEOC’s Updated Guidance, the Commission not only highlights the guidance issued since 1987, as discussed below in detail, but also makes reference to earlier decisions issued by the EEOC itself between 1972 and 1978. See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section II. n.15 (Apr. 25, 2012).

<sup>65</sup> See EEOC, POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000E *et seq.* (1982) (Feb. 4, 1987), available at <http://www.eeoc.gov/policy/docs/convict1.html>. Hereafter cited as “EEOC POLICY STATEMENT ON CONVICTION RECORDS UNDER TITLE VII (Feb. 4, 1987).”

<sup>66</sup> See EEOC, POLICY STATEMENT ON THE USE OF STATISTICS IN CHARGES INVOLVING THE EXCLUSION OF INDIVIDUALS WITH CONVICTION RECORDS FROM EMPLOYMENT (July 29, 1987), available at <http://www.eeoc.gov/policy/docs/convict2.html>. Hereafter cited as “EEOC POLICY STATEMENT ON THE USE OF STATISTICS INVOLVING CONVICTION RECORDS (July 29, 1987).”

<sup>67</sup> EEOC, POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. §2000E *et seq.* (1982) (Sept. 7, 1990), available at [http://www.eeoc.gov/policy/docs/arrest\\_records.html](http://www.eeoc.gov/policy/docs/arrest_records.html). Hereafter cited as “EEOC POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS (Sept. 7, 1990).”

<sup>68</sup> EEOC COMPLIANCE MANUAL, Section 15 (2006), available at <http://www.eeoc.gov/policy/docs/race-color.html#VIB2conviction>. Hereafter cited as “EEOC COMPLIANCE MANUAL, Section xx (2006).” In section 15-VI.B.2, the EEOC discusses how consideration of conviction and arrest records may result in race and color discrimination.

## 1. EEOC Policy Statement on Conviction Records (February 4, 1987)<sup>69</sup>

Prior to issuing the Updated Guidance, the EEOC had relied on policy guidance issued nearly 25 years ago during the tenure of EEOC Chair (and now U.S. Supreme Court Justice) Clarence Thomas. The prior guidance emphasized the “Commission’s underlying position that an employer’s policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population.”<sup>70</sup> Thus, such a policy or practice was viewed as unlawful under Title VII in the absence of a “justifying business necessity.”<sup>71</sup>

Assuming the conviction records policy or practice had an adverse impact on African Americans or Hispanics, the employer was required, in the Commission’s view, to demonstrate that it considered the following three factors to determine whether its policy was justified by business necessity

- The nature and gravity of the offense or offenses;
- The time that has passed since the conviction and/or completion of the sentence; and
- The nature of the job held or sought.<sup>72</sup>

The guidance noted that the EEOC considered “bright line” rules to be unacceptable – “an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII.”<sup>73</sup> The guidance relied, in principal part, on the Eighth Circuit’s decision in *Green v. Missouri Pacific Railroad Company*,<sup>74</sup> as the “leading Title VII case on the issue of conviction records,” which took exception to any blanket exclusions based on criminal convictions.<sup>75</sup>

## 2. Supplemental Policy Statement on Use of Statistics (July 29, 1987)

The EEOC issued an additional policy statement on July 29, 1987, referred to as its “Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment.”<sup>76</sup> This supplemental policy statement reiterated the EEOC’s reliance on *Green v. Missouri Pacific Railroad Company*, and its position that “an employer’s policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population.”<sup>77</sup> However, the policy statement carved out an exception to its general rule, concluding that a “no cause” determination would be “appropriate” in circumstances where: (1) “the employer can present more narrowly drawn statistics showing either that Blacks and Hispanics are not

<sup>69</sup> See EEOC POLICY STATEMENT ON CONVICTION RECORDS UNDER TITLE VII (Feb. 4, 1987).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> As shown by the Updated Guidance, the EEOC continues to rely on this three-prong standard, which the Commission has referred to as the “*Green* factors.” See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Sections V.B.3, V.B.4, and V.B.6 (Apr. 25, 2012). However, the Updated Guidance has added explanatory details for each factor in Section V.B.7 (a) through (c); see also Section V.B.8.

<sup>73</sup> EEOC POLICY STATEMENT ON CONVICTION RECORDS UNDER TITLE VII (Feb. 4, 1987).

<sup>74</sup> 523 F.2d 1290 (8th Cir. 1975); see also 549 F.2d 1158 (8th Cir. 1977). The Updated Guidance continues to cite the *Green* case with approval. See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Sections V.B.1, V.B.4, and V.B.6 (Apr. 25, 2012).

<sup>75</sup> EEOC POLICY STATEMENT ON CONVICTION RECORDS UNDER TITLE VII (Feb. 4, 1987).

<sup>76</sup> See EEOC POLICY STATEMENT ON THE USE OF STATISTICS INVOLVING CONVICTION RECORDS (July 29, 1987).

<sup>77</sup> *Id.*

convicted at a disproportionately greater rate” or (2) “there is no adverse impact in its own hiring process resulting from the convictions policy.”<sup>78</sup>

The supplemental policy statement used the example of “narrow local, regional, or applicant flow data, showing that the policy probably will not have an adverse impact on its applicant pool and/or in fact does not have an adverse impact on the pool.”<sup>79</sup> Other illustrations were used to demonstrate that a more fact-specific analysis may support a “no cause” determination, which may include barring employment for certain crimes by presenting “national, regional, or local data on conviction rates for the particular crime” that show no adverse impact.<sup>80</sup>

### 3. EEOC Guidance Dealing with Arrest Records (September 7, 1990)<sup>81</sup>

The next EEOC Chair, Evan Kemp, continued to address the issue, and in 1990 the EEOC issued further guidance which referred to reliance on arrest records in the pre-employment process as having a disparate impact on African Americans and Hispanics. The EEOC's position was much more severe concerning an employer's reliance on arrest records:

Since using arrests as a disqualifying criteria can only be justified where it appears that the applicant actually engaged in the conduct for which he/she was arrested and that conduct is job related, the Commission further concludes that an employer will seldom be able to justify making broad general inquiries about an employee's or applicant's arrests.<sup>82</sup>

The guidance included a detailed legal discussion involving: (1) the adverse impact of the use of arrest records (*i.e.*, statistics may be used to establish a *prima facie* case based on showing that African Americans are arrested more often than Whites, but similar to convictions, an employer may rebut a discrimination claim by presenting statistics that are “more current, accurate and/ or specific to its region or applicant pool”); and (2) business justification (*i.e.*, an employer may attempt to show not only that the arrest charges are related to the position sought, but also the likelihood that the applicant actually committed the offense).<sup>83</sup> The guidance cautioned that business justification rarely can be demonstrated for blanket exclusions on the basis of arrest records.

The guidance explained that an employer must focus on the conduct, not the arrest or conviction *per se* in relation to the job sought, to demonstrate unfitness for the job, and the EEOC relied on the Eighth Circuit's original and subsequent decisions in *Green v. Missouri Pacific Railroad Company*,<sup>84</sup> as discussed in the EEOC's February 4, 1987 guidance. The EEOC again emphasized that an employer should focus on the three factors discussed in the 1987 guidance.<sup>85</sup> The guidance pointed to selected cases which supported disqualification for employment when dealing with convictions,

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Similarly, the Updated Guidance states that an employer “may present regional or local data showing that African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer's particular geographic area.” See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Sections V.A.2, V.B.4, and V.B.6 (Apr. 25, 2012).

<sup>81</sup> EEOC POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS (Sept. 7, 1990).

<sup>82</sup> The EEOC's Updated Guidance takes a similar approach. See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B.2 (Apr. 25, 2012).

<sup>83</sup> EEOC POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS (Sept. 7, 1990).

<sup>84</sup> See 523 F.2d 1290 (8th Cir. 1975) and 549 F.2d 1158, 1160 (8th Cir. 1977).

<sup>85</sup> EEOC POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS (Sept. 7, 1990).

but included the caveat that with arrests, there was a second-prong that, in the EEOC's view, had to be satisfied—"a showing that the alleged conduct was actually committed."<sup>86</sup> Specific examples were provided to illustrate the process by which arrest record charges should be considered.

#### 4. EEOC Compliance Manual Chapter on Race and Color (April 19, 2006)<sup>87</sup>

In 2006, during the tenure of Chair Cari Dominguez, the EEOC's Compliance Manual was updated to address "Race and Color Discrimination," and in section VI.B.2, which discussed "Hiring and Promotion," the Compliance Manual expressly addressed conviction and arrest records. The Compliance Manual provided in pertinent part:

Of course, it is unlawful to disqualify a person of one race for having a conviction or arrest record while not disqualifying a person of another race with a similar record. For example, an employer cannot reject Black applicants who have conviction records when it does not reject similarly situated White applicants.

In addition to avoiding disparate treatment in rejecting persons based on conviction or arrest records, upon a showing of disparate impact, employers also must be able to justify such criteria as job related and consistent with business necessity. This means that, with respect to conviction records, the employer must show that it considered the following three factors: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought. A blanket exclusion of persons convicted of any crime thus would not be job related and consistent with business necessity. Instead, the above factors must be applied to each circumstance. Generally, employers will be able to justify their decision when the conduct that was the basis of the conviction is related to the position, or if the conduct was particularly egregious.

Arrest records are treated slightly differently. While a conviction record constitutes reliable evidence that a person engaged in the conduct alleged (*i.e.*, convictions require proof "beyond a reasonable doubt"), an arrest without a conviction does not establish that a person actually engaged in misconduct. Thus, when a policy or practice of rejecting applicants based on arrest records has a disparate impact on a protected class, the arrest records must not only be related to the job at issue, but the employer must also evaluate whether the applicant or employee actually engaged in the misconduct. It can do this by giving the person the opportunity to explain and by making follow up inquiries necessary to evaluate his/her credibility.

Other employment policies that relate to off-the-job employee conduct also are subject to challenge under the disparate impact approach, such as policies related to employees' credit history. People of color have also challenged, under the disparate impact theory, employer policies of discharging persons whose wages have been garnished to satisfy creditors' judgments.<sup>88</sup>

The discussion of arrest and conviction records included detailed footnotes.<sup>89</sup> Particularly noteworthy was a citation to a 2003 study referring to disparate treatment of African Americans versus Whites in call-back rates for

<sup>86</sup> *Id.*

<sup>87</sup> EEOC COMPLIANCE MANUAL, Section 15 (2006). In section 15-VI.B.2, the EEOC discusses how consideration of conviction and arrest records may result in race and color discrimination.

<sup>88</sup> *Id.* at Section 15, VI.B.2.

<sup>89</sup> *See id.* at Section 15 VI.B.2 nn. 90-102.

those job applicants with and without criminal records.<sup>90</sup> In addressing adverse impact, the Compliance Manual cited with approval two cases: *Green v. Missouri Pacific Railroad Company*<sup>91</sup> and *Caston v. Methodist Medical Center of Illinois*.<sup>92</sup>

## B. Impact of Third Circuit's Decision in *El v. SEPTA*

A primary impetus for both the November 2008 and July 2011 EEOC meetings focusing on criminal records was the Third Circuit's decision in *El v. South Eastern Pennsylvania Transportation Authority (SEPTA)*.<sup>93</sup> While the *El* decision did not involve litigation by the EEOC, it has been a focal point in the EEOC's discussion of its own guidance and whether such guidance needed to be reassessed.<sup>94</sup>

In *El v. SEPTA*, the plaintiff, an African American, was rejected for a job as paratransit driver based on a second degree murder conviction approximately 40 years earlier when he was 15 years old for which he served over three years in jail. SEPTA had a policy of not hiring anyone with convictions for "moral turpitude or violence." Although *El* was hired by the subcontractor, he was subsequently terminated based on the SEPTA policy following a criminal record background check. The EEOC issued a reasonable cause finding, and the plaintiff thereafter filed a lawsuit against SEPTA alleging that the policy had a disparate impact on minority applicants because they are more likely than Caucasian applicants to have a prior conviction. The district court granted summary judgment in SEPTA's favor and the appeal followed.

At issue on appeal was how courts should interpret disparate impact claims and the "business necessity" defense. The appeals court reviewed in detail the long history of disparate impact claims since *Griggs v. Duke Power Company*,<sup>95</sup> in which the U.S. Supreme Court declared that "disparate impact" cases should proceed in two steps: (1) the plaintiff must prove that the challenged policy discriminates against members of a protected class; and (2) the defendant can overcome the showing of disparate impact by demonstrating "business necessity" (*i.e.*, proving a "manifest relationship" between the policy and job performance).

The Third Circuit in *El* provided its own assessment of this line of cases, commenting: "The Court refused to accept bare or 'common-sense'-based assertions of business necessity and instead required some level of empirical proof that

<sup>90</sup> *Id.* at Section 15 VI.B.2 n.96.

<sup>91</sup> 523 F.2d 1290, 1293-99 (8th Cir. 1975) (applying disparate impact principles to employer's "no convictions" hiring policy).

<sup>92</sup> 215 F. Supp. 2d 1002, 1008 (C.D. Ill. 2002) (race based disparate impact claim challenging employer's policy of not hiring former felons was cognizable under Title VII and thus survived motion to dismiss).

<sup>93</sup> 479 F.3d 232 (3d Cir. 2007). While the *El v. SEPTA* decision was critical, in part, of the EEOC's prior guidance, the Updated Guidance relies on and cites with approval various holdings in the decision relating to the application of the disparate impact theory to cases involving the exclusion of applicants on the basis of criminal records. See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Sections V.B (Apr. 25, 2012).

<sup>94</sup> Commissioner Ishimaru alluded to the *El v. SEPTA* decision in his opening remarks at the 2008 Commission hearing on criminal history, explaining, "One of the reasons why we're here is that as we'll hear during the course of the day, the Courts have questioned some of our guidance that was issued many years ago." See *EEOC Meeting of November 20, 2008—on Employment Discrimination Faced by Individuals with Arrest and Conviction Records* (Nov. 28, 2008) available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/transcript.cfm#announc>. Commissioner Feldblum was even more direct in her inquiries to a panel at the July 26, 2011, panel in which she inquired, "[D]o you disagree with what the 3rd Circuit said in the *SEPTA* case to us, that they thought that our guidance needed some help?" See *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (transcript) available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#klein>.

<sup>95</sup> 401 U.S. 424 (1971). In *Griggs*, where the employer imposed a requirement of a high school education and passing a general intelligence test as a condition of employment for unskilled jobs, the Supreme Court first addressed the disparate impact theory and held: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity." *Id.* at 432. The Court further reasoned that "if an employment practice . . . cannot be shown to be related to job performance, the practice is prohibited." *Id.* The Updated Guidance also relies on *Griggs* and its progeny. EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Sections V.B.1 (Apr. 25, 2012).

challenged hiring criteria accurately predicted job performance.”<sup>96</sup> The appeals court acknowledged that the Supreme Court “has never dealt directly with criminal record policies.”<sup>97</sup> The appeals court then issued somewhat contradictory holdings. On the one hand, the appeals court concluded: “Attempting to implement the *Griggs* standard, we have held that hiring criteria must effectively measure the ‘minimum qualifications for successful performance of the job in question.’”<sup>98</sup> On the other hand, the appeals court acknowledged that the Supreme Court’s prior decisions on “business necessity” did not really apply because the hiring policy dealing with criminal records was not tied to a person’s ability to perform the job in question (*i.e.*, drive a paratransit bus), and instead was tied to whether hiring the individual posed “too much of a risk of potential harm” to passengers.<sup>99</sup>

The appeals court in *El* explained that “the issue before us is the risk that the employee will harm a passenger, and the phrase ‘minimum qualification’ simply does not fit,” thus holding *sui generis* that policies regarding criminal convictions pertain to risk, not job performance and therefore applied a unique method of analysis.<sup>100</sup> The appeals court ultimately concluded that the policy under review needed to “accurately distinguish between the applicants that pose an unacceptable level of risk and those that do not.”<sup>101</sup> The appeals court affirmed the summary judgment finding in favor of the employer based on the findings of an expert criminologist who found that there was a greater risk of hiring someone with a conviction for a violent crime, even someone with a remote crime, but the court indicated that this stemmed in part from the plaintiff’s failure to produce any expert report providing contrary statistical evidence.

The *El v. SETPA* decision received particular attention from the EEOC because the Third Circuit was critical of the EEOC’s 1987 guidance and the three-factor test used for determining “business necessity.”<sup>102</sup> The court therein commented as follows:

The EEOC’s Guidelines . . . do not speak to whether an employer can take these factors into account when crafting a bright-line policy, nor do they speak to whether an employer justifiably can decide that certain offenses are serious enough to warrant a lifetime ban.

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In addition, it does not appear that the EEOC’s Guidelines are entitled to great deference. . . . the EEOC gets deference in accordance with the thoroughness of its research and the persuasiveness of its reasoning. Here, the EEOC’s policy guidance was rewritten to bring it

<sup>96</sup> *El v. SEPTA*, 479 F.3d at 239.

<sup>97</sup> *Id.* The Third Circuit noted that the Supreme Court only dealt “tangentially with criminal behavior in two cases”: (1) *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 794-95, 804 (1973) (in the Title VII context, dealt with employer refusal to rehire a former employee on the ground that the employee had engaged in disruptive, illegal protests in front of the employer’s premises and found “employer’s fear that this employee would continue to be disruptive was a legitimate reason for the refusal [to rehire];” and (2) *New York City Transit Authority v. Beazer*, 440 U.S. 569, 587 n.31 (1979) (in the drug policy context, Court held it was permissible under Title VII to refuse to hire anyone using methadone to treat addiction to illegal drugs for “safety sensitive” positions because it serves the “legitimate employment goals of safety and efficiency”). See *El v. SEPTA*, 479 F.3d at 240.

<sup>98</sup> *El v. SEPTA*, 479 F.3d at 242.

<sup>99</sup> *Id.* at 242-43.

<sup>100</sup> *Id.* at 243.

<sup>101</sup> *Id.* at 245. The Updated Guidance cites this standard with approval. EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Sections V.B.1 (Apr. 25, 2012).

<sup>102</sup> *Id.* at 243-44. The court discussed the EEOC’s three prong standard: “1. The nature and gravity of the offense or offenses; 2. The time that has passed since the conviction and/or completion of the sentence; and 3. The nature of the job held or sought.” *Id.* at 243.

in line with the *Green* case, but the policy document itself does not substantively analyze the statute.<sup>103</sup>

It was the appeals court's line of reasoning in *El* that influenced the EEOC to conduct two separate EEOC meetings and to collect extensive submissions as the Commission advised the public that it was considering revising its 1987 guidance on criminal records.

### C. Other Recent Developments Supporting Ex-Offenders

As discussed in the Updated Guidance, the EEOC also highlighted an additional factor leading to the EEOC's renewed focus on criminal records as a potential barrier to employment—recent efforts at the federal level and around the country “to promote the successful integration of ex-offenders back into their communities.”<sup>104</sup>

<sup>103</sup> *Id.* at 243-44. In *El v. SEPTA*, the Third Circuit noted that generally the EEOC's guidance is not entitled to great deference and that courts routinely apply the least deferential standard—*Skidmore* deference—to EEOC guidance. By way of an overview, there are generally three recognized categories of deference that courts will accord to an agency's rulemaking and interpretations: *Chevron Deference*.

1. *Chevron* deference is the most deferential standard and is generally accorded to an agency's regulations interpreting a statute that it is tasked with enforcing or interpreting, after such regulations have gone through a notice and comment period (*i.e.*, “formal” regulations), although not all formal regulations have been afforded *Chevron* deference by the courts. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Auer Deference*.
2. *Auer* deference is also highly deferential and generally applies to an agency's interpretation of ambiguities in the agency's own formal regulations. Generally, interpretations accorded *Auer* deference are binding unless they are plainly erroneous or inconsistent with the regulation. See *Auer v. Robbins*, 519 U.S. 452 (1997).
3. *Skidmore Deference*. *Skidmore* deference is a less deferential standard that is often applied to an agency's informal guidance, rules, policy statements, and other publications that do not go through a formal notice and comment period. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>104</sup> See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section II n. 16 (Apr. 25, 2012).

## V. EEOC MEETINGS INVOLVING CRIMINAL RECORDS

The April 25, 2012, Updated Guidance includes 26 pages of guidance. Significantly, however, the Updated Guidance includes an additional 26 pages of footnotes with detailed references to various publications, studies and testimony presented at the Commission meetings on criminal records. The discussion below highlights the issues addressed at the EEOC meetings held in November 2008 and July 2011 that focused on criminal records as a potential barrier to employment. The Updated Guidance incorporates many of the views expressed at the EEOC meetings, written submissions, and additional research.

### A. November 2008 Commission Meeting Focusing on Criminal Records

On November 20, 2008, the EEOC held its first major meeting in over 20 years devoted to the topic of criminal records.<sup>105</sup> The Commission meeting led by the former Chair, Naomi Earp, and attended by two EEOC Commissioners (Ishimaru and Barker), who participated in the recent vote on the Updated Guidance, focused on “Employment Discrimination Faced by Individuals with Arrest and Conviction Records.” The session was described as being held to focus on arrest and conviction records as part of the E-Race initiative<sup>106</sup> and work toward developing Updated Guidance on the issue. Chair Earp explained:

Two years ago, Commissioner Ishimaru worked with me to roll out the E-RACE Initiative, Eradicating Racism and Colorism from Employment. E-RACE is basically a 21st Century framework for looking at some old and persistent problems of race and color. We wanted to especially look at those things that may constitute proxies for race, color or ethnicity. Today's Commission meeting on employment discrimination against individuals with arrest and conviction records is an issue that has long been with us but which in recent years has re-emerged as an important civil rights issue.

Of course, the concern about arrest and convictions is also a business issue, a security issue, a safety issue and a tort liability issue. This is also an area where facts and reason can easily be overwhelmed by fears, stereotypes, and myths. So the need to balance so many competing interests including whether or not criminal records are a proxy for race discrimination means that we all have our work cut out for us.

\* \* \*

[W]e have been actively reviewing our existing enforcement guidance on arrest and conviction records. We are working desperately and trying hard to think through these issues in order to provide Updated Guidance. We need to get guidance to the staff as well as to our stakeholders.<sup>107</sup>

<sup>105</sup> Numerous portions of the proceeding were transcribed and are available on the EEOC's website in addition to the detailed written submissions that are published on the EEOC's website. See *EEOC Meeting, Employment Discrimination Faced by Individuals with Arrest and Conviction Records* (Nov. 20, 2008), available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/>.

<sup>106</sup> See *EEOC Meeting, Employment Discrimination Faced by Individuals with Arrest and Conviction Records* (Nov. 20, 2008), available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/>. On February 28, 2007, the E-Race (*i.e.*, Eradicating Racism and Colorism from Employment) initiative was launched by the EEOC. One of the goals of the E-Race initiative, referred to as a five-year plan (FY 2008-2013), was “Developing Strategies, Legal Theories, and Training Modules to Address Emerging Issues of Discrimination,” which included, “Developing Strategies for Addressing 21st Century Manifestations of Discrimination” that included the EEOC's Office of Field Programs and Office of the General Counsel “developing and implementing investigative and litigation strategies to address selection criteria and methods that may foster discrimination based on race and other prohibited bases,” which included arrest and conviction records.

<sup>107</sup> *EEOC Meeting, Employment Discrimination Faced by Individuals with Arrest and Conviction Records* (Nov. 20, 2008), available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/>.

Commissioner Ishimaru also referred to the Second Chance Act, signed by President George W. Bush, which gives offenders greater opportunities to be integrated back into society and employment in general.

The Commission meeting had four panels present on the following topics: (1) Barriers Presented by People with Criminal Convictions; (2) Stakeholder Perspectives and Litigation Issues; (3) New Research Developments; and (4) Employer Practices.

- The first panel included Dr. Devah Pager, Professor of Sociology from Princeton University, who discussed her research which compared success rates of job applicants with and without criminal records, and Ms. Diane Williams, CEO and President of the Safer Foundation, an organization that works to help formerly incarcerated individuals find jobs.
- The second panel included advocates from the employer and employee perspective.
- The third panel involved a presentation by Professor Shawn Bushway from the University of Maryland, an expert on recidivism, who was asked to report on his research involving how long it takes before an ex-offender looks like a non-offender in terms of risk-assessment when considering an ex-offender for employment.
- The final panel discussed recommended approaches to any changes in the EEOC's current guidance and included presentations by lead counsel for an employer group (*i.e.*, Equal Employment Advisory Council (EEAC)) and a representative from the National Employment Law Project (NELP), which is responsible for the Second Chance Labor Project that describes its objective as working to reduce unfair barriers to employment for people with criminal records.

The first panelist, Devah Pager, is perhaps the most noteworthy, not only because of her research findings presented to the EEOC in November 2008 and citation to her work in support of the EEOC's guidance involving disparate treatment towards African American and Hispanic applicants,<sup>108</sup> but also due to her subsequent retention by the EEOC as an expert in its first lawsuit in recent years that focused on criminal records.<sup>109</sup> In her testimony to the EEOC, Dr. Pager reported on the negative impact of a criminal record, which she reported disproportionately impacted on African Americans:

Today, I will be presenting the results of a large-scale field experiment I conducted with Bruce Western in New York City investigating the effects of race and a prison record on employment. In this study, teams of black and white men were matched and sent to apply for hundreds of low-wage jobs throughout the city, presenting equivalent résumés and differing only in their race and criminal background. The results of this study demonstrate a large negative effect of a criminal record on employment outcomes, and one which appears substantially larger for African Americans. The sequence of interactions preceding hiring decisions suggests that black applicants are less often invited to interview, thereby providing fewer opportunities to establish

<sup>108</sup> In its Updated Guidance, the EEOC referred specifically to Dr. Pager's study of testers that supported her findings of disparate treatment based on race or national origin, as documented in her study. See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section IV. n. 55 (Apr. 25, 2012).

<sup>109</sup> As discussed *infra*, the EEOC filed a pattern or practice lawsuit alleging race discrimination based on an employer's alleged exclusion of African American applicants from consideration for employment based on criminal records in *EEOC v. Peoplemark, Inc.*, No. 1:08-cv-00907 (W.D. Mich. filed Sept. 29, 2008). The expert report submitted for Dr. Pager, as submitted by the EEOC in support of its claim, is included as part of the court file (Docket #126, Ex. 13) as well as the critique of her report by the Company's expert, Dr. Malcolm S. Cohen, Ph.D., affiliated with Employment Research Association (Docket #112-2, Ex. 1).

rapport with the employer. Further, employers' general reluctance to discuss the criminal record of an applicant appears especially harmful for black ex-offenders.<sup>110</sup>

Also noteworthy was the testimony of Professor Shawn Bushway, an expert on recidivism, who focused on issues of "risk assessment" in terms of hiring ex-offenders. According to Professor Bushway, as discussed in his presentation to the EEOC, some research suggests that after a period of time, in terms of risk assessment, ex-offenders look similar to non-offenders. As shown below, Professor Bushway qualified his remarks in some respects, at least with regard to ex-offenders with multiple offenses.

Excerpt from Testimony of Professor Shawn Bushway, an expert on recidivism, from the November 2008 Proceeding:<sup>111</sup>

When you talk about assessing risk for ex-offenders . . . making a decision of the human resource person about the level of risk that a person poses based on their own good judgment, their expertise, their knowledge. And they're not, in most cases, using statistical risk assessment, that is risk assessment pools that have been validated to actually predict risk.

. . . And so the best practice is some mix of clinical judgment and expertise and statistical research tools.

However, I'm aware of no case in employment law where a statistical risk assessment is being used. The best you get is rules that are promulgated by employers that say, if you have this particular criminal history record, you can't get hired, but those rules are typically not based on statistical assessments of risk but they're based on legal and clinical judgments of the relative problems associated with different criminal history records. They're not based on risk assessments.

\* \* \*

Over half the states now use some type of risk assessment tool at parole. So there is evidence here that this is being used—that this type of thing is being used and it speaks to two questions that come up in SEPTA. In SEPTA as I read it from a social science perspective, there are two questions that got asked. One is, is it possible to differentiate between ex-offenders in terms of levels of risk and is it possible to differentiate between ex-offenders and non-offenders? In other words, once an ex-offender, are you always at higher risk? And I think the answer to those two questions are actually pretty clear in social science literature. Yes, it is possible to differentiate between ex-offenders in terms of levels of risk. You can't do it perfectly, but you can do it. You can do better than if you were guessing. And then the second element is, you know, do ex-offenders eventually look like non-offenders and the answer is, yes.

\* \* \*

Last comment, in particular if you think you're trying to get at recidivism or probability of re-arrest, those people who are most likely to be categorized as property offenders have higher

110 See *EEOC Meeting, Employment Discrimination Faced by Individuals with Arrest and Conviction Records* (Nov. 20, 2008) (written testimony of Devah Pager, Professor of Sociology, Princeton University), available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/pager.cfm>.

111 Professor Bushway's work was specifically cited in the EEOC's Updated Guidance as an example of "studies demonstrating how much the risk of recidivism declines over a specified time." See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B.6.b.n. 118 (Apr. 25, 2012).

recidivism rates than do violent offenders. Violent offenders are less likely to re-offend and this is a fairly significant—substantial finding. You can see that in basically any study you want.

In general, you know, property offenders are higher rate offenders, part just the nature of the offense and the level of commitment you have to have to be a property offender. . . .

I went ahead and calculated with two different data sets follow-up data for between seven and 15 years for two groups of people, those who offended at a certain period of time say at age 20 and those who didn't. And the question is, in each year after that, so when they're 21, what's the probability that the guy who offended at 20 offended at 21, and what's the probability that the person who didn't offend at 20 and has no criminal history record, offended at 21? And then for those who made it past that one year, what's the probability that you offend. For those who survived two years, what's the probability you offend, et cetera.

. . . And everyone is sort of finding the same thing, which is, initially the rates of offending for the people who've just recently offended are much higher than non-offenders, but that declines and eventually the two lines cross. In our study, it was six to eight years. In other words, after eight years, the ex-offenders looked like non-offenders. . . .<sup>112</sup>

So ex-offenders . . . do, in fact, eventually look like non-offenders. The criminal history record farther out tells you something about the risk. If someone stays clean for a number of years, this is informative. A couple really important ways—things about the one—a couple of important things I want to point out with respect to that phrasing of the question; the first thing, this is not when do ex-offenders have zero risk. It's when do ex-offenders look like non-offenders, and non-offenders do not have zero risk.

\* \* \*

A couple caveats, time since conviction is not the same thing as time since release from prison. Typically, criminal history records only have time since conviction, but it really this is—the clock starts when you get out of prison. . . .

Finally, the biggest thing that carries the weight in terms of risk prediction, is the length of criminal history record. That's a very powerful tool. I don't see a lot of people using that in employment that I can tell. The interesting question is whether the number of offenses or the criminal history rate is relevant as you—for these hazard rates that I've tried to describe. You know, the people with higher rate offenders are going to fail first, so the question is, six, eight, 10 years out, is it still relevant that you've had five offenses, five convictions versus two? And the answer is, I don't know. There's a bunch of people trying to get at that. I see a red light.<sup>113</sup>

The following statements from the Commission meeting also are noteworthy regarding issues raised during the course of the 2008 meeting:

112 Similar testimony was provided at the July 2011 Commission meeting, and one of those testifying, Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, who referred to the studies by criminologist Professor Alfred Blumstein. When asked by Commissioner Ishimaru whether at some point employers should be banned from asking questions about someone's criminal history, she referred to Professor Blumstein's studies, explaining: "They're finding that during this window, which again depends on a number of factors, but between three and eight years, at the end of that point, when you look at the general population, there are no differences." See *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (meeting transcript), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm>.

113 *EEOC Meeting, Employment Discrimination Faced by Individuals with Arrest and Conviction Records* (Nov. 20, 2008) (oral testimony of Shawn Bushway, Professor, State University of New York at Albany), available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/transcript.cfm#bushway>.

- One of the employee advocates recommended that the EEOC adopt a “ban the box” approach in which criminal conviction questions are not permitted until the post-offer stage (which has been adopted in some limited jurisdictions at the state and local level).<sup>114</sup> One proponent of this approach suggested that it would be analogous to the manner of approaching medical inquiries under the ADA. The employee advocates also recommended prohibiting employers from using information about arrests that did not lead to conviction (as prohibited based on various state FEP laws).<sup>115</sup>
- Employer representatives discussed the importance of distinguishing between arrest and conviction records in dealing with the criminal history records, explaining that most employers did not consider arrest records in the pre-employment process.<sup>116</sup>
- Employer advocates brought to the EEOC's attention the fact that many employers in regulated industries are required by federal or state law to inquire into a job applicant's criminal background. For instance, Section 19 of the Federal Deposit Insurance Act bars financial institutions from hiring anyone who has been convicted of any criminal offense involving dishonesty, breach of trust or money laundering unless and until they are able to obtain a written consent letter from the FDIC essentially. Insurance companies are subject to similar rules. Federal contractors may face similar restraints, thus leading one employer advocate to recommend:
 

... as we've discussed, many employers, especially federal government contractors and those in heavily regulated industries such as insurance, healthcare and financial services, now are required to perform detailed criminal background investigations and to automatically disqualify certain applicants based on certain criminal offenses—convictions, I should say. So we would strongly encourage the Commission, if it decides to update its current enforcement guidance, to make clear that an employer's reliance on those laws is sufficient to demonstrate business necessity in cases where adverse impact is shown.<sup>117</sup>
- Employer representatives also pointed out the potential bar to employment based on legitimate job considerations even in the absence of legislation precluding an applicant's employment. One employer representative commented:

114 In the Updated Guidance the EEOC recommends “as a best practice,” that “employers not ask about convictions on job applications . . .” See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B.3 (Apr. 25, 2012). At an earlier public meeting held by the EEOC on May 16, 2007, which focused on employment testing and screening, and touched briefly on pre-employment inquiries relating to an applicant's criminal history, one employee advocate specifically addressed criminal history records and recommended as follows:

... the EEOC can play an important role clarifying how employers may best use the information they have available to them. For example, the EEOC can offer guidance to employers (a) limiting disqualifying offenses that are not job related; (b) imposing age limits on disqualifying offenses eliminating unwarranted lifetime disqualification; (c) waiving in current workers – allow for individual waivers from disqualifying offense for new hires, providing opportunity to document record of rehabilitation; and (d) imposing age limits on use of incomplete arrest records. Doing so protects vulnerable minority populations from unreasonable discrimination and opens doors for those re-entering society without compromising public safety.

115 See *EEOC Meeting, Employment Testing and Screening* (May 16, 2007) (written testimony of Adam Klein, Partner, Outten & Golden), available at <http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html>.

116 *EEOC Meeting, Employment Discrimination Faced by Individuals with Arrest and Conviction Records* (Nov. 20, 2008), available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/index.cfm>. The Updated Guidance, as discussed *supra*, clearly adopted a similar view based on the standard placed on employers in focusing on the underlying conduct, not an arrest record, in eliminating a potential candidate for consideration of employment. See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B.2 (Apr. 25, 2012).

117 See *EEOC Meeting, Employment Discrimination Faced by Individuals with Arrest and Conviction Records* (Nov. 20, 2008) (testimony of Rae T. Vann, General Counsel, Equal Employment Advisory Council), available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/transcript.cfm>. It is noteworthy that the Updated Guidance clearly adopted this view in outlining that an employer would not violate Title VII in the event that it failed to hire an applicant based on reliance on other federal laws or regulations restricting the hiring of an applicant based on certain criminal offenses. See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section VI (Apr. 25, 2012).

. . . outside of these over-arching legal requirements that some employers are obligated to operate under, what might motivate employers who are not required by some law to perform criminal background investigations, and I think we've touched upon those issues throughout the course of the morning. For one thing, depending on the requirements of a particular job, certain criminal conviction information may be very relevant in assessing the individual's ability to perform the job in a safe and acceptable manner. For instance, but again, it's a case-by-case assessment, a company that employs drivers to transport merchandise from Point A to Point B may legitimately disqualify someone who has a history of criminally reckless driving or of driving under the influence of alcohol or controlled substances. At the same time, that criminal record may very well be irrelevant to that applicant's consideration for another job that doesn't involve driving specifically.<sup>118</sup>

\* \* \*

Furthermore, we would ask the Commission to emphasize the categorical bars on the employment of persons who have been convicted of serious violent crimes will not violate Title VII as long as the prohibition is demonstrated by the employer to be job related and consistent with business necessity, which I think is consistent with what you've heard from others.<sup>119</sup>

## B. The Subsequent July 26, 2011 Commission Meeting on Criminal Records

The Commission again revisited the issue of criminal records under the current Chair, Jacqueline Berrien, on July 26, 2011, which was described as a meeting for the "EEOC to Examine Arrest and Conviction Records as a Hiring Barrier."<sup>120</sup> Chair Berrien set the stage for the July 2011 Commission meeting, explaining:

Today's meeting was organized and is being conducted to consider employers' consideration of arrest and conviction records in the hiring, retention and promotion of employees. This meeting is the second full meeting the Commission has held on this issue in recent years. The last one was convened in 2008 under the leadership of Chair Naomi Earp.

The Commission's 2008 meeting, like today's meeting, is linked to the Commission's longstanding concern that employers use information about the arrest or criminal conviction records of job applicants or employees in a manner that satisfies the requirements of Title VII of the Civil Rights Act of 1964.

\* \* \*

Our guidance has recognized that employers may legitimately consider arrest and conviction records under certain circumstances, and significantly, the guidance has taken an approach to the compliance with Title VII that recognizes the need to both balance the interest of employers and the general public with access to the work force.

\* \* \*

118 See *EEOC Meeting, Employment Discrimination Faced by Individuals with Arrest and Conviction Records* (Nov. 20, 2008) (testimony of Rae T. Vann, General Counsel, Equal Employment Advisory Council), available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/transcript.cfm>.

119 *Id.*

120 See *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (meeting transcript and written submissions), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm>.

Sixty-five million adults in the United States have criminal records and one out of every 100 adults are incarcerated. Each year more than 700,000 people are released from prison. After release, the vast majority of these people will return to communities they came from; and it is in the interest not only of those communities, but public safety in general, to help them reconnect with society, find gainful employment, stay out of trouble and avoid returning to jail to the extent we can do that consistently with any public safety concerns.

\* \* \*

Today, we will have an opportunity to hear from a wide range of witnesses who will represent many important interests for the Commission to consider in relation to our guidance on arrest and conviction records and their use in employment decisions.

- In our first panel, we will hear from individuals who represent employers who have been able to successfully integrate people who are returning from prison into their work forces, and who will address forthrightly some of the challenges that have been presented by that effort, but also the tremendous opportunities that have been gained by striking the appropriate balance.
- In our second panel we will hear from people with expertise on state, local and federal policy issues that impact the employment of people with arrest or conviction records.
- And finally, in our third panel today we will hear from experts who will address the legal standards that apply to the employment of people with records of criminal arrest or conviction.

We have an ambitious agenda today. I want to thank in advance all of the witnesses who have come to join us today and who are going to play such an important role in ensuring that the Commission has guidance that is current, that is accurate in its application of the relevant laws and that reflects the range of concerns that come to bear in addressing the issue of employers' use and consideration of criminal arrest and conviction records.

The other Commissioners also made introductory comments. As an example, Commissioner Ishimaru, who participated in the 2008 Commission meeting on the topic, commented on the need to “update and fully develop” the Commission’s criminal background policy position and specifically on the *El* decision, explaining: “The Third Circuit decision in the *El* case is further indication that it’s important for us to update our guidance.”<sup>121</sup>

Commissioner Feldblum acknowledged in her opening remarks that the Commission is not a legislature, and the EEOC was not looking to see whether there should be a new law that prohibits use of criminal convictions or types of criminal convictions.<sup>122</sup> Rather, the focus has been whether “neutral policies,” such as hiring or other employment bars based on criminal records, have a disparate impact on certain protected groups, and if so, whether the impact is job related and consistent with business necessity.

<sup>121</sup> See *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (meeting transcript), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm>.

<sup>122</sup> *Id.* Commissioner Feldblum also referred to several state laws that already addressed that issue. See discussion, *infra*, Section VII. See also *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (written testimony of Barry Hartstein, Shareholder, Littler Mendelson, P.C.), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/hartstein.cfm>.

The first group of three speakers, which involved employers that hired employees with criminal records included: (1) a not-for-profit organization that works with felons, ex-offenders and recovering addicts in training programs involving food service in the Washington, D.C. area; (2) a company that operates hotels across the U.S.; and (3) the U.S. Office of Personnel Management.<sup>123</sup> The first two speakers discussed their success in hiring ex-offenders, and one of the basic themes was that those hired who have a criminal record recognize they are working under a microscope and understand they have more at risk than others, and this has led to success on the job. One of the speakers even referred to potential skill sets developed by ex-offenders, explaining that kitchen jobs in a hotel require experience working in a structured environment, and those who have worked in a prison environment have developed these skills. An additional theme was that organizations need to overcome perceived obstacles and stereotypes in dealing with ex-offenders.

The representative from the U.S. Office of Personnel Management noted that, with only a few exceptions, criminal convictions do not automatically disqualify an applicant from employment with the federal government.<sup>124</sup> Certain statutory bars were reviewed that Congress has enacted over the years regarding specific kinds of federal jobs:

- 5 U.S.C. § 6313 includes a five year bar on federal employment if you are convicted of inciting a riot.
- 18 U.S.C. § 2381 bans from future federal employment, anyone who has been convicted of treason.
- 18 U.S.C. § 922 requires an indefinite bar from any position that requires the individual to ship, transport, possess or receive firearms or ammunitions, or circumstances involving conviction of a misdemeanor crime of domestic violence.
- There are also some agency-specific prohibitions, particularly in the financial area.<sup>125</sup>

Additionally, various federal regulations identify factors, which may be either aggravating or mitigating, which agencies can take into account when evaluating someone with a criminal record. By way of example, 5 C.F.R. § 731.203(c), mentions factors such as the seriousness of the offense, the circumstances under which it occurred, how long ago it occurred, and the absence or presence of rehabilitation.

During an exchange with the Commissioners on the timing of any inquiry on an applicant's criminal record, it was disclosed that with federal jobs, the questions involving criminal records do not come up until *after* there has been a tentative offer of employment. In reviewing the approach by the federal government, Commissioner Barker specifically commented: “. . . I would just think it might be beneficial for us to look at the criteria the federal government uses when we look at adjusting our guidelines.”<sup>126</sup>

<sup>123</sup> See *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (meeting transcript and written submissions), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm>.

<sup>124</sup> The Updated Guidance outlines in detail restrictions in hiring for the federal government, relying in principal part, on the testimony of Robert H. Shriver from the U.S. Office of Personnel Management. See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section VI. E. nn. 157, 158 (Apr. 25, 2012).

<sup>125</sup> Aside from statutory bars, the Office of Personnel Management also has “suitability” regulations. A suitability action can involve removal, cancellation of eligibility or even debarment from federal employment in certain circumstances. These procedures include a formal procedure that requires notice, an opportunity to respond based on materials relied on by the agency taking the action, and a final decision with an appeal to the Merit System Protection Board. See 5 C.F.R. §§ 731, *et seq.*; see also *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (written testimony of Robert H. Shriver, III, Senior Policy Counsel, U.S. Office of Personnel Management), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/shriver.cfm>.

<sup>126</sup> *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (meeting transcript), available at <http://www.eeoc.gov/eeoc/>

A question from Commissioner Feldblum to the first panel of speakers focused on convictions of specific types of crimes and may have signaled the Commission's Updated Guidance referring to conducting an individualized assessment before barring an applicant from employment:

We know people have those blanket rules, and we often sue them when they do. So . . . I'm putting those aside . . . I think there are some other sort of more targeted rules. . . . [A]ssuming that someone doesn't have a blanket rule, they're just like the federal government, they just ask, I want to have a best practices scenario here. . . . And just take a DUI and a case of stealing, just those two. And then how would you process that?<sup>127</sup>

The responses from the speakers focused on doing an individualized assessment, such as looking at the time frame and the position for which the applicant was being considered.<sup>128</sup>

The second group of speakers addressed local, state and federal programs and policies related to employment, specifically focusing on demographic data, studies in the field dealing with recidivism and "collateral consequences" of arrest and conviction records.<sup>129</sup> The subsequent Updated Guidance clearly suggests that the Commissioners took into account this testimony.

One of the speakers, who acknowledged that background checks can serve as an important tool in helping employers assess risk to their employees, customers, assets, and reputations when making hiring decisions, nevertheless raised serious concerns regarding an employer's reliance on criminal records as a hiring tool, and highlighted the following statistics:<sup>130</sup>

- Criminal background checks on those entering the job market are now common practice, and according to a study by Harry Holzer and colleagues, the majority of employers indicate that they would "probably" or "definitely" not be willing to hire an applicant with a criminal record. In fact, a recent report by the National Employment Law Project (NELP) found frequent use of blanket "no-hire" policies among major corporations, as evidenced by their online job ads posted on Craigslist.
- According to the DOJ's Bureau of Justice Statistics (BJS), over 92 million individuals have a criminal record on file in state criminal records repositories. This figure is for year end 2008 and may include individuals with records in more than one state. That said, with about 14 million new arrests recorded annually, it is clear that a significant share of the nation's adult population—estimated at about one in three or four adults—has a criminal record on file.

[meetings/7-26-11/transcript.cfm](#). This testimony may have been a contributing factor for the EEOC's suggested "best practice" of recommending that criminal record inquiries not be included on the employment application. See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B. 3 (Apr. 25, 2012).

127 See EEOC Meeting, *Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (meeting transcript), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm>.

128 Based on the Updated Guidance, which contains an express discussion and recommendation to generally include an individualized assessment in the criminal record check process, it appears that various speakers influenced the Commission in its Updated Guidance addressing this issue. See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B. 9 (Apr. 25, 2012).

129 The speakers included: Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice; Stephen Saltzburg, Professor at George Washington University Law School and Criminal Justice Section Delegate and past chair of the Criminal Justice Section of the ABA; and Cornell William Brooks, Executive Director of the New Jersey Institute of Social Justice. See EEOC Meeting, *Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (meeting transcript and written submissions), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm>.

130 See EEOC Meeting, *Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (written testimony of Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm>.

- Many arrests are for relatively minor crimes, as described below. And what is often forgotten is that many people who have been arrested . . . have never been convicted of a crime. . . . A snapshot of felony filings in the 75 largest counties, for example, shows that one-third of felony arrests never lead to conviction.
- Importantly for this discussion, the impact of having a criminal record has been shown to be exacerbated for African-Americans, who may already experience racial discrimination in the labor market and who are more likely than whites to possess a criminal record. Two prominent studies by Devah Pager involved employment audit studies in Milwaukee and New York City. Both studies, funded by the NIJ, found that a criminal record reduces the likelihood of a job call-back or offer by about 50 percent. This criminal record “penalty” was substantially greater for African Americans than it was for white applicants. The more recent study included Latinos in the test pool and showed they too suffer similar “penalties” in the employment market.<sup>131</sup>

Also reported were the “collateral consequences” of criminal convictions based on a study by the American Bar Association, funded by the Department of Justice’s National Institute of Justice (NIJ), which identified 38,000 collateral consequences of a conviction in which approximately 84 percent of them deal with licensing and employment. The study focused on federal, state and U.S. Territory laws, licensing requirements and regulations.<sup>132</sup> The study tracked the impact of such restrictions and concluded:

The data, which track the duration of the consequences, reveal that 82% of the collateral consequences statutes fail to specify an end date for the exclusion and thus an individual may be subject to the exclusion long after he or she has served his or her sentence. Thus, a crime committed at age 18 can ostensibly deny a former offender the ability to be a licensed barber or stylist when he or she is 65 years old. Additionally, 91% of the statutes collected provide no form of relief within the statute. Therefore, former offenders must turn to the burdensome task of seeking a pardon or to the confusing and often limited seal/expungement process if they hope to overcome 91% of the collateral consequences that exist in the United States.<sup>133</sup>

Testimony also was provided regarding the challenges faced by those with a criminal record as discussed in a follow up report, prepared by the ABA’s Commission on Effective Criminal Sanctions (CECS).<sup>134</sup> The report examined the negative consequences based on an employer’s reliance on criminal background checks in the hiring process and recommended as follows:<sup>135</sup>

- Access to criminal background information for purposes other than law enforcement should be limited.
- Employers and credit reporting agencies should ensure that the information on a criminal record is accurate and that the information does not contain sealed or expunged records.

<sup>131</sup> *Id.*

<sup>132</sup> See *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (written testimony of Stephen Saltzburg, Professor, George Washington University Law School), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/saltzburg.cfm> citing American Bar Association, Criminal Justice Section, *The Collateral Consequences of Convictions Study* (2009-2010), available at <http://isrweb.isr.temple.edu/projects/accproject/index.cfm> (last accessed May 1, 2012).

<sup>133</sup> See *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (written testimony of Stephen Saltzburg, Professor, George Washington University Law School), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/saltzburg.cfm>.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* citing American Bar Association, *Second Chances in the Criminal Justice System: Alternatives to Incarceration and Recovery Strategies*, Commission on Effective Criminal Sanctions (Dec. 2007), available for purchase at <http://apps.americanbar.org/abastore/index.cfm?pid=5090115&section=main&fm=Product.AddToCart> (last accessed May 1, 2012).

- Disqualifications for employment should only be applied when the crime is substantially related to the job opportunity or where serious public safety concerns exist.
- When there is a finding that a crime is substantially related to the job opportunity, there should be some process for relief, such as allowing the applicant to demonstrate his or her fitness of character.<sup>136</sup>
- Adoption of federal and state laws that would require a case-by-case exemption or waiver process in order to provide persons with a criminal record an opportunity to make a showing of their fitness for the employment or license at issue, and provide a statement of reasons in writing if the opportunity is denied because of the conviction.
- Federal and state law should also provide for judicial or administrative review of a decision to deny employment or licensure based upon a person's criminal record.<sup>137</sup>
- There should not be automatic barriers to employment, and the CECS recommended that discretionary factors should be applied on a case-by-case basis.
- Employment barriers should expire after a reasonable period of time, with the report noting that a person who has not committed a crime in seven years is no more likely to commit a crime than a person who has never committed a crime.<sup>138</sup>

Additional testimony also was provided on the detrimental effect on African Americans based on employment bars due to criminal records:<sup>139</sup>

Based on an estimated 12 to 14 million ex-offenders in the workforce . . . of working age in 2008; it is estimated that ex-offenders lowered the overall employment rate by as much as 0.8 to 0.9 percentage points, male unemployment rates by as much as 1.5 to 1.7 percentage points, and, among those less educated men, as much as 6.1 to 6.9 percentage points. These employment losses cost the country \$57 to \$65 billion a year.

The impact of criminal records on employment was largest for African American men, lowering employment rates between 2.3 and 5.3 percentage points. Even prior to the Great

<sup>136</sup> This particular recommendation appears to have been a contributing factor to the EEOC's recommendation that in any individualized assessment, an applicant should be given the opportunity "to demonstrate that the exclusion (based on the criminal record) does not properly apply to him." See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B. 9 (Apr. 25, 2012).

<sup>137</sup> According to Professor Saltzburg:

The CECS favorably noted New York law in this regard. New York's fair employment practices law extends its protections to people with a criminal record, and prohibits public and private employers and occupational licensing agencies from discriminating against employees based upon convictions and arrests that did not result in a conviction, unless disqualification is mandated by law.

*EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (written testimony of Stephen Saltzburg, Professor, George Washington University Law School), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/saltzburg.cfm>.

<sup>138</sup> See *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (written testimony of Stephen Saltzburg, Professor, George Washington University Law School), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/saltzburg.cfm>.

<sup>139</sup> *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (oral testimony of Cornell William Brooks, Executive Director, New Jersey Institute for Social Justice), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#brooks>. Similar testimony was provided based on the adverse impact on Hispanics, but there was testimony regarding the difficulty in getting data generally about Hispanics:

The fact is that data collection of criminal justice statistics is notoriously inconsistent as far as Latinos are concerned, while, simultaneously, the field of criminology research is skewed towards documenting the problems of racial disparities in a black/white binary. For example, data collected by federal agencies including Uniform Crime Reports and the FBI only collect data under the four federally recognized racial categories—white, black, Asian or Pacific Islander, American Indian or Native Alaskan.

*EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (written testimony of Juan Cartagena, President and General Counsel, Latino Justice), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/cartagena.cfm>.

Recession and this uncertain recovery; once prison inmates are added to the jobless statistics, total joblessness among black men has remained around 40 percent through recessions and economic recoveries.<sup>140</sup>

The Commission was thus urged to reaffirm the presumption of disparate impact based on national or regional conviction rate statistics because: “(1) data supports the continued validity of the presumption; (2) producing more particular statistical evidence would prove prohibitively burdensome; and (3) there is no consensus that local data do not reflect national trends.”<sup>141</sup>

The presentations on such statistics led to various questions from the Commissioners, such as the following colloquy between Commissioner Feldblum and one of the speakers, again sending a signal that the EEOC supports the concept of an individualized assessment when considering an applicant's criminal record:

COMMISSIONER FELDBLUM: We heard before in the first panel people's perceptions. People will be violent. That's four percent for those seriously violent; ten percent simple assault, mostly domestic violence; eighteen percent property crimes and this isn't robbery, this is like the guy who might have stolen the food, right, from the corner store; twelve percent drug offenses; fifty-six percent public order, DUI, weapons violations. So a lot of those folks who might have those criminal convictions are not people who would be bad workers . . . So then the question becomes, yes, something can have a disparate impact. You can still apply it if it's job related and consistent with business necessity. . . . Let's assume there's not a bar on asking, but you find out. How is it that you then exercise the judgment to decide whether this is someone who is not appropriate for a job or is still appropriate for a job?

MR. BROOKS: Certainly. Well, we think it's critically important to look at the nature of the job itself. What we found was, for example, working with one of the largest employers in the State of New Jersey in terms of trying to get them to open their doors to considering allowing ex-offenders to compete for work. . . . And once we sat down with them, talked through with them what are the collateral sanctions, what the law actually say. . . . Starting there, then looking at the nature of the job itself; then encouraging them to look at the number of offenses, the kinds of offenses, indications of rehabilitation and taking a very granular look. We found that that was a very practical approach, consistent with the kind of guidance that we are urging the EEOC to put forward and to clarify. We've seen this work. . . . And what we found over and over again is if you can get people to look at the offenses, look at the job, look at the evidence of rehabilitation; then people begin to make the kinds of pro-work, pro-responsibility, pro-economic development decisions that are entirely consistent with Title VII.<sup>142</sup>

In addressing concerns of negligent hiring claims, speakers referred to states, such as Illinois and New Jersey in

140 *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (oral testimony of Cornell William Brooks, Executive Director, New Jersey Institute for Social Justice), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#brooks>. See also *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (written testimony of Cornell William Brooks, Executive Director, New Jersey Institute for Social Justice), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/brooks.cfm>.

141 *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (written testimony of Cornell William Brooks, Executive Director, New Jersey Institute for Social Justice), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/brooks.cfm>.

142 See *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (oral testimony of Cornell William Brooks, Executive Director, New Jersey Institute for Social Justice), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#brooks>. It should be noted that one of the speakers (Professor Saltzburg) clarified that an employer is faced with a much more difficult challenge for those just released from prison. *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (oral testimony of Professor Stephen Saltzburg, Criminal Justice Section Delegate and Past Chair, American Bar Association), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm>.

which ex-offenders can apply for a certificate of rehabilitation if they meet a set of factors, which would then immunize the employer from negligent hiring lawsuits.<sup>143</sup>

While the Commission also received testimony on various legal perspectives and considerations and challenges, the testimony was varied. The first speaker focused on the need to address the needs of the Latino community.<sup>144</sup> The second speaker, a management representative, urged the Commission not to change the current guidance in order to avoid even greater obstacles for compliance.<sup>145</sup> The third speaker addressed concerns from an employee perspective and was particularly critical of unreliability of much of the data received by the employer community.<sup>146</sup>

Ultimately, Commissioner Feldblum put front and center whether the speakers disagreed with the Third Circuit, which was critical of the EEOC's guidance, as discussed in *El v. SEPTA*. Other issues raised during this meeting included whether the guidance should be revised to put in a time limit, such as a presumption that after a certain number of years (e.g., seven), the conviction should not be taken into account in the hiring process. The Commission also raised concerns about reliance on criminal records and background checks for current employees after a period of employment without incident.<sup>147</sup>

143 See discussion between Commission and second panel of speakers, and specifically the colloquy between Commissioner Lipnic and Professor Saltzburg, *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (oral testimony of Professor Stephen Saltzburg, Criminal Justice Section Delegate and Past Chair, American Bar Association), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm>. See also April Frazier and Margaret Love, *Certificates of Rehabilitation and Other Forms of Relief from the Collateral Consequences of Conviction: A Survey of State Laws* (American Bar Association Oct. 1, 2006).

144 See *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (written testimony of Juan Cartagena, President and General Counsel, Latino Justice), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/cartagena.cfm>; see also *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (oral testimony of Juan Cartagena, President and General Counsel, Latino Justice), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#cartagena>.

145 See *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (written testimony of Barry Hartstein, Shareholder, Littler Mendelson, P.C.), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/hartstein.cfm>; see also *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (oral testimony of Barry Hartstein, Shareholder, Littler Mendelson, P.C.), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#hartstein>.

146 See *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (written testimony of Adam Klein, Partner, Outten & Golden LLP), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/klein.cfm>; see also *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (oral testimony of Adam Klein, Partner, Outten & Golden LLP), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#klein>.

147 See *EEOC Meeting, Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011) (transcript), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm>.

## VI. IMPACT OF THE EEOC'S SYSTEMIC INITIATIVE ON USE OF CRIMINAL RECORDS BY EMPLOYERS AND NOTEWORTHY LITIGATION

While the focus of this paper is the EEOC's Updated Guidance on criminal records and its implications for the employer community, the guidance also is intended for EEOC personnel in the field concerning the approach that should be taken in dealing with charges that focus on criminal records. Based on the EEOC's Strategic Enforcement plan, coupled with the Updated Guidance, there is little doubt that the EEOC will not hesitate to commence a systemic investigation based on concerns that a policy involving the use of criminal records is overbroad and unlawfully screening out African Americans and/or Hispanics applicants.

The issue of criminal records has remained front and center based on various EEOC systemic investigations initiated around the country as well as lawsuits filed by the EEOC. While the litigation on this issue has been limited to date, employers should expect more reasonable cause findings and litigation based on policies that the EEOC considers to be overbroad and/or unlawful.

### A. Significant Systemic Investigations

While EEOC investigations are not viewed as public information, employers over the past year in retail, trucking and other transportation carriers, to name only a few industries, have been subjected to systemic investigations premised on the employers' use of criminal background checks. In a recent settlement of an EEOC charge, a large employer agreed to pay \$3.13 million and provide job offers and training to settle an EEOC probable cause finding where the Commission found reasonable cause to believe that the criminal background check policy formerly used by [the employer] discriminated against African Americans in violation of Title VII. . . .<sup>148</sup> According to the EEOC's press release announcing the settlement:

The EEOC's investigation revealed that more than 300 African Americans were adversely affected when [the employer] applied a criminal background check policy that disproportionately excluded black applicants from permanent employment. Under [the employer's] former policy, job applicants who had been arrested pending prosecution were not hired for a permanent job even if they had never been convicted of any offense.

[The employer's] former policy also denied employment to applicants [] who had been arrested or convicted of certain minor offenses. The use of arrest and conviction records to deny employment can be illegal under Title VII of the Civil Rights Act of 1964, when it is not relevant for the job, because it can limit the employment opportunities of applicants or workers based on their race or ethnicity.

\* \* \*

During the course of the EEOC's investigation, [the employer] adopted a new criminal background check policy. In addition to the monetary relief, [the employer] will offer employment opportunities to victims of the former criminal background check policy who still want jobs at [at the employer] and are qualified for the jobs for which they apply. The

148 See Press Release, EEOC, *Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans* (Jan. 1, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>.

company will supply the EEOC with regular reports on its hiring practices under its new criminal background check policy. [The employer] will conduct Title VII training for its hiring personnel and all of its managers.

“When employers contemplate instituting a background check policy, the EEOC recommends that they take into consideration the nature and gravity of the offense, the time that has passed since the conviction and/or completion of the sentence, and the nature of the job sought in order to be sure that the exclusion is important for the particular position. Such exclusions can create an adverse impact based on race in violation of Title VII,” said Julie Schmid, Acting Director of the EEOC’s Minneapolis Area Office. “We hope that employers with unnecessarily broad criminal background check policies take note of this agreement and reassess their policies to ensure compliance with Title VII.”

## B. Noteworthy Litigation Involving Criminal Records

The EEOC has selectively litigated cases involving criminal history records. The first lawsuit approved for litigation by the Commission on the topic of criminal background checks was *EEOC v. Peoplemark*. On September 29, 2008, the EEOC filed a complaint against Peoplemark alleging that the company had a blanket policy of not hiring convicted felons at all its facilities, which adversely impacted African Americans in violation of Title VII.<sup>149</sup> The lawsuit stemmed from an individual charge of discrimination, which was expanded into a systemic investigation and subsequent lawsuit filed on behalf of the charging party and “similarly situated African Americans” who were adversely affected by the company’s practices. While the EEOC ultimately dropped the lawsuit after the employer filed a motion for summary judgment (which stemmed in part from the EEOC’s failure to timely identify its statistical expert in the case), the lawsuit provides a “roadmap” concerning issues of proof and discovery in litigation focusing on criminal history records.<sup>150</sup> The upshot is that these cases will likely involve significant amounts of data and focus on the use of experts: (1) economists and statistical data analyzing hiring data, EEO data, and criminal history records and (2) experts in the field of recidivism, comparable to the expert relied on by the employer in *El v. SEPTA*.

One of the most significant pending cases, *EEOC v. Freeman*,<sup>151</sup> filed by the EEOC on November 30, 2009, alleges in relevant part, that the employer engaged in a nationwide “pattern or practice” of discrimination against a class of African American and Hispanic job applicants by using “criminal history” as a hiring criterion when the criminal history criterion had a disparate impact on these individuals.<sup>152</sup>

The underlying discrimination charge in the *Freeman* case involved a claim by the charging party that she applied for a position with the defendant in August 2007, and was informed that she would be hired, contingent on passing a

149 See Pl. Compl., *EEOC v. Peoplemark, Inc.*, No. 1:08-cv-00907 (W.D. Mich. filed Sept 29, 2008). While over \$750,000 in attorneys’ fees and expert fees were awarded against the EEOC in that case based on the view that the EEOC deliberately caused the company to incur attorneys’ fees and costs in that case when it should have known that the employer did not have a blanket no-hire policy, as alleged in the complaint, the case is on appeal to the Sixth Circuit. 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011), *aff’d*, 2011 U.S. Dist. LEXIS 154429 (W.D. Mich. Oct. 17, 2011), *appeal docketed*, No. 11-2582 (6th Cir. Dec. 16, 2011).

150 See Barry A. Hartstein, *Recent EEOC Developments Involving Disqualification of Applicants Based on Criminal History*, Littler Report, pp. 9-13 (Mar. 28, 2011), available at <http://www.littler.com/publication-press/publication/recent-eeoc-developments-involving-disqualification-applicants-based-c>.

151 No. 8:09-cv-02573 (D. Md. filed Nov. 30, 2009).

152 The lawsuit includes allegations that credit history also was relied on by the employer, which had a significant disparate impact on African American job applicants.

drug, criminal and credit background check. Shortly thereafter, on or about August 30, 2007, the charging party was told that she would not be offered a position. In the discrimination charge, filed on January 17, 2008, the charging party alleged that she was discriminated against based on her race and further asserted that the employer “discriminates in this manner against racial minorities, as a class, in violation of Title VII.” The EEOC alleges in the complaint that the above hiring practices have a significant disparate impact against the protected groups and are not job related or justified by business necessity. The EEOC further asserts that there are appropriate, less-discriminatory alternative selection procedures. The case has had numerous procedural skirmishes to date, which focus on the applicable statute of limitations that apply to the EEOC’s allegations. At present, the case is proceeding through the discovery process.

## VII. PRACTICAL COMPLIANCE ISSUES DEALING WITH CRIMINAL RECORDS

While the EEOC's Updated Guidance should be closely reviewed as part of an employer's compliance efforts in implementing and/or modifying policies dealing with criminal records, employers also should be sensitive to other federal and state law compliance issues. The Updated Guidance briefly addresses federal and/or state laws or regulations that may be viewed as hiring barriers, but there are a broad range of related but independent compliance issues that should be considered.

State laws addressing criminal records in the pre-employment process are by no means uniform. As an example, in some states there are a wide range of limitations, which include prohibiting employers from discriminating against ex-offenders in hiring unless they can demonstrate that the ex-offender's conviction is job related or that employing the ex-offender would pose an unacceptable risk of harm to others (e.g., Hawaii, New York, Pennsylvania and Wisconsin).<sup>153</sup> In addition, in states where the statute and regulations do not prohibit inquiring into criminal history records, the state department of labor or other administrative agency may take the position that certain forms of criminal history inquiries should be avoided.<sup>154</sup> In two jurisdictions, Hawaii and Massachusetts, as further described below, there are restrictions and/or prohibitions in asking applicants about criminal record information on an initial written application.<sup>155</sup> The fair credit reporting statutes in some states also limit the scope and flow of information that "consumer reporting agencies" (i.e., background check companies) can report to employers, including conviction records, and these state laws must be read in tandem with the federal Fair Credit Reporting Act (FCRA).<sup>156</sup> In some jurisdictions, the state laws may be more restrictive than the FCRA, and may have more generous remedy provisions.<sup>157</sup> As discussed below, the FCRA creates its own set of procedural requirements in dealing with criminal background checks when relied on as a screening tool in the pre-employment process.

### A. State Law Restrictions

There are a variety of state laws that restrict the ability of employers to obtain criminal history information from applicants and employees. While not an exhaustive list, the following are illustrative of various state law restrictions:

- **California**—California law prohibits an employer from asking an applicant to disclose information about: (1) an arrest or detention that did not result in conviction, or (2) a referral to, and participation in, any pretrial or

<sup>153</sup> See, e.g., N.Y. CORRECT. LAW § 752-54; N.Y. CRIM. PROC. LAW § 160.60; N.Y. EXEC. LAW §296(15)-(16); see also HAW. REV. STAT. § 378-2.5(a); 18 PA. CONS. STAT. ANN. § 9125; WIS. STAT. § 111.335(1)(c).

<sup>154</sup> For example, the Colorado Civil Rights Division takes the position that an employer may inquire about convictions that are substantially related to the applicant's ability to perform a specific job, if the question is addressed to every applicant. See Colorado Civil Rights Division, *Pre-Employment Inquiries*, available on the Civil Rights Division website at [www.dora.state.co.us](http://www.dora.state.co.us).

<sup>155</sup> While the EEOC's Updated Guidance encouraged employers as a "best practice" not to ask about convictions on job applications, various states, and certain cities, already include apply such restrictions to employers within their jurisdiction. See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B. (Apr. 25, 2012).

<sup>156</sup> For a thorough discussion of the FCRA, see Littler Report, *The FTC Staff Report '40 Years of Experience with the Fair Credit Reporting Act' Illuminates Areas of Potential Class Action Exposure for Employers*, By Rod M. Fliegel and Jennifer Mora, (Dec. 12, 2011) available at <http://www.littler.com/publication-press/publication/ftc-staff-report-40-years-experience-fair-credit-reporting-act-illuminate>.

<sup>157</sup> As an example, the FCRA allows criminal convictions to be reportable indefinitely. 15 U.S.C. § 1681c. California, on the other hand, follows a seven-year rule on convictions, as was previously the standard under the FCRA. CAL. CIVIL CODE § 1786.18. In New York, if the job position an applicant is seeking has an annual salary of less than \$25,000, then the background check may only report criminal convictions that occurred in the previous seven years, but if the salary is equal to or greater than \$25,000, then all criminal convictions may be reported. N.Y. GEN. BUS. LAW § 380-j.

post trial diversion program. An employer may not seek this information from any source or use it as a factor in determining any condition of employment.<sup>158</sup> An employer also may not ask for information concerning certain petty marijuana offenses after two years from the date of the conviction.<sup>159</sup> In addition, the California Department of Fair Employment and Housing takes the position that an employer may not inquire or seek information regarding an applicant concerning any conviction for which the record has been judicially ordered sealed, expunged or statutorily eradicated (e.g., sealed juvenile offense records); or any misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed pursuant to California Penal Code section 1203.4.<sup>160</sup> It should be noted, however, that an employer may ask an employee or an applicant about an arrest for which he or she is out on bail or on personal recognizance pending trial.<sup>161</sup> However, an employer may not use that information to make a hiring decision without independently investigating.<sup>162</sup>

- **Connecticut**—Any question regarding the criminal history of an applicant must notify the applicant, in clear and conspicuous language, of the following: (1) that the applicant is not required to disclose the existence of any arrest, criminal charge or conviction, the records of which have been erased pursuant to applicable law; (2) that criminal records subject to erasure pursuant to applicable law are records pertaining to a finding of delinquency or that a child was a member of a family with service needs, an adjudication as a youthful offender, a criminal charge that has been dismissed or declined of prosecution, a criminal charge for which the person has been found not guilty, or a conviction for which the person received an absolute pardon; and (3) that any person whose criminal records have been erased pursuant to such sections shall be deemed to have never been arrested and may so swear under oath. In addition, the portion of an employment application which contains criminal history information only may be available to members of the employer's personnel department, or if there is no personnel department, to the person in charge of employment and any employee involved in interviewing the applicant.<sup>163</sup>
- **District of Columbia**—It is unlawful for an employer in the District of Columbia to require an employee to produce an arrest record or a copy, extract, or statement from such a record, at the employee's expense. Arrest records are to contain only listings of convictions and forfeitures of collateral that have occurred within 10 years of the time that such record is requested. Violations of this statute are punishable by a fine of not more than \$300 and/or up to 10 days imprisonment.<sup>164</sup>
- **Georgia**—With the exception of certain sex offenders, a discharge pursuant to the Georgia First Offenders Act (FOA) is not a conviction and may not be used to disqualify an applicant from public or private employment.<sup>165</sup>

158 CAL. LAB. CODE § 432.7. As used in this section, "conviction" includes a plea, verdict or finding of guilty regardless of whether a sentence is imposed by the court.

159 CAL. LAB. CODE §§ 432.7, 432.8.

160 CAL. CODE REGS. TIT. 2, § 7287.4(d).

161 CAL. LAB. CODE § 432.7. Even so, an employer may not use that information to make a hiring decision without independently investigating. *Pitman v. City of Oakland*, 197 Cal. App. 3d 1037 (1988).

162 *Pitman*, 197 Cal. App. 3d 1037.

163 CONN. GEN. STAT. § 31-51i(c).

164 D.C. CODE § 2-1402.66.

165 GA. CODE ANN. §§ 42-8-63, 42-8-63.1. Although an employer may not use a FOA discharge as the basis for disqualifying an applicant, the underlying facts of the criminal action do not have to be ignored. There also does not appear to be a private right of action.

- **Hawaii**—In Hawaii, discrimination based on a conviction record is part of the state's Fair Employment Practices law.<sup>166</sup> It is an unlawful for an employer to inquire into arrest and conviction records, unless the conviction "bears a rational relationship to the duties and responsibilities of the position," and the conviction is not greater than 10 years old, excluding periods of incarceration. As a "ban the box" state, an employer may not inquire into or consider conviction records until after an offer of employment has been made, unless expressly permitted by law.<sup>167</sup>
- **Illinois**—Employment applications in Illinois must contain specific language which states that the applicant is not obligated to disclose sealed or expunged records of conviction or arrest. In addition, employers may not ask if an applicant has had records expunged or sealed.<sup>168</sup> It also is unlawful for an employer "to inquire into or to use the fact of an arrest or criminal history record information ordered expunged, sealed or impounded," but the statute does not prohibit an employer "from obtaining or using other information which indicates that a person actually engaged in the conduct for which he or she was arrested."<sup>169</sup>
- **Massachusetts**—Massachusetts also has a "ban the box" law and prohibits an employer from requesting criminal history information on an employment application, unless required by state or federal law for a particular position.<sup>170</sup> Employers may inquire about an applicant's criminal history in subsequent steps in the hiring process. In addition, employers in possession of an applicant's criminal records must provide the applicant with a copy of the records *before* asking the applicant about his or her criminal history and also *before* making an adverse decision based on the applicant's criminal history.<sup>171</sup> Moreover, the Commonwealth's Department of Criminal Justice Information Services is prohibited from disseminating information about convictions after a specified waiting period that begins after release from incarceration or custody: (1) ten years for felonies; (2) five years for misdemeanors; and (3) violations of domestic abuse orders will be treated as felonies. However, there is permanent access for convictions for murder, manslaughter and sex offenses.<sup>172</sup> Before obtaining records online per the system established under Massachusetts law, employers must obtain the applicant's or employee's authorization to review the records and must limit dissemination of those records within its organization to those with a need to know.<sup>173</sup>
- **Nebraska**—In any application for employment, a person cannot be questioned with respect to any arrest or taking into custody for which the record is sealed, and the person may respond as if the sealed arrest or taking into custody did not occur; the person may not be subject to any adverse action because of the response. Applications for employment shall contain specific language stating that the applicant is not

166 HAW. REV. STAT. §§ 378-2 to 378-6.

167 HAW. REV. STAT. § 378-2.5(b).

168 20 ILL. COMP. STAT. 2630/12.

169 775 ILL. COMP. STAT. 5/2-103.

170 See MASS. GEN. LAWS. CH. 6, §§ 167-178B . MGL c.6, s. 167-178BMGL c.6, s. 167-178BMGL c.6, s. 167-178BMGL c.6, s. 167-178B. The Criminal Offender Record Information (CORI) law was completely revamped in 2010. Criminal Offender Record Information Reform Act, 2010 Mass. Acts. Ch. 256St.2010, c.256, s.2-37St.2010, c.256, s.2-37St.2010, c.256, s.2-37St.2010, c.256, s.2-37. Most substantive changes, such as limits to CORI given to employers and others, became effective on May 4, 2012; restrictions on CORI questions on job applications took effect in November 2010. See also Littler ASAP, *Massachusetts Employers Face New Obligations When Conducting Background Checks Involving Criminal Records*, Christopher Kaczmarek, Carie Torrence & Joseph Lazzerro (Mar. 9 2012), available at <http://www.littler.com/publication-press/publication/massachusetts-employers-face-new-obligations-when-conducting-background>. There are various provisions with differing dates of implementation for the Criminal Offender Record Information Reform Act. A checklist for compliance is available at <http://www.lawlib.state.ma.us/subject/about/cori.html>.

171 MASS. GEN. LAWS. CH. 6, § 172; see also <http://www.lawlib.state.ma.us/subject/about/cori.html>

172 *Id.*

173 *Id.*

obligated to disclose a sealed juvenile record or sentence. Employers shall not ask if an applicant has had a juvenile record sealed.<sup>174</sup>

- **Nevada**—The discharge and dismissal of certain first time drug offenses in Nevada, after the accused has completed probation and any required treatment or educational programs, does not constitute a conviction for purposes of employment. The person may not be held guilty of perjury or for giving a false statement for failing to acknowledge or disclose the arrest, indictment or trial in response to any inquiry.<sup>175</sup>
- **New York**—Employers may not deny employment to an applicant or employee due to criminal convictions, unless: (1) there is a direct relationship between the criminal offenses and the job sought; or (2) the granting of employment would involve an unreasonable risk to property, or to the safety or welfare of individuals or the general public.<sup>176</sup> For purposes of this restriction, “‘direct relationship’ means that the nature of the criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the . . . job in question.”<sup>177</sup> In making such a determination, the public agency or private employer is required to consider eight separate factors:
  - (a.) The public policy of [the] state, as expressed in [the] act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
  - (b.) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
  - (c.) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
  - (d.) The time which has elapsed since the occurrence of the criminal offense or offenses.
  - (e.) The age of the person at the time of occurrence of the criminal offense or offenses.
  - (f.) The seriousness of the offense or offenses.
  - (g.) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
  - (h.) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.<sup>178</sup>
- **Pennsylvania**—When an employer is in receipt of information which is part of an applicant’s criminal history record, the employer may consider felony and misdemeanor convictions only to the extent to which they relate to the applicant’s suitability for employment in the particular position. Applicants must be provided written notice that they were not hired based on their criminal record information.<sup>179</sup>

<sup>174</sup> NEB. REV. STAT. § 43-2,108.05(5).

<sup>175</sup> NEV. REV. STAT. § 453.3363(4).

<sup>176</sup> N.Y. EXEC. LAW § 296(15); N.Y. CORRECT. LAW § 752.

<sup>177</sup> N.Y. CORRECT LAW. § 750(3).

<sup>178</sup> N.Y. CORRECT. LAW § 753. Additionally, an employer may not consider a criminal proceeding that terminated in a “youthful offender adjudication,” as defined in section 720.35 of the New York Criminal Procedure LAW. N.Y. EXEC. LAW § 296(16). Certain exceptions apply to employment involving enforcement personnel. See N.Y. EXEC. LAW § 296(16).

<sup>179</sup> 18 PA. CONS. STAT. § 9125.

- **Washington**—The Washington Human Rights Commission's regulations instruct employers not to consider convictions that do not relate reasonably to the job duties, or did not occur within the past 10 years unless some period of incarceration took place within the last 10 years.<sup>180</sup>
- **Wisconsin**—Employers are prohibited from discriminating against employees or applicants on the basis of their conviction records.<sup>181</sup> The term "conviction record" broadly includes information that an individual has been convicted of any felony, misdemeanor or other offense, adjudicated delinquent, less than honorably discharged, or placed on probation, fined, imprisoned or paroled under a law enforcement or military authority.<sup>182</sup> It is not unlawful discrimination to refuse to employ any individual who: (1) has been convicted of any felony, misdemeanor or other offense, the circumstances of which substantially relate to the circumstances of the particular job; or (2) is not bondable when bondability is required for the job.<sup>183</sup>

As shown above, there are numerous and a wide range of state laws that also may regulate the hiring of ex-offenders. State regulation takes many forms, including: (1) workplace notice and posting obligations;<sup>184</sup> (2) limitations on *when*, during the hiring process, employers may ask applicants about their criminal records;<sup>185</sup> (3) limitations on *what* records employers may ask applicants about;<sup>186</sup> and (4) as already noted, restrictions on when employers may rely on criminal records to disqualify applicants from consideration.<sup>187</sup>

## B. Restrictions in Hiring Individuals with Criminal Records

The above discussion demonstrates that employers must take care in dealing with pre-employment inquiries and potential restrictions in the hiring of applicants who have criminal history records, completely unrelated to issues of discrimination under federal EEO laws. On the other hand, some federal regulations restrict employers from hiring those with criminal records in various settings, *e.g.*, persons working in financial institutions and transportation, or handling firearms.<sup>188</sup> At the state level, a wide range of restrictions may result in bars from employment. As discussed in the Updated Guidance, the EEOC will view compliance with federal laws or regulations as a defense to a discrimination claim based on criminal convictions records. However, the EEOC takes the position that Title VII preempts state and/or local laws and regulations and, therefore, any state hiring bars should be job related and justified by business necessity.<sup>189</sup>

180 WASH. ADMIN. CODE § 162-12-140.

181 WIS. STAT. §§ 111.321, 111.325.

182 WIS. STAT. § 111.321(3).

183 WIS. STAT. § 111.335(1)(c).

184 N.Y. LAB. LAW § 201-f.

185 HAW. REV. STAT. §§ 378-2(1)(C), 378-2.5(b); MASS. GEN. LAWS CH. 151B, § 4(9). Various municipalities, such as Philadelphia and San Francisco, apply the ban to private sector employers. For more information about specific states' laws on this issue, including a chart setting forth, which states implement criminal background check restrictions, see National Employment Law Project, *Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records* (rev. Feb. 6, 2012), available at <http://www.nelp.org/page/-/SCLP/2011/CityandCountyHiringInitiatives.pdf?nocdn=1>.

186 CAL. LAB. CODE § 432.8; N.Y. EXEC. LAW § 296(16).

187 N.Y. CORRECT. LAW § 752; 18 PA. CONS. STAT. § 9125; WIS. STAT. § 111.335(1)(c).

188 The Gun Control Act (GCA) prohibits certain categories of persons from handling firearms; this has been interpreted to include employees. Examples of persons prohibited from handling firearms include individuals: under indictment or information for a crime punishable by imprisonment for a term exceeding one year; convicted of a crime punishable by imprisonment for a term exceeding one year; or convicted of misdemeanor domestic violence. See 18 U.S.C. § 922(g).

189 See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Sections VI and VII (Apr. 25, 2012).

For example, at the federal level there are very strict restrictions regarding hiring individuals with criminal records in banking institutions. Section 19 of the Federal Deposit Insurance Act (12 U.S.C. § 1829) prohibits hiring any person convicted of a crime involving dishonesty, breach of trust, or money laundering. As part of the statute, pre-trial diversion or similar programs are considered convictions. There also is a 10-year ban for certain enumerated crimes. On the other hand, certain crimes, described as “*de minimis*,” do not require a waiver from the Federal Deposit Insurance Corporation (FDIC) without its prior written consent.<sup>190</sup> In determining whether to grant a waiver, the FDIC will consider the following factors: (1) the conviction and nature and circumstances of the offense; (2) evidence of rehabilitation, including age at conviction, and time elapsed; (3) the position to be held; (4) amount of influence and control over the management of the institution; (5) management’s ability to supervise and control the person’s activities; (6) degree of ownership over the institution; (7) applicability of the institution’s fidelity bond coverage to the individual; (8) opinion of primary federal and/or state regulator; and (9) any additional relevant factors.

Similarly, DOT’s Federal Motor Carrier Safety Administration has established “Driver Disqualifications and Penalties;” specific provisions on “disqualification of drivers” include a detailed set of restrictions/ban on hiring drivers convicted of certain criminal offenses and/or based on the number of such convictions, which may restrict hiring for 60 days, 1 year, 3 years or even include lifetime bans from employment.<sup>191</sup>

Other examples of federal restrictions are summarized below:<sup>192</sup>

- Convictions of offenses involving dishonesty, breach of trust, or money laundering disqualify an individual from working for institutions insured by the Federal Deposit Insurance Corporation (FDIC).<sup>193</sup>
  - Federal law bars certain classes of felons from working in the insurance industry without receiving an insurance regulatory official’s permission.<sup>194</sup>
  - Certain classes of felons are barred, for 13 years after one’s conviction (or the end of one’s imprisonment if one is sentenced for a term of longer than 13 years) from holding any of several positions in a union or other organization that manages an employee benefit plan, including serving as an officer of the union or a director of the union’s governing board.<sup>195</sup>
  - Federal law also prohibits those convicted of certain crimes from providing healthcare services for which they will receive payment from Medicare,<sup>196</sup> or from working for the generic drug industry.<sup>197</sup>
  - Federal law requires criminal history background checks for individuals who provide care for children.<sup>198</sup>
- In addition, the Federal Child Protection Act authorizes states to enact statutes concerning the facilitation

190 An excellent summary of the restrictions regarding hiring individuals with criminal records at financial institutions, and the applicable “FDIC Statement of Policy,” is set forth at <http://hirenetwork.org/FDIC.html>, prepared by the National H.I.R.E. Network.

191 See DOT Federal Motor Safety Administration Regulations, Subpart D, section 383.51 (49 C.F.R. § 383.51), available at <http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.aspx?reg=383.51>.

192 See National HIRE Network, *Federal Occupational Restrictions Affecting People with Criminal Records*, available at [http://hirenetwork.org/fed\\_occ\\_restrictions.html](http://hirenetwork.org/fed_occ_restrictions.html).

193 See 12 U.S.C. § 1829.

194 See 18 U.S.C. § 1033(c)(2).

195 See 29 U.S.C. §§ 504, 1111.

196 42 U.S.C. § 1320a-7.

197 See 21 U.S.C. § 335a.

198 See 42 U.S.C. § 13041.

of criminal background checks of persons who work with children. It also authorizes states to institute mandatory or voluntary fingerprinting of prospective employees in childcare occupations in order to facilitate criminal background checks.<sup>199</sup>

- Prisoner transportation (even private prisoner transportation) is federally regulated. 42 U.S.C. section 13726(b) sets “minimum standards for background checks and preemployment drug testing for potential employees, including requiring criminal background checks, to disqualify persons with a felony conviction or domestic violence conviction [] from employment.” The purpose of the act was to provide protection against risks to the public inherent in the transportation of violent prisoners and to assure the safety of those being transported.
- Finally, since September 11, 2001, numerous efforts have been made to increase aviation security. Federal laws requiring background checks have been passed to ensure the safety of travelers and airport employees.<sup>200</sup>

At the state level, there also is a confusing hodgepodge of restrictions adopted by legislatures and state agencies, in response to diverse events and various policy concerns, which restrict hiring or the ability to work in certain fields based on license restrictions. Making it even more complicated is the fact that most states have not catalogued their restrictions, making it difficult for both employers and those with criminal records to even be aware of some of the applicable restrictions.<sup>201</sup> One recent study<sup>202</sup> explained that at the state level there frequently are three types of job restrictions:

- Based on the occupation—both licensed and unlicensed occupations, e.g., bartenders, security guards, real estate agents.
- Based on the place of employment, e.g., seaports, schools, nursing homes.
- Based on both, e.g., nurses, teachers.<sup>203</sup>

A related issue that may impact on employment involves potential “certificates of rehabilitation,” available in various states, that may provide an avenue to employment for those otherwise barred by applicable state law. There has been a trend across the country to enable those convicted of certain crimes to mitigate the “collateral consequences” of that conviction, and laws have been enacted in various states that may enable an individual to receive a “certificate of rehabilitation” to restore some of the legal rights that otherwise bar the individual from receiving a license and/or work in a particular field or type of job in the state.<sup>204</sup>

199 42 U.S.C. § 5119A.

200 See 49 U.S.C. §§ 44935, 44936.

201 One potential resource is the ABA Criminal Justice Section, Collateral Consequences project, which has organized laws on a state-by-state basis. See <http://isrweb.isr.temple.edu/projects/accproject/>.

202 Linda Mills, INVENTORYING AND REFORMING STATE-CREATED RESTRICTIONS BASED ON CRIMINAL RECORDS: A POLICY BRIEF AND GUIDE (SEPT. 2008), available at <http://nationalreentryresourcecenter.org/publications/inventorying-and-reforming-state-created-employment-restrictions-based-on-criminal-records-a-policy-brief-and-guide>. The study was prepared by the Annie E. Casey Foundation for the State of Florida.

203 *Id.*

204 Six states offer administrative “certificates of rehabilitation” that may restore some of the legal rights and privileges lost as a result of a conviction. New York’s certificates have the most far reaching legal effect. Both Illinois and Connecticut have enacted certificate programs that may provide significant relief. There may be a “presumption of rehabilitation” in various states that also may affect employment and/or certain licensure. Various employment rights also may be restored based on pardon procedures in effect in various states. See Margaret Love and April Frazier, *Certificates of Rehabilitation and Other Forms of Relief from the Collateral Consequences of Conviction: A Survey of State Laws* (Oct. 1, 2006), available at [http://meetings.abanet.org/webupload/commupload/CR203000/otherlinks\\_files/convictionsurvey.pdf](http://meetings.abanet.org/webupload/commupload/CR203000/otherlinks_files/convictionsurvey.pdf).

### C. Negligent Hiring<sup>205</sup>

Employers today, particularly in certain settings, should evaluate the risk of hiring or placing an individual with a criminal record in certain positions where there is a need to protect employees, customers, vulnerable persons, and a company's assets. An employer also may be subject to potential liability based on the "negligent hiring" doctrine in failing to exercise due diligence to evaluate whether hiring an individual with certain criminal records would create an unreasonable risk to other employees or the public. Liability for negligent hiring will be imposed on an employer if it is aware that the employee is unfit, has reason to believe the employee is unfit, or fails to use reasonable care to discover the employee's unfitness for the position before hiring him or her, and the plaintiff sustains injuries as a proximate result of the employer's negligence.<sup>206</sup>

Some states provide strong support for conducting background investigations as part of an employer's due diligence in the hiring process. As an example, the Florida State Legislature enacted a statute that provides that an "employer is presumed not to have been negligent in hiring [an] employee if, before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general."<sup>207</sup> Traditional case law has also established this rebuttable presumption of due care.<sup>208</sup>

Various cases also have found that an employer may be viewed as having been negligent in failing to conduct a background check, further underscoring the legitimate business reason for conducting criminal background checks in many employment settings.<sup>209</sup> Regardless, even such due diligence is not a guarantee that an employer will be able to prevent acts of violence or other unlawful conduct by its workers.<sup>210</sup>

205 For a detailed discussion of the negligent hiring doctrine, see Littler Mendelson, *THE NATIONAL EMPLOYER*, Vol. I, ch. 8 (Employment Torts) (2011-2012 ed.); see also SEARCH, the National Consortium for Justice Information and Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Information* (2005), available at <http://www.reentry.net/library/item.93793>. The report was the product of a project funded by the Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice. The above discussion is based in relevant part on the more extensive discussion set forth in these publications.

206 See, e.g., *Girard v. Trade Prof'ls, Inc.*, 50 F. Supp. 2d 1050, 1054 (D. Kan. 1999), *aff'd*, 13 F. App'x 865 (10th Cir. 2001) (the negligent hiring doctrine recognizes that employers have a duty to hire only safe and competent employees; an employer breaches that duty when it hires employees it knows or should know are incompetent); *Strickland v. Communications & Cable of Chicago*, 710 N.E.2d 55, 58 (Ill. App. Ct. 1999) (to establish negligent hiring, plaintiff must prove the employer knew or should have known the person hired had a particular unfitness for the job that would create a foreseeable danger to others, and this was proximate cause of plaintiff's injury); *Godar v. Edwards*, 588 N.W.2d 701, 708-09 (Iowa 1999) (Iowa Supreme Court recognizes negligent hiring claim; plaintiff must prove an employment relationship exists, the employer knew, or in the exercise of ordinary care should have known, of its employee's unfitness at the time of hiring, and the employee's incompetence, unfitness, or dangerous characteristics proximately caused the resulting injuries).

207 FLA. STAT. § 768.096.

208 See *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 751 (D. Md. 1996).

209 See *J. v. Victory Tabernacle Baptist Church*, 372 S.E.2d 391, 394 (Va. 1988) (church knew or should have known that employee, who sexually assaulted minor, had previous similar crime); *Oakley v. Flor-Shin Inc.*, 964 S.W.2d 438 (Ky. Ct. App. 1998) (if employer had conducted background check, per established policy, employer would have known of employee's past criminal record and presented issue of fact on negligent hiring theory); *Kladstrup v. Westfall Health Care Center, Inc.*, 701 N.Y.S.2d 808, 811 (N.Y. Sup. Ct. 1999) (nature of duties of nurse's aide obligate employer "to make an in-depth inquiry to assure that an applicant . . . does not have a history of sexual misconduct"); *Welsh Mfg. v. Pinkerton's, Inc.* 474 A.2d 436, 441 (R.I. 1984) ("when an employee is being hired for a sensitive occupation, mere lack of negative evidence may not be sufficient to discharge the obligation of reasonable care;" "background checks in these circumstances should seek relevant information that might not otherwise be uncovered").

210 See, e.g., *C.C. v. Roadrunner Trucking, Inc.*, 823 F. Supp. 913 (D. Utah 1993), adopting magistrate judge's order, 1993 U.S. Dist. LEXIS 7251 (background check typically done in trucking industry and deemed adequate in case in which truck driver raped hitchhiker); *Gay v. United States*, 739 F. Supp. 275 (D. Md. 1990) (employer conducted background check and assault was unpredictable and out of character and could not have been anticipated or guarded against).

## D. FCRA and Related Compliance Issues

Finally, in performing any criminal background checks, an employer must ensure compliance with the FCRA and similar state laws that may impose greater restrictions. The FCRA regulates an employer's collection of virtually any type of information gathered by or through a third party consumer reporting agency (CRA), including but not limited to credit history, criminal history information, education and employment checks, *etc.* It does not apply to purely in-house efforts to gather information (*e.g.*, reference checks). Under the FCRA, the background report prepared by the CRA, whether oral or written, is called a "consumer report." An "investigative consumer report" is a particular type of consumer report that involves the collection of information by the CRA through personal interviews (*e.g.*, in-depth reference checks).

The obligations imposed by the FCRA essentially focus on the process that must be followed when conducting criminal background checks for an applicant. Their purpose is, in part, to ensure that candidates know what information impacted the hiring or personnel decision.<sup>211</sup> Generally speaking, an employer must: (1) obtain informed consent to order a background report; and (2) provide certain "adverse action" notices to applicants that it elects not to hire or incumbent employees that it elects to terminate based in whole or in part on information contained in the background report. The notices afford the candidate time to review and speak out about any inaccurate or incomplete information in the background report (*e.g.*, inaccurate criminal history or credit records). These obligations include the following:

- An employer must provide disclosure and obtain authorization. Before ordering a background report from a CRA, an employer must provide "a clear and conspicuous disclosure . . . in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a background report may be obtained for employment purposes."<sup>212</sup>
- Information may not be provided by a CRA unless the employer first provides the requisite user certification.<sup>213</sup>
- Once an employer receives a consumer report and determines that an applicant or employee may not be suitable for employment based even in part on information contained in the report, the employer must send notice to the applicant or employee and provide the candidate with a copy of the consumer report and the Federal Trade Commission's publication, *A Summary of Your Rights Under the Fair Credit Reporting Act* ("Summary of Rights").<sup>214</sup>

211 While this paper specifically discusses the hiring process, the FCRA laws are not limited to hiring new employees. *See, e.g.*, 15 U.S.C. § 1681a(h) (broadly extending the FCRA to decisions about "promotion, reassignment or retention" of an employee). The rules relating to employees, however, vary in some of the particulars (for example, with respect to misconduct related to employment). 15 U.S.C. § 1681a(y).

212 *See* 15 U.S.C. § 1681b(b)(2)(A)(i). For investigative consumer reports, the disclosure also must include a statement informing the candidate or employee of his or her right to request additional disclosures concerning the "nature and scope" of the employer's investigation and, arguably, the Summary of Rights.

213 *See* 15 U.S.C. § 1681b(b)(1)(A)(i)-(ii).

214 *See* 15 U.S.C. §§ 1681b(b)(2), (b)(3). The purpose of the pre-adverse action notice is to provide candidates with notice that there is negative information in their consumer report, and to allow them an opportunity to challenge the information and have it corrected if a candidate believes it to be incorrect or incomplete. For that reason, an employer is obligated to allow some time after mailing the pre-adverse action notice and before providing notice of the actual adverse action. Several FTC opinion letters state that it must be a "reasonable length" of time, and at least one federal district court has ruled that the minimum is at least five business days. (Of course, if the employer makes a final determination to hire the candidate, then no final adverse action notice is required.)

- Once the decision is made to take the adverse action, and a reasonable length of time has passed since the mailing of the pre-adverse action notice, the employer is obligated to provide oral, written or electronic notice of the adverse action to the candidate, and must provide specific information in that notice concerning the source of the consumer report (*i.e.*, the CRA).<sup>215</sup>

Numerous states have consumer protection laws that are similar to the federal FCRA. While many of the provisions of these laws mirror the FCRA, some states have unique requirements that somewhat exceed those of the FCRA, which include: California, Maine, Massachusetts, Minnesota, New Jersey, New York, Oklahoma and Washington.<sup>216</sup>

## VIII. CONCLUSION

As evidenced by this paper, issues surrounding arrest and criminal records screenings in employment are multifaceted and complex. While it's helpful to have an appreciation for the history behind the EEOC's Updated Guidance, only the future will tell how the Updated Guidance is relied upon by the Commission in its investigations and litigation activities. Moreover, litigation implicating the Updated Guidance—both litigation with the EEOC and private lawsuits—will likely involve arguments regarding the amount of deference a court should accord the Updated Guidance.

Employers who utilize arrest and/or criminal screenings in their hiring, promotion or retention practices should consider whether the Updated Guidance impacts their practices. While doing so, employers should also evaluate their practices in light of state and federal laws related to arrest and criminal records.

<sup>215</sup> See 15 U.S.C. §§ 1681b(b)(3), 1681m(a). The notice must include the name, address and telephone number of the CRA that furnished the report and a statement that the CRA did not make the decision to take the adverse action and is unable to provide the candidate the specific reasons why the action was taken. *Id.* Additionally, the notice must inform the candidate of his or her right to obtain a free copy of a consumer report from the CRA, within 60 days, and the candidate's right to dispute with the CRA the accuracy or completeness of the information contained in the report. 15 U.S.C. § 1681m(a)(3)(A).

<sup>216</sup> See, e.g., CAL. CIVIL CODE §§ 1786 *et seq.*; ME. REV. STAT. ANN. tit. 10 §§ 1311 *et seq.*; MASS. GEN. LAWS ch. 93 §§ 53–67; MINN. STAT. § 13C.02 *et seq.*; N.J. REV. STAT. §§ 56:11–33 *et seq.*; N.Y. GEN. BUS. LAW §§ 380 *et seq.*; OKLA. STAT. tit. 24 § 148 *et seq.*; WASH. REV. CODE § 19.182.020 *et seq.*

## APPENDIX A. Littler's Q & A on the EEOC's April 25, 2012 Enforcement Guidance on Criminal Records

### *Answers to Pressing and Immediate Questions*

**Q:** Is the updated enforcement guidance now “the law”?

**A:** The guidance represents the Commission's construction of Title VII. The federal and state courts are not literally bound by and do not have to “defer” to the guidance. Indeed, the EEOC issued this guidance in part because of criticism of its prior guidance as unpersuasive by the U.S. Court of Appeals for the Third Circuit. That said, it is a certainty that the Commission will rely on its guidance in administrative enforcement actions, and at least some courts are likely to defer to the guidance based on the EEOC's role in enforcing Title VII since the statute's enactment in 1965.

**Q:** Did the EEOC prohibit employers from asking about criminal records on employment applications or early in the hiring process?

**A:** No. The guidance noted that some states require employers to wait until late in the hiring process to ask about conviction records, but the EEOC only “recommended” that employers not ask about convictions on job applications. If employers do so, however, the EEOC advises that such inquiries be “limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.”

**Q:** Did the EEOC prohibit employers from considering criminal records in hiring and employment decisions?

**A:** No. The EEOC takes the position that employers should be circumspect in using criminal records, based largely on the national data concerning disproportionate arrest and conviction rates, but did not purport to outright prohibit employers from considering criminal records.

**Q:** Is the EEOC going to presume disparate impact in its investigations?

**A:** The EEOC stopped short of saying that it will presume a disparate impact from the use of arrest and/or conviction data, but did state that the national data “supports” a finding of disparate impact with regard to race and national origin. An employer defending a charge of discrimination on this basis will have the opportunity to contest a finding of disparate impact based, for example, on data concerning local arrest and conviction rates for protected class members.

**Q:** To satisfy the business necessity standard, is the EEOC requiring formal validation of a criminal record screening policy?

**A:** No. The EEOC takes the position that formal validation is one way to satisfy the business necessity standard (though an unlikely one, based on significant data challenges), but states an alternative is to deploy what it

calls a “targeted screen” *i.e.*, a screen that incorporates the *Green* factors, and in most instances provides an opportunity for an individualized assessment of potentially disqualified ex-offenders. A list of factors to consider is enumerated by the EEOC.

**Q:** Did the EEOC address the significance of older criminal history information, a question that garnered significant attention at the Commission’s public meetings?

**A:** Yes. One of the factors for determining whether use of conviction records is job related and consistent with business necessity, according to the EEOC, is the time that has passed since the offense, conduct and completion of the sentence. However, the EEOC did not suggest, much less define, a bright-line standard in this regard. In fact, the EEOC said that whether the “duration of an exclusion will be sufficiently tailored to justify the business necessity standard will depend on the particular facts and circumstances of each case.” The EEOC further noted that academic studies demonstrate the risk of recidivism declines over time and these studies may inform an employer’s consideration of aged conviction or arrest data.

**Q:** Can an employer still use a consumer reporting agency (or background screening company) to gather and report the criminal history information?

**A:** Yes. The guidance does not purport to prohibit employers from using consumer reporting agencies to provide background check reports, but did seem to warn employers away from using such agencies when they provide unreliable information.

**Q:** Does it matter whether an employer is subject to regulatory requirements?

**A:** Yes. The EEOC acknowledges that some employers are subject to regulatory requirements, but cautions employers about adopting screening policies that exceed those requirements.

## **APPENDIX B. Checklist of EEO and Other State and Federal Laws When Developing Hiring Policies and/or Procedures Involving Inquiries About an Applicant's Criminal Record**

*For any jurisdiction in which an employer operates, the following checklist may be considered when dealing with criminal background checks:*

1. What procedures should be considered to comply with the EEOC's new criminal history guidance?
2. What procedures should be followed to comply with the FCRA and/or more restrictive state laws in dealing with an applicant's criminal history?
3. Are ex-offenders protected by state law, and if so, what additional procedures must be followed in consideration of the applicant?
4. Is there a bar to consideration of certain offenses and/or time bar related to certain offenses under state law?
5. Is there a restriction regarding when inquiries can be made regarding criminal history based on applicable state law?
6. Is there required language/qualifiers to be added on the employment application or posting requirements when inquiring about criminal history (*i.e.*, is an applicant protected from disclosing certain past offenses)?
7. Is the employer protected by statute in making certain inquiries?
8. Is the employer restricted as to whom an applicant's or employee's criminal record can be disclosed?
9. Is the employer barred by state or federal law from hiring an applicant based on certain offenses? If the exclusion is based on state law, can the exclusion be justified as job related and consistent with business necessity, per the EEOC's April 25, 2012 Enforcement Guidance?
10. Even assuming the individual has been convicted of certain offenses, has the applicant received a Certificate of Rehabilitation, and if so, what impact does that have on consideration of the applicant for employment?

## APPENDIX C. EEOC Criminal Records Guidance Resources

- EEOC, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED. 42 U.S.C. § 2000e *et seq.* (Apr. 25, 2012), available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).
- EEOC COMPLIANCE MANUAL, Section 15 (2006), available at <http://www.eeoc.gov/policy/docs/race-color.html#VIB2conviction>.
- EEOC, POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. §2000e *et seq.* (1982) (Sept. 7, 1990), available at [http://www.eeoc.gov/policy/docs/arrest\\_records.html](http://www.eeoc.gov/policy/docs/arrest_records.html).
- EEOC, POLICY STATEMENT ON THE USE OF STATISTICS IN CHARGES INVOLVING THE EXCLUSION OF INDIVIDUALS WITH CONVICTION RECORDS FROM EMPLOYMENT (July 29, 1987), available at <http://www.eeoc.gov/policy/docs/convict2.html>.
- EEOC, POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000e *et seq.* (1982) (Feb. 4, 1987), available at <http://www.eeoc.gov/policy/docs/convict1.html>.

## APPENDIX D. Excerpt from EEOC Enforcement Guidance on the Consideration of Use of Arrest and Conviction Records in Employment Decisions<sup>217</sup>

Section	Status	Hypothetical from EEOC Enforcement Guidance	Outcome—Reasonable Cause / No Reasonable Cause Finding
Section IV. Disparate Treatment Discrimination and Criminal Records	Applicant	<p><b>Example 1: Disparate Treatment Based on Race.</b> John, who is White, and Robert, who is African American, are both recent graduates of State University. They have similar educational backgrounds, skills, and work experience. They each pled guilty to charges of possessing and distributing marijuana as high school students, and neither of them had any subsequent contact with the criminal justice system.</p> <p>After college, they both apply for employment with Office Jobs, Inc., which, after short intake interviews, obtains their consent to conduct a background check. Based on the outcome of the background check, which reveals their drug convictions, an Office Jobs, Inc., representative decides not to refer Robert for a follow-up interview. The representative remarked to a co-worker that Office Jobs, Inc., cannot afford to refer “these drug dealer types” to client companies. However, the same representative refers John for an interview, asserting that John’s youth at the time of the conviction and his subsequent lack of contact with the criminal justice system make the conviction unimportant. Office Jobs, Inc., has treated John and Robert differently based on race, in violation of Title VII.</p>	Reasonable Cause
Section IV. Disparate Treatment Discrimination and Criminal Records	Applicant	<p><b>Example 2: Disparate Treatment Based on National Origin.</b> Tad, who is White, and Nelson, who is Latino, are both recent high school graduates with grade point averages above 4.0 and college plans. While Nelson has successfully worked full-time for a landscaping company during the summers, Tad only held occasional lawn-mowing and camp-counselor jobs. In an interview for a research job with Meaningful and Paid Internships, Inc. (MPII), Tad discloses that he pled guilty to a felony at age 16 for accessing his school’s computer system over the course of several months without authorization and changing his classmates’ grades. Nelson, in an interview with MPII, emphasizes his successful prior work experience, from which he has good references, but also discloses that, at age 16, he pled guilty to breaking and entering into his high school as part of a class prank that caused little damage to school property. Neither Tad nor Nelson had subsequent contact with the criminal justice system.</p> <p>The hiring manager at MPII invites Tad for a second interview, despite his record of criminal conduct. However, the same hiring manager sends Nelson a rejection notice, saying to a colleague that Nelson is only qualified to do manual labor and, moreover, that he has a criminal record. In light of the evidence showing that Nelson’s and Tad’s educational backgrounds are similar, that Nelson’s work experience is more extensive, and that Tad’s criminal conduct is more indicative of untrustworthiness, MPII has failed to state a legitimate, nondiscriminatory reason for rejecting Nelson. If Nelson filed a Title VII charge alleging disparate treatment based on national origin and the EEOC’s investigation confirmed these facts, the EEOC would find reasonable cause to believe that discrimination occurred.</p>	Reasonable Cause
Section V.B.2. Disparate Impact—Arrests	Employee	<p><b>Example 3: Arrest Record Is Not Grounds for Exclusion.</b> Mervin and Karen, a middle-aged African American couple, are driving to church in a predominantly white town. An officer stops them and interrogates them about their destination. When Mervin becomes annoyed and comments that his offense is simply “driving while Black,” the officer arrests him for disorderly conduct. The prosecutor decides not to file charges against Mervin, but the arrest remains in the police department’s database and is reported in a background check when Mervin applies with his employer of fifteen years for a promotion to an executive position. The employer’s practice is to deny such promotions to individuals with arrest records, even without a conviction, because it views an arrest record as an indicator of untrustworthiness and irresponsibility. If Mervin filed a Title VII charge based on these facts, and disparate impact based on race were established, the EEOC would find reasonable cause to believe that his employer violated Title VII.</p>	Reasonable Cause

217 The attached chart includes all the examples of lawful and unlawful conduct in the view of the EEOC based on the EEOC’s Enforcement Guidance on Arrest and Conviction Records.

Section	Status	Hypothetical from EEOC Enforcement Guidance	Outcome—Reasonable Cause / No Reasonable Cause Finding
<p>Section V.B.2. Disparate Impact—Arrests</p>	<p>Employee</p>	<p><b>Example 4: Employer's Inquiry into Conduct Underlying Arrest.</b> Andrew, a Latino man, worked as an assistant principal in Elementary School for several years. After several ten and eleven-year-old girls attending the school accused him of touching them inappropriately on the chest, Andrew was arrested and charged with several counts of endangering the welfare of children and sexual abuse. Elementary School has a policy that requires suspension or termination of any employee who the school believes engaged in conduct that impacts the health or safety of the students. After learning of the accusations, the school immediately places Andrew on unpaid administrative leave pending an investigation. In the course of its investigation, the school provides Andrew a chance to explain the events and circumstances that led to his arrest. Andrew denies the allegations, saying that he may have brushed up against the girls in the crowded hallways or lunchroom, but that he doesn't really remember the incidents and does not have regular contact with any of the girls. The school also talks with the girls, and several of them recount touching in crowded situations. The school does not find Andrew's explanation credible. Based on Andrew's conduct, the school terminates his employment pursuant to its policy.</p> <p>Andrew challenges the policy as discriminatory under Title VII. He asserts that it has a disparate impact based on national origin and that his employer may not suspend or terminate him based solely on an arrest without a conviction because he is innocent until proven guilty. After confirming that an arrest policy would have a disparate impact based on national origin, the EEOC concludes that no discrimination occurred. The school's policy is linked to conduct that is relevant to the particular jobs at issue, and the exclusion is made based on descriptions of the underlying conduct, not the fact of the arrest. The Commission finds no reasonable cause to believe Title VII was violated.</p>	<p>No Reasonable Cause</p>
<p>Section V. B.7. Disparate Impact—Examples of Criminal Conduct Exclusions that Do Not Consider the <i>Green</i> Factors</p>	<p>Applicants</p>	<p><b>Example 5: Exclusion Is Not Job Related and Consistent with Business Necessity.</b> The National Equipment Rental Company uses the Internet to accept job applications for all positions. All applicants must answer certain questions before they are permitted to submit their online application, including "have you ever been convicted of a crime?" If the applicant answers "yes," the online application process automatically terminates, and the applicant sees a screen that simply says "Thank you for your interest. We cannot continue to process your application at this time."</p> <p>The Company does not have a record of the reasons why it adopted this exclusion, and it does not have information to show that convictions for all offenses render all applicants unacceptable risks in all of its jobs, which range from warehouse work, to delivery, to management positions. If a Title VII charge were filed based on these facts, and there was a disparate impact on a Title VII-protected basis, the EEOC would find reasonable cause to believe that the blanket exclusion was not job related and consistent with business necessity because the risks associated with all convictions are not pertinent to all of the Company's jobs.</p>	<p>Reasonable Cause</p>

Section	Status	Hypothetical from EEOC Enforcement Guidance	Outcome—Reasonable Cause / No Reasonable Cause Finding
<p>Section V.B.7. Disparate Impact- Examples of Criminal Conduct Exclusions that Do Not Consider the <i>Green</i> Factors</p>	<p>Employee</p>	<p><b>Example 6: Exclusion Is Not Job Related and Consistent with Business Necessity.</b> Leo, an African American man, has worked successfully at PR Agency as an account executive for three years. After a change of ownership, the new owners adopt a policy under which it will not employ anyone with a conviction. The policy does not allow for any individualized assessment before exclusion. The new owners, who are highly respected in the industry, pride themselves on employing only the “best of the best” for every position. The owners assert that a quality workforce is a key driver of profitability.</p> <p>Twenty years earlier, as a teenager, Leo pled guilty to a misdemeanor assault charge. During the intervening twenty years, Leo graduated from college and worked successfully in advertising and public relations without further contact with the criminal justice system. At PR Agency, all of Leo’s supervisors assessed him as a talented, reliable, and trustworthy employee, and he has never posed a risk to people or property at work. However, once the new ownership of PR Agency learns about Leo’s conviction record through a background check, it terminates his employment. It refuses to reconsider its decision despite Leo’s positive employment history at PR Agency.</p> <p>Leo files a Title VII charge alleging that PR Agency’s conviction policy has a disparate impact based on race and is not job related for the position in question and consistent with business necessity. After confirming disparate impact, the EEOC considers PR Agency’s defense that it employs only the “best of the best” for every position, and that this necessitates excluding everyone with a conviction. PR Agency does not show that all convictions are indicative of risk or danger in all its jobs for all time, under the <i>Green</i> factors. Nor does PR Agency provide any factual support for its assertion that having a conviction is necessarily indicative of poor work or a lack of professionalism. The EEOC concludes that there is reasonable cause to believe that the Agency’s policy is not job related for the position in question and consistent with business necessity.</p>	<p>Reasonable Cause</p>
<p>Section V.B.9. Disparate Impact- Individualized Assessment</p>	<p>Applicant</p>	<p><b>Example 7: Targeted Screen with Individualized Assessment Is Job Related and Consistent with Business Necessity.</b> County Community Center rents meeting rooms to civic organizations and small businesses, party rooms to families and social groups, and athletic facilities to local recreational sports leagues. The County has a targeted rule prohibiting anyone with a conviction for theft crimes (e.g., burglary, robbery, larceny, identity theft) from working in a position with access to personal financial information for at least four years after the conviction or release from incarceration. This rule was adopted by the County’s Human Resources Department based on data from the County Corrections Department, national criminal data, and recent recidivism research for theft crimes. The Community Center also offers an opportunity for individuals identified for exclusion to provide information showing that the exclusion should not be applied to them.</p> <p>Isaac, who is Hispanic, applies to the Community Center for a full-time position as an administrative assistant, which involves accepting credit card payments for room rentals, in addition to having unsupervised access to the personal belongings of people using the facilities. After conducting a background check, the County learns that Isaac pled guilty eighteen months earlier, at age twenty, to credit card fraud, and that he did not serve time in prison. Isaac confirms these facts, provides a reference from the restaurant where he now works on Saturday nights, and asks the County for a “second chance” to show that he is trustworthy. The County tells Isaac that it is still rejecting his employment application because his criminal conduct occurred eighteen months ago and is directly pertinent to the job in question. The information he provided did nothing to dispel the County’s concerns.</p> <p>Isaac challenges this rejection under Title VII, alleging that the policy has a disparate impact on Hispanics and is not job related and consistent with business necessity. After confirming disparate impact, the EEOC finds that this screen was carefully tailored to assess unacceptable risk in relevant positions, for a limited time period, consistent with the evidence, and that the policy avoided overbroad exclusions by allowing individuals an opportunity to explain special circumstances regarding their criminal conduct. Thus, even though the policy has a disparate impact on Hispanics, the EEOC does not find reasonable cause to believe that discrimination occurred because the policy is job related and consistent with business necessity.</p>	<p>No Reasonable Cause</p>

Section	Status	Hypothetical from EEOC Enforcement Guidance	Outcome—Reasonable Cause / No Reasonable Cause Finding
Section V.B.9. Disparate Impact-Individualized Assessment	Employee	<p><b>Example 8: Targeted Exclusion Without Individualized Assessment Is Not Job Related and Consistent with Business Necessity.</b> “Shred 4 You” employs over 100 people to pick up discarded files and sensitive materials from offices, transport the materials to a secure facility, and shred and recycle them. The owner of “Shred 4 You” sells the company to a competitor, known as “We Shred.” Employees of “Shred 4 You” must reapply for employment with “We Shred” and undergo a background check. “We Shred” has a targeted criminal conduct exclusion policy that prohibits the employment of anyone who has been convicted of any crime related to theft or fraud in the past five years, and the policy does not provide for any individualized consideration. The company explains that its clients entrust it with handling sensitive and confidential information and materials; therefore, it cannot risk employing people who pose an above-average risk of stealing information.</p> <p>Jamie, who is African American, worked successfully for “Shred 4 You” for five years before the company changed ownership. Jamie applies for his old job, and “We Shred” reviews Jamie’s performance appraisals, which include high marks for his reliability, trustworthiness, and honesty. However, when “We Shred” does a background check, it finds that Jamie pled guilty to misdemeanor insurance fraud five years ago, because he exaggerated the costs of several home repairs after a winter storm. “We Shred” management informs Jamie that his guilty plea is evidence of criminal conduct and that his employment will be terminated. Jamie asks management to consider his reliable and honest performance in the same job at “Shred 4 You,” but “We Shred” refuses to do so. The employer’s conclusion that Jamie’s guilty plea demonstrates that he poses an elevated risk of dishonesty is not factually based given Jamie’s history of trustworthiness in the same job. After confirming disparate impact based on race (African American), the EEOC finds reasonable cause to believe that Title VII was violated because the targeted exclusion was not job related and consistent with business necessity based on these facts.</p>	Reasonable Cause
Section VI. Federal Prohibition	Applicant	<p><b>Example 9: Exclusion Is Not Job Related and Consistent with Business Necessity.</b> Your Bank has a rule prohibiting anyone with convictions for any type of financial or fraud-related crimes within the last twenty years from working in positions with access to customer financial information, even though the federal ban is ten years for individuals who are convicted of any criminal offense involving dishonesty, breach of trust, or money laundering from serving in such positions.</p> <p>Sam, who is Latino, applies to Your Bank to work as a customer service representative. A background check reveals that Sam was convicted of a misdemeanor for misrepresenting his income on a loan application fifteen years earlier. Your Bank therefore rejects Sam, and he files a Title VII charge with the EEOC, alleging that the Bank’s policy has a disparate impact based on national origin and is not job related and consistent with business necessity. Your Bank asserts that its policy does not cause a disparate impact and that, even if it does, it is job related for the position in question because customer service representatives have regular access to financial information and depositors must have “100% confidence” that their funds are safe. However, Your Bank does not offer evidence showing that there is an elevated likelihood of committing financial crimes for someone who has been crime-free for more than ten years. After establishing that the Bank’s policy has a disparate impact based on national origin, the EEOC finds that the policy is not job related for the position in question and consistent with business necessity. The Bank’s justification for adding ten years to the federally mandated exclusion is insufficient because it is only a generalized concern about security, without proof.</p>	Reasonable Cause

Section	Status	Hypothetical from EEOC Enforcement Guidance	Outcome—Reasonable Cause / No Reasonable Cause Finding
Section VI. Federal Prohibition	Applicant	<p><b>Example 10: Consideration of Federally Imposed Occupational Restrictions.</b> John Doe applies for a position as a truck driver for Truckers USA. John’s duties will involve transporting cargo to, from, and around ports, and Truckers USA requires all of its port truck drivers to have a TWIC. The Transportation Security Administration (TSA) conducts a criminal background check and may deny the credential to applicants who have permanently disqualifying criminal offenses in their background as defined by federal law. After conducting the background check for John Doe, TSA discovers that he was convicted nine years earlier for conspiracy to use weapons of mass destruction. TSA denies John a security card because this is a permanently disqualifying criminal offense under federal law. John, who points out that he was a minor at the time of the conviction, requests a waiver by TSA because he had limited involvement and no direct knowledge of the underlying crime at the time of the offense. John explains that he helped a friend transport some chemical materials that the friend later tried to use to damage government property. TSA refuses to grant John’s waiver request because a conviction for conspiracy to use weapons of mass destruction is not subject to the TSA’s waiver procedures. Based on this denial, Truckers USA rejects John’s application for the port truck driver position. Title VII does not override Truckers USA’s policy because the policy is consistent with another federal law.</p>	No Reasonable Cause
Section VII. State Law Prohibition	Applicant	<p><b>Example 11: State Law Exclusion Is Job Related and Consistent with Business Necessity.</b> Elijah, who is African American, applies for a position as an office assistant at Pre-School, which is in a state that imposes criminal record restrictions on school employees. Pre-School, which employs twenty-five full- and part-time employees, uses all of its workers to help with the children. Pre-School performs a background check and learns that Elijah pled guilty to charges of indecent exposure two years ago. After being rejected for the position because of his conviction, Elijah files a Title VII disparate impact charge based on race to challenge Pre-School’s policy. The EEOC conducts an investigation and finds that the policy has a disparate impact and that the exclusion is job related for the position in question and consistent with business necessity because it addresses serious safety risks of employment in a position involving regular contact with children. As a result, the EEOC would not find reasonable cause to believe that discrimination occurred.</p>	No Reasonable Cause
Section VII. State Law Prohibition	Applicant	<p><b>Example 12: State Law Exclusion Is Not Consistent with Title VII.</b> County Y enforces a law that prohibits all individuals with a criminal conviction from working for it. Chris, an African American man, was convicted of felony welfare fraud fifteen years ago, and has not had subsequent contact with the criminal justice system. Chris applies to County Y for a job as an animal control officer trainee, a position that involves learning how to respond to citizen complaints and handle animals. The County rejects Chris’s application as soon as it learns that he has a felony conviction. Chris files a Title VII charge, and the EEOC investigates, finding disparate impact based on race and also that the exclusionary policy is not job related and consistent with business necessity. The County cannot justify rejecting everyone with any conviction from all jobs. Based on these facts, County Y’s law “purports to require or permit the doing of an[] act which would be an unlawful employment practice” under Title VII.</p>	Reasonable Cause

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**Atlanta, GA**  
404.233.0330

**Birmingham, AL**  
205.421.4700

**Boston, MA**  
617.378.6000

**Charlotte, NC**  
704.972.7000

**Chicago, IL**  
312.372.5520

**Cleveland, OH**  
216.696.7600

**Columbia, SC**  
803.231.2500

**Columbus, OH**  
614.463.4201

**Dallas, TX**  
214.880.8100

**Denver, CO**  
303.629.6200

**Detroit, MI\***  
313.446.6400

**Fresno, CA**  
559.244.7500

**Gulf Coast**  
251.432.2477

**Houston, TX**  
713.951.9400

**Indianapolis, IN**  
317.287.3600

**Kansas City, MO**  
816.448.3558

**Las Vegas, NV**  
702.862.8800

**Lexington, KY\***  
859.317.7970

**Long Island, NY**  
631.293.4525

**Los Angeles, CA**  
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213.443.4300

**Los Angeles, CA**  
Century City  
310.553.0308

**Memphis, TN**  
901.795.6695

**Miami, FL**  
305.400.7500

**Milwaukee, WI**  
414.291.5536

**Minneapolis, MN**  
612.630.1000

**Morgantown, WV**  
304.291.3004

**Nashville, TN**  
615.383.3033

**New Haven, CT**  
203.974.8700

**New York, NY**  
212.583.9600

**Newark, NJ**  
973.848.4700

**Northern Virginia**  
703.442.8425

**Northwest Arkansas**  
479.582.6100

**Orange County, CA**  
949.705.3000

**Orlando, FL**  
407.393.2900

**Overland Park, KS**  
913.814.3888

**Philadelphia, PA**  
267.402.3000

**Phoenix, AZ**  
602.474.3600

**Pittsburgh, PA**  
412.201.7600

**Portland, OR**  
503.221.0309

**Providence, RI**  
401.824.2500

**Reno, NV**  
775.348.4888

**Rochester, NY**  
585.203.3400

**Sacramento, CA**  
916.830.7200

**San Diego, CA**  
619.232.0441

**San Francisco, CA**  
415.433.1940

**San Jose, CA**  
408.998.4150

**Santa Maria, CA**  
805.934.5770

**Seattle, WA**  
206.623.3300

**St. Louis, MO**  
314.659.2000

**Walnut Creek, CA**  
925.932.2468

**Washington, D.C.**  
202.842.3400

## INTERNATIONAL

**Caracas, Venezuela**  
58.212.610.5450

**Mexico City, Mexico**  
52.55.4738.4258

**Monterrey, Mexico**  
52.81.8851.1200

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