



## To Screen or Not to Screen: Navigating the Muddy Waters Of the EEOC's Criminal Background Check Guidance

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Since its issuance in 2012, the United States Equal Employment Opportunity Commission's ("EEOC" or "Commission") guidance on the use of criminal records in hiring has been a source of confusion and criticism from employers and the legal community alike. In 2013, the attorneys general of nine states sent a letter to the Commission challenging the EEOC guidance and urging it to withdraw two lawsuits it had initiated enforcing its stance against two employers' use of bright-line criminal background checks in the hiring process. In direct response to the attorneys generals' challenge, the Commission recently issued additional informal guidance providing further clarification of what it views as an employer's legal obligation when using criminal history information to make hiring decisions. In light of the EEOC's increased enforcement of its guidelines in recent years, it is important for employers to have a solid understanding of what the EEOC requires and how to ensure their hiring policies comply with those requirements. Employers should additionally make sure they are aware of any local laws that limit or otherwise restrict the use of criminal background checks in hiring, such as Seattle's Job Assistance Ordinance.

**Title VII and the EEOC Guidance:** Title VII of the Civil Rights Act of 1964, one of the many laws enforced by the EEOC, prohibits employment discrimination based, among other things, on race, color, religion, sex, and national origin. The EEOC guidance addresses the disparate impact theory of liability, which is one way an employer's conduct can violate Title VII. Under that theory, an employer's facially neutral policy or practice may result in liability for employment discrimination if it disproportionately harms a class of individuals protected under Title VII. An employer may defend against such a claim by showing that the policy or practice in question is job-related and consistent with business necessity.

In its guidance, the EEOC explains that, because statistics illustrate that certain minority groups are arrested and incarcerated in numbers disproportionate to their representation in the general population, an employer's use of criminal background checks in the hiring process may disparately affect members of certain protected classes of applicants. As such, the Commission has taken the position that bright-line policies that exclude all applicants arrested for or convicted of nearly any crime will rarely be upheld as job-related and consistent with business needs. Instead, employers should aim for targeted policies that exclude applicants only for criminal conduct that specifically relates to the position in question.

**The EEOC's "Two Step" Process:** The EEOC has recently clarified that its guidance "encourages a two-step process" for the use of criminal background checks in the hiring process. As a first step, the guidance calls for employers to use a "targeted" screen of criminal records, which considers what the EEOC refers to as the "three *Green* factors," as identified in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977), namely: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct and/or completion of the sentence; and (3) the nature of the job held or sought.

In the next step, the guidance "encourages employers to provide opportunities for individualized assessment for those people who are screened out" to demonstrate whether an employer's criminal conduct exclusion is job-related and consistent with business necessity. According to the EEOC, an individualized assessment requires that an employer: (1) inform the individual that s/he may be excluded because of past criminal conduct; (2) provide an opportunity to the individual to demonstrate that the exclusion does not properly apply to him/her; and (3) consider whether the individual's additional information shows that the policy as applied is not job-related and consistent with business necessity.

**Targeted Screening:** The *Green* factors described above should be used as a guide for employers to develop targeted policies that exclude individuals from employment only from a particular position for specified criminal conduct within a defined period of time, according to the EEOC. For example, the Commission considers a bright-line screening policy that disqualifies any applicant with a conviction for *any* crime other than a minor traffic violation to be inconsistent with the *Green* factors. Similarly, screening policies that exclude every applicant ever convicted of a violent crime are unlikely to be upheld as job-related and consistent with business necessity. The use of a carefully-tailored policy is step one in ensuring that employment decisions based on criminal conduct are job-related and consistent with business needs.

**Individualized Assessment:** Under the EEOC's recently-issued information guidance, individualized assessments provide a way to ensure that applicants are not mistakenly screened out based on incorrect, incomplete or irrelevant information. Individual assessments should include notice to applicants who have been screened out along with an opportunity to demonstrate that the exclusion should not apply to them under their particular situation. Although the EEOC has noted that individual assessments are not required and are merely a suggested safeguard intended to help employers avoid liability, the implication is that employers who skip that step are at greater risk for violating Title VII, at least where the EEOC is concerned.

**Seattle's Criminal Background Check Ordinance:** Seattle's Job Assistance Ordinance—which applies to positions performed at least 50 percent of the time in the City of Seattle—prohibits employers from advertising a position or implementing a policy that categorically excludes all job applicants or employees with criminal convictions or arrests (with the exception of positions with unsupervised access to children, developmentally disabled persons or vulnerable adults or to government employers). It additionally prohibits employers from conducting background checks on job applicants prior to the initial screening of the applicants. Employers may inquire about conduct related to an employee's arrest record but may not take employment action based solely on the arrest record absent a legitimate business reason. Similarly, employers may not take adverse action based solely upon an individual's criminal conviction or pending criminal charge unless a legitimate business reason exists. In short, the Ordinance imposes processes and considerations similar to those identified in the EEOC guidance.

**Employer Take Away:** One thing is abundantly clear from the EEOC guidance: bright-line policies barring any applicant with a criminal history from any employment position will certainly be viewed as a Title VII violation. Targeted screening, in contrast, is permissible and should inquire only as to criminal history information that is relevant to the particular job. To ensure compliance with EEOC requirements, employers should permit applicants who are otherwise qualified but have been screened out due to targeted criminal history screening a reasonable opportunity to provide

additional relevant information. Where an applicant is still denied employment after this individualized assessment, reasons for the hiring decision should be documented and reflective of why the decision was necessary to support the employer's legitimate business needs. Employers with employees performing at least 50 percent of their job duties in the City of Seattle must additionally ensure compliance with local Seattle law, which imposes additional restrictions on the use of criminal backgrounds checks.

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