



JONES DAY  
**COMMENTARY**

## EEOC ISSUES NEW GUIDANCE ON THE USE OF CRIMINAL BACKGROUND CHECKS BY EMPLOYERS

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (“EEOC”) approved new enforcement guidance related to the use of arrest and conviction records by employers. This guidance supersedes all prior guidance by the EEOC on the subject and adds new complexities and considerations for employers conducting criminal background checks on job applicants.

### BACKGROUND

Federal law does not specifically prohibit employers from accessing or using an applicant’s criminal history during the hiring process. However, for decades, the EEOC has stated that Title VII of the Civil Rights Act of 1964 (“Title VII”) limits the consideration of criminal background information to the extent that such consideration has a discriminatory effect, or disparate impact, on protected classes, including African Americans, Hispanics, and men.

According to the EEOC’s 1987 guidance, employers were prohibited from applying blanket no-hire rules against individuals with criminal records. Instead, conviction information could be considered by the employer only if it was justified by business necessity based on the consideration of three factors: (1) the nature and gravity of the offense or offenses; (2) the time that passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought (the three factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977) and referred to as the “Green Factors”).

Further, the EEOC imposed additional restrictions on the use of arrest information because, unlike convictions, the EEOC did not consider arrests alone to be reliable evidence that an individual engaged in unlawful conduct. Therefore, in order to establish a business necessity to rely on arrest records, an employer had to not only consider the three factors listed above, but also conduct an evaluation of

whether the applicant engaged in the misconduct alleged in the arrest record.

In recent years, the EEOC increased its focus on employer use of criminal history information. In July 2011, the full Commission held a public meeting to examine “employment barriers faced by individuals with arrest and conviction records.” During the meeting, the EEOC Chair Jacqueline Berrien stated that the use of criminal records in hiring decisions is a “long-standing concern” of the EEOC. She further noted that the EEOC was considering amending or revising its guidance on the issue because “when reentry fails, public safety, our economy, the future of families, and the community as a whole are placed at risk.”

## NEW EEOC GUIDANCE

On April 25, 2012, the Commission voted four to one to enact a new enforcement guidance on the use of criminal information by employers. While the EEOC’s new guidance is not binding on the courts, the guidance reflects the approach the Commission will be taking in investigating and/or deciding whether to litigate the allegations of a charge.

The new guidance focuses primarily on disparate impact claims. Under the new guidance, the EEOC presumes that employer use of criminal history information creates a disparate impact under Title VII, given national data indicating that African Americans and Hispanics are arrested and convicted at a higher rate than their representation in the population. Therefore, the primary focus of the EEOC’s new guidance is on the employer’s burden of proving that its use of criminal background information is job related and consistent with business necessity. This new guidance is not simply a reiteration of the EEOC’s prior policy. Instead, it imposes additional duties on employers using criminal convictions in the hiring process.

Indeed, the new guidance sets out two methods for employers to establish that the use of criminal background information in hiring is “job related and consistent with business necessity.” Both approaches are burdensome and costly to employers. First, employers can formally validate the

relationship between the criminal conduct and the duties of the particular position at issue using the EEOC’s Uniform Guidelines on Employee Selection Procedures. However, as the EEOC itself recognized, “social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications, and thereby provide a framework for validating some employment exclusions ... are rare at the time of this drafting.” Therefore, at least at this point, it would be very difficult to sufficiently validate the use of criminal background information to satisfy the EEOC’s new guidance.

Second, assuming the employer is unable to validate the relationship between the criminal conduct and a specific job, it can use targeted exclusions that are guided by the *Green Factors*. According to the EEOC, targeted exclusions are those “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.”

However, even if the employer uses the “targeted screen” approach to establish job relatedness and business necessity, the EEOC suggests that it should also conduct an individualized assessment of each person screened out by his or her criminal background information. As an example of this individualized assessment, the EEOC states that applicants could be given the opportunity to explain why he or she should not be denied a position due to the criminal information obtained by the employer. Further, the new guidance specifies the following factors that employers should assess when making the individualized inquiry into an individual with a criminal history:

- 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.

This targeted screen approach likely would be burdensome to employers, particularly in light of the ever-expanding use of online applications. Per the new guidance, employers would be ill-advised to apply broad criminal history exclusions across all positions. Instead, employers would be required to tailor any screen to the particular job at issue. Moreover, employers would arguably have to engage in a time-consuming individualized inquiry of every applicant excluded due to criminal history.

Furthermore, even if an employer is able to establish job relatedness and business necessity by one of the two approaches adopted by the EEOC, that is not the end of the analysis. The new guidance explains that a plaintiff can still prevail in a disparate impact claim against the employer if he or she is able to show that the employer refused to adopt a less discriminatory “alternative employment practice” that “serves the employer’s legitimate goals as effectively as the challenged practice.” However, the new guidance does not offer any explanation about “alternative employment practices” in the context of criminal background checks.

With respect to arrest records, the EEOC noted that such records alone should not form the basis of an employment decision. However, the employer may make employment decisions based on an individual’s underlying conduct associated with the arrest. Although the guidance does not specifically address whether employers should engage in an independent inquiry into the conduct associated with arrest, such an inquiry is contemplated in the examples provided by the EEOC and was required by previous EEOC guidance.

Finally, the new guidance recognizes that some employers are subject to federal statutory and/or regulatory requirements that prohibit them from hiring individuals with criminal records in certain positions. The EEOC indicated that their new guidance does not preempt such other federal

guidelines, but employers may be subject to a claim under Title VII if they scrutinize individuals to a higher degree than required under applicable federal requirements.

## RECOMMENDATIONS

Some private employers may be using criminal background checks in their hiring process in a manner inconsistent with the EEOC’s guidance or applicable case law in this area. Moreover, the new guidance might reflect a modified and more aggressive approach by the EEOC in disparate impact claims in general. Specifically, the EEOC’s unprecedented step of requiring either validation or a “targeted screen” establishing a clear link between the employer’s hiring criteria and the requirements of the specific job at issue imposes cumbersome burdens on employers that ignore the realities of the modern hiring process.

## LAWYER CONTACTS

For further information, please contact your principal firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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