**USE OF CRIMINAL HISTORY RECORDS IN THE HIRING PROCESS:**

**The EEOC’s Updated Guidance, Prior Guidance and Conflicting Maze of Federal and State Laws, Guidelines, Regulations and Case Developments**

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# NATIONAL EEO CONFERENCE

**ABA LABOR AND EMPLOYMENT LAW SECTION EEO COMMITTEE**

**SAVANNAH, GEORGIA APRIL 5, 2013**

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# INTRODUCTION[1](#_bookmark0)

On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) 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. On November 19, 2012, in its annual report on EEOC developments, the EEOC also announced a $450,000 settlement involving a charging party and a class of 81 African-Americans who, like the charging party, allegedly were denied employment due to the employer's blanket "no felony" conviction record policy.[2](#_bookmark1)

As discussed below, in *EEOC v Freeman*, the EEOC is now involved in a pivotal lawsuit alleging that an employer engaged in a pattern or practice of unlawful discrimination by refusing to hire a class of African American and male job applicants across the United States based, in relevant part, on various types of criminal charges or convictions. According to the EEOC, this practice had an unlawful discriminatory impact because of race and sex, and was neither job-related nor justified by business necessity.[3](#_bookmark2) Following contentious litigation between the parties, a summary judgment motion seeking to have the EEOC’s lawsuit dismissed is now pending before a Federal District Court.[4](#_bookmark3)

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

1 This paper is based in large part on a 2012 Littler Report, *Criminal Background Checks: Evolution of the EEOC's Updated Guidance and Implications for the Employer Community,* by Barry Hartstein, Rod Fliegel, Jennifer Mora and Marcy McGovern, available at <http://www.littler.com/publication-press/publication/criminal-background-checks-evolution-eeocs-updated-guidance-and-> implic

2 *See* Fiscal Year 2012 Performance and Accountability Report (Nov. 19, 2012), *available* at <http://www.eeoc.gov/eeoc/plan/2012par_performance.cfm>

3 See EEOC Press Release (October 1, 2009) at <http://www.eeoc.gov/eeoc/newsroom/release/10-1-09b.cfm>

4 *See Equal Employment Opportunity Commission v Freeman*, Case No. 8:09-cv-02573-RWT (D. Md)

manufacturers. A flurry of new EEOC charges and similarly broad investigations by the Commission is virtually certain in the next 12 to 24 months, regardless of the outcome in the *Freeman* litigation. This result is expected based on the EEOC’s Strategic Enforcement Plan, which refers to “Eliminating Systemic Barriers in Recruitment and Hiring,” as one of the EEOC’s “National Priorities” (e.g. “use of screening tools,” “background screens”).[5](#_bookmark4) These developments underscore the importance of employers continuing to closely monitor case developments involving consideration of criminal records in the hiring process 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, was intended to “update and consolidate” all of the Commission’s prior policy statements about the use of criminal records and “supersede the Commission’s previous policy statements on this issue.”[6](#_bookmark5) Further, according to the EEOC, the Updated Guidance “builds on longstanding court decisions and guidance that were issued over twenty years ago.”[7](#_bookmark6)

While recent litigation and the Updated Guidance has brought the issue front and center, the EEOC long ago raised 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”). So, too, since the EEOC’s initial guidance in 1987, the EEOC has expressed its view 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

*5 See* Strategic Enforcement Plan, approved by the EEOC on December 17, 2012, available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>

6 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)

7 *Id.* at Sections I and II.

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*, 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.”[8](#_bookmark7)

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 addressed both disparate treatment and disparate impact claims. It also reviewed the EEOC’s approach regarding employer policies involving the use of both arrest and conviction records.

As discussed in this paper, 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.”[9](#_bookmark8)

8 479 F.3d 232, 243-44 (3d Cir. 2007).

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 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).”

Unfortunately, the Updated Guidance continues to leave employers in a quandary concerning what steps must be taken to ensure compliance, from an EEO perspective, when applicants are excluded from employment based on a criminal conviction record. The Updated Guidance continues to be subject to strongly divided views as recently witnessed at a recent U.S. Commission on Civil Rights hearing on the topic, which was held on December 2012.[10](#_bookmark9) As referenced above, in *EEOC v Freeman*, [11](#_bookmark10) one federal district court also may soon decide what burden is placed on the EEOC in seeking to pursue claims of race discrimination and/or discrimination against males based on a disparate impact theory alleging a violation of Title VII.

Since the Updated Guidance only became effective in April 2012, any employer challenged by the EEOC based on the use of criminal history records needs to understand both the Updated Guidance and prior guidance previously in effect. Thus, this paper 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.

While the primary focus of this paper is EEO-related issues, employers cannot address the issue of criminal history in a vacuum. Employers need to balance any policy with safeguarding employees, customers and/or third parties entering their premises, aside from safeguarding their property, and cannot ignore the potential of negligent hiring claims. Adding to the maze is a hodgepodge of state laws, some of which bar employers from hiring individuals with criminal history records. On the other hand, any employer with operations across the

U.S. also must closely monitor various state laws that may restrict certain inquiries about criminal history and/or restrict the use of criminal history in the hiring process, including new legislation that continues to be added to mix at the state level.

1. *See* December 7, 2012 reference to hearing on criminal background checks at [http://www.usccr.gov/.](http://www.usccr.gov/) As explained in its press release on the hearing, “The Commission initiated this investigation to determine whether the new EEOC Guidance policy or other prohibitions or limitations on the use of criminal background checks results in lower job opportunities and reduced employment overall among minorities, including nonoffenders. Employers use criminal history checks to help ensure a safe environment for customers and employees, reduce legal liability for negligent hiring, reduce or prevent theft, embezzlement or other criminal activity, comply with state laws requiring background checks, and assess overall applicant trustworthiness. From the EEOC’s point of view, the increased use of criminal background checks may indicate possible disparate impact discrimination under Title VII of the Civil Rights Act.” The transcript from the hearing is not yet available on the website for the U.S. Commission on Civil Rights.

11 *Equal Employment Opportunity Commission v Freeman*, Case No. 8:09-cv-02573-RWT (D. Md). It should be noted that the EEOC dropped the portion of the lawsuit alleging discrimination against Hispanics based on the apparent inability to support its disparate impact claim against the employer.

In short, employers need 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 history records and related inquiries based on the specifics of their business and industry.

# USE OF CRIMINAL RECORD CHECKS IN EMPLOYMENT

# Use of Criminal Record Checks By Employers

Tens of millions of criminal record checks are conducted annually.[12](#_bookmark11) 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:[13](#_bookmark12)

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.[14](#_bookmark13) 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.

12 *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-](http://www.reentry.net/library/item.93793-Report%20of%20the%20National%20Task%20Force%20on%20the%20Commercial%20Sale%20of%20Criminal) [Report%20of%20the%20National%20Task%20Force%20on%20the%20Commercial%20Sale%20of%20Criminal.](http://www.reentry.net/library/item.93793-Report%20of%20the%20National%20Task%20Force%20on%20the%20Commercial%20Sale%20of%20Criminal)

13 *Id.* at 1.

14 *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.

A 2010 survey conducted by the Society for Human Resource Management (SHRM) indicated that criminal record checks are conducted for a number of reasons:[15](#_bookmark14)

* + - To ensure a safe work environment for employees (61%);[16](#_bookmark15)
    - 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;
    - 19% conducted criminal background checks for selected job candidates; and
    - 7% did not conduct criminal background checks for any of its candidates.[17](#_bookmark16)

1. 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.
2. 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.

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

17 *Id.* at Slide 3.

 Other (15%).[18](#_bookmark17)

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.

# 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).[19](#_bookmark18) 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 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.[20](#_bookmark19)

In the Updated Guidance, the EEOC notes that arrest and incarceration rates are particularly high for African American and Hispanic men.[21](#_bookmark20) 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.”[22](#_bookmark21)

18 *Id*. at Slide 4.

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

20 *Id.*

21 *Id.* at Section II.

22 *Id*. at Section III.A.

# THE EEOC’S APRIL 2012 UPDATED GUIDANCE ON CRIMINAL RECORDS

# 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.”[23](#_bookmark22) 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.[24](#_bookmark23)

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.[25](#_bookmark24) 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

23 *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) Previously identified and hereafter cited as “EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section xx (Apr. 25, 2012).” *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.

24 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). The transcript of the April 25, 2012 meeting in which the Updated Guidance was approved is available at [http://www.eeoc.gov/eeoc/meetings/4-25-12/transcript.cfm.](http://www.eeoc.gov/eeoc/meetings/4-25-12/transcript.cfm) Closed-captioned video of the meeting also is available via the EEOC’s website, [http://www.eeoc.gov/eeoc/meetings/4-25-12/video.cfm.](http://www.eeoc.gov/eeoc/meetings/4-25-12/video.cfm)

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

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.[26](#_bookmark25)

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,” [27](#_bookmark26) 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.”[28](#_bookmark27)

# 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 record.[29](#_bookmark28) 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.”[30](#_bookmark29) The EEOC provides a laundry list of evidence that it may look at in determining whether discriminatory conduct has occurred, including:
  + Biased statements;

26 *Id.* at Section VIII.

27 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 the *Green* factors is discussed in this paper at Section III.C.2.c.

28 *See* EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.B.4 (Apr. 25, 2012) (emphasis added).

29 *See id.* at Section IV.

30 *Id*.

* 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);[31](#_bookmark30) and
* Statistical evidence, which may help to determine if the employer counts criminal record more heavily against members of a protected group.[32](#_bookmark31)

# 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.”[33](#_bookmark32)

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.[34](#_bookmark33) 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.”[35](#_bookmark34)

31 However, the EEOC reportedly has not yet relied on testers in dealing with criminal records.

32 *See* EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section IV (Apr. 25, 2012).

33 *Id.* at Section V.

34 *Id*. at Section V.A.

35 *Id.* at Sections V.A.1 and V.A.2 and V.C.

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).

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.[36](#_bookmark35)

Similar to the 1987 guidance on statistics,[37](#_bookmark36) 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.”[38](#_bookmark37)

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

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

1. *See* EEOC POLICY STATEMENT ON THE USE OF STATISTICS INVOLVING CONVICTION RECORDS (July 29, 1987), *available at*

[http://www.eeoc.gov/policy/docs/convict2.html.](http://www.eeoc.gov/policy/docs/convict2.html)

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

discriminatory because the focus is the specific employment practiced in issue[39](#_bookmark38) 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.[40](#_bookmark39) 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.

1. Establishing Policy is Job Related and Consistent With Business Necessity
   1. Arrests

The EEOC’s position on arrests has not substantially changed since its 1990 guidance.[41](#_bookmark40) In short, “an exclusion based on an arrest, in itself, is not job related and consistent with business necessity.”[42](#_bookmark41)

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.”[43](#_bookmark42) Thus, an employer can conduct an independent investigation and elect to 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

39 *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.

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

41 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)

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

43 *Id.*

likelihood that the applicant actually engaged in the alleged criminal conduct, but this obligation is implied by “Example 4” of the Updated Guidance.[44](#_bookmark43)

* 1. 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.”[45](#_bookmark44) 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.[46](#_bookmark45)

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.”[47](#_bookmark46) 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:”[48](#_bookmark47)

* 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; [49](#_bookmark48) or

44 *Id*.

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

46 *Id*.

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

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

49 *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.

* 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*”[50](#_bookmark49) (*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.[51](#_bookmark50)

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).

* 1. 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.[52](#_bookmark51) 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:

50 549 F.2d 1158 (8th Cir. 1977).

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

52 *See id.* at Section V.B.6.

* 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.

1. 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.

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

1. 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.”[53](#_bookmark52) 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.”[54](#_bookmark53) 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.”[55](#_bookmark54) 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.”[56](#_bookmark55) In footnote 127, the Commission cites the studies of various

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

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

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

56 *Id.*

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, 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.[57](#_bookmark56)

1. *See* EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section V.A.1 (Apr. 25, 2012).
2. 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 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.[58](#_bookmark57)

# 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.”[59](#_bookmark58)

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

59 *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.[60](#_bookmark59)

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.[61](#_bookmark60)

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.”[62](#_bookmark61) The guidance otherwise highlights exceptions related to criminal record bars based on federal security clearance.[63](#_bookmark62)

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.[64](#_bookmark63)

60 *Id*.

61 *See id*. at Section VI.B. 62 *See id*. at Section VI.C. 63 *See id.* at Section VI.D. 64 *See id.* at Section VI.E.

1. 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.”[65](#_bookmark64) 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.

# 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.[66](#_bookmark65)

Overall, employers are urged by the EEOC to develop a “narrowly tailored written policy and procedures for screening for criminal records.”[67](#_bookmark66) 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.

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

66 *See id.* at Section VIII.

67 *Id.*

* + - Train managers, hiring officials, and decision makers 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 decision makers on how to implement the policy and procedures consistent with Title VII.

*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.

# THE ROAD TO THE UPDATED GUIDANCE – A REVIEW OF THE EEOC’S PRIOR POLICY STATEMENTS ON CRIMINAL RECORDS, NOTEWORTHY 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.”[68](#_bookmark67) 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 also 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*,[69](#_bookmark68) is briefly summarized below. Other case law not discussed in the Updated Guidance, including case law relied on in the initial guidance requires mention, particularly because it may become particularly relevant as the courts grapple with the appropriate legal standard to be applied in reviewing an employer’s policy dealing with the use of criminal records in the hiring process.

# 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:[70](#_bookmark69)

* In 1987, the Commission issued a policy statement on the issue of conviction records under Title VII[71](#_bookmark70) and a statement on the use of statistics and charges involving the exclusion of individuals with conviction records from employment.[72](#_bookmark71)

68 *Id*. at Section II.

69 479 F.3d 232 (3rd Cir. 2007).

70 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).

1. *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.](http://www.eeoc.gov/policy/docs/convict1.html) Hereafter cited as “EEOC POLICY STATEMENT ON CONVICTION RECORDS UNDER TITLE VII (Feb. 4, 1987).”

1. *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.](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).”
   * In 1990, the Commission issued guidance on the consideration of arrest records in employment decisions under Title VII.[73](#_bookmark72)
   * 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.[74](#_bookmark73)
2. EEOC Policy Statement on Conviction Records (February 4, 1987)[75](#_bookmark74)

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.”[76](#_bookmark75) Thus, such a policy or practice was viewed as unlawful under Title VII in the absence of a “justifying business necessity.”[77](#_bookmark76)

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;

1. 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).”

74 EEOC COMPLIANCE MANUAL, Section 15 (2006), *available at* [http://www.eeoc.gov/policy/docs/race-color.html#VIB2conviction.](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.

75 *See* EEOC POLICY STATEMENT ON CONVICTION RECORDS UNDER TITLE VII (Feb. 4, 1987).

76 *Id.*

77 *Id.*

* The time that has passed since the conviction and/or completion of the sentence; and
* The nature of the job held or sought.[78](#_bookmark77)

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.”[79](#_bookmark78) The guidance relied, in principal part, on the Eighth Circuit’s decision in *Green v. Missouri Pacific Railroad Company*,[80](#_bookmark79) as the “leading Title VII case on the issue of conviction records,” which took exception to any blanket exclusions based on criminal convictions.[81](#_bookmark80)

1. 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.”[82](#_bookmark81) 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.”[83](#_bookmark82) 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

78 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.

79 EEOC POLICY STATEMENT ON CONVICTION RECORDS UNDER TITLE VII (Feb. 4, 1987).

80 523 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).

1. EEOC POLICY STATEMENT ON CONVICTION RECORDS UNDER TITLE VII (Feb. 4, 1987).
2. *See* EEOC POLICY STATEMENT ON THE USE OF STATISTICS INVOLVING CONVICTION RECORDS (July 29, 1987).

narrowly drawn statistics showing either that Blacks and Hispanics are not convicted at a disproportionately greater rate” or (2) ”there is no adverse impact in its own hiring process resulting from the convictions policy.”[84](#_bookmark83)

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.”[85](#_bookmark84) 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.[86](#_bookmark85)

1. EEOC Guidance Dealing with Arrest Records (September 7, 1990)[87](#_bookmark86)

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.[88](#_bookmark87)

84 *Id.*

85 *Id.*

86 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).

87 EEOC POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS (Sept. 7, 1990).

88 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).

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).[89](#_bookmark88) 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*,[90](#_bookmark89) 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.[91](#_bookmark90) The guidance pointed to selected cases which supported disqualification for employment when dealing with convictions, 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.”[92](#_bookmark91) Specific examples were provided to illustrate the process by which arrest record charges should be considered.

1. EEOC Compliance Manual Chapter on Race and Color (April 19, 2006)[93](#_bookmark92)

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:

89 EEOC POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS (Sept. 7, 1990).

90 *See* 523 F.2d 1290 (8th Cir. 1975) and 549 F.2d 1158, 1160 (8th Cir. 1977).

91 EEOC POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS (Sept. 7, 1990).

92 *Id.*

93 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.

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.[94](#_bookmark93)

The discussion of arrest and conviction records included detailed footnotes.[95](#_bookmark94) Particularly noteworthy was a citation to a 2003 study referring to disparate treatment of African Americans versus Whites in call-back rates for those job applicants with and without criminal records.[96](#_bookmark95) In addressing adverse impact, the Compliance Manual cited with approval two cases: *Green v. Missouri Pacific Railroad Company*[97](#_bookmark96) and *Caston v. Methodist Medical Center of Illinois.*[98](#_bookmark97)

# Other Developments Highlighted By Commission 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.”[99](#_bookmark98)

* 1. **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)*.[100](#_bookmark99)

94 *Id*. at Section 15, VI.B.2.

95 *See id.* at Section 15 VI.B.2 nn. 90-102.

96 *Id.* at Section 15 VI.B.2 n.96.

97 523 F.2d 1290, 1293-99 (8th Cir. 1975) (applying disparate impact principles to employer’s “no convictions” hiring policy).

98 215 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).

99 *S*ee EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section II n. 16 (Apr. 25, 2012).

100 479 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).

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.[101](#_bookmark100)

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*,[102](#_bookmark101) 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

101 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-](http://www.eeoc.gov/eeoc/meetings/11-20-08/transcript.cfm#announc) [08/transcript.cfm#announc.](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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#klein)

102 401 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, Section V.B.1 (Apr. 25, 2012).

empirical proof that challenged hiring criteria accurately predicted job performance.”[103](#_bookmark102) The appeals court acknowledged that the Supreme Court “has never dealt directly with criminal record policies.”[104](#_bookmark103) 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.’”[105](#_bookmark104) 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.[106](#_bookmark105)

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.[107](#_bookmark106) 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.”[108](#_bookmark107) 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

103 *El v. SEPTA,* 479 F.3d at 239.

104 *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.

105 *El v. SEPTA*, 479 F.3d at 242.

106 *Id.* at 242-43.

107 *Id*. at 243.

108 *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).

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.”[109](#_bookmark108) 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 in line with the *Green* case, but the policy document itself does not substantively analyze the statute.[110](#_bookmark109)

109 *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.

110 *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:

1. *Chevron Deference*. *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).
2. *Auer Deference*. *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).

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.

# Other Noteworthy Case Developments Worth Mention

While not discussed in the Updated Guidance, prior case law relied on in the initial 1987 guidance should not be ignored because a pivotal issue before the courts may be the required burden on an employer to support its policy in the event of challenge by the EEOC or others. As discussed above, the Appeals Court in the *El* decision issued somewhat contradictory holdings regarding the burden placed on an employer to justify its policy, but did acknowledge that the Supreme Court “has never dealt directly with criminal history policies.”[111](#_bookmark110) At least three cases should be noted, which suggest that an employer’s good faith in establishing a “reasonable” criminal history policy deserves consideration. As an example, the 1987 guidance relied, in relevant part, on the following cases:[112](#_bookmark111)

* + - *Carter v Gallagher*, 452 F.2d 315 (8th Cir.) dealt with disqualification for a fire fighter job for a prior felony or misdemeanor conviction and the district court decree limited disqualification to 5 years after a felony or incarceration and 2 years for a misdemeanor. On appeal, while the parties agreed that such convictions should not “per se” constitute absolute bars to employment, the court concluded, “We would not consider any rule giving fair consideration to the bearing of the conviction upon applicant’s fitness for the firefighter job to be inappropriate.”
    - *Richardson v Hotel Corp of America*, 332 F. Supp. 519 (E.D. La. 1971)*,* aff'd mem.*,* 468 F.2d 951 (5th Cir. 1972), dealt with the issue whether a hotel may lawfully discharge a bellman because, previous to his employment at the hotel, he had been convicted of theft of receiving stolen goods. The court held, “It is reasonable for management of a hotel to require that persons employed in positions where they have access to valuable property of others have a record reasonably free from convictions for serious property related crimes.” The court noted that the employer had an exemplary record with respect to affording equal opportunity in jobs at all levels who are members of minority groups and concluded, “While not decisive, these factors suggest that the requirement was not intentionally invidious.” “…the plaintiff has failed to show

111 *El v SEPTA*, 479 F. 3d at 239.

112 See EEOC 1987 Guidance at footnote 9.

discrimination because of race, and the defendant has established that its criteria were reasonable and related to job necessities.”

* + - *Craig v. Department of Health, Education, and Welfare,* 508 F. Supp. 1055 (W.D. Mo. 1981) involved a factual situation in which the employee was given the choice to resign or to be terminated by her employer, after a newspaper identified her as a criminal who pleaded guilty to possession of a stolen government check. In entering judgment in favor of the employer, in relevant part, on a disparate impact theory, the court held, “While there may have been slippage from ideal practices, it would appear the agency attempts to follow legal principles which *Green* cites as ‘instructive’…. ‘ ‘There is no doubt that (an employer) could logically prohibit and refuse employment in certain positions where the felony conviction would directly reflect on the felon's qualifications for the job (e.g. conviction of embezzlement and a job requiring the handling of large sums of money).” ‘

The above approach is consistent with the view of other recent commentators who submit that in establishing hiring standards based on criminal history, such policies should be upheld where “*reasonably necessary to achieve an important business objective*:”

District courts have taken a deferential stance in a different direction and, in effect, deferred to employers’ risk assessments in their effort to balance non-discriminatory policies with other obligations they bear under the law. In the absence of any legislative history from the Civil Rights Act of 1991 on the business necessity defense, the district court in Rhode Island applied “consistent with business necessity” in a different setting and described it this way:

. . . the term “consistent with business necessity” requires something less than a showing that the challenged practice is essential to the conduct of the employer’s business but something more than a showing that it serves a legitimate business purpose. What it appears to require is proof that the challenged practice is *reasonably necessary to achieve an important business objective*.

[*Donnelly v. R.I. Bd. of Governors for Higher Educ.*, 929 F. Supp. 583, 594 (D. R.I. 1996)](http://newsandinsight.thomsonreuters.com/linkOut.aspx?linkType=Find&amp;cite=929%20F.%20Supp.%20583) (emphasis added).[113](#_bookmark112)

113 *See EEOC guidance on criminal convictions and employer duty of care in negligence. Which prevails?,* Terence G. Connor and Kevin J. White, Hunton & Williams LLP (Oct. 10, 2012) at

# 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.

# 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.[114](#_bookmark113) 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[115](#_bookmark114) 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

[http://newsandinsight.thomsonreuters.com/Legal/Insight/2012/10\_-](http://newsandinsight.thomsonreuters.com/Legal/Insight/2012/10_-_October/EEOC_guidance_on_criminal_convictions_and_employer_duty_of_care_in_negligence___Which_prevails_/)

[\_October/EEOC\_guidance\_on\_criminal\_convictions\_and\_employer\_duty\_of\_care\_in\_negligence Which\_prevails\_/](http://newsandinsight.thomsonreuters.com/Legal/Insight/2012/10_-_October/EEOC_guidance_on_criminal_convictions_and_employer_duty_of_care_in_negligence___Which_prevails_/)

114 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/.](http://www.eeoc.gov/eeoc/meetings/11-20-08/)

115 *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/.](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.

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.[116](#_bookmark115)

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.

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/.](http://www.eeoc.gov/eeoc/meetings/11-20-08/)

* 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,[117](#_bookmark116) 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.[118](#_bookmark117) 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 résumé’s and differing only in their race and criminal

117 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).

118 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).

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 rapport with the employer. Further, employers’ general reluctance to discuss the criminal record of an applicant appears especially harmful for black ex-offenders.[119](#_bookmark118)

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:[120](#_bookmark119)

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

119 *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.](http://www.eeoc.gov/eeoc/meetings/11-20-08/pager.cfm)

120 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).

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 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….[121](#_bookmark120)

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.[122](#_bookmark121)

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

121 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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm)

122 *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.](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).[123](#_bookmark122) 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).[124](#_bookmark123)

* 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.[125](#_bookmark124)
* 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

123 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.

*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.](http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html)

125 *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.](http://www.eeoc.gov/eeoc/meetings/11-20-08/index.cfm) The Updated Guidance, as discussed *infra*, 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).

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.[126](#_bookmark125)

* 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:

… 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

126 *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.](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).

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. [127](#_bookmark126)

\* \* \*

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.[128](#_bookmark127)

# 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.”[129](#_bookmark128) 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

127 *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.](http://www.eeoc.gov/eeoc/meetings/11-20-08/transcript.cfm)

128 *Id.*

129 *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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm)

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.

\* \* \*

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.”[130](#_bookmark129)

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.[131](#_bookmark130) 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.

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.[132](#_bookmark131) 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

130 *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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm)

131 *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*.*](http://www.eeoc.gov/eeoc/meetings/7-26-11/hartstein.cfm)

132 *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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm)

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.[133](#_bookmark132) 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.[134](#_bookmark133)

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.

133 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).

134 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 ttestimony 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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/shriver.cfm)

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.”[135](#_bookmark134)

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?[136](#_bookmark135)

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.[137](#_bookmark136)

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

135 *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.](http://www.eeoc.gov/eeoc/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).

136 *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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm)

137 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).

consequences” of arrest and conviction records.[138](#_bookmark137) 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:[139](#_bookmark138)

* + 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.
  + 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.

138 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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm)

139 *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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm)

* + 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.[140](#_bookmark139)

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.[141](#_bookmark140) 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.[142](#_bookmark141)

140 *Id.*

141 *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).

142 *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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/saltzburg.cfm)

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). [143](#_bookmark142) The report examined the negative consequences based on an employer’s reliance on criminal background checks in the hiring process and recommended as follows:[144](#_bookmark143)

* + 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.
  + 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.[145](#_bookmark144)
  + 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.

143 *Id.*

144 *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](http://apps.americanbar.org/abastore/index.cfm?pid=5090115&amp;section=main&amp;fm=Product.AddToCart) (last accessed May 1, 2012).

145 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).

* + 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.[146](#_bookmark145)
  + 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.[147](#_bookmark146)

Additional testimony also was provided on the detrimental effect on African Americans based on employment bars due to criminal records:[148](#_bookmark147)

146 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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/saltzburg.cfm)

147 *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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/saltzburg.cfm)

148 *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-](http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#brooks) [11/transcript.cfm#brooks*.*](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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/cartagena.cfm)

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 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.[149](#_bookmark148)

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.”[150](#_bookmark149)

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

149 *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-](http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#brooks) [11/transcript.cfm#brooks*.*](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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/brooks.cfm)

150 *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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/brooks.cfm)

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.[151](#_bookmark150)

In addressing concerns of negligent hiring claims, speakers referred to states, such as Illinois and New Jersey in 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.[152](#_bookmark151)

151 *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-](http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#brooks) [11/transcript.cfm#brooks.](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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm)

152 *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

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.[153](#_bookmark152) The second speaker, a management representative, urged the Commission not to change the current guidance in order to avoid even greater obstacles for compliance.[154](#_bookmark153) 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.[155](#_bookmark154)

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.[156](#_bookmark155)

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.](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).

153 *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;](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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#cartagena)

154 *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;](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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#hartstein)

155 *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;](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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#klein)

156 *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.](http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm)

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

As discussed at the outset, 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 (and even male workers based on recent litigation, as referenced below).

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 amount of 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.

# 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 . . . .”[157](#_bookmark156) 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

157 *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-](http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm) [12a.cfm.](http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm)

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 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.”

The EEOC announced another less publicized settlement involving criminal history records in its fiscal year- end report for 2012 in which it described a private settlement involving an employer’s use of criminal history as follows:

A charge was settled for $450,000 to be paid to the charging party and a class of 81 African- Americans who, like the charging party, were denied employment due to the employer's blanket "no felony" conviction record policy. The settlement agreement also includes provisions in which any money not awarded to the charging party or the class will be

donated to not-for-profit organizations that do job training and placement for individuals with conviction records.[158](#_bookmark157)

During the coming year, it is anticipated that the EEOC will announce other significant settlements involving systemic investigations relating to the use of criminal history records in the hiring process as a further means to induce employers to modify their policies to conform to the EEOC’s Updated Guidance, despite the lack of clarity in various portions of the guidance concerning what the EEOC will consider to be acceptable.

# Noteworthy EEOC Litigation Involving Criminal Records[159](#_bookmark158)

1. *EEOC v. Peoplemark*

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.[160](#_bookmark159) 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 agreed to a joint motion to dismiss 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 provided a preview concerning issues of proof and discovery in litigation focusing on criminal history records.[161](#_bookmark160) The upshot is that these cases will likely involve significant amounts of data and focus on the

158 See <http://www.eeoc.gov/eeoc/plan/2012par_performance.cfm>

159 While there have been various private lawsuits involving the use of criminal history records, by employers, the discussion herein is limited to litigation filed by the EEOC.

160 *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 in 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).

161 *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-](http://www.littler.com/publication-press/publication/recent-eeoc-developments-involving-disqualification-applicants-based-c) [involving-disqualification-applicants-based-c.](http://www.littler.com/publication-press/publication/recent-eeoc-developments-involving-disqualification-applicants-based-c)

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.*

1. *EEOC v. Freeman*

One of the most significant pending cases, *EEOC v. Freeman*,[162](#_bookmark161) filed by the EEOC on November 30, 2009, alleged 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 (and male applicants) by using “criminal history” as a hiring criterion when the criminal history criterion had a disparate impact on these individuals.[163](#_bookmark162) The *Freeman* case truly provides a “roadmap” concerning the legal and factual issues to be litigated when dealing with criminal history.

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 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 alleged in the complaint that the above hiring practices had a significant disparate impact against the protected groups and were not job related or justified by business necessity. The EEOC further asserted that there were appropriate, less-discriminatory alternative selection procedures. The case initially had numerous procedural skirmishes, which focus on the applicable statute of limitations that applied to the EEOC’s allegations, and the employer significantly limited the scope of the suit based on court rulings that the claims were limited to those filed 300 days prior to the charge, and an additional ruling that limited any claims to 300 days prior to notice that the EEOC was pursuing a systemic claim involving criminal history.[164](#_bookmark163)

Thereafter, as the parties proceeded through the discovery process, one of the most noteworthy developments in *Freeman* involved the request for a Rule 30(b)(6) deposition concerning the EEOC’s own hiring practices and use of criminal records. On March 27, 2012, Freeman served the EEOC with a deposition notice asking that a

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

163 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.

164 See 8:08-cv-02573 (D. Md) (Docket Nos. 18-19 and 42-43).

designated EEOC representative appear to testify on a number of topics, such as: (1) the agency's basis for challenging an employer's use of credit history or arrest records in hiring; (2) the EEOC's policies on and justifications for restrictions against considering arrest and credit records in hiring; and (3) the EEOC's adjudicative procedures for determining the “credentialing and suitability decision making process.” The EEOC filed a motion for a protective order and asked the district court to deny Freeman's request to depose the EEOC regarding these topics.

The district court denied the EEOC’s motion.[165](#_bookmark164) Although the EEOC argued that its use of criminal records and credit histories for hiring purposes within the agency was not relevant to its lawsuit against Freeman because (1) the business necessity defense “is employer- and job-specific,” and (2) Freeman “[was] the employer in question,” the district court disagreed. According to the court, it could not, in the early stages of the litigation, evaluate the merits of Freeman's defense. Rather, relying on the Ohio district court's order in *Kaplan* requiring the EEOC to provide information about its hiring practices, the court reasoned that if the EEOC “uses hiring practices similar to those used by [Freeman], this fact may show the appropriateness of those practices, particularly because [the EEOC] is the agency fighting unfair hiring practices.”[166](#_bookmark165) The court further added that Freeman was “not required to accept [the EEOC's] position in its briefs that the two entities' practices are dissimilar . . . .” In fact, Freeman presented evidence that the parties’ hiring practices *were* comparable because they both considered similar factors, such as the “nature of the offense” committed, the “seriousness of the conduct,” and the position to be filled.

The court also rejected the EEOC's argument that allowing Freeman to depose agency officials would be duplicative because the EEOC had been deposed on similar issues in the *Kaplan* litigation. In doing so, the court noted that Freeman was not a party to that litigation and “the record does not show that the deposition in *Kaplan* covered all of the same topics that [Freeman] seeks to cover in its deposition of [the EEOC].” Finally, the court rejected the EEOC's remaining “burdensomeness” argument in support of its request for a protective order.

On August 29, 2012, the EEOC’s voluntarily dismissal of the claims involving Hispanic workers based on the apparent conclusion that the disparate impact could not be established based on the record.

165 *EEOC v. Freeman,* 2012 U.S. Dist. LEXIS 114408, \*15(D. Md. Aug. 14, 2012).

166 *EEOC v. Kaplan Higher Education Corp.*, 2012 U.S. Dist. LEXIS 54949 (N.D. Ohio Apr. 18, 2012).

On December 21, 2012, the defendant filed a motion for summary judgment (or, in the alternative, for partial summary judgment).[167](#_bookmark166) The employer’s motion is based on various grounds, including: (1) the statistics cited by the EEOC’s expert fail to support the existence or absence of disparate impact because they are based on a “highly selective, erroneous and incomplete data set and woefully inadequate statistical techniques; (2) the EEOC does not identify any specific criterion within the company’s practices that it alleges have a disparate impact, to wit, the EEOC relies solely on the cumulative effects of various elements of its criminal record (and credit) policies, rather than identifying the specific criminal offenses (e.g. theft related offenses, sex offenses, drug trafficking) relied to exclude applicants that have a disparate impact on African American or male applicants; (3) the disparate impact claim involving male applicants should be dismissed absent a showing of past discrimination by the employer against this group, and there is no evidence of such past discrimination by the employer.

The EEOC filed its response in opposition to the motion for summary judgment (or alternatively, partial summary judgment) on February 6, 2013.[168](#_bookmark167) The EEOC focuses on a broad range of arguments in challenging the employer’s motion, but a significant portion of its challenge is fact-driven. In principal part, the EEOC focuses on the employer’s policy and argues that certain criminal justice system occurrences (or credit history occurrences) involve “blanket disqualifying selection criteria,” and if certain predetermined standards are not met, this results in a “no-hire” decision. Based on the employer’s policy, the employer makes no efforts to reach out to candidates to obtain mitigating information. The EEOC further argues that the decisions by employers are arbitrary because the hiring managers are not trained to properly interpret the criminal (or credit history) records.

The EEOC otherwise addresses the employer’s motion and argues: (1) defendant’s criticisms of its experts are contrary to science and law, and even if accepted, they do not change the findings of statistically significant racial and gender disparate impact, and defendant has failed to offer any alternative statistical analysis showing that the alleged errors and omissions would change the results of the analysis; (2) particular employment practices that caused the racial and sex-based impact in the case were identified, and focuses on defendant’s policy “that disqualifies job applicants based on their criminal justice history (or credit history), and argues that “an individual employment practice, once identified, be broken down further into its smallest theoretically possible subcomponents…”; and (3) “Title VII ensures equal employment opportunities for all persons,

167 Id., Docket No. 114. This was preceded by a motion to exclude the expert reports, which was filed several days earlier on December 18, 2012. (Docket No. 108).

168 Id., Docket No. 126.

including White persons and men,” focusing on the express language of Title VII, legislative history that disparate impact is available to White males and alleged mischaracterization of the law by the employer.[169](#_bookmark168)

The summary judgment ruling in the *Freeman* case clearly will be significant for both the employer community and the EEOC, but regardless of the outcome, the losing party will argue that the decision is merely the decision of one district on the issue. Further, over the coming months, it is anticipated that the EEOC will be filing additional lawsuits against employers dealing with failure to hire claims focusing on criminal history records.

# PRACTICAL COMPLIANCE ISSUES DEALING WITH CRIMINAL RECORDS

While the EEOC’s Updated Guidance and ongoing case developments should be closely reviewed as part of an employer’s compliance efforts in implementing and/or modifying policies dealing with criminal records, employers also need to 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).[170](#_bookmark169) 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.[171](#_bookmark170) In two jurisdictions, Hawaii and Massachusetts, as further described below, there are restrictions and/or prohibitions in asking applicants

169 Id. The Court set a March 13, 2013 reply date for the employer to respond, which is subsequent to the date this paper has been submitted.

170 *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).

171 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/)

about criminal record information on an initial written application.[172](#_bookmark171) 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).[173](#_bookmark172) In some jurisdictions, the state laws may be more restrictive than the FCRA, and may have more generous remedy provisions.[174](#_bookmark173) 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.

# 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:[175](#_bookmark174)

* ***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 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.[176](#_bookmark175) An employer also may not

172 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).

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

174 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.

175 See Appendix B for a state-by-state review of applicable laws relating to use of criminal history records in the hiring process.

176 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.

ask for information concerning certain petty marijuana offenses after two years from the date of the conviction.[177](#_bookmark176) 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.[178](#_bookmark177) 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.[179](#_bookmark178) However, an employer may not use that information to make a hiring decision without independently investigating.[180](#_bookmark179)

* ***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.[181](#_bookmark180)

177 CAL. LAB. CODE §§ 432.7, 432.8.

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

179 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).

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

181 CONN. GEN. STAT. § 31-51i(c).

* ***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.[182](#_bookmark181)
* ***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.[183](#_bookmark182)
* ***Hawaii -*** In Hawaii, discrimination based on a conviction record is part of the state’s Fair Employment Practices law.[184](#_bookmark183) It is 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.[185](#_bookmark184)
* ***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.[186](#_bookmark185) 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

182 D.C. CODE § 2-1402.66.

183 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.

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

185 HAW. REV. STAT. § 378-2.5(b).

186 20 ILL. COMP. STAT. 2630/12.

obtaining or using other information which indicates that a person actually engaged in the conduct for which he or she was arrested.”[187](#_bookmark186)

* ***Indiana-*** Indiana House Bill 1033, which went into effect on July 1, 2012, in part: (1) prohibits certain pre-employment inquiries; (2) restricts the types of criminal history information that employers and background report providers (known as “consumer reporting agencies” or CRAs) can obtain from Indiana state court clerks; and (3) restricts the types of criminal history information that CRAs can report to employers in background reports. The new Indiana law provides that residents of Indiana with restricted or sealed criminal records may legally state on an “application for employment or any other document” that they have not been adjudicated, arrested or convicted of the offense recorded in the restricted records. In addition, covered employers will be prohibited from asking an “employee, contract employee, or applicant” about sealed and restricted criminal records. The law does not define the term “employer,” and does not specifically address what it means for applicants and employees to be able to “legally” state on documents that they do not have certain previous

criminal records.[188](#_bookmark187)

* ***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.[189](#_bookmark188) 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

187 775 ILL. COMP. STAT. 5/2-103.

188 For a detailed explanation of the new law, *see* Rod Fliegel, Jennifer Mora, and William Simmons, *Indiana Passes New Legislation Restricting Criminal History Information Reported in Background Checks*, LITTLER ASAP (June 26, 2012), <http://www.littler.com/publication-press/publication/indiana-passes-new-legislation-restricting-criminal-history-informatio>n.

189 *See* MASS. GEN. LAWS. CH. 6, §§ 167-178B. The Criminal Offender Record Information (CORI) law was completely revamped in 2010. *See* Chapter 256 of the Acts of 2010, An Act Reforming the Administrative Procedures Relative to Criminal Offender Record Information and Pre- and Post-Trial Supervised Release, *available at* [http://www.malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter256.](http://www.malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter256) 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* Christopher Kaczmarek, Carie Torrence, and Joseph Lazazzero, *Massachusetts Employers Face New Obligations When Conducting Background Checks Involving Criminal Records*, LITTLER ASAP (Mar. 9, 2012), <http://www.littler.com/publication-press/publication/massachusetts-employers-face-new-obligations-when-conducting-backgroun>d.

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.](http://www.lawlib.state.ma.us/subject/about/cori.html)

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.[190](#_bookmark189) 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.[191](#_bookmark190) 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.[192](#_bookmark191)

* ***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 obligated to disclose a sealed juvenile record or sentence. Employers shall not ask if

an applicant has had a juvenile record sealed.[193](#_bookmark192)

* ***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.[194](#_bookmark193)
* ***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

190 MASS. GEN. LAWS. CH. 6, § 172; *see also* [http://www.lawlib.state.ma.us/subject/about/cori.html.](http://www.lawlib.state.ma.us/subject/about/cori.html)

191 *Id*.

192 *Id*.

193 NEB. REV. STAT. § 43-2,108.05(5).

194 NEV. REV. STAT. § 453.3363(4).

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.[195](#_bookmark194) 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.”[196](#_bookmark195) In making such a determination, the public agency or private employer is required to consider eight separate factors:

1. 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.
2. The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
3. 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.
4. The time which has elapsed since the occurrence of the criminal offense or offenses.
5. The age of the person at the time of occurrence of the criminal offense or offenses.
6. The seriousness of the offense or offenses.
7. Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
8. 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.[197](#_bookmark196)

* ***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.

195 N.Y. EXEC. LAW § 296(15); N.Y. CORRECT. LAW § 752.

196 N.Y. CORRECT LAW. § 750(3).

197 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).

Applicants must be provided written notice that they were not hired based on their criminal record information.[198](#_bookmark197)

* ***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.[199](#_bookmark198)
* ***Wisconsin -*** Employers are prohibited from discriminating against employees or applicants on the basis of their conviction records.[200](#_bookmark199) 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.[201](#_bookmark200) 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.[202](#_bookmark201)

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;[203](#_bookmark202)

1. limitations on *when*, during the hiring process, employers may ask applicants about their criminal records;[204](#_bookmark203)

198 18 PA. CONS. STAT. § 9125.

199 WASH. ADMIN. CODE § 162-12-140.

200 WIS. STAT. §§ 111.321, 111.325.

201 WIS. STAT. § 111.321(3).

202 WIS. STAT. § 111.335(1)(c).

203 N.Y. LAB. LAW § 201-f.

204 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.](http://www.nelp.org/page/-/SCLP/2011/CityandCountyHiringInitiatives.pdf?nocdn=1)

1. limitations on *what* records employers may ask applicants about;[205](#_bookmark204) and (4) as already noted, restrictions on when employers may rely on criminal records to disqualify applicants from consideration.[206](#_bookmark205)

# 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.[207](#_bookmark206) 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.[208](#_bookmark207)

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.[209](#_bookmark208) In determining whether to grant a waiver, the FDIC will consider the following factors: (1) the conviction and

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

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

207 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).

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

209 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,](http://hirenetwork.org/FDIC.html) prepared by the National H.I.R.E. Network.

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;

1. 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.[210](#_bookmark209)

Other examples of federal restrictions are summarized below:[211](#_bookmark210)

* + 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).[212](#_bookmark211)
  + Federal law bars certain classes of felons from working in the insurance industry without receiving an insurance regulatory official’s permission.[213](#_bookmark212)
  + 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.[214](#_bookmark213)

210 *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.](http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.aspx?reg=383.51)

211 *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)

212 *See* 12 U.S.C. § 1829.

213 *See* 18 U.S.C. § 1033(c)(2).

214 *See* 29 U.S.C. §§ 504, 1111.

* + Federal law also prohibits those convicted of certain crimes from providing healthcare services for which they will receive payment from Medicare,[215](#_bookmark214) or from working for the generic drug industry.[216](#_bookmark215)
  + Federal law requires criminal history background checks for individuals who provide care for children.[217](#_bookmark216) In addition, the Federal Child Protection Act authorizes states to enact statutes concerning the facilitation 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. [218](#_bookmark217)
  + 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.[219](#_bookmark218)

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

215 42 U.S.C. § 1320a-7.

216 *See* 21 U.S.C. § 335a.

217 *See* 42 U.S.C. § 13041.

218 42 U.S.C. § 5119A.

219 *See* 49 U.S.C. §§ 44935, 44936.

be aware of some of the applicable restrictions.[220](#_bookmark219) One recent study[221](#_bookmark220) 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.[222](#_bookmark221)

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.[223](#_bookmark222)

An excellent example of legislation to assist ex-offenders reintegrate into the workforce is a recently enacted Ohio statute. The Ohio law provides protections from tort liability for negligent hiring and retention claims for

220 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/.](http://isrweb.isr.temple.edu/projects/accproject/)

221 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-](http://nationalreentryresourcecenter.org/publications/inventorying-and-reforming-state-created-employment-restrictions-based-on-criminal-records-a-policy-brief-and-guide) [employment-restrictions-based-on-criminal-records-a-policy-brief-and-guide.](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.

222 *Id.*

223 Various 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)

businesses that hire and employ rehabilitated ex-offenders. Ohio Senate Bill 337, effective September 28, 2012, contains many provisions that amend the definitions of certain crimes and affect the ability of individuals with prior criminal histories to obtain employment. For example, the bill expands opportunities for individuals to seal their criminal record histories and limits disqualifications for occupational licenses based on criminal convictions. The most important provisions of the new law for employers, however, relate to the establishment of a procedure for certain individuals to obtain a “certificate of qualification for employment,” and the corresponding limitation of tort liability for employers that hire and retain individuals who are issued such certificates.[224](#_bookmark223)

In enacting these protections for employers from tort liability for negligent hiring and retention claims, Ohio joins other states, such as Colorado, Florida, Illinois, Massachusetts, New York, and North Carolina. Employers should be mindful of the scope of these protections. It remains to be seen what protections, if any, they offer in employment-related actions other than common law tort claims, such as in sexual harassment matters.

# Negligent Hiring[225](#_bookmark224)

In the absence of immunity statutes, such as Ohio’s recent law, 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

224 *See* Rod Fliegel, William Simmons, and Inna Shelley, *Ohio Joins Handful of States that Offer Tort Liability Protections for Business that Hire and Employee Rehabilitated Ex-Offenders*, LITTLER ASAP (Aug. 10, 2012), [http://www.littler.com/publication-](http://www.littler.com/publication-press/publication/ohio-joins-handful-states-offer-tort-liability-protections-businesses-) [press/publication/ohio-joins-handful-states-offer-tort-liability-protections-businesses-.](http://www.littler.com/publication-press/publication/ohio-joins-handful-states-offer-tort-liability-protections-businesses-)

225 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-.](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.

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.[226](#_bookmark225)

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.”[227](#_bookmark226) Traditional case law has also established this rebuttable presumption of due care.[228](#_bookmark227)

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

226 *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 (1999) (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).

227 FLA. STAT. § 768.096.

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

checks in many employment settings.[229](#_bookmark228) 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.[230](#_bookmark229)

# 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.[231](#_bookmark230) 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

229 *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”).

230 *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).

231 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

* + 1. § 1681a(y).

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.”[232](#_bookmark231)
      * Information may not be provided by a CRA unless the employer first provides the requisite user certification.[233](#_bookmark232)
      * 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”).[234](#_bookmark233) However, employers also

need to be aware that there are recent changes regarding notices and related issues that will soon go into effect.[235](#_bookmark234)

232 *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.

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

234 *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.)

235 Before January 1, 2013, employers should use new FCRA notices for their background check programs, which reflect modest changes to the mandatory agency-drafted FCRA summary of rights form (the “FCRA Summary of Rights”). *See* Rod Fliegel and Jennifer Mora, *Employers Must Update FCRA Notices for Their Background Check Programs Before January 1, 2013*, LITTLER

* + - * 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).[236](#_bookmark235)

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.[237](#_bookmark236)

# CONCLUSION

As evidenced by this paper, issues surrounding arrest and criminal records screenings in employment are multifaceted and complex. While it is 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. As shown above, employers need to carefully monitor applicable state law and case developments in this evolving area of the law.

ASAP (Sept. 4, 2012), [http://www.littler.com/publication-press/publication/employers-must-update-fcra-notices-their-background-](http://www.littler.com/publication-press/publication/employers-must-update-fcra-notices-their-background-check-programs-jan) [check-programs-jan.](http://www.littler.com/publication-press/publication/employers-must-update-fcra-notices-their-background-check-programs-jan)

236 *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).

237 *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 – HYPOTHETICALS FROM EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF USE OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (APRIL 25, 2012)

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| Section | Status | Hypothetical from EEOC Enforcement Guidance | Outcome- Reasonable Cause/No Reasonable Cause Finding |
| Section IV - Disparate Treatment And Criminal Records | Applicant | **Example 1: Disparate Treatment Based on Race.** 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 | Reasonable Cause |
|  |  | marijuana as high school students, and neither of them had |  |
|  |  | any subsequent contact with the criminal justice system. |  |
|  |  | 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. |  |

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| Section IV. Disparate Treatment | Applicant | **Example 2: Disparate Treatment Based on National Origin.** 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.  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. | Reasonable Cause |
| SectionV.B.2. Disparate Impact – Arrests | Employee | **Example 3: Arrest Record Is Not Grounds for Exclusion.** 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 | Reasonable Cause |

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|  |  | 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. |  | |
| Section V.B.2. Disparate Impact – Arrests | Employee | **Example 4: Employer's Inquiry into Conduct Underlying Arrest**. 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 | No Cause | Reasonable |
|  |  | 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 |  |  |

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|  |  | terminates his employment pursuant to its policy.  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. |  |
| Section V. B.7. Disparate Impact- Convictions | Applicants | **Example 5: Exclusion Is Not Job Related and Consistent with Business Necessity.** 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.”  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. | Reasonable Cause |

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| Section V.B.7. Disparate Impact- Convictions | Employee | **Example 6: Exclusion Is Not Job Related and Consistent with Business Necessity.** 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.  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.  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 *Green* 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 | Reasonable Cause |

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|  |  | 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. |  |
| Section V.B.9. Disparate Impact – Convictions- Individualized Assessment | Applicant | **Example 7: Targeted Screen with Individualized Assessment Is Job Related and Consistent with Business Necessity.** 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.  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.  Isaac challenges this rejection under Title VII, alleging that | No Reasonable Cause |

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|  |  | 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. |  |
| Section V.B.9. Disparate Impact- Convictions- Individualized Assessment | Employee | **Example 8: Targeted Exclusion Without Individualized Assessment Is Not Job Related and Consistent with Business Necessity.** “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.  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 | Reasonable Cause |

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|  |  | 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. |  |
| Section VI. Federal Prohibition | Applicant | **Example 9: Exclusion Is Not Job Related and Consistent with Business Necessity.** 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.  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, | Reasonable Cause |

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|  |  | 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. |  |
| Section VI. Federal Prohibition | Applicant | **Example 10: Consideration of Federally Imposed Occupational Restrictions.** 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. | No Reasonable Cause |

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| Section VII. State Law Prohibition | Applicant | **Example 11: State Law Exclusion Is Job Related and Consistent with Business Necessity.** 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. | No Reasonable Cause |
| Section VII. State Law Prohibition | Applicant | **Example 12: State Law Exclusion Is Not Consistent with Title VII.** 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 | Reasonable Cause |

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|  |  | 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. |  |

**APPENDIX B – STATE LAWS APPLICABLE TO CRIMINAL HISTORY INQUIRIES**

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| STATE | APPLICABLE RESTRICTIONS IN USE OF CRIMINAL HISTORY |
| Alabama | There are no state statutory restrictions on an employer’s use of arrest or conviction records. Alabama law provides that a person whose juvenile records have been sealed may properly respond to criminal history inquiries by stating that no such records exist. Code of Alabama § 12-15-103(d). |
| Alaska | There are no state statutory restrictions on an employer’s use of arrest or conviction records. Alaska law provides that a person may deny the existence of an arrest, charge, conviction or sentence that has been sealed. Alaska Stat. §  12.62.180. In addition, no person may use sealed juvenile records without a court order for good cause shown. Alaska Stat. § 47.12.300(d), (f). |
| Arizona | There are no state statutory restrictions on a private employer’s use of arrest or conviction records. |
| Arkansas | There are no state statutory restrictions on an employer’s use of arrest or conviction records. In addition, the Arkansas State Criminal Records Act allows employers to obtain all conviction information on an applicant or employee from the Arkansas Crime Information Center. Ark. Code. Ann. § 12- 12-1502. Arkansas law provides that an individual whose criminal records have been sealed or expunged may state that no such records exist and such records shall not affect the person’s civil rights or liberties. Ark. Code Ann. § 16-90- 901(a), § 16-90—902(b). |
| 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 pre-trial or 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. Cal. Lab. Code §  432.7. In addition, an employer may not ask for information concerning certain petty marijuana offenses after two (2) years of the date of the conviction. Cal. Lab. Code §§ 432.7, 432.8. |

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|  | An employer may not inquire or seek information regarding an applicant concerning: (1) any conviction for which the record has been judicially ordered sealed, expunged or statutorily eradicated (*e.g.,* juvenile offense records sealed pursuant to Cal. Wel. & Inst. Code § 389 and Pen. Code §§ 851.7 or 1203.45);  (2) any misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed pursuant to Penal Code § 1203.4; or (3) any arrest for which a pretrial diversion program has been successfully completed pursuant to Penal Code §§ 1000.5 and  1001.5. Cal. Code Regs., Tit. 2, § 7287.4(d). California law also prohibits employers from making employment decisions based on whether an applicant or employee has had to register as a sexual offender. Cal. Penal Code  § 290.46(k)(2).  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. Cal. Lab. Code §  432.7. However, an employer may not use that information as the sole basis for an adverse hiring or employment decision without independently investigating. *Pitman v. City of Oakland*, 197 Cal. App. 3d 1037 (Cal. App. 1988). |
| Colorado | It is an unfair labor practice for an employer to require an applicant to provide information regarding the applicant’s record of civil or military disobedience, unless the record resulted in a plea of guilty or a conviction by a court of competent jurisdiction. Colo. Rev. Stat. § 8-3-108(1)(m). In addition, the Colorado Civil Rights Division takes the position that inquiries into an applicant’s arrests may be discriminatory. Colorado Civil Rights Division, Pre- Employment Inquiries, available at [http:///www.dora.state.co.us/civil-](http://www.dora.state.co.us/civil-rights/publications_and_services/Employment_Discrimination_Brochures/JobDiscrim2001.pdf) [rights/publications\_and\_services/Employment\_Discrimination\_Brochures/JobD](http://www.dora.state.co.us/civil-rights/publications_and_services/Employment_Discrimination_Brochures/JobDiscrim2001.pdf) [iscrim2001.pdf.](http://www.dora.state.co.us/civil-rights/publications_and_services/Employment_Discrimination_Brochures/JobDiscrim2001.pdf) A private employer may inquire into an applicant’s convictions that are substantially related to the applicant’s ability to perform a specific job, if the question is addressed to every applicant.  Colorado law prohibits employers, in either an application or interview or any other way, from requiring an applicant to disclose information contained in sealed records. Colo. Rev. Stat. § 24-72-308(1)(f)(I). In addition, an applicant may not be denied employment solely because of his or her refusal to disclose information contained in sealed records. *Id.* Rather, a person whose criminal records have been sealed because the person was not charged, the case was |

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|  | dismissed, or the person was acquitted, may properly respond to inquiries regarding criminal records by stating that no such records exist. Colo. Rev. Stat. § 24-72-308(1)(d). |
| Connecticut | **An employment application that contains 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 section 46b-146, 54-76o or 54- 142a; (2) that criminal records subject to erasure pursuant to section 46b-146, 54-76o or 54-142a 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 nolled (not prosecuted), 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 section 46b-146, 54-76o or 54-142a shall be deemed to have never been arrested within the meaning of the general statutes with respect to the proceedings so erased and may so swear under oath.  Conn. Gen. Stat. § 13-51i(c). 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. *Id.* at § 13-51i(f).  No employer may discharge or in any manner discriminate against any employee solely on the basis that the employee had, prior to being employed by such employer, an arrest, criminal charge or conviction which has been erased pursuant to the above statutory provisions, or on the basis of a conviction prior to employment for which the employee has received provisional pardon |

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|  | pursuant to 54-130a. *Id.* at § 31-51i(e). |
| Delaware | There are no state statutory restrictions on an employer’s use of arrest or conviction records, except that an offense for which the records have been expunged does not need to be disclosed by the person as an arrest for any purpose. 10 Del. Code § 1027(e), 11 Del. Code § 437(e). |
| 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. D.C. Code Ann. § 2-1402.66. Violations of this statute are punishable by a fine of not more than $300 and/or up to 10 days imprisonment. |
| Florida | Currently, there are no state statutory restrictions on a private employer’s use of arrest or conviction records, except that a person who is the subject of an expunged or sealed criminal record may lawfully deny or fail to acknowledge the arrests covered by the expunged or sealed record. Fla. Stat. §§ 943.0585(4), 943.059(4). |
| 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. O.C.G.A. § 42-8-63. Although an employer may not use a FOA discharge as the basis for disqualifying an applicant, the law has been interpreted to provide that the underlying facts of the criminal action do not have to be ignored. If an employer makes an employment decision based on criminal history records, notice must be given to the applicant, including information that the records were obtained, the specific contents of the records, and the effect the records had upon the decision. Ga. Code Ann. § 35-3-34(b). There also are protections regarding the applicant's juvenile record - an individual whose juvenile records have been sealed may respond to inquiries by stating that no such records exist. Ga. Code Ann. § 15-11-79.2. |
| Hawaii | **In Hawaii, an employer may not seek any information regarding the applicant’s criminal record history on an employment application**. Haw. Rev. Stat. § 278-2(1)(C). However, after a conditional offer of employment has |

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|  | been made, an employer may inquire about and consider an individual's criminal conviction records when making decisions concerning hiring, termination, or the terms, conditions, or privileges of employment, provided that: (1) the conviction record bears a rational relationship to the duties and responsibilities of the position; and (2) the conviction took place within the past 10 years, not counting any periods of incarceration. Haw. Rev. Stat. § 378-2.5. An employer may neither ask about nor consider arrest records when the person was not convicted. Haw. Rev. Stat. § 378-2(1)(A). Further, an individual who has been issued a certificate of expungement may respond to inquiries by stating that no record of the specific arrest exists. Haw. Rev. Stat. §§ 571- 88(d), 831-3.2(e). |
| Idaho | There are no state statutory restrictions on an employer’s use of arrest or conviction records. However, the Idaho Human Rights Commission recommends that employers not inquire about arrests, which inquiries are considered evidence of discrimination unless the employer can show that they are job-related or there is a business necessity for seeking such information. According to the Commission, an employer may ask applicants regarding convictions, but should consider the kind of violation and how long ago it occurred before disqualifying a candidate from employment based on the conviction |
| Indiana | Applicants with restricted or sealed criminal records may legally state on an "application for employment or any other document" that they have not been adjudicated, arrested or convicted of the offense recorded in the restricted records. In addition, an employers is prohibited from asking an "employee, contract employee, or applicant" about sealed and restricted criminal records. The law, which went into effect on July 1, 2012 , allows Indiana ex-offenders to file a petition with the court in which they were tried eight (8) years following the completion of their sentence to have their criminal records sealed.  Indiana law also restricts information that employers can obtain from Indiana state court clerks. Specifically, the law prohibits courts from disclosing information pertaining to alleged infractions where the individual: (1) is not prosecuted or if the action against the person is dismissed; (2) is adjudged not to have committed the infraction; (3) is adjudged to have committed the infraction and the adjudication is subsequently vacated; or (4) was convicted of the infraction and satisfied any judgment attendant to the infraction conviction |

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|  | more than five years ago.  Those securing information from the state on an applicant on behalf of employer may only provide information pertaining to criminal *convictions*. The law explicitly states that criminal history providers will no longer be permitted to provide the following information in background reports:(1) an infraction, an arrest or a charge that did not result in a conviction; (2) a record that has been expunged; (3) a record indicating a conviction of a Class D felony if the Class D felony conviction has been entered as or converted to a Class A misdemeanor conviction; and (4) a record that the criminal history provider knows is inaccurate. Those securing such information from the state also may not include any Indiana criminal record information in an assembled report unless the CRA updates the information to reflect changes to the official record occurring 60 days or more before the date the criminal history report is delivered.  Employers who violate the law by asking employees, contract employees or applicants about sealed and restricted criminal records are deemed to have committed a Class B infraction, which may result in a fine, currently up to  $1,000. The Indiana Attorney General also can bring an action to enforce those provisions and seek civil penalties of $1,000 for a first violation and $5,000 for subsequent violations. (IC 24-4-18 IS added to the Indiana Code as a new Chapter , effective July 1, 2013, per House Act No. 1033) |
| Iowa | There are no state statutory restrictions on an employer’s use of arrest or conviction records. However, the Iowa Civil Rights Commission takes the position that an employer should not inquire into arrest records. The Commission takes the position that inquiries into an applicant’s conviction record is acceptable if job related, and that employment applications should include a disclaimer that convictions will not automatically be a bar to employment, but that the job and the time, nature and seriousness of conviction will be taken into account. |
| Kansas | An employer may require a job applicant to sign a release allowing the employer to access the applicant’s criminal history record for purposes of determining the applicant’s fitness for employment. Kan. Stat. Ann. § 22- 4710(c). However, an employer may not require an applicant or employee to |

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|  | challenge his or her criminal history record information for the purpose of obtaining a copy of the person’s record. Kan. Stat. Ann. § 22-4710(a). The Kansas Human Rights Commission takes the position that inquiry into arrests is not acceptable, but that inquiries into convictions are permissible if job-related. A person whose record of arrest, conviction or diversion has been expunged may state in any application for employment that he or she has never been arrested, convicted or diverted. Kan. Stat. Ann. § 21-4619(h). |
| Kentucky | There are no state statutory restrictions on a private employer’s use of arrest or conviction records, except that an individual whose criminal history records have been expunged may respond to inquiries by stating that no such records exist. Ky. Rev. Stat. §§ 431.076(5) (records for those found not guilty or for whom charges have been dismissed); 431.078(5) (misdemeanor convictions); 510.300(3) (arrest records relating to specific sexual offense); 631.330(4) (sealed juvenile records). |
| Louisiana | There are no state statutory restrictions on a private employer’s use of arrest or conviction records, except that a person whose record of arrest and/or conviction has been expunged is not required to disclose that he or she was arrested or convicted. La. Rev. Stat. Ann. § 44:9(I); La. Children’s Code Art. 922 (juvenile records). |
| Maine | There are no state statutory restrictions on an employer’s use of arrest or conviction records. However, the Maine Human Rights Commission takes the position that inquiries about arrests are unlawful, but inquiries about convictions that are related to the job are permissible. A person whose juvenile records have been sealed may respond to inquiries as if the crime had never occurred. 15 Me. Rev. Stat. § 3308(8)(D). |
| Maryland | An employer may not require an applicant to disclose expunged information regarding criminal charges in an employment application, interview or otherwise. Md. Code. Ann. (Crim. Proc.) § 10-109. In addition, the refusal of an applicant to disclose information about criminal charges that have been expunged may not be the sole reason for an employer to discharge or refuse to hire the person. *Id.* An employer may not require an applicant to inspect or challenge his or her criminal history records. Md. Code. Ann. (Crim. Proc.) § 10-228. |
| Massachusetts | I**t is an unlawful employment practice for an employer to request criminal** |

**offender record information on its initial employment application**. Mass. Gen. Laws. Ch. 151B § 4(9 ½). The only exceptions to this requirement are if:

(i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or (ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses. *Id.*

# After an applicant has submitted an initial employment application, an employer may question applicants during the interview process regarding only the following: (1) felony convictions; and (2) information regarding a conviction or release from incarceration during the last 5 years for a misdemeanor that is not a first offense for drunkenness, simple assault, speeding, a minor traffic violation, an affray, or disturbing the peace. *Id.* at

§ 4(9). An employer may not make any written or oral inquiry regarding the following: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction of any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information. *Id.*

* An applicant for employment may respond by stating “no record” to any inquiry regarding any sealed record, record of prior arrests, court appearances and adjudication in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution. Mass. Gen. Laws, Ch. 276 §§ 100A, 100C.
* An employer in possession of an applicant’s criminal offender record information must provide the applicant with the criminal history record prior to questioning the applicant about his or her criminal history, regardless of where

the employer obtained the information. Mass. Gen. Laws Ch. 6 § 171A. If the employer makes an adverse decision on the basis of criminal history, the employer must provide the applicant with the criminal history, if it has not already been provided. *Id.* In addition, an employer that conducts five or more criminal background investigations per year, regardless of where the information is obtained, shall maintain a written criminal offender record information policy providing that it will notify the applicant of any potential adverse decision based on the criminal offender record information, provide a copy of the criminal record information to the applicant, and provide information concerning the process of correcting a criminal record. *Id.*

* Information regarding registered sex offenders “shall not be used to commit a crime or to engage in illegal discrimination or harassment of an offender.” Mass. Gen. Laws Ch. 6 § 178N. However, there is no indication that Massachusetts’ employment discrimination statute is intended to protect ex-sex offenders.

Massachusetts also has implemented requirements for employers who obtain criminal history information, either through the Commonwealth’s CORI[238](#_bookmark237) system or through a private source such as a credit reporting agency or other background report vendor.

Since May 4, 2012, all employers have access to the Commonwealth’s web- based, iCORI system. While this new law expands access to CORI records, the legislation also limits the scope of available records. Previously, unless sealed, all criminal records are reported in CORI regardless of the record's age or disposition status. This has allowed eligible employers to view records even if a case was dismissed or the individual was found not guilty. Under the Act, on a

238 CORI refers to the Commonwealth's database of criminal record information, such as arrest and conviction records and data concerning judicial proceedings, sentencing, incarceration, and release. CORI records are limited to crimes investigated and prosecuted by the Commonwealth and do not include information related to federal crimes or crimes committed in other states.

going forward basis, most employers will only be able to access information related to pending arrests and charges that resulted in a conviction, limited to the past ten years for felonies and the past five years for misdemeanors. All employers, however, will have permanent access to data related to convictions for murder, manslaughter, and certain sexual offenses.

The Massachusetts legislation also imposes new recordkeeping requirements and record retention limits on employers that obtain criminal records through iCORI.

* Acknowledgment Forms. To access iCORI records, employers must obtain signed acknowledgement forms from the employee or applicant authorizing the employer to view the iCORI records. Employers must maintain acknowledgment forms for a minimum of one year following the date of the iCORI request.
* Secondary Dissemination Log. Employers must limit the dissemination of iCORI records to only those employees with a need to know within the organization and certain government officials. If an employer disseminates the records, it must maintain a secondary dissemination log to record: (i) the subject's name; (ii) the subject's date of birth; (iii) the dissemination date; (iv) the name of the person to whom the record was disseminated; and (v) the purpose of the dissemination. The log must be kept for a minimum of one year following the date of the dissemination.
* Retention Limits. Employers may not maintain iCORI records for more than seven years after the employee's last date of employment or the date of the final decision not to hire an applicant.

The Act also imposes obligations on all employers that obtain criminal history information, including:

* Prior to questioning an applicant about his/her criminal history or making an adverse decision based on an applicant's criminal history, employers who are in possession of criminal history records must provide a copy of those records to the applicant.
* Employers who annually conduct five or more background investigations must maintain a written criminal record information

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|  | policy. The policy must, at a minimum, require the employer to: (i) notify any applicant who is the subject of a background investigation of the potential for an adverse decision based on the criminal history records; (ii) provide a copy of the criminal history records and the policy to the applicant; and (iii) provide information concerning the process for correcting criminal records through the DCJIS or the consumer reporting agency. |
| Michigan | An employer may not inquire about or make a record of misdemeanor arrests that did not result in conviction, in either its employment application or in connection with the terms, conditions, or privileges of employment. Mich. Comp. Laws Ann. § 37.2205a(1). However, an employer may inquire into pending felony charges before a conviction or dismissal. Mich. Comp. Laws Ann. § 37.2205a(1). An employer may also ask applicants whether they have ever been convicted of a crime, except that a person whose conviction has been set aside is considered not to have been convicted. Mich. Comp. Laws Ann. § 780.622(1). Any person who knows or should know that a conviction was set aside is guilty of a misdemeanor if he or she uses that information. Mich. Comp. Laws Ann. § 780.623(3)(5). |
| Minnesota | There are no state statutory restrictions on a private employer’s use of arrest or conviction records for employment positions not requiring a license, except that, Minnesota law provides that no person shall be disqualified “from pursuing, practicing, or engaging in any occupation for which a license is required” solely or in part because of a prior criminal conviction, unless the crimes for which the individual was convicted directly relate to the position of employment or occupation for which the license is sought. Minn. Stat. §  364.03. In determining whether the conviction directly relates to the occupation, the hiring or licensing authority must consider: (1) the nature and seriousness of the crime or crimes for which the individual was convicted; (2) the relationship of the crime or crimes to the purposes of regulating the occupation; and (3) the relationship of the crime or crimes to the ability, capacity and fitness required to perform the duties of the occupation. *Id.* In addition, a person who has been convicted of a crime or crimes which directly relate to the position of employment or occupation shall not be disqualified from the position or occupation if the person can show competent evidence of |

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|  | sufficient rehabilitation and present fitness to perform the duties of the position or occupation. *Id.* Sufficient evidence of rehabilitation may be established by the production of a copy of a local, state or federal release order, and evidence that at least one year has elapsed since release from any local, state or federal correction institution without subsequent conviction of a crime and compliance with all terms and conditions of parole. Alternatively, the applicant may provide a copy of the relevant Department of Corrections discharge order or other documents showing completion of probation or parole supervision. *Id.* In addition, the licensing or hiring authority shall consider the following evidence:  (1) the nature and seriousness of the crime; (2) all circumstances relative to the crime, including mitigating circumstances or social conditions surrounding the commission of the crime; (3) the age of the person at the time the crime was committed; (4) the length of time elapsed since the crime was committed; and  (5) all other competent evidence of rehabilitation and present fitness including, but not limited, letters of reference by persons who have been in contact with the applicant since the applicant’s release from any correctional institution. *Id.*  In Minnesota, a person may deny the existence of a minor marijuana offense that has been expunged pursuant to Minn. Stat. §152.18 for purposes of employment. Minn. Stat. § 609A.03(4). |
| Mississippi | There are no state statutory restrictions on an employer’s use of arrest or conviction records, except that a person whose criminal records have been expunged may deny the existence of the criminal record. Miss. Code § 99-15- 57(1). |
| Missouri | There are no state statutory restrictions on a private, non-regulated employer’s use of arrest or conviction records, except that a person whose records have been closed is not required to disclose such arrest or trial in response to any inquiry made of the person for any purpose. Mo. Rev. Stat. § 610.110. In addition, a person may deny the existence of convictions for drunk driving that have been expunged by a court after 10 years of good behavior. Mo. Rev. Stat.  § 577.054. |
| Montana | There are no state statutory restrictions on an employer’s use of arrest or conviction records. However, the Department of Labor and Industry takes the |

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|  | position that inquiries into arrest records should not be made at any time during the hiring process. Mont. Admin. R. 24.9.1406(1) and (2)(h). An employer may lawfully inquire into an applicant’s criminal conviction history. Mont. Admin. R. 24.9.1406(2)(h). |
| Nebraska | **Employment applications must contain specific language that states that the applicant is not obligated to disclose a sealed juvenile record or sentence**. Neb. Rev. Stat. Ann. § 43-2, 108.05(5). In addition, employers shall not ask if an applicant has had a juvenile record sealed. If any inquiry is made in violation of the law, the person may respond as if the sealed event did not occur, and the person may not be subject to any adverse action. *Id.*  There are no state statutory restrictions on an employer’s use of adult conviction records. However, criminal history information regarding arrests is only available to employers under the following conditions: (1) with a notarized request by the subject of the record for the release of such record to a specific person; or (2) if the subject of the record is currently the subject of prosecution or correctional control as the result of a separate arrest. Neb. Rev. Stat. § 29- 3523. |
| Nevada | Employers or their authorized agents may request information regarding criminal offenses concerning an employee or prospective employee, or a volunteer or prospective volunteer, if the individual gives the employer written consent to obtain this information. Nev. Rev. Stat. § 179A.100. However, the Nevada Equal Rights Commission takes the position that employers may not inquire into arrests that did not result in conviction, but may inquire about felony convictions and recent misdemeanor convictions which resulted in imprisonment, provided that the inquiry is accompanied by a statement that a conviction will not necessarily disqualify the applicant from the position.  A person whose arrest or conviction records have been sealed may respond to any inquiry in an application for employment as though the arrest, conviction, dismissal or acquittal did not occur. Nev. Rev. Stat. § 179.285; Nev. Rev. Stat.  § 62H.170 (juvenile records). In addition, the discharge and dismissal of certain first-time drug offenses, after the accused has completed probation and any required treatment or education programs, does not constitute a conviction |

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|  | for purposes of employment, and the person need not respond to any inquiry regarding such offenses. Nev. Rev. Stat. § 453.3363.  Nevada law expressly prohibits the “use” of “information obtained from the [sex offender] community notification website” for any purposes related to employment. Nev. Rev. Stat. § 179B.270. |
| New Hampshire | There are no state statutory restrictions on an employer’s use of arrest and conviction records. In any application for employment, a person may be questioned about a previous criminal record only in terms such as, “Have you ever been arrested for or convicted by a crime that has not been annulled by a court?” N.H. Rev. Stat. § 651:5(X). In addition, juvenile delinquency records are closed and placed in an inactive file once the delinquent turns 21. N.H. Rev. Stat. § 169-B:35. |
| New Jersey | To determine work qualifications, employers may obtain information about an applicant’s criminal history record, unless such information has been expunged. To obtain criminal history information from the state, the employer must present the signed authorization of the applicant. The employer must also sign a certification, on forms prescribed by the Division of State Police, certifying that: (1) the employer is authorized to receive criminal history record information; (2) the records shall be used by the employer solely for the purpose of determining the applicant’s qualifications for employment; (3) the records will not be disseminated to persons for unauthorized purposes; and (4) the employer will otherwise comply with the provisions of N.J. Admin. Code tit. 13 § 59-1.6(a). N.J. Admin. Code tit. 13 § 59-1.2.  If criminal history record information may be used as the basis to disqualify an applicant from obtaining employment, the employer must provide the applicant with adequate notice and opportunity to confirm or deny the accuracy of any information contained in the criminal history record. The applicant must be allowed a reasonable period of time to correct or complete the record prior to the employer’s final decision concerning the applicant’s eligibility. An applicant is presumed to be innocent of any pending charges or arrests for which there are no final dispositions on the record. N.J. Admin. Code tit. 13 § 59-1.6.  A person whose criminal records have been expunged may respond to any |

inquiries as though the arrest, conviction and/or proceedings did not occur. N.J. Stat. § 2C:52-27.

**Newark, New Jersey.** Prior to a conditional offer, employers are prohibited from asking applicants about their criminal history. (Newark Ordinance, 12- 1630, eff. Nov. 18, 2012). If an applicant voluntarily discloses this information, the ordinance does not prevent the employer from discussing the information disclosed. An advertisement that in any way limits eligibility for employment based on an applicant's criminal history also is prohibited. Following a conditional offer, while consideration of criminal history is permitted, employers may not make criminal history inquiries unless they make a good- faith determination that the position in question is of such a sensitive nature that a criminal background check is required. In such cases, employers must notify applicants that a criminal background check is being conducted and obtain written consent authorizing the specific inquiry.

Permitted inquiries regarding criminal history following a condition offer, include: (1) Inquiries into indictable offense convictions (e.g. felonies), for up to eight years after sentencing; (2) disorderly persons convictions or municipal violations (e.g. misdemeanors), for up to five years after sentencing; (3) pending criminal charges, until the case is dismissed; and (4) convictions for murder, voluntary manslaughter, and certain sex offenses requiring registration that are punishable by a term of incarceration in state prison, regardless of how much time has passed since the conviction.

When evaluating criminal information, employers must consider several relevant factors, including the nature of the crime and its relationship to the duties of the position sought, any information pertaining to the applicant's or employee's degree of rehabilitation and good conduct, whether the prospective job provides an opportunity for the commission of a similar offense, whether the circumstances leading to the offense are likely to reoccur, how much time has elapsed since the offense, and whether any certificate of rehabilitation has been issued by any federal or state agency. Employers must document their consideration in an Applicant Criminal Record Consideration form and provide this form to any applicant who has a conditional offer revoked because of his or her criminal history. Employers must also provide applicants with the relevant

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|  | portions of the ordinance at this time and must notify applicants of their opportunity for review of the accuracy and or relevance of the results of the inquiry.  Employers also must follow similar procedures when an adverse employment action is taken against a current employee based on a criminal history record. In such cases, employers must notify the employee of the adverse employment decision, provide a copy of the results of the inquiry and a written notice of the decision explaining the reasons for the decision, and again advise the employee of the opportunity for review.  Employers may not inquire about, require any applicant or employee to disclose, or take any adverse action against an applicant or employee based on any arrest not then pending and which did not result in a conviction; on any records that have been erased, expunged, pardoned, or nullified; or on any juvenile adjudications of delinquency or any records that have been sealed. An exception is made permitting inquiries where any federal or state law requires the consideration of an applicant's or an employee's criminal history for the purposes of employment, provided this exemption is limited to those offenses the federal or state law requires the employer to consider.  Employers also must follow similar procedures when an adverse employment action is taken against a current employee based on a criminal history record. In such cases, employers must notify the employee of the adverse employment decision, provide a copy of the results of the inquiry and a written notice of the decision explaining the reasons for the decision, and again advise the employee of the opportunity for review.  Employers are subject to fines for violations of the ordinance up to $1,000 for each occurrence. |
| New Mexico | There are no state statutory restrictions on a private employer’s use of arrest or conviction records. |
| New York | Unless specifically required or permitted by statute, an employer generally cannot inquire or make an adverse employment decision based on: (1) an arrest or criminal accusation that did not result in conviction and is not then pending against the individual, (2) a youthful offender adjudication, or (3) a conviction |

for a violation sealed pursuant to section 160.55 of the criminal procedure code.

N.Y. Exec. Law §296(16).

While an employer may inquire about criminal convictions, an employer 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.

N.Y. Exec. Law § 296(15); N.Y. Correct. Law §§ 751-752. 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. N.Y. Correct. Law § 750.3. In making this determination, the employer shall consider the following factors:

1. the public policy of New York to encourage licensure and employment of persons previously convicted of one or more criminal offenses;
2. the specific duties and responsibilities necessarily related to the license or employment sought;
3. the bearing, if any, the criminal offense or offenses will have on the person’s fitness or ability to perform one or more job duties or responsibilities;
4. the time which has elapsed since the occurrence of the criminal offense or offenses;
5. the age of the person at the time of occurrence of the criminal offense or offenses;
6. any information produced by or on behalf of the person in regard to rehabilitation and good conduct;
7. the legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.

N.Y. Correct. Law § 753.

If a person who has been convicted of a criminal offense is denied employment, at the person’s request, the employer is required to provide a written statement explaining the reasons for the denial within 30 days of the request. N.Y. Correct. Law §754.

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|  | In New York, an applicant or employee is not required to disclose the existence of sealed criminal records. N.Y. Crim. Proc. Law § 160.60 (sealed arrest records); § 160.55 (sealed conviction records). |
|  | There are no state statutory restrictions on an employer’s use of arrest or conviction records, except that an individual is not required to disclose or acknowledge an expunged criminal history record in response to any inquiry.  N.C. Gen. Stat. §§7B-3201 (juvenile records); 15A-145(b) (certain first offender records); 15A-146(a) (records that have been dismissed or there is a finding of not guilty); 147(a), (b) (charges resulting from the theft of the person’s identity); 15A-149 (records relating to charges for which a pardon has been granted). |
| North Carolina | There are no state statutory restrictions on an employer’s use of arrest or conviction records, except that an individual is not required to disclose or acknowledge an expunged criminal history record in response to any inquiry.  N.C. Gen. Stat. §§7B-3201 (juvenile records); 15A-145(b) (certain first offender records); 15A-146(a) (records that have been dismissed or there is a finding of not guilty); 147(a), (b) (charges resulting from the theft of the person’s identity); 15A-149 (records relating to charges for which a pardon has been granted). |
| North Dakota | There are no state statutory restrictions on an employer’s use of arrest or conviction records. However, the North Dakota Department of Labor takes the position that employers may not ask applicants whether they have been arrested, but may inquire as to whether the applicant has ever been convicted of a felony. |
| Ohio | An employer may not inquire about or consider sealed arrests at the pre- employment stage. Ohio Rev. Code § 2953.55(A). In addition, an employer may not inquire about or consider a sealed conviction or an expunged or sealed bail forfeiture unless it bears a direct relationship to the job for which the person is being considered. Ohio Rev. Code § 2953.33(B). Finally, an employment application may not inquire into juvenile arrest records that have been sealed. Ohio Rev. Code § 2151.357(G).  A person whose juvenile arrest records have been expunged may reply to inquiries by stating that no records exist. Ohio Rev. Code § 2151.358(D). The |

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|  | individual may not be subject to adverse action because of the arrest or response. Id. at § 2151.357(G).  An arrest or conviction for a minor misdemeanor drug violation (relating to 100 grams or less of marijuana or five grams or less of hashish) does not constitute a criminal record and need not be reported by the person. Ohio Rev. Code § 2925.11(D). |
| Oklahoma | An employer may not require an applicant to disclose any information contained in sealed records in an employment application, interview or otherwise. Okla. Stat. tit. 22 § 19(F). In response to any inquiries regarding criminal history information, an applicant need not disclose any information contained in sealed records, and may state that no such records exist. *Id.* An applicant may not be denied employment solely because of his or her refusal to disclose criminal records information that has been sealed. |
| Oregon | It is unlawful for an employer to seek access to criminal record information for employment purposes unless the employee or applicant is first advised that the information might be sought. Or. Rev. Stat. § 181.555(2)(b). In addition, an employer may not inquire into the expunged juvenile records of a prospective employee. Or. Rev. Stat. § 659A.030.  It is an unlawful labor practice for an employer to refuse to hire or terminate from employment an individual due to an expunged juvenile record unless based on a bona fide occupational qualification. Or. Rev. Stat. § 659A.303.  Oregon’s sex offender website proclaims that it is illegal to engage in discrimination or harassment against a registered sex offender under state law; however, there is no statutory provision for this prohibition and the extent to which it applies to employment decisions is unclear. |
| Pennsylvania | Although there is no statutory prohibition on an employer’s *inquiry* into an applicant’s criminal history, when an employer is in receipt of information which is part of applicant’s criminal history record, the employer is prohibited from using arrest records, and may consider felony and misdemeanor convictions only to the extent to which they relate to the applicant’s suitability for employment in a particular position. Pa. Cons. Stat. § 9125. In addition, the Pennsylvania Human Relations Commission takes the position that an applicant’s conviction records should be the cause of rejection for employment |

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|  | only if their number, nature or recency would cause the applicant to be unsuitable for the position.  An employer must notify the applicant in writing if the decision not to hire the applicant is based on the applicant’s criminal history. Pa. Cons. Stat. § 9125.  **Note regarding Philadelphia, PA:** Philadelphia Bill 110111-A, captioned the [Fair Criminal Record Screening Standards Act,](http://legislation.phila.gov/attachments/11273.pdf) was enacted in 2011 and prohibits employers from including criminal record history questions on an employment application and from making personnel decisions based on records of an arrest that did not result in a conviction. Under this ordinance, employers may not: (1) inquire of applicants or employees about any arrest or criminal accusation that is not still pending and did not result in a conviction; (2) require job applicants to disclose any criminal convictions during the application process through the first "interview," and if employers do not conduct "interviews," they are prohibited from gathering any information regarding the applicant's criminal convictions during the hiring process (the term "interview" is broadly defined to include "any direct contact by the employer with the applicant, whether in person or by telephone, to discuss the employment being sought or the applicant's qualifications”); or (3) take any adverse action against an applicant or incumbent employee (*e.g.*, refuse to hire, transfer, promote, or terminate) because of past arrests or criminal accusations which did not result in convictions. |
| Rhode Island | An employer may not inquire into whether an applicant has ever been arrested or charged with a crime unless the applicant is applying for a law enforcement position. R.I. Gen. Laws § 28-5-7(7). However, an employer may inquire into an applicant’s conviction record. *Id.*  In Rhode Island, a person whose conviction record has been expunged may state that he or she has never been convicted of the crime. R.I. Gen. Laws § 12- 1.3-4. This provision does not apply if the person is applying: (1) for a position with a law enforcement agency; (2) for admission to the bar of any court; (3) for a teaching or coaching certificate; or (4) to be the operator or employee of an early childhood education facility. |

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| South Carolina | There are no state statutory restrictions on an employer’s use of arrest or conviction records. |
| South Dakota | There are no state statutory restrictions on an employer’s use of arrest or conviction records. However, the South Dakota Department of Human Rights takes the position that inquiries into an applicant’s arrest or conviction record are suspect if not substantially related to the functions of employment. |
| Tennessee | There are no state statutory restrictions on an employer’s use of arrest or conviction records. |
| Texas | There are no state statutory restrictions on an employer’s use of arrest and conviction records, except that a person whose arrest records have been expunged may deny the occurrence of the arrest and the existence of the expungement order. Tex. Code Crim. Proc. art. 55.03. In addition, a person whose juvenile records have been sealed is not required on any application for employment to state that he or she was subject to a proceeding in juvenile court. Tex. Fam. Code § 58.003. |
| Utah | An employer may obtain information from criminal history or warrants of arrest for any purpose authorized by statute, executive order, court rule, court order or local ordinance. Utah Code § 53-10-108. However, the Utah Labor Commission advises that at the pre-employment stage, an employer may not ask about arrest records, but may ask about felony convictions if they are job related. Utah Admin. Code Rule R606-2-2. The rule is silent as to whether an employer may inquire into misdemeanor convictions.  In Utah, a person whose arrest records, conviction records, or juvenile court records have been expunged may properly respond to any criminal history inquiry by denying the existence of such records. Utah Code Ann. §§ 77-18- 10(7); 77-18-13(3); 78A-6-1105(4).  **Tied to criminal history inquiries is provision under Utah law that prohibits an employer from seeking the date of birth, social security number, or driver’s license number of an applicant for employment *prior to* making an offer of employment, except in limited circumstances that includes criminal background checks.** Utah Code 34-46-201. Exceptions to the prohibition exist only if the request for information is applicable to all |

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|  | applicants for the position, and the information is requested during the time in the employer’s selection process when the employer: (1) obtains a criminal background check; (2) obtains a credit history of an applicant for employment, subject to the requirements of the Fair Credit Reporting Act, 15 U.S.C. Sec. 1681 *et seq*.; (3) obtains a driving record of a driver from the Driver License Division in accordance with Utah Code §§ 53-3-104 or 53-3-42; (4) conducts a review of its internal record to determine whether the applicant was previously employed by or applied for employment with the employer; or (5) collects the information to provide to a government entity for the purpose of (a) determining eligibility for a government service, benefit or program that requires that the information is collected on or before the day on which an offer of employment is made, or (b) participating in a government service, benefit or program that requires that the information is collected on or before the day on which an offer of employment is made. *Id.* If one or more of these exceptions apply, the applicant must specifically consent to the employer taking the action for which the information is requested. *Id.* An employer is deemed to have violated this statute if it requests an applicant’s date of birth, social security number or driver’s license number, but fails to take the permitted action for which the information is requested. *Id.* |
| Vermont | There are no state statutory restrictions on an employer’s use of arrest or conviction records, except that a person whose juvenile records have been sealed may replay to inquiries by stating that no such records exist. 33 Vt. Stat. Ann. tit. 33 § 5119(e)(1). |
| Virginia | An employer may not, in an employment application, interview or otherwise, require an applicant to disclose information concerning any arrest or criminal charge that has been expunged. Va. Code Ann. § 19.2-392.4. In addition, an applicant may not be denied employment due solely to the applicant’s refusal to disclose information regarding any expunged arrest or criminal charges. *Id.*  Arrests more than one year old without a disposition and no active prosecution pending may not be reported to an employer. Va. Code Ann. § 19.2-389(A)(2). Employers seeking information regarding an applicant’s conviction information must first obtain written consent from the person on whom the data is being sought and as well as photo identification from the applicant. Va. Code Ann. § 19.2-389 (H). |

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|  | A person whose juvenile records have been destroyed may reply to inquiries by stating that no records exist. Va. Code. Ann. § 16.1-306. |
| Washington | The Washington Human Rights Commission takes the position that at the pre- employment stage, an employer may only inquire about arrests that occurred within the last 10 years, and that the inquiry must include whether the charges are still pending, have been dismissed, or led to conviction of a crime that would adversely affect job performance. Wash. Admin. Code § 162-12-140. In addition, at the pre-employment stage, inquiries concerning convictions are permitted if: (1) the crimes inquired about relate reasonably to the job duties, and (2) such convictions (or release from prison) occurred within the last 10 years. *Id.* These restrictions on inquiries regarding arrests and convictions do not apply after the person is employed, unless the records are used by an employer for the purpose of discrimination on the basis of a protected status. *Id.* at § 162-12-180. However, persons with a criminal history are not a protected class under Washington law. *Id.* at § 162-04-070.  In certain circumstances, employers are authorized by statute to obtain criminal conviction information from the Washington State Patrol, such as for: (1) conducing pre- and post-employment evaluations who may have access to information affecting national security, trade secrets, confidential or proprietary business information, or money or items of value in the course of employment; or (2) assisting an investigation of suspected employee misconduct where such misconduct may also constitute a penal offense under the laws of the United States or any state. Wash. Rev. Code. §43.43.815. If the employer obtains a conviction record for one of the statutorily authorized purposes, it must notify the employee or applicant within 30 days of receipt of the record, or upon completion of the investigation into suspected misconduct, and must make the record available for examination by the employee or applicant and advise of such availability. *Id.*  A person whose conviction record has been terminated may state that he or she has never been convicted of that crime. Wash. Rev. Code § 9.94A.640(3). In addition, a person whose juvenile records have been sealed may reply to inquiries by stating that the proceedings never occurred. Wash. Rev. Code § |

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| West Virginia | There are no state statutory restrictions on an employer’s use of arrest and conviction records. However, the West Virginia Bureau of Employment Programs takes the position that at the pre-employment stage, an employer may inquire about convictions that bear a direct relationship to the job and have not been expunged or sealed by the courts. Consideration should be given to the nature and recentness of the convictions and rehabilitation. Pre-employment inquiries should be accompanied by a disclaimer stating that a conviction record will not necessarily be a bar to employment.  A person whose criminal records have been expunged is not required to disclose that such a record exists on any employment application or other type of application. W. Va. Code § 61-11-25(e). In addition, sealing of a juvenile record has the effect of extinguishing an offense as if it never occurred. *Id.* at § 49-5-18(e). |
| Wisconsin | Wisconsin law places significant restrictions on an employer’s inquiry into and use of arrest and conviction records. Employers are prohibited from discriminating against any individual (applicants or employees) on the basis of their arrest record. Wis. Stat. §§ 111.321, 111.325. Unlawful discrimination includes requesting an applicant or employee to supply information regarding an arrest record, except for a record of a pending charge. Wis. Stat. § 111.335(1). However, it is not unlawful discrimination to request information regarding arrest records when employment depends on the bondability of the individual and the individual may not be bondable due to an arrest record. *Id.*  In addition, it is not unlawful discrimination to refuse to employ, or suspend from employment, an individual who is subject to the *pending charge* if the circumstances of the charge *substantially relate* to the circumstances of the particular job. *Id.* However, an employer may not terminate an employee who is the subject of a pending criminal charge that is substantially related to the circumstances of the job unless and until he or she is convicted of the offense. *Id.* |

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|  | Employers are further prohibited from discriminating against any individual (applicant or employee) on the basis of their conviction records. Wis. Stat. §§ 111.321, 111.325. “Conviction records” 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. Wis. Stat. § 111.32(3). However, 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 required for the position. Wis. Stat. § 111.335(1)(c).  Wisconsin’s Department of Workforce Development takes the position that an employer may ask whether an applicant has any pending charges or convictions, as long as the employer makes it clear that any convictions will only be considered if the offenses are substantially related to the particular job.  In addition, an ordinance in Madison, Wisconsin prohibits discrimination with respect to the compensation, terms, conditions or privileges of employment based on an individual’s arrest or conviction record. Madison, Wisconsin Code of Ordinances 39.03(8)(a). Discrimination based on an arrest or conviction record is not prohibited if the individual is subject to a pending criminal charge, or within the past three years has been placed on probation, paroled, released from incarceration, or paid a fine for a felony, misdemeanor or other offense, provided that the circumstances of the arrest or conviction substantially relate to the circumstances of the particular job. *Id.* at 39.03(8)(i)(3). |
| Wyoming | There are no state statutory restrictions on an employer’s use of arrest or conviction records, except that a person whose juvenile record has been expunged may reply to inquiries by denying the existence of the record. Wyo. Stat. § 14-6-241(a). |