Pre-Employment Screening:
How New EEOC Guidance Affects Criminal Background Checks & Potentially Increases Employer Risks

An HRWebAdvisor Webinar

by

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EEOC votes 4-1 on April 25, 2012 to issue a new “Enforcement Guidance”
“Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act”
EEOC Guidance

Effective date: Immediately

April 25, 2012
How bad is it?
BAD...
EEOC Commissioner Connie Barker issues strong dissent
Barker: “The unintended consequences will be that even those business owners who we all agree should conduct criminal-background checks simply will not.”
That’s the Bomb.
OR …
Does the EEOC Guidance merely refine earlier EEOC Guidance (1987, 1990) and...
Not-so-bad...

Require employers to do some modest “housecleaning” of their screening policies and practices?
EEOC Guidance

The Answer...
Somewhere in-between…

Employers *can* adjust
• Exact impact TBD

• However, criminal-background checks are alive and well… *if* employers do it “right” (*the purpose of this webinar*)

• Some more hoops and loops to jump through, but…
Your right to do (and benefits of doing) criminal-background checks remain intact and viable.
Employers Can Adjust

Just “Do the Right Thing.”
However - ?

Uncertainty
Clearly:

(1) *Not* as bad as Commissioner Barker projects; and

(2) *Not* modest clarification of earlier Guidance as some at the EEOC have claimed.
(1) American Association for Justice;

(2) American Civil Liberties Union;

(3) Legal Action Center; and

(4) National Employment Law Center…
Rejoice!

All celebrated the issuance of the EEOC Guidance...
What more do you need to know?

All of these groups consistently and zealously target the employer community.
Employer Groups Not-So-Happy

The U.S. Chamber of Commerce?
The Call for “Individualized Assessments”
(1) Blanket criminal-background policies much *harder* to defend; and...
(2) Case-by-case evaluations with ability of individual to confront employer over records-check results more likely to be all-but-required in most instances.
Vagueness

The Riddler

Uncertainty?
Vagueness

EEOC Enforcement Guidance is vague in many areas...
Vagueness – Good

Generally, *good* for employers (we want flexibility)…
Vagueness – Bad

But gives EEOC field offices great leeway on how to interpret/enforce
“Ban the Box”

New York EEOC Office’s Lead Trial Attorney Elizabeth Grossman on May 15 (20 days after issuance of Guidance) in speech says “ban the box” will be viewed as a “red flag” by the EEOC.
“Ban the Box” –

Question on job application which asks “Have you ever had a criminal conviction?”

Yes

No
“Ban the Box”

Plaintiffs’ attorneys, ex-offenders’ rights advocates, and the current EEOC all want to “ban the box.”
EEOC Enforcement Guidance downplays this… “ban the box” not required or even mentioned by the EEOC in it’s “recommendations” section of Guidance.
Now, field staff in NY apparently on a crusade – considers it immediate “red flag” which will invite further EEOC inquiry/investigation.
(Parenthetically – literally – the box is considered very useful by many employers to…)**
“Ban the Box”

(1) Determine the job applicant’s veracity; and

(2) Make a more informed decision.

Normally, a section for further explanation is provided and applicants very fairly are given the opportunity to “explain it away” – as they frequently do.)
Two Compelling Interests at Stake...
(1) The need for ex-offenders to reintegrate into society upon release from prison

(Absent a job, a return to crime may be inevitable for many), and …
(2) The need for employers to make *informed* hiring decisions and protect their employees, customers, and assets…and avoid legal exposure (including negligent-hiring claims)
**EEOC**: “In one survey [SHRM], a total of 92% of responding employers stated that they subjected all or some of their job candidates to criminal-background checks.”
"subjected"
According to the Workplace Violence Research Institute, negligent hiring costs U.S. businesses more than $18 billion annually.
Some criminal-justice-reform and civil-liberties advocates vehemently support maximizing opportunities for convicted felons (ex-offenders):

• To be rehabilitated; and
• To re-enter main-stream society as normal citizens…
... But at what cost?
Critics of Criminal-Background Checks

• To society?
• To employers?
• To employees?
• To victims?
• To high at-risk and vulnerable populations (e.g., children, the disabled, and the elderly)?
CRITICS OF CRIMINAL-BACKGROUND CHECKS:

• Feel that employers use criminal-background checks to “discriminate” against convicted felons and impede their re-integration into society.
However, studies (University of Chicago, Georgetown) show just the opposite:

Companies that use criminal-background checks are:

(1) Less likely to engage indiscrimination;
(2) More likely to hire ex-offenders;

(3) More likely to hire minorities; and

(4) More likely to recognize their legal responsibilities and obligations.
“Citizen re-entry” advocates criticize criminal-background checks in:

(1) Employment;
(2) Credit;
(3) Housing; and
(4) Voting.
• The **U.S. Department of Justice** tracked the re-arrest, re-conviction, and re-incarceration of former inmates for three years after their release from prisons in 15 States.
Key findings include:

- Released convicted criminals with the highest re-arrest rates were for robbery (70.2%), burglary (74%), larceny (74.6%), motor-vehicle theft (78.8%), possession of — or selling — stolen property (77.4%), and possession, use, and/or sale of illegal weapons (70.2%).
• Nearly 70 percent of drug-abusing offenders return to prison within three years of their release.
Does anyone not know what “going postal” means?
On the rise in the workplace:

- Workplace Violence
- Sexual Assaults
- Substance-Abuse-Related Crime and Accidents
Negligent-Hiring Claims: Dramatically Increase

- Employers lose 70 percent of negligent-hiring cases
- Average jury verdict in such cases is $1.6 million
A Balancing Test

• Potential liabilities if you hire…

• Potential liabilities if you don’t…
Why Employers Are Checking:

- More informed hiring decisions;
- Avoid mistakes/future problems/future liabilities/turnover;
Why Employers Are Checking:

• Shield to liability (We did everything a reasonable and responsible employer could…);

• Detection; and

• Deterrence.
What does it cost?

• $40-$300

• As an example of multi-jurisdictional checks: DC/MD/VA (and federal) criminal-background check – typically around $130
Recidivism – Within 3 Years

- 650,000 released inmates/year
- More than half (51.8 percent) back in prison within three years
- 61.7 percent rearrested for violent crimes regardless of what their initial offense was
Recidivism – Within 3 Years

• 67.8 percent arrested again within three years
[More than 80 percent of crimes go unsolved]
Racial Issue?

YES – But in the “right” direction:

• 11.2 percent of jobs filled by African-American males when employers do criminal-background checks

• Only 3.3 percent when they do not
Overall, employers doing criminal-background checks are more than 50 percent more likely to hire African-Americans than employers who do not (24 percent versus 14.8 percent)
Green v. Missouri Pacific Railroad, 549 F.2d 1158 (8th Circuit 1977)

An employer can justify a practice which results in a disparate impact on a protected class if it demonstrates a business necessity for that practice.
(1) The nature and gravity of the criminal 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.
“Green Factors”

Generally, employers are doing very well on #’s 1 and 2 (nature of the crime and time elapsed), and not-so-well on #3 (job-relatedness).
“Green Factors” still highly relevant… but now the EEOC is refining and expanding the employer defense to all-but-require an individualized assessment – make sure you can tie the criminal history as relevant to the particular job.
Relevancy

Pedophile to youth summer camp? Absolutely.

Drug-dealer to pharmaceutical job? Absolutely.
Relevancy?

DUI to sales clerk?
Possibly/Probably not.

Marijuana possession to gardener?
Possibly/Probably not.
Some of this is common sense.

Can you justify the screening?
Keys for Employers:

(1) Job-relatedness;
(2) Business necessity; and
(3) Individualized assessment (unless *clearly* unnecessary).
Employer may satisfy Title VII obligations by issuing an internal policy that is “narrowly tailored.”

“Targeted screens” based on “Green factors” are highly preferred.
“Narrowly tailored” means a “demonstrably tight nexus to the position in question.”
EEOC Guidance specifically states that “Title VII does not necessarily require individualized assessments in all circumstances.”
The “right” policy (i.e., “narrowly tailored”) and the “right” criminal conviction is enough for disqualification.
• Avoid blanket statements, exclusions, hard-and-fast rules, and inflexible policies

• “Red flags” for the EEOC, and very hard to defend against legally
Another Key

• Be thoughtful regarding your disqualifications. No one is forcing you to hire convicted killers and rapists – no matter what the job. Consider the individual facts, the context, the job, and the time elapsed. Make informed, justifiable decisions.
Social studies which demonstrate *specific* convictions lead to *specific* future behaviors in *specific* contexts can be useful.
Validation Studies

- But, fortunately, *not* required
- Valid to show “business necessity”
- More relevant to class actions
- Very expensive
- Currently rare and therefore little “on the shelf”
EEOC Requests for Information

- Usually go back three-to-five years
- Usually nationwide in scope
- Usually *include* third-party vendors
EEOC Guidance: “arrest record study alone may not be used to deny employment opportunity,” but…
Employers are allowed to take adverse employment actions after looking at the “conduct underlying the arrest” if the individual would be unfit for the position because of the conduct.
**EEOC example:** elementary school assistant principal accused by several young girls of improper touching… does *not* require conviction for some type of adverse employment action
Dos and Don’ts based on the EEOC’s New “Guidance on the Use of Arrest and Conviction Records in Making Employment Decisions.”
40 Dos and Don’ts

Now to the most important – and hopefully useful – part of the presentation…
Don’ts are even *more* important because they directly lead to significant legal exposure... *and* because managers *get fired* for “doing don’ts”
Dos and Don’ts

Do:

(1) Base adverse employment decisions on convictions, *not* arrests (unless extreme circumstances);
Do:

(2) Be consistent with your decision-making to avoid disparate-treatment claims;
Do:

(3) Develop a narrow screen focusing on: (a) the nature of the crime; (b) the position at issue; and (c) the time since the conviction ("the Green factors");
Do:

(4) Document the reasons for your narrow screen;
Do:

(5) Make the criminal-history inquiry in writing at a later stage of the hiring process;
Do:

(6) If the crime is not particularly egregious, perform an individualized assessment with the job applicant;
**Do:**

(7) Ask about the following in an individualized assessment:

(a) Accuracy and circumstances of the offense;

(b) Rehabilitation efforts;
(c) Whether the job applicant has performed the same type of work since the conviction;

(d) Character references; and

(e) Whether the individual is bonded;
**Do:**

(8) Disqualify persons for reasons required by federal law or regulations;
Do:

(9) Assess job-relatedness of state disqualifiers;
Do:

(10) Train persons making disqualifying decisions regarding the EEOC Guidance;
Do:

(11) Self-audit to root out inconsistencies in application (centralized management);
Do:

(12) Coordinate with your contractors and vendors as to what records are kept, how they are kept, and how long they are kept – including electronically – and as to what information is collected and how it is ascertained (i.e., it may not be enough that you do things right – the EEOC routinely requests records from your third-party personnel affiliates);
Do:

(13) Use different standards for different positions within your company ("targeted screens");
**Do:**

(14) Carefully consider ratings/matrices regarding what criminal convictions are considered job-related for which positions, with caveats that these are guidelines for triggering further individualized assessment;
Do:

(15) Demonstrate compliance with the EEOC’s Guidance by keeping records related to having your appropriate policies in place and implemented (i.e., think defensively so as to be able to justify your actions and demonstrate good faith);
**Do:**

(16) Review and refine your current policies;
Dos and Don’ts

Do:
(17) Consider recency;
Do:

(18) Self-audit as to the conduct by your Human Resources representatives and hiring decision-makers to make sure the semantics of non-compliance are not used such as hard formulas and statements implying hard-and-fast disqualification standards (in most instances);
Do:

(19) Limit *per se* disqualifiers (i.e., use in only very limited circumstances), and engage in appropriate analysis for any remaining *per se* disqualifiers;
Do:

(20) Analyze specific jobs and specific crimes if a general disqualification rating or matrix is to be utilized;
Do:

(21) Maintain a file explaining the basis for policy refinements;
Do:

(22) Use qualifiers if ratings/matrices are utilized;
**Do:**

(23) Engage in individualized analysis and dialogue whenever feasible and appropriate; and
Do:

(24) Make sure, if you use ratings/matrices, that the criminal conviction fits precisely into the categories which are included in the ratings/matrices, and that those interpreting such classifications are knowledgeable on the nature and category of convictions.
Don’t:

(1) Fail to look at the underlying conduct for arrests
(i.e., sometimes arrests are enough – an element of common sense);
Don’t:

(2) Ask about criminal convictions on the initial application;
Don’t:

(3) Be inconsistent in your reasons for disqualifying applicants;
Don’t:

(4) Use across-the-board exclusions (e.g., “no hiring of convicted felons”) (No “blanket” disqualifiers);
**Don’t:**

(5) Without assessing job-relatedness, follow any state or local requirement that persons be disqualified for certain convictions;
Don’t:

(6) Utilize an on-line application system that has an “auto-kick-out” for persons who answer “yes” to a question about criminal convictions (or other set criteria);
Don’t:

(7) Voluntarily provide more information to the EEOC than requested on an isolated Charge (e.g., elements of the individual’s personnel file unrelated to the Charge such as the confirmation that the individual passed his or her criminal-background check). Limit responses appropriately to specific allegations so as not to invite broader EEOC inquiry;
Dos and Don’ts

Don’t:

(8) Conduct a self-audit unless it is attorney-client-privileged;
**Don’t:**

(9) Create disparate-impact issues in your individualized assessments (i.e., monitor the numbers to make sure protected classes are not disproportionately impacted *after* individualized assessments for the same or similar criminal histories);
Dos and Don’ts

Don’t:

(10) Fail to train Human Resources personnel and managers with hiring decision-making authority on the EEOC Guidance and your company’s policies and practices – and document the training re same (with signed and dated acknowledgement forms);
Don’t:

(11) Retreat from screening for criminal histories in making safe and informed hiring decisions (i.e., don’t abandon criminal-background-check practices… just revise/update them);
**Don’t:**

(12) Respond to any EEOC action regarding your background-screening policies and practices without legal counsel (small starts can become big finishes);
Dos and Don’ts

Don’t:

(13) Create or retain records unnecessarily, and/or create and retain statistical analyses of hiring unnecessarily or without an attorney-client privilege;
Don’t:

(14) Fail to qualify any policy statements and/or manager and supervisor guidelines less they become hard-to-refute evidence of hard-and-fast disqualification rules;
**Don’t:**

(15) Engage in *in-person* dialogues with job applicants who have criminal histories involving violent crime on a one-on-one basis *or* – except in extreme circumstances – at all; and
Don’t:

(16) Hire anyone you perceive to pose an undue risk in the workplace – *under any circumstances*.

“Damn the torpedoes, full speed ahead!”
—Admiral David Glasgow Farragut
Are FDIC requirements preempted by the EEOC’s Enforcement Guidance?
Financial Institutions

No.
DISQUALIFIERS

Certain convicted felons disqualified from working for Federal Deposit Insurance Act ("FDIC")-insured financial institutions
Section 19 of the Federal Deposit Insurance Act (12 U.S.C. 1829) prohibits any person convicted of a crime involving:

- Dishonesty;
- Breach of trust; or
- Money laundering…
Financial Institutions

... or who has entered into a pretrial diversion or similar program in a prosecution for such an offense...
Financial Institutions

... From directly or indirectly owning...
or controlling or otherwise participating in the conduct of affairs of the insured institution.
Section 19 imposes a duty upon the insured institution to make a “reasonable inquiry” regarding an applicant’s history… to avoid hiring or permitting participation in its affairs anyone who has a conviction or program entry for a convicted offense.
Penalties:
(a) Up to $1M fine; and
(b) Up to five years imprisonment
Financial Institutions

Disqualification Period:

• Minimum of ten-year prohibition period

• Application for Consent Required
Preemption

EEOC wants its cake and to eat it too
**EEOC Guidance:**

(1) Allows for federal preemption of Guidance by federal laws/regulations; but

(2) Prohibits state-law preemption of EEOC Guidance.
Preemption

EEOC probably just wants to preserve its rights to question state-law disqualifiers (e.g., laws prohibiting school districts, daycare centers, or nursing homes from hiring convicted felons)
Many, many states have many, many such disqualifier laws for myriad types of institutions.
Would EEOC lose in a legal challenge to its authority to preempt such state laws? YES.*

Would it even try to assert preemption? No.*

(* – In my opinion)
Preemption

Still, caught between state-law disqualifier requirements (which essentially mandate criminal-background checks) and the problematic and somewhat contradictory EEOC Guidance…
Employers should comply with *state* law, and…
...Assess/demonstrate job-relatedness
(Will *not* be hard.)
Still, a strong employer concern: the EEOC Guidance currently refuses to allow employers to establish “business necessity” based on state or local laws requiring disqualification of individuals based on their criminal histories.
Preemption Summary

• EEOC still requires demonstration of “job-relatedness” and “business necessity”

• Questionable enforceability in this regard (i.e., EEOC unlikely to take this position or prevail in court)
Further Lack of Clarity

The landscape could change:
Further Lack of Clarity

- Congress
- Legal challenge to the EEOC Guidance
- Possible change in the Administration
- Case law
About Your Speaker

Mark A. de Bernardo is a Partner in the Washington, D.C. Region office of Jackson Lewis LLP. He is Practice Group Leader of the firm’s Alternative Dispute Resolution practice, and co-Leader of its Government Relations practice.

Mr. de Bernardo concentrates his practice on employment litigation and counseling, government relations, and workplace drug-testing issues, but also represents employers on senior executive personnel actions, labor-management relations, and alternative dispute resolution (“ADR”). He also has extensive experience in the management of employment-related class actions.

Mr. de Bernardo is the founder (in 1989), and serves as the Executive Director of the Institute for a Drug-Free Workplace, a national coalition dedicated to promoting and preserving the rights of employers and employees in effective substance-abuse-prevention programs, and he served as the President of the Foundation for Drug Education and Awareness. Mr. de Bernardo is the author of four state drug-testing laws, and the only workplace drug-testing law endorsed by the President’s Commission on Model State Drug Laws. Among the many clients he has represented on drug-testing issues are the National Basketball Association, the U. S. House of Representatives, and more than 20 Fortune 200 corporations.