

# What HR Professionals Need to Know About the EEOC's New Guidance on Criminal Background Checks

By Leslie E. Silverman

The Society for Human Resource Management's 2010 Background Checking survey revealed that a substantial percentage of employers routinely use criminal background checks during employment selection. Given the Equal Employment Opportunity Commission's (EEOC) recent focus on employer use of criminal background records, many in the HR community were concerned that the EEOC's new Enforcement Guidance would mark a radical departure from existing Commission policy. Fortunately, the EEOC's new Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions ("Guidance")<sup>1</sup> appears at first blush to be largely a collective restatement of the Commission's long-standing policy statements on employer use of criminal background checks.

The 52-page Guidance document was released following the Commission's April 25, 2012, meeting after a bipartisan 4-1 vote. In the Guidance, the EEOC describes the circumstances under which an employer's use of arrest and conviction records can violate Title VII's disparate treatment and disparate impact theories, provides hypothetical examples to underscore its legal analysis and concludes with a list of employer best practices. Surprisingly, the EEOC does not appear to be imposing any new bright-line rules explicitly designed to cut off employer's access to and use of certain information. Instead, the Commission continues to embrace the use of the long-standing three-factor test identified by the court in *Green v. Missouri Pacific Railroad Company*,<sup>2</sup> when evaluating criminal history. The *Green* factors are:

- (1) the nature or gravity of the offense or conduct;
- (2) the time elapsed since the conviction and/or completion of the sentence; and
- (3) the nature of the job sought or held.

The Guidance however attempts to provide employers with a better understanding as to how the EEOC expects the factors to be applied.

## **What Is New or Noteworthy in the Enforcement Guidance?**

- **Application Questions.** Although the agency did not "ban the box",<sup>3</sup> such as the prohibition imposed under Massachusetts' Criminal Offender Record Information law, the EEOC recommends that employers refrain from asking about convictions in employment applications as a "best practice." The Guidance also advises that when employers do ask applicants about their criminal history, that they only ask applicants who are applying to positions where criminal history may be relevant and that the questions be limited to those convictions that have a nexus to job duties.
- **Arrest Records.** The Guidance expressly states that arrest records are treated differently and that an employer may not use an arrest record, by itself, to deny employment. This does not mean that an

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<sup>1</sup> See [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)

<sup>2</sup> *Green v. Missouri Pacific Railroad Company*, 23 F.2d 1158, 1160 (11th Cir. 1975).

<sup>3</sup> "Ban the box" prohibits the use of the "box" on the application asking if the applicant has ever been convicted of a crime.

employer's hands are tied if it learns an employee has been arrested. In those jurisdictions where state laws do not ban inquiries regarding arrest records, the Guidance permits employment decisions based on *the conduct* underlying the arrest. Accordingly, an employee may be terminated for an arrest or an applicant denied employment, so long as the conduct the employee or applicant was arrested for is relevant and makes the individual unfit for the position. For example, a school bus driver arrested for drunk driving.

- **Individualized Assessment.** The biggest development in the revised Guidance is the EEOC's introduction of the concept of "individualized assessment" to criminal background checks. An employer conducts an "individualized assessment" when it informs an employee or applicant that he or she is being screened out due to a criminal record, provides the individual with opportunity to respond and the employer considers extenuating circumstances before making a final decision. In the Guidance, the EEOC states that employers who develop a targeted screen using the three *Green* factors and conducts an "individualized assessment" can avoid Title VII liability. Although the individual assessment has been characterized as a "best practice" and the Guidance states that "Title VII does not *require* individualized assessment *in all circumstances*," it is not entirely clear under which circumstances the Commission will expect an individual assessment to be utilized. According to the SHRM survey, 88 percent of respondents indicated that they allow job candidates to explain the results of a criminal background check. Thus, it appears many employers already do a portion of this best practice.
- **Compliance with Federal Law.** The Guidance makes clear that an employer who is conducting criminal background checks in order to comply with another federal law or regulation (including those governing eligibility for an occupational license, registration or a security clearance) will not violate Title VII. The EEOC cautions, however, that any screening that exceeds the scope of a federally imposed restriction will be scrutinized and that liability may arise if an employer cannot provide evidence justifying an enhanced policy. Thus, in one of the hypothetical examples, a financial institution is prohibited under federal law from hiring anyone who has been convicted of an offense in the past 10 years. If a bank chooses to augment its screening to cover a 20-year period, the additional screening period should not be based on a generalized concern about security. Rather, the EEOC states that the bank must be able to offer evidence showing that there is an elevated likelihood of committing crimes for someone who has been crime-free for more than 10 years.
- **Compliance with State Law.** Unfortunately, the Guidance also makes clear that compliance with state and local laws will not shield employers from Title VII, because Title VII pre-empts state and local laws that are in conflict with it. This may very well place employers in a "no win" position of deciding to comply with state law while risking violation of federal law. However, this is still somewhat of a gray area as Commissioner Victoria Lipnic noted in the discussion leading to the adoption of the Guidance. While state laws may not pose a *per se* shield to a Title VII charge, compliance with state law may still constitute a business necessity. Developments as to the application of state laws should be followed as the Guidance is implemented.

## **What HR Professionals Should Do Now**

In the wake of the new Guidance, employers should anticipate aggressive oversight by the EEOC. The Commission continues to emphasize its systemic program and has been pursuing employment selection procedures. The EEOC's systemic program investigates and litigates pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location. One need look no further than the EEOC's recent \$3.13 million conciliation settlement with Pepsico following an investigation into claims that black applicants were excluded under the company's criminal background check policy. Additionally, during consideration of the new Guidance at the April 25 meeting, it was revealed that the EEOC is in the midst of investigating hundreds of background check charges. While this Guidance purports to instruct the EEOC how it should apply Title VII to criminal background checks, private plaintiffs and their attorneys will certainly attempt to use the new Guidance as they pursue charges.

In light of the EEOC guidance, HR professionals should:

- Review background screening policies and practices in light of the new Guidance;
- Make adjustments needed to the extent practices cannot be justified as job related and consistent with business necessity;
- If your policy does not currently provide applicants and employees with the opportunity for individualized assessments, consider the feasibility of implementing a process in your workplace and consult Section V. B 9 of the Guidance for more information on how to conduct an individualized assessment;
- Train recruiters and job interviewers, and decision-makers to use criminal history lawfully in accordance with the new Guidance;
- Beware of state law prohibitions and mandates regarding arrests and conviction records in those jurisdictions where your company does business and how they interact with the EEOC's new Guidance; and
- Review the list of employer best practices in the Guidance.

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