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The Dangerous Impact of Barring Criminal Background Checks: Congress Needs to Overrule the EEOC's New Employment "Guidelines"

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Abstract
The EEOC's new criminal background check "Enforcement Guidance" is potentially unlawful and certainly ill advised. In addition to lowering minority hiring rates and exposing employers to crushing liability, this new Guidance places employers in a vicious "Catch 22" situation: Business owners will have to choose between conducting criminal background checks and risking liability for supposedly violating Title VII or following the EEOC's Guidance, abandoning background checks, and risking liability for criminal conduct by employees. Furthermore, failing to conduct such background checks places the public at risk, as violent offenders might go for years before lashing out at customers or co-workers. The U.S. House of Representatives and the Senate have already taken some actions to stop enforcement of this Guidance, but more is needed.

This paper, in its entirety, can be found at **http://report.heritage.org/lm81**

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On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) issued new "Enforcement Guidance" (Guidance) that is designed to restrict criminal background checks by employers.[1] This potentially unlawful and certainly ill-advised guidance threatens to impose undeserved liability and risk on employers, placing them in an irreconcilable "Catch 22" situation: Business owners will have to choose between conducting criminal background checks and risking liability for supposedly violating Title VII or following the EEOC's Guidance, abandoning background checks, and risking liability for criminal conduct by employees.

Additionally, the EEOC has placed individual Americans at risk, as this Guidance increases the odds that they will be the victims of property crimes and violence. And to add further injury to insult, this guidance is also likely to make it more difficult for racial and ethnic minorities to obtain employment.

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Despite the fact that Congress, when it passed Title VII of the Civil Rights Act of 1964, intentionally "did

Talking Points

- The Equal Employment Opportunity Commission's new Guidance on criminal background checks will lower minority hiring rates and expose employers to crushing liability.
- This new Guidance places employers in a vicious "Catch 22" situation: Business owners will have to choose between conducting criminal background checks and risking liability for supposedly violating Title VII or following the EEOC's Guidance, abandoning background checks, and risking liability for criminal conduct by employees.
- Without any evidentiary foundation, the EEOC assumes that because blacks and Hispanics are arrested and convicted at a higher rate than whites, the consideration of criminal backgrounds has a disparate impact on minorities and is therefore a violation of Title VII.
- Failing to conduct such background checks places the public at risk, as violent offenders might go for years before lashing out at customers or co-workers.

not confer upon the EEOC authority to promulgate rules or regulations,"[2] the EEOC issues "guidance" documents that are *de facto* substitutes for regulations. Indeed, courts, employers, and plaintiffs' lawyers consider such guidance to be the standard that employers, with regard to employment law, should meet.

As several commissioners on the U.S. Commission on Civil Rights have noted, "this is a troubling practice given Congress's clear intent that the EEOC refrain from rulemaking."[3] Such rulemaking provides yet another example of an overreaching federal agency going beyond its statutory authority.

A Faulty Foundation

The April Guidance issued by the EEOC is based on a faulty premise: that convicted felons are a protected class under federal law. Yet, as even the EEOC is forced to admit, "a criminal record is not listed as a protected basis in Title VII."[4] Refusing to hire a convicted felon is not discrimination on the basis of race, color, religion, sex, or national origin.

The EEOC is able to avoid this problem, however, through its use of a legal fiction: Without any evidentiary foundation, it assumes that because blacks and Hispanics are arrested and convicted at a higher rate than whites, the consideration of criminal backgrounds has a disparate impact on minorities and is therefore a violation of Title VII. In the Guidance, which runs over 30 pages, the EEOC ignores the fact that there is no reliable evidence of racial bias in the criminal justice system's handling of violent and non-violent offenses.[5]

AS EVEN THE EEOC IS FORCED TO ADMIT, "A CRIMINAL RECORD IS NOT LISTED AS A PROTECTED BASIS IN TITLE VII." REFUSING TO HIRE A CONVICTED FELON IS NOT DISCRIMINATION ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

As the Eleventh Circuit wrote in a case dismissing similar racial bias claims, the plaintiffs could not "advance a single showing of contemporary race bias that ostensibly is producing the comparatively well-evidenced disparate-impact" in the criminal justice system. Moreover, the burden on anyone (including the EEOC) trying to make such a claim:

> [I]s significant in light of the numerous filters and checks built into our criminal-justice system that are independently capable of weeding out cases improperly infused with racial motives … [including] grand juries, the right to a trial by a jury (and specifically by a jury whose composition has not been manipulated on the basis of race), an impartial judge supervising the trial, appellate and collateral state-court review, federal habeas review, and clemency.[6]

The EEOC made no showing of racial bias in the criminal justice system whatsoever to justify its new Guidance.

It is not racial discrimination that deprives felons, black or white, of their ability to obtain employment "but their own decision to commit an act for which they assume the risks of detection and punishment."[7] Regrettably, "the facts overwhelmingly show that blacks go to prison more often because blacks commit more crimes."[8]

There is no question that an employer would be liable under Title VII if it treated job applicants with the same criminal records differently because of their race; that would be discriminatory treatment based on race. But the EEOC Guidance also purports to make unlawful the uniform application of criminal record

1. Equal Employment Opportunity Commission, Enforcement Guidance, Consideration of Arrest and Conviction Records in Employment Decision Under Title VII of the Civil Rights Act of 1964, No. 915.002 (2012) [hereinafter EEOC Guidance].
2. General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976).
3. Letter from Peter Kirsanow, Gail Heriot, and Todd Gaziano, U.S. Commission on Civil Rights, to Rep. Hal Rogers, Chairman, H. Comm. on Appropriations (May 4, 2012) [hereinafter Commission Letter].
4. EEOC Guidance, III, C.
5. *See* Amy L. Wax, Race, Wrongs, and Remedies: Group Justice in the 21st Century 91 (Hoover Institution 2009).
6. Johnson v. Florida, 405 F.3d 1214, 1239 (11th Cir. 2005).
7. Johnson v. Bush, 214 F.Supp.2d 1333, 1341 (S.D. Fla. 2002).
8. Wax, *supra* note 5. "[D]espite the widely held belief to the contrary, blacks are not singled out for stricter or more frequent prosecution. Nor do they receive longer sentences once criminal history and other sentencing factors are taken into account. In short, for ordinary violent and property crimes, the answer to the question, 'Is racial bias in the criminal justice system the principal reason that proportionately so many more blacks than whites are in prison,' is no."

exclusions without regard to race because such application supposedly has a disparate impact on certain racial groups—unless the employer can meet very strict and overly narrow standards of being "job related and consistent with business necessity."

In contrast, the Third Circuit pointed out that the "business necessity" standard," which constitutes a valid defense to a Title VII case (as outlined in the Supreme Court's decision in *Griggs v. Duke Power*[9]), does not necessarily apply where the hiring policy has nothing to do with an applicant's ability to do the job. Rather, the hiring policy concerns who may "pose too much of a risk of potential harm" to be trusted with the job.[10]

Yet the EEOC Guidance requires employers to validate the criminal conduct exclusion either in light of its "Uniform Guidelines on Employee Selection Procedures" or by providing an opportunity for an individualized assessment for those people identified by "a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job." Such arduous requirements seem at the least puzzling, considering the fact that the EEOC itself admits that "Title VII does not require individualized assessment in all circumstances."

The "Uniform Guidelines on Employee Selection Procedures" would require employers to provide social science studies relating criminal conduct to subsequent work performance. Yet the EEOC itself says that studies assessing "whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications" are "rare at the time of this" Guidance. So the EEOC is, in essence, asking employers to produce nonexistent studies on criminal behavior and job performance. Note that the Guidance includes no discussion whatsoever of the potential risk that hiring felons may pose to employers—and their customers. As the Third Circuit concluded, "it is hard to articulate the minimum qualification for posing a low risk of attacking someone."[11]

NOTE THAT THE GUIDANCE INCLUDES NO DISCUSSION WHATSOEVER OF THE POTENTIAL RISK THAT HIRING FELONS MAY POSE TO EMPLOYERS—AND THEIR CUSTOMERS.

The EEOC ignores this generalized risk at the very same time that it recognizes that its restrictions cannot be applied to certain industries—because of that very risk. For example, the Guidance notes that federal law excludes certain felons from working as security screeners or otherwise having unescorted access to the secure areas of any airport and that there are equivalent requirements for federal law enforcement officers, child care workers in federal agencies or facilities, bank employees, and port workers. In other words, blanket exclusions based on the risk of repeated criminal behavior—exclusions that cause disparate impact—are legitimate when imposed by the federal government. However, these same exclusions are somehow suspect and discriminatory when imposed by private industry.

The EEOC also dismisses the well-established evidence regarding the recidivism of felons. To be certain, the propensity of an individual with a criminal record to commit a future crime may decrease as the length of time that he is crime-free increases, but such an individual cannot:

> [B]e judged to be less or equally likely to commit a future violent act than comparable individuals who have no prior violent history. It is possible that those differences might be small, but making such predictions … is extremely difficult, and the criminological discipline provides no good basis for making such predictions with any assurance they will be correct.[12]

Additionally, should such predictions prove inaccurate, the consequences, to both employers and the public at large, could be dire.

Enormous Risk to Employers

If they are deterred from conducting criminal background checks and subsequently hire a convicted felon, employers are exposed to enormous

9. Griggs v. Duke Power, 401 U.S. 424 (1971).
10. El v. Se. Pennsylvania Transp. Auth., 479 F.3d 232, 242–43 (3d Cir. 2007) (upholding a policy barring hiring of anyone with a violent criminal conviction). But an absolute bar to employment based on prior convictions may violate Title VII if it is not justified as a business necessity. *See* Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975).
11. *Id.* at 243.
12. *Id.* at 246.
13. The EEOC even says that employers should "not ask about convictions on job applications."

liability.[13] This risk is illustrated by a case decided on March 29, 2012, by the Indiana Court of Appeals, in which a motel was successfully sued by the estate of one of its guests who was robbed and murdered by a prior employee who had obtained a copy of the motel's master key.[14] The motel had not done a criminal background check on the employee, which would have turned up his prior criminal history (including as a juvenile) of battery, criminal trespass, burglary, theft, and receipt of stolen property.[15]

As the Indiana court pointed out, under the Restatement (Second) of Torts, landowners have a duty to take reasonable precautions to protect their business invitees from foreseeable criminal attacks. There has been a huge increase in lawsuits filed under the theory of negligent hiring:

> Employers are being forced to defend their hiring practices and decisions whenever a workplace violence or other work-related crime with victims takes place. The plaintiffs' law is aggressive in this regard, and understandably so given their success rate in negligent-hiring and negligent-retention lawsuits.[16]

Caught between aggressive plaintiffs' lawyers and the EEOC, in other words, employers are under siege.

This case also demonstrates the risk posed to employers by out-of-control courts engaged in judicial nullification. Despite the fact that the jury in this case assigned 97 percent of the blame for the guest's death to the former employee, 2 percent to the motel, and 1 percent to the victim (for unexplained reasons), the court tossed out Indiana's comparative negligence statute. It then remanded the case for a new trial where the jury would not be allowed to assign comparative fault to the actual wrongdoer—so the motel may end up with a huge liability for the intentional misconduct of its former employee.

Unreasonable and Disconnected

In its Guidance, the EEOC provides numerous examples of unacceptable behavior by employers. These examples, however, are belied by actual events that demonstrate the extent to which the EEOC is disconnected from reality. For instance, consider the following scenario: A black employee has worked successfully at an agency for three years. However, 20 years earlier, he was convicted of misdemeanor assault. If the employer now learns of the past misdemeanor, he may not fire the employee: Under the Guidance, doing so would violate Title VII.

Yet in 2010, a biology professor at the University of Alabama in Huntsville shot and killed three of her colleagues and wounded three others after she was denied tenure.[17] The university had not conducted a criminal background check that would have revealed her 2002 conviction for misdemeanor assault and disorderly conduct. Under the EEOC's view, such a misdemeanor conviction would not have given the university grounds to refuse to employ the teacher. Yet the propensity for violent conduct revealed by the misdemeanor charge manifested itself tragically at the school eight years later.

RATHER THAN HELPING MINORITIES AS IT MAY HAVE BEEN INTENDED TO DO, THE EEOC'S GUIDANCE WILL HAVE THE OPPOSITE EFFECT.

Finally, it is likely that the EEOC's Guidance will make it more difficult for certain racial and ethnic minorities to find employment. Specifically, employers who do not use criminal background checks may be less likely to hire African Americans and Hispanics. Those employers may use race as a proxy for past criminal history:

> [I]n the absence of the salutary information that may be provided by a criminal background check, especially where a candidate has a weak employment history, some employers discriminate statistically against black men. If the tendency of employers is to overestimate the likelihood that African-American job applicants have prior felony convictions, systematic background checks may actually increase

14. Santelli v Rahmatullah, __ N.E.2d __, No. 49A04-1011-CT-704 (Ind. App. 2012).
15. Pryor v. Indiana, 884 N.E.2d 441 (Ind. App. 2008). Most of these crimes occurred when the individual was a juvenile. In its hypotheticals, the EEOC almost uniformly holds that it is improper for employers to consider juvenile criminal behavior.
16. Letter from Garen E. Dodge on behalf of the Council for Employment Law Equity to the EEOC Executive Officer (Aug. 9, 2011) at 3, *available at* http://cdia.files.cms-plus.com/PDFs/Council%20for%20Employment%20Law%20Equity.pdf.
17. Shaila Dewan, et al., *For Professor, Fury Just Beneath the Surface*, N.Y. Times (Feb. 20, 2010).

> the likelihood that an African-American applicant is hired.[18]

Thus, rather than helping minorities as it may have been intended to do, the EEOC's Guidance will have the opposite effect.

Using survey data from the Multicity Study of Urban Inequality from over 3,000 establishments, one 2006 study concluded that "employers who check criminal backgrounds are more likely to hire African American workers, especially men [and t]his effect is stronger among those employers who report an aversion to hiring those with criminal records than among those who do not."[19] Another 2009 study based on a survey of over 600 establishments found that "when employers do criminal background checks during hiring, the hiring rates of black men *increase*."[20] This "counterintuitive finding" shows that a background check actually counteracts the effect that the higher incidence of criminal convictions among African-American job applicants has on their employment prospects.

Congressional Action

Congress has already taken some action. On May 9, 2012, the House approved Representative Ben Quayle's (R–AZ) amendment to the Commerce, Justice, and Science appropriations bill that prohibits the use of any funds by the EEOC to enforce the Guidance.[21]

A report issued by the Senate Appropriations Committee also criticized the Guidance, voicing the committee's concern about the "EEOC's plans to issue new guidance on the use of criminal and credit background checks in the employment context that may limit the ability of conscientious employers to hire with confidence and create conflict with Federal and State laws." The committee directed "that stakeholders be engaged in discussion about the intended changes to background check guidance, and that new guidance on the use of criminal background checks and credit checks be circulated for public input at least 6 months before adoption."[22]

The EEOC should not only be limited from using any funds to enforce this Guidance; it should also be directed by Congress to withdraw the Guidance. Otherwise, the EEOC Guidance will be used as the standard by the courts and by plaintiffs' lawyers.

Furthermore, allowing the EEOC Guidance to be implemented will place employers in a vicious "Catch 22" dilemma, forced to choose between conducting criminal background checks and risking liability for supposedly violating Title VII or following the EEOC's Guidance, abandoning background checks, and risking liability for criminal conduct by employees. The Guidance will expose employers to serious liability, lead to greater injuries and property damage to employers and their customers, and decrease the employment prospects of some racial minorities.

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18. Commission Letter.
19. Harry Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J. L. & Econ. 451 (2006).
20. Michael Stoll, *Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market*, 1 U. Chi. Legal F. 381, 407 (emphasis added).
21. H.AMDT. 1073 to Commerce, Justice, Science and Related Agencies Appropriations Act, 2013, H.R. 5326, 112th Cong. (2012).
22. S. Rep. No. 112-158, at 114–15 (2012).