



**OFFICE FOR CIVIL RIGHTS**  
OFFICE OF JUSTICE PROGRAMS  
U.S. DEPARTMENT OF JUSTICE

810 7<sup>th</sup> Street, NW  
Washington, DC 20531

Tel: (202) 307-0690  
TTY: (202) 307-2027  
E-mail: [askOCR@usdoj.gov](mailto:askOCR@usdoj.gov)  
Website: [www.ojp.usdoj.gov/ocr](http://www.ojp.usdoj.gov/ocr)

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**Advisory for Recipients of Financial Assistance from the U.S. Department of Justice  
on the U.S. Equal Employment Opportunity Commission's *Enforcement Guidance:  
Consideration of Arrest and Conviction Records in Employment Decisions*  
Under Title VII of the Civil Rights Act of 1964**

June 2013

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued an updated enforcement guidance, cautioning employers that the use of arrest or conviction information in making employment decisions may, in certain circumstances, violate Title VII of the Civil Rights Act (Title VII) of 1964, as amended,<sup>1</sup> which prohibits discrimination in employment based on race, national origin, and other protected classes.<sup>2</sup> In light of the disproportionately high national rates of arrest and imprisonment of African Americans and Hispanics, especially African American and Hispanic men in comparison to their representation in the general population,<sup>3</sup> the *EEOC Enforcement Guidance* advises employers that if they misuse arrest and conviction records in making employment decisions, they may be engaging in unlawful discrimination.<sup>4</sup>

Consistent with the *EEOC Enforcement Guidance* and the Attorney General's commitment to remove barriers to prisoner reentry,<sup>5</sup> grant-making offices of the U.S. Department of Justice (DOJ or Department)<sup>6</sup> issue this Advisory to remind recipients of financial assistance from the Department of their obligation not to engage in discriminatory employment practices related to the improper use of arrest and conviction records. Although most recipients of Department funding are subject to Title VII, which generally applies to both public and private employers with fifteen or more employees,<sup>7</sup> almost all recipients of financial assistance under certain DOJ program statutes, regardless of the number of employees, must comply with those statutes' prohibitions against employment discrimination based on race, national origin, and other protected classes. The DOJ program statutes at issue are the Omnibus Crime Control and Safe Streets Act (Safe Streets Act) of 1968, as amended; the Juvenile Justice and Delinquency

Prevention Act (JJDP A) of 1974, as amended; and the Victims of Crime Act (VOCA) of 1984, as amended.<sup>8</sup> In interpreting these DOJ program statutes as they apply to employment discrimination, the Justice Department relies on Title VII standards.<sup>9</sup> Consequently, the Department refers to the *EEOC Enforcement Guidance* in interpreting the obligations of employers that receive financial assistance under the Safe Streets Act, the JJDP A, and the VOCA.<sup>10</sup>

Recipients should consult their legal counsel and the *EEOC Enforcement Guidance* for assistance in making employment decisions based on arrest and conviction records.<sup>11</sup> The DOJ grant-making offices are aware, however, that many of their recipients, which include law-enforcement agencies, correctional systems, state and local criminal justice agencies, and victim-service providers, may have good reason, for sensitive positions, to request and evaluate criminal background information in making employment decisions. The *EEOC Enforcement Guidance* does not prohibit employers from conducting background checks, but it provides a useful framework for employers and their legal counsel to evaluate prospective and current employees' arrest or conviction records.<sup>12</sup>

### **Employment Discrimination Claims**

Employment discrimination claims under Title VII and the DOJ program statutes generally fall into two categories: disparate-treatment claims and disparate-impact claims.<sup>13</sup> Disparate-treatment discrimination occurs when an employer intentionally treats an individual differently based on race, national origin, or another protected class.<sup>14</sup> Disparate-impact discrimination occurs when an employer's neutral employment policy or practice has the effect of disproportionately screening out or disadvantaging a Title VII-protected group and the employer fails to demonstrate that the policy or practice is "job related for the position in question and consistent with business necessity."<sup>15</sup>

### **Conviction Records**

Employers may take into account conviction records in making employment decisions, but they should take stock of how they use this information.

An example of the impermissible use of conviction records under a disparate-treatment analysis would be an employer who makes a different assessment of the conviction records of two similarly situated applicants for employment, one white and one African American. Even though both applicants may have similar job qualifications and comparable conviction records, the employer excludes the African American applicant based on his conviction record while hiring the white applicant despite hers.

Under a disparate-impact analysis, according to the *EEOC Enforcement Guidance*, given the disproportionate number of African American and Hispanic men who have conviction records, an employer's use of conviction records to screen job applicants will generally have a disparate impact on these groups.<sup>16</sup> The employer may successfully defend against a discrimination claim alleging that the use of conviction records has an unlawful disparate impact based on race or national origin by showing that despite the disparate impact on a particular group, the employer's screening practice is both job related and consistent with business necessity.

According to the *EEOC Enforcement Guidance*, employers should consistently be able to meet this standard in two ways. The first option is for an employer to validate its criminal-conduct screening under the standards of the *Uniform Guidelines on Employee Selection Procedures*.<sup>17</sup> The second option has two parts: (1) to develop targeted screening based on three considerations, known as the *Green* factors, which are (a) the nature of the crime; (b) the time elapsed since the offense, conduct, or completion of the criminal sentence; and (c) the nature of the job<sup>18</sup> and then, in most cases, (2) to provide an "opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity."<sup>19</sup>

### **The Uniform Guidelines**

Employers may use criminal-record screenings that have an adverse impact on racial and ethnic groups, if they can validate the screening process based on the technical framework of the Uniform Guidelines.<sup>20</sup> The EEOC, the DOJ, and other federal agencies jointly issued the Uniform Guidelines to help employers comply with federal law when making employment decisions.<sup>21</sup> Whenever an employer's selection process adversely impacts applicants for employment (or candidates for promotion or retention) based on race, national origin, or sex, the process may be unlawful unless the employer has properly validated it in accordance with the Uniform Guidelines or has otherwise justified the selection process under federal law.<sup>22</sup> The *EEOC Enforcement Guidance* cautions, however, that at the present moment, social studies that provide a framework for validating employment exclusions are rare.<sup>23</sup>

### **Targeted Screening and Individualized Assessment**

In most instances, employers that have a blanket policy of disqualifying all applicants for employment who have criminal convictions would run afoul of Title VII.<sup>24</sup> Employers may, however, use conviction-record screenings that have an adverse impact on racial and ethnic groups, if they conduct a targeted screening based on the *Green* factors and then provide an opportunity for an individualized assessment of the excluded people to determine whether the policy, as applied, is job related and consistent with business necessity.<sup>25</sup> For example, in the case of an applicant for employment, the individualized assessment may consist of notifying the

applicant of the exclusion based on the applicant's conviction record, providing the applicant with the opportunity to explain why the exclusion should not apply, and determining whether the applicant's explanation would justify an exception to the employer's exclusion policy.<sup>26</sup>

Significantly, the *EEOC Enforcement Guidance* notes that an employer may be able to justify a targeted records screen without having to conduct an individualized assessment if the screen is "narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question."<sup>27</sup>

Even if an employer is able to demonstrate that its employment practices are job related and consistent with business necessity, a complainant might "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."<sup>28</sup>

Recipient law-enforcement agencies and correctional systems would likely not run afoul of Title VII or the DOJ program statutes in using criminal-background screening to select sworn officers or security staff, as long as they are able to show that disqualifying criminal convictions are job related and consistent with business necessity. For example, if a position requires that an employee carry a firearm, an employer, following federal law, would be able to exclude from that position individuals prohibited from possessing a firearm as the result of a qualifying misdemeanor domestic-violence conviction.<sup>29</sup> Similarly, organizations may take into account a person's recent criminal history in filling positions that have contact with vulnerable populations, which may include children, people with severe mental or physical disabilities, or survivors of sexual assault and other violent crimes.<sup>30</sup>

### **Example of Disparate-Impact Discrimination Based on the Improper Use of a Conviction Record**

An example of disparate-impact employment discrimination based on a public recipient's improper use of a conviction record would be the following:

The newly hired town manager of Center City recently revised the town's city-wide employment policies. One new policy states that no Center City employee who has contact with the public may have a violent-crime record. Thomas, a forty-year-old Hispanic man, has for more than two decades served as a records clerk at the Center City Police Department, which receives numerous grants under the Safe Streets Act from the DOJ. When Thomas was a teenager, he pled guilty to a misdemeanor assault charge, which is a violent crime under state law. In the interim, he has not had contact with the criminal justice system, and he has consistently received the town's highest performance ratings. Implementing the

new employment policy, the town manager notified Thomas that the town was terminating his employment because one of Thomas' duties is to provide, on occasion, accident reports to members of the public who come to police headquarters. The town considered neither the nature of employees' offenses, the time passed since conviction, nor the nature of particular public-contact jobs before sending out termination notices. The town also did not provide Thomas with an opportunity to explain his conviction record. If the new employment policy adversely impacts Hispanic men, Thomas may have a national-origin discrimination claim against Center City, not only under Title VII but also under the Safe Streets Act.

### **Arrest Records**

In making employment decisions, recipients should distinguish between conviction records and arrest records. An arrest by itself is not evidence of criminal behavior.<sup>31</sup> Moreover, as the *EEOC Enforcement Guidance* notes, there is significant evidence showing that arrest records may be incomplete or inaccurate.<sup>32</sup> Accordingly, an arrest record standing alone should not be the basis for denying an employment opportunity. An employer may rely, however, on a fact-based analysis of the underlying circumstances related to an arrest to determine if the conduct makes the individual unfit for the position in question.<sup>33</sup>

Like claims of employment discrimination based on the improper use of conviction records, claims of employment discrimination based on the improper use of arrest records could fall under either a disparate-treatment or a disparate-impact theory of discrimination.

### **Equal Employment Opportunity Plans**

The issue of employment discrimination related to the misuse of arrest and conviction records may also arise for many recipients of DOJ funding in the context of formulating an Equal Employment Opportunity Plan (EEOP).<sup>34</sup> The Safe Streets Act not only prohibits recipients from engaging in unlawful employment discrimination, but it also requires many recipients to produce an EEOP.<sup>35</sup> An EEOP is a report that compares the percentage of a recipient's workforce in eight major job categories, cross-classified by race, national origin, and sex, to the percentage of similarly classified qualified people in the same job categories in the relevant labor market.<sup>36</sup> If the comparison indicates that the recipient's workforce has a significant underutilization of qualified employees in certain job categories based on race, national origin, or sex, the recipient must address the discrepancy, explaining the steps it has taken, or plans to take, to ensure equal employment opportunity.<sup>37</sup> Major recipients of financial assistance subject to the Safe Streets Act must submit an EEOP to OJP's Office for Civil Rights for review and approval.<sup>38</sup>

Preparing an EEOP requires recipients to analyze their employment practices to determine whether they may have had the effect of discriminating on the basis of race, national origin, or sex. “Recipient agencies are expected to conduct a continuing program of self-evaluation to ascertain whether any of their recruitment, employee selection or promotional policies (or lack thereof) directly or indirectly have the effect of denying equal employment opportunities to minority individuals and women.”<sup>39</sup>

In reviewing submitted EEOPs, the Office for Civil Rights may suggest modifications to an EEOP if the Office finds that a recipient’s selection or promotion procedures need improvement, especially when it comes to correcting “any identifiable employment impediments which may have contributed to . . . existing disparities.”<sup>40</sup>

In light of the *EEOC Enforcement Guidance* and the federal regulations on the development of an EEOP, recipients of financial assistance subject to the authority of the Safe Streets Act should consider whether their reliance on arrest and conviction records in making employment decisions may have had an adverse effect on otherwise qualified minority candidates. The Office for Civil Rights encourages recipients to examine this issue and to incorporate their analysis in future EEOPs.

### **Technical Assistance and Resources**

Recipients of DOJ financial assistance seeking technical assistance on the proper use of arrest and conviction records in making employment decisions may contact the EEOC’s regional offices (<http://www.eeoc.gov/field/index.cfm>). Recipients of DOJ financial assistance seeking technical assistance in developing an EEOP may contact the Office for Civil Rights (<http://www.ojp.usdoj.gov/about/offices/ocr.htm>) by telephone at (202) 307-0690, by TDD/TTY at (202) 307-2027, or by e-mail at [askOCR@ojp.usdoj.gov](mailto:askOCR@ojp.usdoj.gov).

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<sup>1</sup> 42 U.S.C. § 2000e (2006).

<sup>2</sup> U.S. EQUAL EMP’T OPPORTUNITY COMM’N, NO. 915.002, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf) [hereinafter EEOC ENFORCEMENT GUIDANCE].

<sup>3</sup> See Amy Solomon, Senior Advisor to the Assistant Att’y Gen., Office of Justice Programs (OJP), U.S. Dep’t of Justice, Testimony at the EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier (July 26, 2011) (written testimony available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm>); EEOC ENFORCEMENT GUIDANCE, *supra* note 2, at 4 & 28 nn.10-14.

<sup>4</sup> EEOC ENFORCEMENT GUIDANCE, *supra* note 2, at 3-4; Press Release, U.S. Equal Emp’t Opportunity Comm’n, Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans (Jan. 11, 2012), <http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>.

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<sup>5</sup> Letter from Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to State Attorneys General (Apr. 18, 2011) (on file with the OJP); *see also* NAT’L REENTRY RES. CTR., FED. INTERAGENCY REENTRY COUNCIL, <http://csgjusticecenter.org/nrrc/projects/firc/> (last visited June 1, 2013) (“Reentry provides a major opportunity to reduce recidivism, save taxpayer dollars, and make our communities safer.”).

<sup>6</sup> This Advisory applies to recipients of financial assistance from the following DOJ grant-making components: the Office of Community Oriented Policing Services, the Office on Violence Against Women, and the OJP, which includes the Bureau of Justice Assistance; the Bureau of Justice Statistics; the National Institute of Justice; the Office of Juvenile Justice and Delinquency Prevention; the Office for Victims of Crime; and the Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) Office.

<sup>7</sup> 42 U.S.C. § 2000e(b).

<sup>8</sup> The JJDPA incorporates by reference (*see* 42 U.S.C. § 5672(b)) the nondiscrimination provision of the Safe Streets Act, which prohibits a recipient of financial assistance under the statute from discriminating in employment based on race, national origin, and other protected classes:

No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this chapter.

*Id.* § 3789d(c)(1).

The VOCA contains similar language, which prohibits a recipient of financial assistance under the statute from discriminating in employment based on race, national origin, or other protected classes:

No person shall on the ground of race, color, religion, national origin, handicap, or sex be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in connection with, any undertaking funded in whole or in part with sums made available under this chapter.

*Id.* § 10604(e).

<sup>9</sup> 28 C.F.R. § 42.203(c) (2012).

<sup>10</sup> Recipients of financial assistance that are unsure of whether they are subject to one of the DOJ program statutes should check their award materials, which ordinarily cite the statutory authority under which the DOJ made the grant award. *See supra* p. 6 (Recipients may also contact the Office for Civil Rights at the OJP for assistance); *see also* CATALOG OF FEDERAL DOMESTIC ASSISTANCE, <https://www.cfda.gov/> (last visited June 24, 2013) (Recipients can search within the CFDA to determine whether a program is subject to a program statute).

<sup>11</sup> *See* U.S. EQUAL EMP’T OPPORTUNITY COMM’N, QUESTIONS AND ANSWERS ABOUT THE EEOC’S ENFORCEMENT GUIDANCE (2012), [http://www.eeoc.gov/laws/guidance/qa\\_arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm); U.S. DEP’T OF LABOR, NO: 31-11, TRAINING EMPLOYMENT GUIDANCE LETTER (2012), [http://wdr.doleta.gov/directives/attach/TEGL/TEGL\\_31\\_11\\_acc.pdf](http://wdr.doleta.gov/directives/attach/TEGL/TEGL_31_11_acc.pdf).

<sup>12</sup> Employers that rely on data from consumer reporting agencies, which may include arrest and conviction information, should be aware of the application of the Fair Credit Reporting Act, 15 U.S.C. § 1681. EEOC ENFORCEMENT GUIDANCE, *supra* note 2, at 5; *see also* FED. TRADE COMM’N, BUREAU OF CONSUMER PROT., BUS. CTR., USING CONSUMER REPORTS: WHAT EMPLOYERS NEED TO KNOW (2012), <http://www.business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know>.

<sup>13</sup> EEOC ENFORCEMENT GUIDANCE, *supra* note 2, at 6.

<sup>14</sup> *Id.* at 6-9.

<sup>15</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also* EEOC ENFORCEMENT GUIDANCE, *supra* note 2, at 9 & n.63.

<sup>16</sup> Even though national statistics support a finding that an employer's use of conviction-record exclusions has a disparate impact based on race and national origin, employers may be able to provide evidence (e.g., applicant-flow data, arrest and conviction rates in a particular geographic area) to show that their employment policies or practices do not have an adverse impact based on race or national origin. EEOC ENFORCEMENT GUIDANCE, *supra* note 2, at 10.

<sup>17</sup> *Id.* at 14 & n.111; *see* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1-18 [hereinafter Uniform Guidelines].

<sup>18</sup> EEOC ENFORCEMENT GUIDANCE, *supra* note 2, at 11 & nn.90-92, 14-16 (citing *Green v. Mo. Pac. R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977)).

<sup>19</sup> EEOC ENFORCEMENT GUIDANCE, *supra* note 2, at 14.

<sup>20</sup> Under some circumstances, validation of the screening process may be either unnecessary or impossible. *Id.* at 14, 15 & n.113 (citing 29 C.F.R. § 1607.6(B)).

<sup>21</sup> 28 C.F.R. § 50.14(1)(B).

<sup>22</sup> The Uniform Guidelines recognize three methods for validating employee-selection procedures that have an adverse impact on the basis of sex or membership in racial or ethnic groups: criterion-related validation, content validation, and construct validation (*see* 28 C.F.R. § 50.14(5)(A)):

1. Criterion-related validity [is] a statistical demonstration of a relationship between scores on a selection procedure and job performance of a sample of workers.
2. Content-validity [is] a demonstration that the content of a selection procedure is representative of important aspects of performance on the job.
3. Construct validity [is] a demonstration that (a) a selection procedure measures a construct (something believed to be an underlying human trait or characteristic, such as honesty) and (b) the construct is important for successful job performance.

Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996, 12,001 (Mar. 2, 1979), *available at* [http://www.eeoc.gov/policy/docs/qanda\\_clarify\\_procedures.html](http://www.eeoc.gov/policy/docs/qanda_clarify_procedures.html); *see also* 28 C.F.R. § 50.14(5)(B); 29 C.F.R. § 1607.16.

<sup>23</sup> EEOC ENFORCEMENT GUIDANCE, *supra* note 2, at 15.

<sup>24</sup> *Green*, 523 F.2d at 1298 (“We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed . . . To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.”).

<sup>25</sup> EEOC ENFORCEMENT GUIDANCE, *supra* note 2, at 14.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 20 & n.128 (citing 42 U.S.C. § 2000e-2(k)(1)(A)(ii)); *see also* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (“Thus, when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must ‘show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.’”) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

<sup>29</sup> 18 U.S.C. § 922(g)(9).



<sup>30</sup> *See, e.g.*, *El v. SEPTA*, 479 F.3d 232 (3d Cir. 2007) (affirming summary judgment for employer on the termination of an African American driver with a violent-crime record who provided transport for people with disabilities). The Third Circuit, however, acknowledged that its ruling might have been different had the appellant rebutted expert testimony. *El*, 479 F.3d at 235, 247; *see also* EEOC ENFORCEMENT GUIDANCE, *supra* note 2, at 12. Another factor in the court's decision was that the post under review involved contact with a vulnerable population. *Id.* at 235, 243, 245, 247.

<sup>31</sup> EEOC ENFORCEMENT GUIDANCE, *supra* note 2, at 12.

<sup>32</sup> *Id.* at 6, 12.

<sup>33</sup> *Id.* at 13.

<sup>34</sup> *See* Equal Employment Opportunity Program Guidelines, 28 C.F.R. §§ 42.301-.308; OFFICE OF JUSTICE PROGRAMS, EQUAL EMP'T OPPORTUNITY PLANS, <http://www.ojp.usdoj.gov/about/ocr/eeop.htm> (last visited June 1, 2013).

<sup>35</sup> Recipients that (1) have a minority service population of three percent or more; (2) are units of state or local governments, instrumentalities of state or local governments, or private entities; (3) have fifty or more employees; and (4) receive an award of \$25,000 or more subject to the Safe Streets Act's administrative provisions must develop an EEOP. § 42.302(d).

<sup>36</sup> §§ 42.304(a), (f), (g).

<sup>37</sup> § 42.304(f)(1); §42.306(b).

<sup>38</sup> Recipients that meet all of the criteria for developing an EEOP and receive an award of \$500,000 or more subject to the administrative provisions of the Safe Streets Act must submit an EEOP to OJP's Office for Civil Rights. 28 C.F.R. § 42.204(b); *see supra* note 35.

<sup>39</sup> § 42.306(a).

<sup>40</sup> § 42.306(b).