Off the Record: Why the EEOC Should Change Its Guidelines Regarding Employers’ Consideration of Employees’ Criminal Records During the Hiring Process

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I. INTRODUCTION

The United States releases approximately 700,000 inmates from prison each year. Of those released, most are young men without a college education, and about two-thirds remain unemployed one year after their release. Those who can find steady work after their release are both less likely to return to prison and more capable of taking on the social roles of spouse and parent. Despite the obvious advantages to society, employers are less likely to hire people with criminal records than people without criminal records.

Statistically, African American men are roughly six times more likely to go to prison than Caucasian men, and they are also overrepresented among released prisoners. Thus, employers’ refusal to hire individuals with criminal records creates a disparate impact on African Americans. To help assuage and prevent this racially disparate impact, the Equal Employment Opportunity Commission (EEOC)—the commission Congress assigned to enforce its laws against race, sex, and religious discrimination in the workplace—should revise its guidelines to prevent employers from relying on criminal records inappropriately to exclude applicants with a criminal record.

This Note will discuss how and why the EEOC should revise its guidelines regarding the use of criminal records during the hiring process. Part II will discuss the history of the EEOC and the EEOC’s current guidelines regarding employer use of criminal records during the hiring process. Part III will discuss how and why the EEOC should change its guidelines and the different perspectives regarding what these changes should entail. Finally, Part IV lays out specific recommendations regarding how the EEOC can change its guidelines to help minimize the disparate impact against minorities during the hiring process.

II. BACKGROUND

To understand the need for a change in the EEOC’s guidelines, it is important to be familiar with how the EEOC operates and how employers currently hire their employees. A discussion of how the use of criminal records during the hiring process has a disparate impact on minority applicants will highlight the need for a change in the EEOC’s guidelines.

2. Id.
3. Id.
4. Id.
5. Pager, supra note 1.
6. Id.
7. For the purpose of this Note, “minority” refers to all non-Caucasian populations.
A. The Use of Criminal Records During the Hiring Process Has a Disparate Impact on Minority Applicants

The Civil Rights Act of 1964 (Civil Rights Act) was originally enacted to eliminate the last vestiges of Jim Crow laws and segregation and deal with discrimination in voting, public accommodations, education, and employment. Congress enacted Title VII of the Civil Rights Act in 1964 to continue the practice of preventing employment discrimination started by “the Unemployment Relief Act of 1933, which provided ‘[t]hat in employing citizens for the purpose of this Act no discrimination shall be made on account of race, color, or creed.’” Title VII prohibits employers from using facially neutral selection processes—such as the use of criminal records—that have the effect of disproportionately excluding people of a certain race, color, religion, sex, or national origin, from employment opportunities.

When employers use facially neutral selection processes that have the effect of disproportionately excluding people of a certain race, color, religion, sex, or national origin from employment opportunities, affected job applicants may file a disparate impact claim. In order to state a disparate impact claim under Title VII, plaintiffs must first present a prima facie case by “[identifying] the employment practice allegedly responsible for the disparities . . . then [producing] statistical evidence showing that the challenged practice causes a disparate impact on the basis of race, color, religion, sex, or national origin.” Once the plaintiff makes a prima facie case, the burden of proof shifts to the employer who can either “directly attack [the] plaintiff’s statistical proof by pointing out deficiencies in data or fallacies in the analysis” or “rebut a plaintiff’s prima facie showing by demonstrating that the challenged practice is job related for the position in question and consistent with business necessity.”

Despite Title VII’s provisions regarding practices that cause a disparate impact on minority groups, several studies show that employers are extremely unlikely to hire an employee with a criminal record. Minorities are more likely to have criminal records than non-minorities, not because

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11. EEOC, 40th Anniversary, supra note 9.


13. Id.

14. Id.

15. Id.

16. See, e.g., Devah Pager, The Mark of a Criminal Record, 108 Am. J. Soc. 937, 960 (2003) (“[M]ere contact with the criminal justice system, in the absence of any transformative or selective effects, severely limits subsequent employment opportunities . . . ex-offenders are only one-half to one-third as likely as nonoffenders to be considered by employers.”); Harry J. Holzer et al., Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and Their Determinants 41 (Inst. for Research on Poverty, Working Paper No. 1243-02, 2002), available at http://www.irp.wisc.edu/publications/dps/pdfs/dp124302.pdf (“Employer willingness to hire ex-offenders is very limited, even relative to other groups of disadvantaged workers (such as welfare recipients).”); Transcript of the Equal Emp’t Opportunity Comm’n Meeting of Nov. 20, 2008, http://www.eeoc.gov/eeoc/meetings/11-20-08/transcript.cfm (Nov. 20, 2008) [hereinafter EEOC Transcript] (“[C]lose to 60 percent of employers have told researchers that they would not or probably would not hire someone with a conviction history.”).
they tend to commit crimes more often than non-minorities, but because of racial profiling and other factors such as prosecutorial discretion, receiving jail time rather than bail, higher bail for similar charges, less advantageous proposals during plea bargaining, longer sentences, and higher receipt of the death penalty.\footnote{See, e.g., Eric Lotke, \textit{Racial Disparity in the Justice System: More than the Sum of its Parts}, \textit{FOCUS}, May–June 2004, at 3–4 (discussing why racial minorities are more likely to have criminal records); End Racial Profiling Act of 2001, S. 989, 107th Cong. § 2(a)(2) & (5) (2001), available at http://www.aele.org/s989.html (discussing statistics that show “racial profiling is a real and measureable phenomenon” and a 2001 Department of Justice Report which found that “although African-Americans and Hispanics were more likely to be stopped and searched, they were less likely to be in possession of contraband”); J. Mitchell Pickerill et al., \textit{Search and Seizure, Racial Profiling, and Traffic Stops: A Disparate Impact Framework}, 31 \textit{LAW \& POL’Y} 1, 11, 19 (2009) (finding that even when controlling other factors dealing with “individual, situational, and contextual characteristics of a stop,” “race still has an impact on the likelihood of a search”); EEOC Transcript, supra note 16 (citing the war on drugs as a law enforcement practice that disproportionately targets minorities, leading to higher arrest and conviction rates in some minority communities).} Provided that members of both minority and non-minority races are committing crimes at the same rate, when law enforcement officers stop and search minorities at a higher rate it follows that a larger number of minorities will be prosecuted.\footnote{See Lotke, supra note 17, at 3 (“If more African Americans are searched, then more contraband will be found on African Americans and more of them will be sent to prison. Thus, the raw numbers weigh against African Americans even though probability tells a different story.”).} Because minorities are criminally prosecuted statistically more often than non-minorities, employers who give too much deference to criminal records during the hiring process cause a disparate impact on minorities.\footnote{See Laura Moskowitz, Staff Attorney with the Nat’l Emp. Lab. Project, Remarks at Meeting of the Equal Emp’t Opportunity Comm’n: Employment Discrimination Faced by Individuals with Arrest and Conviction Records (Nov. 20, 2008), http://www.eeoc.gov/eeoc/meetings/11-20-08/moskowitz.cfm (explaining that employer reliance on criminal records has a disparate impact on minorities because minorities are more likely than whites to be arrested and incarcerated).} The EEOC has held that this disparate impact violates Title VII because it discriminates against minorities.\footnote{See \textit{Why Do We Need E-RACE?}, EEOC, http://www.eeoc.gov/initiatives/e-race/why_e-race.html (“Facially neutral employment criteria are significantly disadvantaging applicants and employees on the basis of race and color.”).} Because the disparate impact results in a Title VII violation, courts have held blanket policies where employers refuse to hire anyone with a criminal record illegal.\footnote{See, e.g., Field v. Orkin Exterminating Co., No. Civ. A. 00-5913, 2002 WL 32345739, at *1 (E.D. Pa. Feb. 21, 2002) (holding that defendant employer who terminated plaintiff employee, an office manager and bookkeeper for a small pest control company, because she “had been convicted several years earlier of interfering with the custody of a child, concealing the child’s whereabouts and conspiracy,” violated Title VII, and holding generally, “a blanket policy of denying employment to any person having a criminal conviction is a violation of Title VII”).}

\textbf{B. The EEOC’s Origins and Authority Regarding Title VII}

Title VII created the EEOC, and “Congress intended the EEOC to be ‘the lead enforcement agency in the area of workplace discrimination.’”\footnote{See \textit{Catherine R. Cañano}, \textit{When the Music Stops, Why Not Require Certain Title VII Plaintiffs to Find a Chair on Which to Rest Their Complaint?}, 42 \textit{J. MARSHALL L. REV.} 505, 511 (2009).} Originally, Title VII “limited the EEOC’s functions to the investigation of employment discrimination charges
and informal methods of conciliation and persuasion. Thus, when the EEOC’s conciliation efforts failed in the course of an investigation, its involvement in the claim ended. Derrig notes that “[w]hen it originally enacted Title VII, Congress hoped to encourage employers to comply voluntarily with the Act.” However, when many employers did not voluntarily comply with the Act, Congress strengthened the EEOC’s powers of investigation and enforcement.

Currently, “[t]he EEOC is empowered to prevent any person from engaging in any unlawful employment practice.” Title VII states that an employee must file a charge of discrimination with the EEOC before the employee may file a private lawsuit. The employee must file the charge within 180 days after the allegedly discriminatory act occurred, and the EEOC must serve notice of the charge to the employer within ten days of filing. After the employee files the charge with the EEOC and the employer has been notified, Title VII states that the EEOC is responsible for investigating the charge in “order to determine whether there is reasonable cause to believe that the statute was violated.” Before issuing some form of resolution, the EEOC may handle the processing of a charge in a number of ways.

In order to assess whether there is reasonable cause to believe the charge is true, the EEOC examines “whether the ‘evidence establishes under the appropriate legal theory, a prima facie case, whether the employer has provided a viable defense, and whether there is evidence of pretext.” The EEOC must determine whether there is reasonable cause as soon as possible, no later than 120 days from the filing of the charge. If the EEOC

23. During a conciliation effort, “[t]he EEOC attempts to ‘achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief.’” Ellen N. Derrig, Title VII-The Doctrine of Laches as a Defense to Private Plaintiff Title VII Employment Discrimination Claims, 11 W. New Eng. L. Rev. 235, 242 n.31 (1989) (citing 29 C.F.R. § 1601.24 (1988)). If the employer accepts, “the remedy is embodied in a conciliation agreement that is signed by the charging party and the employer.” Id. at 241–42.

24. Id. at 242. “Enforcement could be achieved, if at all, only if the Title VII claimant initiated a private suit within thirty days after the receipt of EEOC notification that conciliation efforts had not been successful.” Id.


26. Id. at 242–43.

27. Caifano, supra note 22, at 511. But see Brent T. Carney, Part-Time Employees Divide the Circuits: An Interpretation of “Employer” Under Title VII and the ADEA, 31 New Eng. L. Rev. 167, 170 (1996) (“Congress exempted small businesses having fewer than fifteen employees from Title VII in order to protect them from the threat and expense of litigation.”).

28. Caifano, supra note 22, at 511. Title VII also “prescribes that the EEOC is responsible for processing the charge.” Id.


30. Caifano, supra note 22, at 511–12. “Title VII provides that the EEOC’s investigation can be broad.” Id.

31. The “EEOC may assign a charge for priority investigation if the initial facts appear to support a violation of the law.” Id. at 512 n.50. The EEOC can also try to settle a charge. Id. However, “if, in the agency’s best judgment, further investigation will not establish a violation of the law,” the EEOC may dismiss a charge. Id. “When a charge is dismissed, a notice is issued in accordance with the law which gives the charging party ninety days in which to file suit.” Caifano, supra note 22, at 512 n.50.

32. Id. at 512 (quoting EEOC Compliance Manual (CCH) § 40.2). “Between FY 2001 and FY 2006, the EEOC made a ‘reasonable cause’ determination seven percent of the time on average per year.” Id.

33. Derrig, supra note 23, at 244.
finds that there is reasonable cause, then it can either file a suit on behalf of an individual or decide to close its case and, upon request, issue a "Right to Sue" letter.\textsuperscript{35} Next, the EEOC must try to eliminate any allegedly unlawful employment practice through informal methods such as conference, conciliation, and persuasion.\textsuperscript{36} During its conciliation efforts, the EEOC must "attempt to achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief."\textsuperscript{37}

The EEOC can bring a civil action only once it has determined that it has been unsuccessful in obtaining a satisfactory conciliation agreement.\textsuperscript{38} "If the EEOC does not bring an action within one hundred and eighty days after the claim is filed, it must then notify the aggrieved party of the failure of conciliation."\textsuperscript{39} Next, "[t]he private civil action must be commenced within ninety days of receipt from the EEOC of a notice of right to sue."\textsuperscript{40} The charging party still has the right to file a lawsuit in federal court if the EEOC does not find reasonable cause.\textsuperscript{41} The courts have rejected the argument that the EEOC finding of no reasonable cause should create a bar to filing a lawsuit.\textsuperscript{42} Thus, parties who likely have no case may file a lawsuit.

\textit{C. The EEOC’s Current Guidelines Regarding Employers’ Use of Criminal Records During the Hiring Process}

Employers may use criminal records during the hiring process so long as they demonstrate that the use of criminal records is "related for the position in question and consistent with business necessity."\textsuperscript{43} In order for employers to decide whether the conduct from the criminal record is related to the position sought, the EEOC’s current guidelines state that employers should look to the nature and gravity of the offense, how long it has been since the arrest or conviction, and the nature of the job the employee wants or has.\textsuperscript{44} For example, in \textit{West v. The Salvation Army}, the court held that "[t]he Salvation Army’s practice to evaluate the employee and his criminal history demonstrates that the hiring policy attempts to ascertain the [applicant’s] ability to perform the job as well as the risk to the Salvation Army."\textsuperscript{45} In that situation, the job required that the

\begin{thebibliography}{9}
\bibitem{35} Caifano, \textit{supra} note 22, at 513.
\bibitem{36} Derrig, \textit{supra} note 23, at 245.
\bibitem{37} \textit{Id.} (quoting 29 C.F.R. § 1601.24(a) (1998)). “Successful conciliation avoids litigation through the execution of a formal conciliation agreement.” \textit{Id.}
\bibitem{38} \textit{Id.} at 245.
\bibitem{39} \textit{Id.}
\bibitem{40} Derrig, \textit{supra} note 23, at 245.
\bibitem{41} Caifano, \textit{supra} note 22, at 513.
\bibitem{42} \textit{Id.} “The U.S. Supreme Court said ‘whatever the practical merits of this (respondent’s) argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits.’” \textit{Id.} at 514.
\end{thebibliography}
plaintiff get household goods from private residences. Thus, because the plaintiff had prior convictions for burglary of private residences, the employer’s refusal to hire the plaintiff due to his criminal record was within the EEOC’s guidelines because “[c]onvictions of serious crimes—such as burglary—may present a substantial risk for employers like the Salvation Army.”

III. ANALYSIS

This Part will outline the need for a change in the EEOC’s guidelines. The EEOC’s guidelines lack clarity and deference. Due to this lack of clarity and deference, courts do not enforce the EEOC’s guidelines, and because of this lack of enforcement, employers do not feel the need to adhere to the guidelines.

A. The EEOC’s Guidelines Lack Clarity and Deferece

The EEOC’s guidelines are not sufficiently clear because neither employers nor courts have a precise definition of what constitutes “business necessity.” Additionally, several employers appear not to follow these guidelines because they are not aware of them. Due to this lack of clarity and the fact that employers are not aware of the guidelines, the EEOC is currently considering changing its guidelines for employers’ use of employees’ criminal records.

1. Lack of Clarity in the EEOC’s Guidelines

Courts and employers struggle to determine what constitutes a “business necessity.” The Third Circuit highlighted this confusion regarding whether a practice is a “business necessity” in El v. Southeastern Pennsylvania Transportation Authority. The court held that the Southeastern Pennsylvania Transportation Authority’s (SEPTA) policy, which “disallowed hiring anyone with . . . a violent criminal conviction,” did not violate Title VII. In El, although the employee’s second-degree murder conviction was

46. Id.
47. Id.
48. See infra note 50 (discussing why courts do not enforce the EEOC’s guidelines).
49. See infra note 51 (discussing how employers fail to comply with the EEOC’s guidelines).
51. See Letter from National Employment Law Project, to Stuart J. Ishimaru, Acting Chairman, U.S. EEOC (June 9, 2009), available at http://nelp.3cdn.net/aa8a6751197fa03ef_e2m6b5abc.pdf (alleging that “one of the nation’s largest banks (Bank of America), one of the world’s largest staffing agencies (Manpower), and a state office charged with helping individuals obtain employment (One-Stop Career Center) conspicuously failed to comply with the EEOC’s guidance regulating criminal background checks for employment”) [hereinafter NELP Letter].
52. See EEOC Transcript, supra note 16 (discussing why and how the EEOC’s guidelines should change regarding employer use of employees’ criminal records).
53. See, e.g., El, 479 F.3d. at 241 (discussing the history of the courts’ confusion regarding what constitutes business necessity).
54. Id.
55. Id. at 235. In this case, the employee was working as a paratransit bus driver whose “position involve[d] providing door-to-door and curb-to-curb transportation service for people with mental and physical
40 years old and he was 15 years old at the time of the incident, the court held that the employee’s termination under SEPTA’s policy was justified as a “business necessity” to prevent the employee from working as a paratransit bus driver.\footnote{Id. at 235–36, 248. Although the court notes that the EEOC’s guidelines require “employers to consider the circumstances of that offense,” the court also mentions that the EEOC’s guidelines are silent regarding “whether an employer justifiably can decide that certain offenses are serious enough to warrant a lifetime ban.”} El highlights the need for a clearer definition of what constitutes a “business necessity.” What one did as a minor 40 years prior should not prevent that person from holding a job as a paratransit bus driver. Additionally, the court in El stated that “[i]f a bright-line policy can distinguish between individual applicants that do and do not pose an unacceptable level of risk, then such a policy is consistent with business necessity.”\footnote{Id. at 245.} However, the court left it up to other courts to decide on the basis of the specific facts of the case whether a particular policy constitutes a “business necessity.”\footnote{Id.} This ruling seems to conflict with other courts that have held blanket policies that refuse to hire any employee with a criminal record are illegal.\footnote{Field v. Orkin Extermination Co., No. Civ. A. 00-5913, 2002 WL 32345739, at *1 (E.D. Pa. Feb. 21, 2002).}

2. Lack of Adherence to the EEOC’s Guidelines Stems from a Lack of Deferece

The court in El did not give much deference to the EEOC’s guidelines.\footnote{Id. at 245.} The lack of deference was, in part, due to the Supreme Court’s holding that when Congress enacted Title VII, it did not intend to give the EEOC authority to promulgate rules or regulations.\footnote{El, 479 F.3d at 245.} Rather, Congress intended for the amount of deference afforded the EEOC to depend on the thoroughness of its consideration, the soundness of its reasoning, and its consistency with prior and future pronouncements.\footnote{Id.} Presumably, if the EEOC changes its guidelines to appear more persuasive and to show the “thoroughness of its research,” the courts will give the EEOC’s guidelines more deference.\footnote{Id. at 245.} The lack of clarity in its guidelines and the lack of deference from the courts may have recently led the EEOC to hesitate to respond to a request from the National Employment Law Project (NELP) to investigate some allegations of employment discrimination.\footnote{NELP Letter, supra note 51.}

The NELP letter asked the EEOC to enforce its guidelines regarding the use of criminal records with three major employers: Bank of America, Manpower, and One-Stop Career Center.\footnote{Id.} The NELP letter alleges that those employers’ “use of an absolute bar to employment for individuals with criminal records violates Title VII of the Civil Rights Act of 1964 and EEOC guidance, because such policies have an unjustified adverse impact on minority applicants for employment.”\footnote{Id. at 1.} If this allegation is true, the...
EEOC will most likely follow *Field*, which held that blanket policies used by employers that exclude all employees with criminal records are illegal.\(^{67}\) Additionally, the EEOC will most likely find that the NELP has a legitimate claim and will bring an action against the employers.\(^{68}\) Perhaps in light of *El*, the EEOC appears reluctant to respond until it changes its guidelines and its decisions might evoke more deference from the courts.\(^{69}\) Ideally, once the EEOC’s guidelines are changed, courts will grant greater deference by more strictly enforcing the EEOC’s decisions, thus resulting in employers following the guidelines more diligently.\(^{70}\) The EEOC will likely find that the NELP has a legitimate claim against the mentioned employers once it revises its guidelines so that those guidelines are given more deference, and so that the NELP will be more likely to win its case.\(^{71}\)

**B. The EEOC Recognizes that Changes Must be Made to Its Guidelines**

Due to the general confusion and lack of adherence to the current guidelines, the EEOC held a meeting on November 20, 2008 to discuss employment discrimination faced by individuals with arrest and conviction records.\(^{72}\) Although nothing final resulted from the meeting, various people shared several different viewpoints that illustrate current opinions on the issue.\(^{73}\) For example, Laura Moskowitz\(^ {74}\) suggested that the EEOC keep parts of its current guidelines, such as the presumption that the use of criminal records has a disparate impact on certain minority groups.\(^ {75}\) Retaining the presumption is critical because, otherwise, the misuse of criminal records during the hiring process would not be a Title VII violation, and the EEOC would not be able to adjudicate the situation.\(^ {76}\) Moskowitz also suggested that the EEOC’s guidelines retain the prohibition of blanket policies excluding people with criminal records unless the employer can show a justified business necessity.\(^ {77}\) By excluding most blanket policies, the EEOC ensures that employers give at least some consideration to future employees with criminal records.\(^ {78}\) She also suggested that the EEOC’s guidelines maintain consideration of rehabilitation and work history and the requirement that employers link each applicant’s criminal record to the nature of the job.\(^ {79}\) Thus, an employer would have

\(^{67}\) *Field*, 2002 WL 32345739, at *1.

\(^{68}\) See infra Part IV (proposing new guidelines for the EEOC).


\(^{70}\) See *Id.* (describing why courts do not give much deference to the EEOC’s current guidelines).

\(^{71}\) NELP Letter, *supra* note 51.

\(^{72}\) EEOC Transcript, *supra* note 16.

\(^{73}\) *Id.*

\(^{74}\) Laura Moskowitz, a staff attorney at the National Employment Law Project, staffs the Second Chance Labor Project where she works in collaboration with “advocates, unions, and policymakers to promote the employment rights of people with criminal records and a more fair and effective system of employment screening for criminal records.” *Biography of Laura Moskowitz*, U.S. EEOC, http://www.eeoc.gov/eeoc/meetings/11-20-08/moskowitz_bio.cfm (last visited Nov. 14, 2009).

\(^{75}\) Moskowitz, *supra* note 19.

\(^{76}\) See EEOC Transcript, *supra* note 16 (explaining why the use of criminal records can lead to a disparate impact on minorities, which is a Title VII violation).

\(^{77}\) *Id.*

\(^{78}\) Moskowitz, *supra* note 19.

\(^{79}\) *Id.*
to demonstrate a connection between the employee’s crime and what the employee’s potential job would entail. Once again, these guidelines focus on encouraging employers to evaluate employees more closely rather than arbitrarily rejecting them because of their criminal record. If the goal of the hiring process is for employers to hire those individuals who will perform the best at their jobs, employers must look past criminal convictions which are unrelated to the job. Commissioner Ishimaru mentioned that “[b]usiness and industry suffers as a result [of using criminal convictions inappropriately] because it is not able to benefit fully from the skills of every potential worker. For our economy to be successful, we cannot afford to waste any available talent.”

Thus, when employers blindly refuse to hire employees with criminal records, they both create a disparate impact against minority employees and hurt the economy by “wasting talent.”

Moskowitz suggested some changes as well. For example, the EEOC’s guidelines should prohibit the use of arrest records that have not led to convictions. Moskowitz argued that, unlike convictions, arrests are mere allegations that can result in no conviction or a conviction of a lesser charge, and employers currently misuse them by failing to investigate whether the arrest led to a conviction. Additionally, research has shown that after six to eight years without re-offending, people with criminal records are no more likely to re-offend than people without criminal records. Moskowitz suggested that employers should not be allowed to consider criminal records seven years after the employee has been released from incarceration.

If the EEOC wants to prevent the misuse of criminal records from creating a disparate impact on minorities, and federal programs already exist to give employers incentive to hire employees with criminal records, then employers’ lack of

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80. See id. (describing the connection an employer must make between the crime and the job the employee seeks).
81. EEOC Transcript, supra note 16.
82. Id.
83. Moskowitz, supra note 19.
84. Id. Twenty states already prohibit or advise against the use of arrest records during the employment process due to possible misuse, creating conflict with the EEOC’s guidelines which currently allow the use of arrest records. Id.
85. EEOC Transcript, supra note 16.
86. Moskowitz, supra note 19.
87. See id. (discussing why after seven years, employers likely do not have a legitimate business necessity for refusing to hire someone because of their criminal record).
88. Id. Some of these programs include:

the Department of Labor’s free bonding program which insures employers against losses due to [employees’] dishonesty or theft and also the Federal Work Opportunity Tax Credit, which allows a company to claim a tax credit for hiring an employee with a felony conviction within one year of the date of his or her conviction or release from incarceration.

EEOC Transcript, supra note 16.
awareness essentially renders these federal programs useless. Clearer guidelines could help make employers aware of these programs and potentially decrease the disparate impact on minorities the misuse of criminal records creates. It is futile for programs to exist if those who could benefit from them are not aware of them. Although it is difficult to determine precisely why employers do not take advantage of these programs, these beneficial guidelines will make employers more likely to take advantage of the programs. If employers are aware of the programs, they will be more likely to take advantage of them.

Commissioner Rae Vann highlighted the need for the EEOC’s guidelines to be clearer, especially regarding when employers can legally rely on the use of criminal records during the hiring process. Vann mentioned that because “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,” the new guidelines should ensure that employers will not violate Title VII by relying on industry regulations. This suggestion lends itself to the above discussion highlighting the need for clearer guidelines. In order for the guidelines to be sufficiently clear for employers to use and understand, they must specify when employers may not exclude employees because of their criminal records, and they must specify when employers must exclude employees because of their criminal records.

C. Problems Employers Cause When They Rely on Criminal Records Inappropriately

When employers rely on criminal records inappropriately, they cause a variety of problems for employees, the EEOC, and themselves. One of these problems includes making blanket policies that reject all applicants with a criminal record. Another problem includes wasting the EEOC’s time and resources.

1. Employers Make Blanket Policies Rejecting All Applicants with a Criminal Record

Some employers refuse to hire anyone with any sort of criminal record. Such an approach ignores statistical studies that have found that the type of offense, the time since the last offense, and the total number of offenses committed affect the probability that a
potential employee will commit a crime that will affect his job. Several cases have held that refusing to hire all people with criminal records violates Title VII, but employers continue with the policy partly because they are unaware that the EEOC prohibits such practices.

2. Employers Waste EEOC Time and Resources When They Violate EEOC Guidelines

When employers use applicants’ criminal records inappropriately—in violation of EEOC guidelines—the result is a waste of resources for both the EEOC and the judicial system. People who misinterpret or are unaware of the law end up violating the law, and oftentimes, they are prosecuted. Because prosecution requires court resources, time and money would be saved by clarifying the EEOC’s guidelines. Thus, if the EEOC’s guidelines help employers to better understand the law, more employers will follow the law, requiring fewer prosecutions and lessening the consumption of court resources. If the EEOC guidelines were clearer and more widely known among employers, the amount of litigation involved in suits against employers who misuse criminal records during hiring practices could be reduced. Such a reduction in litigation would leave the EEOC free to use its resources to investigate other cases of discrimination.

D. Employers’ Right to Use Criminal Records During the Hiring Process

Employers can benefit from referring to candidates’ criminal records during background checks because under certain circumstances “criminal convictions are relevant to fitness for employment.” Employers can also protect their assets, employees, and third parties from possible criminal activity, insulating their businesses from liabilities that may arise. Employers have a right to run their businesses as successfully as possible so long as they do not infringe potential employees’ Title VII rights. In order to achieve that goal, Professor Foreman, who expressed his concerns for employers at the EEOC’s meeting on November 20, 2008, suggested that the EEOC...

97. See Moskowitz, supra note 19 (explaining why employers should consider these factors when referring to employees’ criminal records).
100. See Michael L. Foreman, Professor, The Penn. State Univ. Dickinson Sch. of Law, Remarks at Meeting of the Equal Emp. Opportunity Comm’n: Employment Discrimination Faced by Individuals with Arrest and Conviction Records, (Nov. 20, 2008), http://www.eeoc.gov/eeoc/meetings/11-20-08/foreman.cfm (“If an employer discovers, or should have discovered, that the job applicant has a criminal record, and that negligence results in harm to someone the employer may be liable for substantial damages.”); see also Rae T. Vann, Gen. Counsel, Equal Emp. Advisory Council, Remarks at Meeting of the Equal Emp. Opportunity Comm’n: Employment Discrimination Faced by Individuals with Arrest and Conviction Records, (Nov. 20, 2008) http://www.eeoc.gov/eeoc/meetings/11-20-08/vann.cfm (“[R]eviewing criminal conviction history can be critical in determining an applicant’s suitability to perform a specific job, minimizing workplace safety issues, and avoiding legal liability.”).
101. See Foreman, supra note 100 (discussing employer’s rights and concerns during the hiring and employment process).
make its guidelines more clear so that employers can more easily and confidently rely upon them in order to protect themselves from liability. In addition to clarifying the guidelines, Professor Foreman also highlighted the importance of delaying any sort of inquiry into a potential employee’s criminal record until the final hiring stages for a variety of public policy purposes.

The public policy purposes involve expanding the applicant pool in order to improve the odds of selecting the most qualified individual. The goal of the hiring process is to hire the most qualified person for the job. Thus, the EEOC’s guidelines should work to expand the applicant pool in order to hire the most qualified person. Another public policy purpose involves saving “employers the expenses associated with doing criminal background [checks] on applicants and reduc[ing] the likelihood of discrimination based on an unrelated record. . . . [I]t encourages individuals with prior convictions to apply for positions without the fear of immediate rejection and pledges a more holistic review will [take place].” If individuals with prior convictions fail to apply for a job due to a fear of rejection, this may result in qualified applicants not applying for a job that they could have performed diligently and successfully.

Employers considering criminal records during the hiring process may benefit potential employees. One study found that employers who looked at the criminal records of applicants were more likely to hire African Americans than employers who did not look at the criminal records of applicants. These results prevailed among employers that were unwilling to hire people with a criminal record. One possible explanation for this effect is that in the absence of criminal records, employers tend to use characteristics they perceive to correlate with criminal activity, such as race and breaks in employment history, to determine which candidates they will hire. Thus, when employers reference and rely on actual criminal records rather than racial traits that they believe correlate positively with criminal activity, they tend to hire more minorities because records indicate these minorities do not have criminal records.

IV. RECOMMENDATION

Now that a need for a change in the EEOC’s guidelines has been established, this Note will explain what these changes should entail and how they should be implemented. Making the guidelines more explicit is necessary in order for the employers to understand and follow them. Additionally, in order to increase awareness, the guidelines should be

102. Id.
103. Id.
104. Id.
105. Id.
106. Foreman, supra note 100.
108. Id.
109. Id.
110. Id. at 452.
111. See id. at 473 (“[E]mployers with a particularly strong aversion to ex-offenders may be more likely to overestimate the relationship between criminality and race and hence hire too few African Americans as a result.”).
made more available to both employers and employees.

A. Make Guidelines More Explicit

As discussed in Part III.D, many employers still apply a blanket exclusion on potential employees with criminal records in violation of Title VII. The Third Circuit highlighted the confusion surrounding the EEOC’s current guidelines and the lack of deference courts give to the current guidelines. In order to avoid blanket exclusions and confusion, the EEOC should clarify its guidelines and make them more accessible to employers. The new guidelines should be more detailed and leave less room for interpretation. The substantive content that will make the EEOC’s guidelines more explicit and easier for employers to follow and understand should include the type of offense, the time since the last offense, and the timing of inquiry.

1. Type of Offense

The EEOC should place a complete ban on employers looking at arrest records of employees. As discussed in Part II.A, arrest records are not an accurate representation of a potential employee’s past criminal conduct because many arrests never lead to criminal convictions and, more generally, arrests are mere allegations that a crime occurred, not proof that a crime happened. Because racial minorities are more likely to be arrested than non-minorities and an arrest is not reliable evidence that an employee committed a crime, the EEOC’s new guidelines should ban the use of arrest records during the hiring and employment process. Several states have already adopted this view. By not considering arrest records at all, employers will not risk misinterpreting or misusing them. A complete ban is the easiest type of guideline for employers to understand and follow, leaving no room for misinterpretation or misunderstanding.

Employers also need to understand what sorts of convictions constitute a “business necessity.” In order to deal with the “business necessity” confusion discussed in Part III.A.1, the EEOC’s new guidelines should outline what types of offenses constitute a “business necessity” in different types of careers. When deciding what constitutes a “business necessity,” employers should consider: the “age of the person at the time of offense; [t]he length and consistency of the person’s work history, including whether the person has recently been employed; [e]vidence of rehabilitation, whether for substance abuse or personal rehabilitation; and [e]ducational attainment.” The new guidelines

113. See supra Part III.A.2 (discussing the lack of deference courts give to the current guidelines).
114. Too much room for interpretation would lead to employers interpreting the guidelines differently and thus adhering to the guidelines differently.
115. See Moskowitz, supra note 19 (discussing why arrest records should not be used at all during hiring and employment decisions).
116. Id. “[T]wenty ‘states have specifically prohibited or advised against pre-employment [arrest] inquiries in their fair employment laws due to the possible misuse of this information.’” Id. (quoting Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964 (Sept. 7, 1990)).
could present this information in a chart format and provide information on how to find the contact information for the EEOC office closest to that employer in order to consult with the EEOC about the potential hire.

Additionally, employers need to comply with federal laws that require them to disqualify certain types of offenders from particular types of jobs. In order for employers to hire employees in a way that both complies with Title VII and federal laws, the EEOC’s new guidelines should clearly outline these requirements. The new guidelines should devote a section to telling employers that they must obey federal laws that require them not to hire certain offenders in certain lines of work. In order to keep the guidelines concise, they should provide employers with instructions on how they can obtain information about who they may not legally hire.

2. Time Since Last Offense

Studies have shown that once someone has gone seven years since his last offense the odds of that person committing another offense are the same as someone who has never committed an offense. These studies indicate that there is a fundamental unfairness in judging someone’s character and ability to perform a job based on an offense that person committed seven years ago when they are statistically no more likely to commit a new offense than someone without a criminal record. The EEOC should include this explicit seven-year timeline in its new guidelines for employers to use. This way, employers will not be tempted to use 40-year-old convictions to fire competent employees as the employer did in El. Because rehabilitation has been said to be the “historical premise of the modern prison,” employers should trust that once potential and current employees have gone seven years without committing another crime the prison system has fulfilled its rehabilitative purpose. Thus, the applicants should be treated the same as potential applicants who lack a criminal record.

3. Timing of Inquiry

The EEOC should also instruct employers to save any inquiry into an employee’s criminal record for the end of the interview process in order to avoid subconsciously or consciously tainting the employer’s decision. It would be far easier for employers to base their decisions on criminal records and allow these records to influence their decisions if employers inquire about them initially. It would be difficult for an employer to find out that a potential employee has a criminal record and then try not to allow that knowledge to taint that employer’s judgment when making a hiring decision. Several different cities and counties already require this of their employers. Implementing this

118. Id.
119. See supra Part III.B (discussing why it is unfair to deny someone the opportunity to perform a job because of a conviction from seven years ago).
121. See Edward L. Rubin, The Inevitability of Rehabilitation, 19 LAW & INEQ. 343, 352 (2001) (arguing that rehabilitation is the primary purpose of the modern prison).
122. See Moskowitz, supra note 19 (explaining the “ban the box” method, where employers may not inquire into potential employees’ criminal records until the final stage of the hiring process).
123. Some cities and counties that have instructed employers to save inquiry into employees’ criminal
requirement in the EEOC’s guidelines would help to make nationwide hiring practices 
both more uniform and fairer and less likely to lead to a discriminatory impact against 
hiring minorities with criminal records.

B. Make Guidelines More Readily Available to Employers and Employees

Employers tend not to adhere to the EEOC’s guidelines because they are not aware 
of them.124 One way to raise employers’ awareness of the EEOC’s guidelines regarding 
the use of criminal records during the hiring process is to require employers to post a 
copy of the guidelines somewhere in their office in a location that is visible to employees 
as well.125 By posting a copy of the guidelines, employers will be familiar with—and 
hopefully abide by—the guidelines and employees will know their rights regarding 
employment issues. To enforce this requirement the EEOC could fine employers for 
failing to post the guidelines.126 In order to ascertain which employers do not post the 
guidelines, the EEOC should do site checks of places of employment. This would provide 
employers with an additional incentive to post the guidelines.

C. Incentives for Employers

The EEOC should highlight the various government-sponsored incentives for 
employers to hire employees with criminal records, including programs that give six-
month insurance coverage for any theft committed by an employee with a criminal record 
and different tax credits employers may receive for hiring employees with criminal 
records.127 The new guidelines should dedicate a specific, easily accessible128 section to 
the various incentives for employers in order to make them aware of and entice them to 
use the incentives. This way such opportunities will no longer be wasted and employers 
will be more likely to give employees with a criminal record a chance, helping to reduce 
the disparate impact against minorities that occurs when employers refuse to hire 
employees with criminal records.

records until the end of the hiring process are “[Chicago,] Boston, Minneapolis, St. Paul, San Francisco, 
Baltimore, Battle Creek (MI), Alameda (Oakland, CA area) County, Multnomah (Portland, OR area) County, 
and Travis (Austin, TX area) County. Initiatives have also been proposed in Los Angeles, Philadelphia, 
Newark, New Haven, Oakland, Seattle, and San Antonio.” Id.

124. See NELP Letter, supra note 51 (detailing employers’ lack of awareness regarding the EEOC’s 
guidelines).

125. Some federal regulations already require employers to post certain regulations in the office, such as 
the Family and Medical Leave Act (FMLA), which specifies that “[e]ach employer shall post and keep posted, 
in conspicuous places on the premises of the employer where notices to employees and applicants for 
employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts 
from, or summaries of, the pertinent provisions of [the FMLA].” 29 U.S.C. § 2619(a) (2006).

126. The FMLA specifies that “[a]ny employer that willfully violates this section may be assessed a civil 
money penalty not to exceed $100 for each separate offense.” Id.

127. See Moskowitz, supra note 19 (discussing the various programs which exist to encourage employers to 
hire employees with criminal records).

128. By “easily accessible” this Note means that the incentives should be located in the table of contents or 
on one of the first few pages of the guidelines to ensure that employers will be aware of the incentives available 
to them.
These new guidelines would have important implications for both employers and employees. Employers will have to spend more time during the hiring process to make sure that they do not unfairly discriminate against employees due to their criminal records. Employers will also have to spend some time thoroughly reading and understanding the EEOC’s new guidelines, which must be located in a place that is easily accessible to both employers and employees.

These guidelines will also help both employers and employees to understand the law. When more people understand the law, more people will follow the law, and fewer violations will take place. With fewer violations of Title VII, the EEOC will be able to use its time, money, and resources on other issues that warrant its attention.