



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Washington, D.C. 20507

Office of the Chair

August 29, 2013

Hon. Patrick Morrisey
Attorney General
State of West Virginia
State Capitol Building 1, Room E-26
1900 Kanawha Boulevard East
Charleston, WV 25305

Hon. John W. Suthers
Attorney General
State of Colorado
Office of the Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203

Hon. Luther Strange
Attorney General
State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36104

Hon. Samuel S. Olens
Attorney General
State of Georgia
Office of the Attorney General
40 Capital Square, SW
Atlanta, GA 30334

Hon. Derek Schmidt
Attorney General
State of Kansas
120 SW 10th Avenue, 2nd Floor
Topeka, KS 66612

Hon. Jon Bruning
Attorney General
State of Nebraska
Office of the Attorney General
2115 State Capitol
Lincoln, NE 68509

Hon. Tim Fox
Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620-1401

Hon. Alan Wilson
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211

Hon. John E. Swallow
Attorney General
State of Utah
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, UT 84114

Dear Gentlemen:

The U.S. Equal Employment Opportunity Commission (“Commission” or “EEOC”) has received your letter dated July 24, 2013 urging the Commission to reconsider the positions expressed in its April 25, 2012 Enforcement Guidance, titled *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, (“the Guidance” or “the Enforcement Guidance”), which was approved

in a 4-1 bipartisan vote.¹ The Commission met publicly to discuss the use of arrest and conviction records in employment in 2008 and July 2011, and those meetings, their testimony and over 300 written comments submitted by the public helped inform the Commission's consideration of revisions to existing EEOC guidance, originally issued in 1987 and 1990. The updated guidance clarifies and updates the EEOC's longstanding policy in this area. You also expressed concern about two recently-filed EEOC lawsuits challenging criminal background exclusions under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). I welcome this opportunity to respond to your concerns.

Background: Title VII Analysis and Criminal Record Screens

As you know, the Commission is the federal agency responsible for enforcing the federal equal employment opportunity laws, including Title VII. Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.²

Title VII liability can, as your letter acknowledges, "arise with proof of 'disparate treatment' or 'disparate impact.'"³ With respect to criminal background checks, liability for disparate treatment (or intentional discrimination) arises if a Title VII-covered employer uses criminal history information differently based on an applicant's or employee's race, national origin, or other protected trait.⁴ Disparate impact liability - first recognized by the Supreme Court in 1971 and later codified in the Civil Rights Act of 1991 -- arises if an employer uniformly administers a criminal background check that disproportionately excludes people of a particular race, national origin, or other protected characteristic, and is not "job related for the position(s) in question and consistent with business necessity" within the meaning of Title VII.⁵

Title VII Disparate Impact Analysis, Criminal Background Screens, and the Commission's Enforcement Guidance

Your letter criticizes the EEOC's application of disparate impact analysis to the use of criminal history screens, both as set forth in the agency's Enforcement Guidance and in two recently-filed EEOC lawsuits. Indeed, your letter asserts that "race discrimination cannot plausibly be your agency's actual concern" and that the EEOC's "true purpose may not be the correct enforcement of the law, but rather the illegitimate expansion of Title VII protection to former criminals."⁶

At the outset, I want to make clear that it is not illegal for employers to conduct or use the results of criminal background checks, and the EEOC never has suggested that it is. The EEOC's mission is to prevent and remedy employment discrimination prohibited under federal law. Applying disparate impact analysis to criminal background checks is squarely within this mission. It is grounded in several Supreme Court and federal

¹ See generally U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance on the 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/arrest_conviction.cfm [hereinafter *Enforcement Guidance*].

² 42 U.S.C. § 2000e *et seq.*

³ Letter from Patrick Morrissey, Att'y Gen., State of W. Va., et al., to U.S. Equal Emp't Opportunity Comm'n, 2 (July 24, 2013) [hereinafter *State AG Letter*].

⁴ See 42 U.S.C. § 2000e-2(a). See also *Enforcement Guidance*, § IV., "Disparate Treatment Discrimination and Criminal Records."

⁵ 42 U.S.C. § 2000e-2(k)(1)(A)(i); *Griggs v. Duke Power Company*, 401 U.S. 424 (1971); *Enforcement Guidance*, § V., "Disparate Impact Discrimination and Criminal Records."

⁶ *State AG Letter* at 3.

court decisions dating back to the 1970s.⁷ It is rooted in longstanding EEOC policy guidance, dating from the late 1980s adopted under then-Commission Chair Clarence Thomas.⁸ It is also supported by, among other things, extensive, contemporary criminal justice data concerning race and national origin.⁹

Your primary objection to the substance of the Enforcement Guidance relates to its discussion of individualized assessments. But this objection appears to be premised on a misunderstanding: that the Guidance urges employers “to use individualized assessments *rather than* bright-line screens.”¹⁰ This is incorrect. The Guidance does not urge or require individualized assessments of all applicants and employees.

Instead, the Guidance encourages a two-step process, with individualized assessment as the second step. First, the Guidance calls for employers to use a “targeted” screen of criminal records. A “targeted” screen considers “at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)).”¹¹ Once the targeted screen has been administered, the Guidance encourages employers to provide opportunities for individualized assessment *for those people who are screened out*. Using individualized assessment in this manner provides a way for employers to ensure that they are not mistakenly screening out qualified applicants or employees based on incorrect, incomplete, or irrelevant information, and for individuals to correct errors in their records. The Guidance’s support for individualized assessment only for those who are identified by the targeted screen also means that individualized assessments should not result in “significant costs” for businesses.¹²

Furthermore, as your letter acknowledges, the Guidance explains that an employer may decide never to conduct an individualized assessment if it can demonstrate that its targeted screen is always job related and consistent with business necessity:

As discussed above in Section V.B.4, depending on the facts and circumstances, an employer may be able to justify a targeted criminal records screen solely under the *Green* factors. Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably

⁷ In the Guidance, the Commission cited *Griggs* and its progeny to demonstrate how disparate impact analysis has been construed. See, e.g., *Griggs*, 401 U.S. at 431; *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Dothard v. Rawlinson*, 433 U.S. 321 (1977). The Commission also cited circuit court cases to demonstrate how disparate impact analysis has been applied when evaluating criminal record exclusions. See, e.g., *El v. SEPTA*, 479 F.3d 232 (3d Cir. 2007); *Green v. Mo. Pac. R.R.*, 523 F.2d 1290 (8th Cir. 1975), *appeal after remand*, 549 F.2d 1158 (8th Cir. 1977).

⁸ See U.S. Equal Emp’t Opportunity Comm’n, *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (1990), http://www.eeoc.gov/policy/docs/arrest_records.html; U.S. Equal Emp’t Opportunity Comm’n, *Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records for Employment* (1987), <http://www.eeoc.gov/policy/docs/convict2.html>; U.S. Equal Emp’t Opportunity Comm’n, *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq. (1987), <http://www.eeoc.gov/policy/docs/convict1.html>. These policy statements have been superseded by the Enforcement Guidance.

⁹ *Enforcement Guidance*, § V.A.2., “Determining Disparate Impact,” nn. 65–74 and accompanying text (citing data from sources such as the FBI’s Uniform Crime Reports and the U.S. Department of Justice’s Bureau of Justice Statistics Special Report on the Prevalence of Imprisonment in the U.S. Population).

¹⁰ State AG Letter at 3 (emphasis added). The Enforcement Guidance also does not use the term “bright-line” screens.

¹¹ *Enforcement Guidance*, § I., “Summary.”

¹² State AG Letter at 4.

tight nexus to the position in question. Title VII thus does not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity.¹³

Thus, the individualized assessment is a safeguard that can help an employer to avoid liability when it cannot demonstrate that using only its targeted screen would always be job related and consistent with business necessity.

Another assertion in your letter is that the Guidance "purports to supersede state and local hiring laws that impose bright-line criminal background restrictions that are not narrowly tailored."¹⁴ The letter suggests that the Guidance undermines state laws -- such as a West Virginia law precluding people with felony or misdemeanor convictions from serving as municipal judges -- and asserts that, "[a]s the chief legal officers for our states, we find this intrusion into state sovereignty particularly egregious."¹⁵

The Commission's Guidance, however, does not supersede any state or local laws. Title VII does, but only if the state or local law requires or permits an act that is inconsistent with the federal statute.¹⁶ Section 708 of Title VII, which governs the statute's effect on state and local laws, has been part of the statute since Congress passed it in 1964 and states:

Nothing in this subchapter [42 U.S.C. §§ 2000e *et seq.*] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter [42 U.S.C. §§ 2000e *et seq.*].¹⁷

Accordingly, the EEOC's Guidance is simply reciting and applying the text of Title VII, which sets forth the principle that federal law preempts contradictory state or local law.

¹³ *Enforcement Guidance*, § V.B.8., "Targeted Exclusions that Are Guided by the *Green* Factors."

¹⁴ State AG Letter at 4.

¹⁵ *Id.*

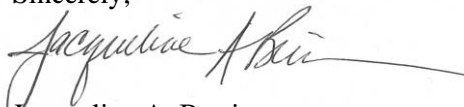
¹⁶ *See Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991) (noting that "[i]f state tort law furthers discrimination in the workplace and prevents employers from hiring women who are capable of manufacturing the product as efficiently as men, then it will impede the accomplishment of Congress' goals in enacting Title VII").

¹⁷ 42 U.S.C. § 2000e-7.

Recent EEOC Litigation

Your letter also raised concerns about two recently-filed EEOC lawsuits against Dolgencorp, LLC, d/b/a Dollar General and the BMW Manufacturing Co., LLC. The merits of these cases will be determined in court. However, I wish to reiterate here that these lawsuits challenge criminal history screening processes that the Commission alleges have a disproportionate impact on African-Americans and are not job related and consistent with business necessity, in violation of Title VII.

Sincerely,

A handwritten signature in cursive script that reads "Jacqueline A. Berrien". The signature is written in black ink and has a long horizontal flourish extending to the right.

Jacqueline A. Berrien
Chair

cc: Constance S. Barker, Commissioner
Chai R. Feldblum, Commissioner
Victoria A. Lipnic, Commissioner
Jenny R. Yang, Commissioner
P. David Lopez, General Counsel