Practical Steps Employers Can Take to Comply with New EEOC Criminal Record Guidance

A Whitepaper By

Employment Screening Resources (ESR)

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Introduction to EEOC Guidance on Criminal Records

At a meeting on April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC) – the agency that enforces federal laws prohibiting employment discrimination – voted 4 to 1 to update the Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. According to the EEOC, the updated Guidance builds on longstanding court decisions and guidance documents that the EEOC issued over 20 years ago and focuses on employment discrimination based on race and national origin. The Civil Rights Act covers employers with 15 or more employees.\(^1\)

The EEOC enforces Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination based on race, color, religion, sex, or national origin. The EEOC Enforcement Guidance is part of the EEOC’s efforts to eliminate unlawful discrimination in employment screening, hiring, or retention. The EEOC had originally issued three separate policy documents in February 1987 and July 1987 and in September 1990 explaining when the use of arrest and conviction records in employment decisions may violate Title VII.

The 2012 Guidance is not a rule or regulation and therefore does not have the force or effect of law. However, it is the EEOC’s position on enforcement of Title VII in regarding criminal records, and therefore is an important document for employers. An employer that does not follow the EEOC guidelines can be subject to an investigation and litigation by the EEOC, as well as private lawsuits by individuals that may allege a failure to hire based upon discriminatory criteria. Although Courts are not required to accept the EEOC position, Courts will take an EEOC Guidance into account in any litigation and employers put themselves at risk by not taking the Guidance into consideration.

Leading up to the new Guidance, the EEOC held a public meeting in July of 2011 on ‘Arrest And Criminal History As A Hiring Barrier.’ Recent enforcement actions include the E-RACE (Eradicating Racism and Colorism in Employment) initiative and a strategic plan to target systemic violators. For example, a major beverage firm agreed to pay $3.13 million and make policy changes to resolve a charge of nationwide hiring discrimination against African Americans with criminal background checks following an investigation. In addition, the EEOC has stepped up its enforcement with high profile litigation accusing employers of using criminal records and credit reports in a way that produced a “disparate impact.”

The purpose of this whitepaper is to go beyond simply repeating the EEOC Guidance language and instead give “real world” examples and suggestions on what employers should do now to remain in compliance with EEOC Guidance while performing criminal background checks.

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\(^1\) One commissioner dissented. Her comments can be found at [http://www.eeoc.gov/eeoc/meetings/4-25-12/transcript.cfm](http://www.eeoc.gov/eeoc/meetings/4-25-12/transcript.cfm).

\(^2\) The rules for counting employees for purposes of application of the Civil Rights Act can be complex and any business that is approaching the 15 employee level may want to check with their attorney.

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Why Do Employers Use Criminal Background Checks?

A 2012 survey from the Society for Human Resource Management (SHRM), ‘Background Checking – The Use of Criminal Background Checks in Hiring Decisions,’ found that nearly seven out of ten organizations – 69 percent – conduct criminal background checks on all of their job candidates while 18 percent conduct criminal checks on select job candidates and 14 percent do not conduct criminal checks on any job candidates.

Other key findings of the survey, which consisted of a sample composed of 544 randomly selected HR professionals from SHRM’s membership, include:

- Among organizations that conduct criminal background checks, 62 percent initiate criminal background checks after a contingent job offer and 32 percent initiate them after the a job interview. Only 4 percent of organizations initiate criminal background checks before a job interview.

- 52 percent of organizations conduct criminal checks on job candidates to reduce legal liability for negligent hiring while 49 percent conducted them to ensure a safe work environment for employees.

- 96 percent of organizations say that they are influenced not to hire convicted violent felons while 74 percent say they are influenced by non-violent felony convictions.

- 69 percent of organizations conduct criminal checks on job candidates for positions with fiduciary and financial responsibilities and 66 percent conduct them on job candidates who will have access to highly confidential employee information.

- 58 percent of organizations allow job candidates to explain the results of their criminal checks before the decision to hire or not to hire is made while 27 percent allow job candidates to explain the results after the decision is made.

In addition, the SHRM survey found that larger organizations are more likely to conduct criminal background checks for all job candidates than smaller organizations:

- 83 percent of organizations with 2,500 to 24,999 employees conducted criminal background checks for all job candidates.

- 69 percent of organizations with 100 to 499 employees conducted criminal background checks for all job candidates.

- 48 percent of organizations with 1 to 99 employees conducted criminal background checks for all job candidates.

The SHRM survey ‘Background Checking – The Use of Criminal Background Checks in Hiring Decisions’ is at: [http://www.shrm.org/Research/SurveyFindings/Articles/Pages/CriminalBackgroundCheck.aspx](http://www.shrm.org/Research/SurveyFindings/Articles/Pages/CriminalBackgroundCheck.aspx).

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What is the EEOC Concerned With?

There have been a number of drivers leading the EEOC to re-examine its previous notices on the use of criminal records:

- In 2007, a case from Philadelphia brought attention to the issue when an applicant with a 40 year old homicide conviction was denied employment as a public bus driver. (El v. SEPTA 479 F.3d 232 (3d Cir. 2007)

- The EEOC cited studies showing that millions of Americans have criminal records, and therefore the use of criminal records as a barrier to employment is problematic. The National Employment Law Project (NELP), a national advocacy organization for employment rights of lower-wage workers and the unemployed, issued a study in March 2011 called – ’65 Million “Need Not Apply” – The Case for Reforming Criminal Background Checks for Employment.’ The report estimated nearly 65 million people in the United States – more than one in four adults – have criminal records. Other studies also show a high rate, and even though such studies are subject to debate since they can include misdemeanors, it is undisputed that a surprisingly large segment of the American workforce has some sort of criminal record.

- Privacy and poverty law lawyers have lobbied to restrict the use of criminal records in order to facilitate re-entry into society for ex-offenders. According to the study by NELP cited above, unfairly obstructing workers with criminal records from an opportunity to obtain employment lowers public safety since studies show that providing ex-convicts the opportunity for stable employment actually lowers crime recidivism rates. Ensuring that all workers have job opportunities is critical since no economy can sustain a large and growing population of unemployable workers, especially with the cost of corrections at each level of government having increased 660 percent from 1982 to 2006.

- In order to facilitate employment of ex-offenders, a number of cities and counties across the U.S. have joined the “Ban the Box” movement. The goal is to remove the box on job applications where applicants are asked to check whether or not they have a criminal record next to the question about past criminal arrests and convictions. By removing this question, supporters assert that job applicants can be assured that they will not be automatically excluded for consideration for a job because of their past mistakes and that those applicants with criminal pasts are given a fair shot in the process. Otherwise, they may be deterred from even applying in the first place. The concern is that by asking about a criminal record early in the process, job applicants essentially face a life-time ban on employment for many jobs. This does not mean that pedophiles will have access to playground jobs or robbers are entitled to jobs involving cash. The idea is that an appropriate background check can still be conducted before the job is finalized, but ex-offenders should be afforded the opportunity to at least compete for a position in the first place before a criminal record results in being disqualified out of the gate. A Resource Guide from NELP ‘Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records’ updated in February 2012 lists cities and counties that have “banned the box.” The NELP Resource Guide is available at: http://nelp.3cdn.net/14047d447967924539_zcm6bz5bp.pdf.
Suggestions have been made by organizations lobbying for consumer rights that background checks are inaccurate. The background screening industry has countered that in fact, given the millions of searches performed each year, and the complexities of background screening, the accuracy level is extremely high. A study by the National Association of Professional Background Screeners (NAPBS) – http://www.napbs.com – validated by an independent research firm confirms this. However, there have been documented cases of inaccuracy leading to the loss of job opportunities.

Along with the increased focus on enforcement and litigation mentioned earlier, these issues came together to trigger the EEOC’s review of this important area. The underlying issue is that the use of criminal records is difficult because it involves important American values that can seem to conflict. On one hand, Americans value public safety and a safe workspace with honest and qualified employees. On the other hand, society has a strong belief in second chances, and that a person’s past should not hold that person back forever, particularly for more minor offenses. After all, America is a country that prides itself on second chances.

The issue is how to draw lines that both protect innocent people and, at the same time, does not burden ex-offenders, their families, and the taxpayers by creating a permanent class of unemployed people. Unless an ex-offender can get a job, they cannot become a taxpaying and law abiding citizen and the taxpayers end up building more prisons then they do schools or hospitals, so it is a matter of finding a good balance.

Wait. A Business Can Be Sued for NOT Hiring Criminals?

According to a recent New York Times article, many small business owners do not know it is illegal for employers to impose a “blanket ban” on hiring job applicants with criminal histories and are not aware that the EEOC recently voted to update Guidance on the use arrest and conviction records in employment decisions. (See: http://www.nytimes.com/2012/06/21/business/smallbusiness/us-presses-on-illegal-bias-against-hiring-those-with-criminal-records.html.)

The Times article interviewed business owners, labor lawyers, and human resources consultants and found many small businesses “had no idea” there was anything wrong with employers using the criminal histories of job seekers to impose blanket bans on hiring applicants with a criminal records or that such practices would discriminate against them illegally in the eyes of the EEOC.

The reason, said one labor lawyer interviewed for the story, was that many small businesses “don’t have an H.R. person and get minimal education about compliance issues,” and labor lawyers interviewed in the article say that the new EEOC enforcement Guidance requires employers “to establish procedures to show they are not using criminal records to discriminate by race or national origin.”

Arrest Records vs. Conviction Records

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According to the EEOC, an employer’s use of an individual’s criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII. Since having a criminal record is not listed as a protected basis in Title VII, the question of whether an employer’s reliance on a criminal record to deny employment violates Title VII depends on whether it is part of a claim of employment discrimination based on race, color, religion, sex, or national origin. The EEOC Guidance discusses the differences between arrest and conviction records:

- **Arrest:** The fact of an arrest does not establish the criminal conduct has occurred, and an exclusion based on an arrest, in itself, is not job related and consistent with business necessity. However, an employer may make an employment decision based on the conduct underlying an arrest is the conduct makes the individual for the position in question.

- **Conviction:** In contrast, a conviction record will usually serve as sufficient evidence that a person engaged in particular conduct. In certain circumstances, however, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision.

### Disparate Treatment vs. Disparate Impact

Title VII liability for employment discrimination is determined using two analytic frameworks: “disparate treatment” and “disparate impact.” The EEOC Guidance discusses disparate treatment and disparate impact analysis under Title VII:

- **Disparate treatment liability:** A violation may occur when an employer treats criminal history information differently for different applicants or employees, based on their race or national origin.

- **Disparate impact liability:** An employer’s neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity.

Under a ‘disparate impact’ approach, an employer can be liable even if they did not subjectively intend for any discrimination to occur. It is not an issue of what the employer intended, but rather what actually resulted from the employer’s policies and procedures.

### Job Related & Consistent with Business Necessity Defense

The EEOC Guidance also describes two circumstances in which the EEOC believes employers will consistently meet the “job related and consistent with business necessity” defense:

- **#1:** The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or
#2: The employer develops a targeted screen considering 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)). The employer’s policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.)

**Federal, State & Local Laws and the EEOC Guidance**

The EEOC Guidance also discusses Federal, State & Local Laws that either conflict with or are preempted by Title VII.

- **Federal Laws:** Compliance with other federal laws and/or regulations that conflict with Title VII is a defense to a charge of discrimination under Title VII.

- **State/Local Laws:** State and local laws or regulations are preempted by Title VII if they “purport to require or permit the doing of any act which would be an unlawful employment practice” under Title VII. 42 U.S.C. § 2000e-7. In other words, even if an employer is following state laws, the EEOC can allege a violation of the federal Civil Rights law if there is a “disparate impact.”

**“Ban the Box” and Limited Questions about Past Conduct**

The EEOC also recommends the “Ban the Box” approach mentioned above as a best practice where the employer removes the box that job applicants are asked to check on most applications if they have a criminal record. The EEOC also recommends that when a criminal questions is eventually asked, that it not be so open ended that if elicits matters that are ether old or irrelevant to the job.

The EEOC commented:

- As a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.

A collateral consequence of a criminal conviction can include a limitation on the ability to get a job. The EEOC recommendations on “Ban the Box” and limitations on questions about past criminal conduct are aimed at assisting ex-offenders in having the opportunity to at least compete for employment without a near automatic elimination due to their status as past offenders before employers have had the opportunity to consider the applicants on their merits.

**Factors Added to Three Part “Green” Test**
The EEOC has long taken the position that an employer should not automatically reject an applicant with a criminal record without taking into consideration whether the matter was related to the job, so that there was a business necessity to deny employment. This is why nearly every employment application follows a question about past criminal conduct with a statement that a criminal record will not be the basis for an automatic rejection. For this reason, prior to the EEOC Guidance, the use of a “decision matrix” and a scoring system such as “red light, orange light, green light” was not recommended, since a red light tended to be an automatic exclusion without a consideration of the specific facts of that applicant.

The EEOC recommended in 1987 that employers first analyze three factors: the nature of the crime; the time elapsed; and the nature of the job. This three part test is known as the “Green” test based upon Green v. Missouri Pacific Railroad, 523 F.2d 1290 (8th Cir. 1975).

The new EEOC Guidance enhances the three part test with more detailed definitions

☑ Green Factor #1: Nature and gravity of the offense:

Additional language:

☑ The harm caused.

☑ The legal elements of the crime.

☑ The classification of the offense (e.g., misdemeanor vs. felony).

☑ Green Factor #2: Time since the conviction and/or completion of the sentence:

Additional language:

☑ Includes evaluation of recidivism.

☑ Green Factor #3: Nature of the job held or sought:

Additional language:

☑ More than just job title.

☑ Evaluation of specific duties, essential functions, circumstances (i.e. supervised or not) and environment (in a home, at a factory, etc.).

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**Notifying Applicant of Individualized Assessment**

The EEOC also suggested, although indicated it was not required, that employers consider the use of an “Individualized Assessment” in cases where an applicant is rejected due to the three part Green Factors test.
Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual’s additional information shows that the policy as applied is not job related and consistent with business necessity.

The individual’s showing may include information that he or she was not correctly identified in the criminal record, or that the record is otherwise inaccurate.

An important consideration is that once the employer notifies the applicant of the opportunity, it is the applicant’s responsibility to follow up with the employer. The employer does not need to pursue the rejected applicant to set up a meeting. In other words, the ball is in the applicant’s court once the employer sends out the notice.

### Additional Factors for Individualized Assessment

The EEOC indicated additional evidence an employer should review for the Individualized Assessment:

- Facts or circumstances surrounding the offense or conduct.
- Number of offenses for which the individual was convicted.
- Age at the time of conviction, or release from prison.
- Evidence that individual performed the same type of work, post-conviction, without any known incidents of criminal conduct.
- Length/consistency of employment before/after offense.
- Rehabilitation efforts.
- Whether individual is bonded under a federal, state, or local bonding program.

### EEOC Recommended Best Practices for Employers

The EEOC Guidance recommends the following examples of best practices for employers who are considering criminal record information when making employment decisions.

**General**

- Eliminate policies or practices that exclude people from employment based on any criminal record.
- Train managers, hiring officials, and decision makers about Title VII and its prohibition on employment discrimination.

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Developing a Policy

- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
  - Identify essential job requirements and the actual circumstances under which the jobs are performed.
  - Determine the specific offenses that may demonstrate unfitness for performing such jobs.
  - Identify the criminal offenses based on all available evidence.
  - Determine the duration of exclusions for criminal conduct based on all available evidence.
  - Include an individualized assessment.
  - Record the justification for the policy and procedures.
  - Note and keep a record of consultations and research considered in crafting the policy and procedures.

- Train managers, hiring officials, and decision makers on how to implement the policy and procedures consistent with Title VII.

Questions about Criminal Records

- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

Confidentiality

- Keep information about applicants’ and employees’ criminal records confidential. Only use it for the purpose for which it was intended.

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**EEOC: The Great, The Good & The Challenging**

The EEOC objective of ensuring that ex-offenders are not the subject of unfair treatment by employers should be fully embraced. America is a country of second chances, and if a person has committed a crime and done the time, he or she needs need a job in order to become a law abiding and a tax-paying citizen. As a society, we cannot afford to build more prisons than schools or hospitals.

However, the results can be devastating when the wrong person is put in the wrong job and children are molested, woman are subjected to serious sexual assaults, and people are murdered in their own homes.

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– all because appropriate due diligence was not exercised. There should be a job for everyone, but not everyone is entitled to every job.

A review of the EEOC Enforcement Guidance for use of criminal records by employers can be broken down into three sections: The Great, The Good, and The Challenging:

The Great:
The EEOC said background checks are absolutely lawful. There is nothing in the Guidance that in anyway prohibits or prevents an employer from engaging in due diligence to select safe and qualified applicants.

In addition, the EEOC gave more clarity to the three part Green Test. Prior to the Guidance, employers utilized the barebones three part test. Now for example, instead of just considering the nature of the job, an employer is asked to go into more details such as job title, job duties, essential functions of the job, circumstances (degree of supervision), and environment (e.g. private home vs. factory).

The Good:
The following two suggestions are easily implemented, and may have little or no negative impact on employer and could potentially have a very positive impact on the problems of associated with finding appropriate work for ex-offenders. They are discussed in more detail later in this whitepaper:

- The EEOC suggested a “Ban the Box” approach for private employers
- The “Ban the Box” movement in states/cities seeks to remove the criminal history question from job applications and shows employer use of criminal records is under fire
- The EEOC suggested an “Individualized Assessment” if applicant fails the three part “Targeted Screen” approach

The Challenging:

- The EEOC suggested that employers only ask criminal questions related to the job:

Although goal of the EEOC is laudable, the practical implementation is challenging. The idea behind the EEOC suggestion is that a broadly worded question about past criminal history may elicit information that is either too old or irrelevant to the job. The problem is that there are 1,000’s of jobs and crimes, making it an extremely difficult undertaking to precisely determine exactly what offense is relevant to the job. Adding in factors such as the age of the offense, or the level (such as felony or misdemeanor), make this daunting task. For example, if an applicant was convicted 3 years ago for assault, how is an employer supposed to draw fine lines to say for some jobs that is acceptable and for others it is unacceptable. Furthermore, the EEOC has given no practical guidance on how to deal with this suggestion. The illustrations in the EEOC Guidance are based upon extreme examples. In the case of what questions about criminal records should be asked in connection to certain jobs, an employer needs to thread the needle much more tightly, and there is no clear or obvious way to do that. The goal of not having a

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criminal record act as a “lifetime ban” on employment is clear, but the EEOC has provided no practical guidance for employers to implement the policy of limiting criminal inquiries.

The illustrations provided by the EEOC were basic and covered fairly obvious cases. Decisions that employers must face in the real world every day are much more complex. For example, there is widespread agreement that a violent criminal should not work with groups at risk. However, that is not likely to be the situation facing most employers. The actual situation facing an employer is likely to be much more difficult and subtle, such as a person convicted of minor offense years ago who has done well since. The solution may well be for employers to begin the process of developing a Matrix that matches various crimes with the risks associated with a job (as discussed below).

One potential problem to watch out for is that the EEOC Guidance of employers limiting inquiries can have the unintended consequence of working against ex-offenders trying to get jobs. The problem is that an applicant with criminal records is being put into a position of potentially having to make a very complicated legal and factual judgment in order to respond to the narrowly worded questions about past criminal conduct envisioned by the EEOC. Ex-offenders sometimes find it difficult to recall exactly what occurred in court, and if an ex-offender makes even an innocent mistake, it could be construed as an attempt to lie and fabricate. This is another issue employers will need to keep in mind.

The EEOC suggests the use of studies to determine recidivism and relevance of older crimes:

- The science when it comes to determining future relevance of a past offense is in its development stage. Until there is a great deal more study, the science of predicting which individuals may or may not re-offend in the future is not the basis from which employers can make hiring decisions. The EEOC cites studies that an ex-offender’s criminal past becomes irrelevant over time. The difficulty for employers is that the recidivism studies cited in the EEOC Guidance are still in the early stage and presents real difficulties in trying to use them as the basis of social policy. The studies cited by the EEOC concerning recidivism, although useful and a good place to start, are in the very early stages of research. The studies agree on one point: there a great deal more empirical evidence is needed

The EEOC indicated it was no defense if an employer was following state rules.

- If an employer is following state rules that specify that certain crimes disqualify an applicant, the employer can still conceivably be the target of an EEOC action. That places an employer in a nearly impossible Catch-22, where they may have to choose between violating state law or risk action under Title VII if there is allegation of disparate impact caused by a state or local rule. It has been suggested that the EEOC’s goal is not to place employers in an impossible situation, but to encourage state governments and licensing agencies to exercise care in drafting laws that place unnecessary limits on consumers with criminal records. Employers in such a situation
may find that the best course is to follow state law, since presumably a state legislature has made some sort of legislative finding that certain criminal records are inconsistent with certain occupations or licenses.

Three Potential Employer Responses to New EEOC Guidance

Employers are well advised to have an action plan to comply with the new EEOC Guidance on the use of criminal records. There are three potential employer responses to the EEOC Guidance.

- **Employer Response #1 to EEOC Guidance** is to seek advice from labor law firm to set up system.
- **Employer Response #2 to EEOC Guidance** is to continue current system with common sense modifications based upon EEOC Guidance.
- **Employer Response #3 to EEOC Guidance** is to utilize the methods outlined in this whitepaper as a basis to set up in-house system for compliance based on new EEOC Guidance.

Employer Response #1 to New EEOC Guidance

Employer Response #1 to EEOC Guidance is to seek advice from labor law firm to set up system. This may be advisable if an employer is of sufficient size, or is well known to the point where it believes it may attract the attention of the EEOC especially in light of the EEOC’s enforcement plan to focus on systemic violators. Labor law firms can be located by checking the listings of labor law firms and labor lawyers using resources such as the following:


Employer Response #2 to New EEOC Guidance

Employer Response #2 to EEOC Guidance is to continue with a firm’s current system, and add common sense modifications based upon EEOC Guidance. At a minimum:

- Have policy that employer maintains a safe workplace and will conduct strict review of any applicant with a criminal record, but no **automatic disqualification**.
- Have both a non-discrimination and a diversity policy in place, complete with appropriate and documented training.
- Ensure proper training of managers and supervisors.
- Ensure that all information remains protected and confidential and only viewed by a person with a need to see for hiring.
Use the enhanced “Green Factors” when analyzing a criminal matter.

Consider not asking about past criminal convictions up front on the application but instead use a “criminal advisement” (details in next section). As a practical matter, at least 70% of all applicants are normally eliminated by employers in the first round of review on the basis that the applicant does not even possess the knowledge, skills, abilities or experience to perform the job. There is no advantage to asking a potentially controversial question that serves as an early up front knockout punch. The best practice may be to wait until all applicants have been considered initially on criteria that are clearly fair and neutral, and to delay the question about a criminal record until at or after the interview when a candidate is further into the process. If an employer finds an ex-offender is a candidate that is otherwise qualified, an employer may well consider that applicant for the right position.

When asking a criminal question, place common sense limits so that an employer is not asking about events that are far too old or irrelevant. For example, instead of asking if a person had ever been convicted of a crime, an employer may wish to limit question to the past ten (10) years. The concern is that a broad and open ended question can potentially create a lifetime ban on employment. Of course, if an employer has a “matrix” of criminal matters that are related to a job (as described below), then such limits can be easily made based upon the matrix.

Use “Individualized Assessment” process as a final safety valve. When used in conjunction with a Notice of Pre-Adverse action under the federal Fair Credit Reporting Act (FCRA), this becomes another notice that is sent as well. If the applicant wishes to make a case, then the burden is on the applicant to contact the employer to explain why the reports is either inaccurate or why they should be hired anyway. This represents an additional “relief valve” to ensure all applicants are treated fairly and have a chance to make their case, and adds very little if anything to an employer’s administrative burdens.

Use a “Criminal Record Advisement” instead of asking a question about past criminal conduct in the employment application. This is a way of fairly advising applicants about what to expect during the hiring process. It is analogous to advising applicants during an interview that, if selected, at some point they need to prove evidence of a right to work in U.S. An employer should not ask about the right to work during the interview, but can advise that it will be a requirement down the road.

However, such an advisement should NOT be a de facto or indirect way to slam the door shut on ex-offenders, and must be carefully worded as not to deter or chill ex-offenders from applying:

Sample “Criminal Record Check Advisement”

Below is an example of a “Criminal Record Check Advisement”:
If the company determines an applicant is suitable for the position based on a job related evaluation of skills and experience that may also include an interview, prior to final selection and subsequent employment, an applicant will be subject to a background check that is appropriate to the job functions and business necessity. If related criminal records are revealed in the process, the applicant will not be automatically disqualified.

Additional Considerations:

The EEOC suggests limiting inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity. This is very difficult to do since there are hundreds of different crimes and jobs. The suggested best practice is the following:

- Select and train “Criminal Record Assessment Specialist” to handle the process, thereby arguably eliminating need to try to only ask about “job related” crimes. The specialist would filter out the information provided and only send on to the decision maker information that may be relevant and requires additional analysis.

- Utilize an employment screening firm to collect such information on finalists only, and to report back results based upon the system described below.

**Employer Response #3 to New EEOC Guidance**

**Employer Response #3 to EEOC Guidance** is to utilize the methods outlined in this whitepaper as a basis to set up in-house system for compliance based on new EEOC Guidance. An employer would start with the suggestions in Response Number 2 above, and then utilize a more formalized structure to ensure compliance. The essential thrust is that employers may need to consider the use of a matrix system in order to determine which crimes require further review and which crimes are clearly not relevant to a job. Although prior to the EEOC Guidance employers and screening firms avoided the idea of a matrix in order to avoid allegations of discriminatory automated decision making, the new EEOC Guidance appears to encourage employers to use a matrix approach in order to analyze how and if an offense is relevant to a particular job.

**Begin with a Job Class Description**

Employers should define ahead of time the Job Class Functions, Duties, Skills, Requirements, Environment, Level of Supervision, Interaction with Others, and Special Risk Factors.

This is step one in satisfying the EEOC requirement that: “The employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.”

**For Each Job Class Create and Utilize the Following Tools**

- Job Class Analysis Worksheet.
Risk Assessment Matrix.

“Green” Factors Review (enhanced).

Individualized Assessment Worksheet.

**Job Class Analysis**

- List all the elements of each category for the entire Job Class including:
  - Functions, Duties, Skills, Requirements, Environment, Level of Supervision, Interaction with Others, and Special Risk Factors.
  - Rank each element in a range from not important to critical to the job. This “job relatedness” is the basis for determining if further review is required.
  - Importantly, the Functions, Duties, Skills and Environment factors help to not only identify special risk factors, but to allow the employer to analyze an employee or an applicant based upon these objective areas before initiating the background check.

**Risk Assessment Matrix**

- This matrix compares frequently encountered criminal matters to each element is a defined Job Class. For example crimes of theft by deception such as embezzlement would be highly related to a job in finance/accounting.

- It should take into account the seriousness of each crime and when it happened. A petty theft conviction from 10 years ago with no subsequent contact with the legal system may no longer be relevant to certain finance positions.

- If based on the Job Class and the Risk Assessment Matrix the applicant would not be eliminated, then the employer can proceed in the hiring process and this special review process ends here.

- If based upon the Job Class, the job related element(s) and the crime(s) in question it is determined that further research is needed, then the applicant goes to the next step, which is a “Green” Factors Review Worksheet.

**“Green” Factors Review**

- If the Risk Assessment Matrix review indicates further research is needed, you move on to a worksheet that contains the enhanced “Green” Factors defined by the EEOC to review the offense and offender circumstances in the required detail.

- If after the Green Factors review process it is determined the applicant should not be eliminated, then they may continue in the hiring process.
If the person would still be eliminated after “Green” Factors Review, then EEOC defined Individualized Assessment is triggered.

**Individualized Assessment Worksheet**

- At this stage, the applicant has been potentially eliminated based upon the first three steps.
- However, the EEOC says the applicant should have the opportunity to demonstrate reasons they believe might overturn the current finding of elimination.
- An employer can facilitate this process providing notice to the applicant about the process and using an Individualized Assessment Worksheet to determine fully and finally if the applicant should be eliminated.
- If the applicant fails to respond to the notice you can eliminate them based on that alone.

**Pre-Adverse Action Notice and the EEOC Guidance**

- If a consumer has been eliminated based on the first three stages, they are entitled to two notices:
  - Pre-adverse action notice.
  - Notice of an “Individualized assessment.”
- These should be separate documents to demonstrate specific compliance with both EEOC and FCRA.
- If the decision is made final after the pre-adverse action letter and the opportunity for an individualized assessment, then the FCRA required final post-adverse action letter is required as well.

**What If an Applicant Lies?**

At some point in the hiring process, an employer should ask about past criminal records. It can be extremely relevant to employment and demonstrates due diligence. Depending upon the employer’s hiring process, an employer may be able to justify asking the question either at, or just after, an interview.

By the time an applicant has been invited to an interview, an employer has likely gone through a process to whittle down the applicant pool by a close examination of neutral and job related criteria, such as knowledge, sills, abilities, and experience. If the candidate lies about a criminal record, then any decision not to hire would be based upon the fabrication. After all, no employer is obligated to hire anyone who is dishonest and deceitful. However, keep in mind that the criminal questions should still be limited in scope to exclude matters that are too old or not relevant to the job.
**The Bottom Line**

Even with increased regulations, employers must still do background checks to ensure that new hires are qualified, capable and free from unacceptable risk. The updated EEOC Guidance requires some additional processes be incorporated into policies and procedures. While change is always a burden, these additional requirements can be effectively managed.

Once instituted, employer has a great deal of protection since they can demonstrate good faith EEOC compliance. In addition, the changes may well result in some offenders capable of doing the work getting through the door when they may have otherwise been eliminated early.

Although compliance may seem like a time consuming project, it is no more difficult than many other Human Resources project such as creating an employee manual or reviewing employee classifications. Once the project is completed, then an employer has a program in place, subject to periodic reviews and updates.

**Helpful Links for EEOC Guidance**

- The materials for the EEOC public meeting held April 25, 2012 on the use of arrest and conviction records, including testimony and transcripts, are available at [http://www.eeoc.gov/eeoc/meetings/4-25-12/index.cfm](http://www.eeoc.gov/eeoc/meetings/4-25-12/index.cfm).
- A recorded version of a webinar hosted by Employment Screening Resources (ESR) founder and CEO Attorney Lester Rosen, ‘Practical Steps Employers Can Take to Comply with the New EEOC Criminal Guidance,’ is available at: [https://www2.gotomeeting.com/register/781044434](https://www2.gotomeeting.com/register/781044434). *(ESR CLIENTS: For a recording of the ESR ‘Client Only’ EEOC Guidance webinar on May 31, 2012, contact ESR Customer Service at 415.898.0044 or customerservice@esrcheck.com.)*

**About the Author – Attorney Lester Rosen**

**Attorney Lester S. Rosen** is Founder and CEO of Employment Screening Resources (ESR), a nationwide background screening firm accredited by the National Association of Professional Background Screeners (NAPBS®). He is the author of “The Safe Hiring Manual,” the first comprehensive guide to background screening, and a noted authority and frequent speaker on the topics of background screening, due diligence, and legal compliance. He has qualified and testified as an expert witness in court cases related
to screening and hiring issues and has testified before the California Legislature on laws relating to background checks. He chaired the steering committee that founded the NAPBS, the background screening industry’s professional trade association, and served as first co-chair.

**About Employment Screening Resources (ESR)**

**Employment Screening Resources (ESR)** – ‘The Background Check Authority℠’ – provides accurate and actionable information, empowering employers to make informed safe hiring decisions for the benefit for their organizations, their employees, and the public. ESR literally wrote the book on background screening with “The Safe Hiring Manual” by Founder and CEO Lester Rosen. ESR is accredited by The National Association of Professional Background Screeners (NAPBS), a distinction held by a small percentage of screening firms. By choosing an accredited screening firm like ESR, employers know they have selected an agency that meets the highest industry standards. For more information about Employment Screening Resources (ESR), visit [http://www.esrcheck.com/](http://www.esrcheck.com/) or call 888.999.4474 Toll Free.

**About ESR Assured Compliance℠ System**

ESR provides clients specific alternatives on EEOC Guidance for criminal records through additions to its proprietary ESR Assured Compliance℠ system. The ESR Assured Compliance℠ system, which only ESR clients have access to, provides a pathway to compliance with the new EEOC Enforcement Guidance on the use of criminal records with propriety tools, software, and templates. Since all employers need an action plan to comply with the new rules of the EOCC Guidance on the use of arrest and conviction records, ESR Assured Compliance℠ offers clients flexible compliance templates with potential paths they may consider to find the best fit for their business. Specific questions about the ESR Assured Compliance℠ system should be emailed to: EEOCtools@esrcheck.com.

To help businesses remain in compliance with the U.S. Equal Employment Opportunity Commission (EEOC) Guidance on use of criminal background checks, Employment Screening Resources (ESR) provided its clients with the ESR Assured Compliance℠ system for EEOC Guidance for criminal records at a special “client only” webinar hosted by ESR founder and CEO Attorney Lester Rosen in May 2012. ESR clients who would like a recording of the special ESR ‘Client Only’ EEOC Guidance webinar may contact ESR Customer Service at 415.898.0044 or clientsupport@esrcheck.com. In addition, a recorded version of second ESR webinar on the new EEOC Guidance hosted by Rosen in June 2012 that was open to the general public is available at: [https://www2.gotomeeting.com/register/781044434](https://www2.gotomeeting.com/register/781044434).