

## **Criminal Background Checks in Employment: An Unfolding Legal Quandary for Employers**

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### **Abstract**

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This article examines the important and controversial topic of criminal background checks in employment. An overview is provided as to the prevalence of the use of background checks and the legal and ethical controversies ensuing therefrom. The article analyzes the applicable law pertaining to criminal background checks in employment, including federal, state, and local statutory law, federal case law, as well as EEOC "guidelines" and enforcement actions. The implications for the stakeholders affected by criminal background checks, especially legal consequences for employers, are discussed. Finally, the authors make recommendations to employers as to how to use criminal background checks in a legal, ethical, and efficacious manner.

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**Keywords:** background checks, criminals, incarceration, employment

### **Introduction**

The topic of criminal background checks in employment is indeed an important as well as controversial and difficult one in the world of business today, as this hiring practice addresses core values in society. Yet these values can conflict. One societal value is the belief that if a criminal ex-offender has paid his or her "debt to society," then opportunities, such as employment, should be made available to such a person, just like everyone else.

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However, any societal value is the right as well as responsibility of the employer to staff its workforce in a safe, secure, and productive manner. Accordingly, certain key questions – with legal, ethical, and practical ramifications - arise when ex-offenders seek employment, to wit: When has an individual truly paid his or her “debt to society”? Does the individual continue to “pay the price” for a poor choice, indiscretion, or for being a victim of circumstance for the rest of one’s life? What are the employer’s legal and ethical duties regarding criminal background checks in employment, and to whom do these duties extend? The employer, of course, has legal obligations to job applicants, and these legal obligations have been highlighted by recent legal developments. But the employer also has legal obligations to its employees, customers, clients, and other stakeholders. Business owners and managers today are thus confronted with this dilemma of conflicting values and duties as well as the responsibility of doing the “right thing” in utilizing criminal background checks in the hiring process.

Criminal background checks in employment, as with many employment law topics, have many levels to examine. This article will first provide certain background information pertinent to the subject of criminal background checks in employment, particularly criminal conviction and incarceration rates for minorities and the prevalence of background checks in employment. Next, the article will treat the legal ramifications of background checks in employment. Legislation and legislative efforts – commonly called “ban the box” acts (with the “box” referring to the box where a job applicant checks off his or her criminal history) will be examined as well as statutes which require criminal background checks in employment. Furthermore, the authors will explicate the “disparate impact” theory of the Civil Rights Act and demonstrate how this legal doctrine can be used to hold an employer liable for employment discrimination for having a criminal background check as part of the hiring process. The authors, moreover, in the legal section will explain the legal guidelines emanating from the Equal Employment Opportunity Commission (EEOC) regarding the use of criminal background checks in employment.

Particular attention will be paid to two recent legal actions instituted by the EEOC against employers alleging racial discrimination by the use of criminal background checks. Finally, the legal section will address the tort of negligence in the employment context, specifically the tort of negligent hiring, which is another legal concern for employers.

The next major section of the article entails all the implications of employers utilizing criminal background checks in employment on all the affected stakeholders. Then the authors provide certain recommendations to employers to deal with this difficult subject matter in a legal, moral, and practical manner. A brief summary/conclusion is provided to finish this article, followed by the bibliography and brief biographies of the authors.

## **Background**

### **A. Incarceration Rates**

Over the past two decades, there has been a significant increase in the number of people in the United States who have had contact with the criminal justice system (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013; EEOC, Enforcement Guidance, 2012). In 2012, according to Bureau of Justice Statistics (Smialek, 2014), approximately 1 in 35 adults was imprisoned at the federal, state, or local level or was on probation or parole. As a result, there also has been a concomitant major increase in the number of people who have criminal records and who are still in their working years (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013; EEOC, Enforcement Guidance, 2012). To illustrate, in 1991, only 1.8% of the adult population had served time in prison (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013). In 2001, that percentage increased to 2.7% (1 in 37 adults); and by the end of 2007, 3.2% of all U.S. adults (1 in 31) were constrained under some form of correctional supervision or incarceration (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013). The EEOC points out that “arrest and incarceration rates are particularly high for African American and Hispanic men” (EEOC, Enforcement Guidance, 2012, p. 3).

In 2001, 1 of every 17 white men (5.9%) will be expected to go to prison at some point in his lifetime (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013). However, the rates for black men were 1 in 3 men, or 32.2%; and for Hispanic men the rates were 1 in 6, or 17.2% (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013; EEOC, Enforcement Guidance, 2012).

Accordingly, the difference in rates for men expected to go to prison in their lifetimes between blacks, Hispanics, and whites is very dramatic indeed. Furthermore, as recently as 2010, black men were imprisoned at a rate seven times higher than white men and almost three times higher than Hispanic men (Thurm, 2013; EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013).

And according to the Bureau of Justice Statistics, if incarceration rates do not decrease, approximately 6.6% of all individuals born in the United States in the year 2001 will serve some sort of time incarcerated in their lifetimes (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013). The arrest and incarceration rates for African American and Hispanic men are particularly revealing. The aforementioned populations are arrested at a rate that is 2 to 3 times more than their proportion of the general population (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013). Moreover, if one was not to consider increases in incarceration rates and "merely" assumed that current rates would remain unchanged, 1 in 17 white men would be expected to serve time in prison in their lifetimes as compared to 1 in 6 Hispanic men and compared to 1 in 3 black men who will serve prison time in their lifetimes (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013). Saltzburg (EEOC, Meeting of July 26, 2011, *Written Testimony of Stephen Saltzburg*, 2013, p. 1) notes that one in 12 African American men are in prison compared to only 1 in 87 white men. It also should be pointed out that, according to one legal commentator: "Most arrests that appear on criminal background checks are for minor crimes and non-criminal offenses such as curfew and loitering violations, vagrancy, and disorderly conduct (EEOC, Meeting of July 26, 2011, *Written Testimony of Adam Klein*, 2013, p. 1). Concepcin (2012, p. 238) concurs and points to a 2010 study which indicated that of the over 13 million arrests for 2010 (except traffic violations) only 4.2% were for violent crimes and 12.5% for property crimes. Concepcin (2012, p. 238) adds that "while only a fraction of these arrests result in convictions, the arrests will appear on a routine criminal background check."

The latest arrest figures, published in January of 2014, are findings published in the journal *Crime & Delinquency* (McCleod, 2014; Cavico, Mujtaba and Muffler, 2014). The findings, based on research conducted by several universities, and which did not include minor traffic offenses, show that by the time they reached 23 years of age, black males had an arrest rate of 49%, compared to 44% of Hispanic males, and 38% for white males.

The percentages for girls and women were about the same among whites, Hispanics, and blacks (McCleod, 2014). Furthermore, by the time they reached 18 years of age, 30% of black and 26% of Hispanic males had been arrested, compared to 22% of white males (McCleod, 2014). One commentator, in studying the aforementioned data, attributed the increase in arrest rates to the greater presence of police officers in schools (deemed the “school-to-prison pipeline”) as well as the fact that crimes such as domestic violence are reported more frequently today (McCleod, 2014, p. 5A).

Moreover, “African Americans are as much as 15 times more likely than whites to be arrested for low-level offenses. While less than 20% of arrests of African Americans for these offenses result in convictions, they will show up in a ‘routine’ criminal background check” (EEOC, Meeting of July 26, 2011, *Written Testimony of Adam Klein*, 2013, p. 1). Such statistics can lead to biased perceptions about minorities and may further hinder hiring practices (Mujtaba, 2014). Furthermore, criminal records, though readily available, may be incomplete, difficult to interpret, and/or inaccurate. As such, “many of those flagged in these data bases have never been convicted of a crime – in fact, one-third of felony arrests never lead to conviction. Worse still, criminal records can contain inaccuracies that are routinely reflected in criminal background checks. One study of the F.B.I.’s database found that out of 10,000 hits, 5.5% were falsely attributed to individuals who had not been convicted of a crime. State records likely contain similar inaccuracies because there is no standardized process for reporting arrests and disposition at the state and local level” (EEOC, Meeting of July 26, 2011, *Written Testimony of Adam Klein*, 2013). Conceptin (2012) adds that “criminal history records are notoriously inaccurate and may include errors sufficiently serious to warrant denial of employment” (p. 246).

## B. Recidivism Rates

The “revolving door” in the criminal justice system emerges as a major societal problem; and one directly related to the employment of ex-offenders (Cavico, Mujtaba and Muffler, 2014). Based on studies, Foreman (EEOC, Meeting of November 20, 2008, *Statement of Michael L. Foreman*, 2013) indicates that more than 7000,000 people annually leave federal and state prisons and return to society; and this number is more than four times the number of people who returned home from prison in the last two decades.

The number of people with criminal histories that seek to re-enter the workforce is also substantially increasing. To illustrate, in 2008, approximately 12,500 citizens returned from prison to the communities of Michigan. Within two years, nearly half of them will return to prison (EEOC, Meeting of November 20, 2008, *Statement of Michael L. Foreman*, 2013). A principal factor in such high recidivism is a lack of employment opportunities. Concepcin (2012) emphasizes that "...research has shown that employment is one of the strongest predictors of desistance from crime. Additionally, certain characteristics of employment are more effective in reducing recidivism than others. For example, research has shown that better quality jobs and higher wages reduce the likelihood of recidivism" (p. 248). It may not be a lack of adequate qualifications, but rather the social stigma surrounding a felony conviction that prevents many ex-prisoners from obtaining a job; and then the lack of a job can use them to offend again. In most cases, prison sentences are a way to repay a "debt to society," but the stigma of a criminal conviction often follows a person long after that "debt" is supposed to have been "settled," and the ex-offender has returned to the community.

To illustrate, Concepcin (2012, p. 238) points to a study which indicates that the presence of a criminal record reduces the likelihood of a "call-back" or employment offer by 50%.Foreman (EEOC, Meeting of November 20, 2008, *Statement of Michael L. Foreman*, 2013, p. 1) consequently warns that "unless there is meaningful rehabilitation and concerted effort to reintegrate these individuals back into all aspects of society, there is a significant chance that those released will be back in prison within three years. The reasons for this 'revolving prison door' are...(that) most ex-offenders, upon being released, have little money, minimal training or education, and limited job opportunities." They thus will find it difficult to obtain employment. Concepcin (2012) notes too that a record of past criminal conduct will have decreasing value over time in predicting similar future behavior: "The risk of recidivism has been shown to decrease with time clean" (p. 245).

### C. Prevalence of Criminal Background Checks in Employment

Employment data on the use of criminal background checks is also very revealing. Regarding the prevalence of criminal checks in employment, a survey by the Society of Human Resource Management indicated that some 92% of employers use criminal background checks for some or all job openings (EEOC, Office of the Legal Counsel, *Testimony on Arrests and Convictions*, 2013; Thurm, 2013).

Harwin (2012, p.2) relates that “nearly three quarters of employment applications inquire into an applicant’s criminal background, and nearly half of employers routinely follow up with background checks.” Conceptin (2012, p. 237) adds that in the retail industry 94.3% of retailers used criminal conviction checks as a screening measure during the hiring process.” For example, Wal-Mart, the largest private employer in the U.S., conducts criminal background record checks on all job applicants in its U.S. stores (EEOC, Meeting of July 26, 2011, *Written Testimony of Adam Klein*, 2013).

Foreman (EEOC, Meeting of November 20, 2008, *Statement of Michael L. Foreman*, 2013, p. 1) point to a Los Angeles study that indicated that over 40% of employers will reject a job applicant with a criminal record irrespective of the nature of the offense and any other individualized factors. Harwin (2012, pp. 2-3) points to a study that indicated that more than 60% of employers refuse to hire ex-offenders. Moreover, more than 90% of employers will reject applicants who report a history of violent crime (Harwin, 2012, p. 4). Saltzburg (EEOC, Meeting of July 26, 2011, *Written Testimony of Stephen Saltzburg*, 2013, p. 3) adds that “some private employers have adopted sweeping policies against employing people with criminal records, including those who were arrested and never convicted.” Yet the EEOC emphasizes that criminal record databases can be incomplete and/or inaccurate (EEOC, Enforcement Guidance, 2012). To illustrate, Saltzburg (EEOC, Meeting of July 26, 2011, *Written Testimony of Stephen Saltzburg*, 2013, p. 4) notes that about nine million criminal background checks are conducted by the FBI each year, mainly for employment purposes, but, according to the Attorney General, nearly 50% of the FBI records are incomplete or inaccurate.”

Employers can, of course, search all these criminal databases themselves or do a basic Internet search; however, employers typically use third-party background screening businesses, in particular, consumer reporting agencies (Cavico, Mujtaba and Muffler, 2014; EEOC, Enforcement Guidance, 2012). The access employers have to the criminal records of applicants and employees has been facilitated by a federal statute – the Fair Credit Reporting Act (FCRA).The FCRA, though primarily a consumer protection law, in part permits a consumer reporting agency to supply a consumer report (typically referred to as a “credit report”) about an individual to an employer for the purposes of evaluating a person for employment, retention, reassignment, or promotion.

The report can contain criminal records, including arrests (with a seven year time limit from the date of the report) and convictions (with no time limits) (Concepcin, 2012, pp. 234-35). Criminal records, the EEOC notes, can be obtained by employers from court records, law enforcement and corrections agency records, registries or “watch lists” (for example, of sex offenders or people with outstanding warrants, state criminal law record repositories, and the Interstate Identification Index (which is the FBI’s comprehensive record of federal, state, and international criminal justice records) (EEOC, Enforcement Guidance, 2012).

Some of the main reasons cited by employers for doing criminal background checks are statutory requirements, fear of theft and fraud, and concern for workplace violence and for liability for negligent hiring (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013; EEOC, Guidance Manual, 2012). Regarding the latter, Foreman (EEOC, Meeting of November 20, 2008, *Statement of Michael L. Foreman*, 2013, p. 1) states that “the number of tort lawsuits against employers for negligent hiring or retention appears to be increasing, and more employers are naturally wary of facing larger liability for their hiring actions, and paying their lawyers to defend against them.” Saltzburg (EEOC, Meeting of July 26, 2011, *Written Testimony of Stephen Saltzburg*, 2013, p. 1), moreover, states that “many small businesses cannot afford a hiring mistake; a business that hires an ex-offender immediately increases its exposure to liability because of civil suits for negligent hiring.” Technology, too, has also changed the manner in which employers screen applicants, as today there are now many online sources to obtain the criminal history of job applicants and employees and commercial enterprises have put together private databases of criminal records from which they can provide for payment information to employers (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013).

One legal commentator, in fact, said that there is now a “cottage industry” of data collection agencies that provide information to prospective employers; and “in addition to arrest and conviction records, several data-collection agencies also market and sell a retail-theft contributory database that is used by prospective employers to screen applicants....One provider claims that 75,000 retailers, including Home Depot, CVS, Walgreens, and Target, utilize the retail-theft database for making hiring decisions” (EEOC, Meeting of July 26, 2011, *Written Testimony of Adam Klein*, 2013, p. 1).

As such, when one juxtaposes the prevalence of the readily available acquisition and use of criminal background checks in employment with the aforementioned national incarceration data one can clearly see the huge disparity among black, Hispanic, and white men; and consequently one now also can perceive the legal, ethical, and practical ramifications to this employment practice. And some of those legal consequences were plainly pointed out by the Equal Employment Opportunity Commission in that the national data "...provides a basis for the Commission to further investigate Title VII disparate impact charges challenging criminal record exclusions (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013, p. 3).

However, the statistics dealing with violence in the workplace are also very revealing and quite pertinent to the analysis herein. The Bureau of Justice Statistics indicate that in 2009 there were 572,000 non-fatal violent crimes (rape, sexual assault, robbery, and aggravated and simple assault) which occurred against persons age 16 years or older while they were at work. Moreover, workplace violence accounted for 15% of non-fatal violent crimes committed against people 16 years of age or older (EEOC, Meeting of July 18, 2012 – Public Input into the Development of EEOC's Strategic Enforcement Plan, *Written Testimony of David Burton*, 2013, p. 2). These workplace violence facts and figures are very relevant to a lawsuit for negligent hiring.

## The Legal Environment

The legal environment pertaining to the use of criminal background checks in employment is a multi-faceted one as it encompasses four major, and at times conflicting, areas: 1) legislation – federal, state, and local – mandating criminal background checks for certain positions; 2) legislation and legislative efforts – federal, state, and local – prohibiting and restricting the use of such criminal checks, popularly called "ban the box" legislation; 2) Title VII of the Civil Rights Act and in particular the "disparate impact" theory of civil rights law as well as attendant case law interpreting disparate impact in the context of criminal background checks; 3) regulatory guidelines regarding criminal law inquiries in employment promulgated by the Equal Employment Opportunity Commission as well as recent legal actions instituted by the EEOC alleging discriminatory use of criminal background checks;

4) the common law tort of negligence and specifically the doctrine of negligent hiring. All these legal aspects of the topic are examined, explicated, and illustrated.

## **A. Statutory Requirements of Criminal Background Checks**

### **1. Federal**

To complicate matters legally, not only for employers but also for federal agencies, including the Equal Employment Opportunity Commission, there are many statutes that require employers to do criminal background checks and which can preclude employment. On the federal level, some illustrations of these laws that mandate background checks are:

- Environmental Protection Agency (EPA) – The EPA pursuant to federal regulations requires background checks, including felony and misdemeanor convictions and weapons offenses, for all contractor workers before they are qualified to work on any EPA contract at any “response site” or “sensitive site.” To be qualified to work on a contract at an EPA “response site” a person must not have had a weapons offense in the last five years or a felony conviction in the last three years. And to be qualified to work on a contract at an EPA-designated “sensitive site,” a person must not have had a weapons offense in the last ten years, a felony conviction in the last seven years, or a misdemeanor conviction in the last five years (EEOC, Office of the Legal Counsel, Title VII: EPA Information Collection Request, Background Checks, 2013).
- Maritime Transportation Security Act – This Act requires criminal background checks for security reasons of employees in the maritime transportation industry who have unaccompanied access to secure areas within the maritime sector; but the statute contains an individualized appeal procedure for port workers (EEOC, Office of the Legal Counsel, Title VII: EPA Information Collection Request, Background Checks, 2013; EEOC, Enforcement Guidance, 2012; EEOC, Meeting of November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records, *Statement of Rae T. Vann*, General Counsel, Equal Employment Advisory Counsel, 2013).

- U.S. Patriot Act of 2001 – This statute requires truck drivers with commercial driver's licenses to undergo criminal background checks in order to be eligible for a hazardous materials endorsement, which is a necessary requirement for many trucking jobs (EEOC, Meeting of November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records, *Statement of Rae T. Vann*, General Counsel, Equal Employment Advisory Counsel, 2013).
- Violent Crime Control and Law Enforcement Act of 1994 – This law makes it illegal for an insurance company to willfully permit a person who has been convicted of insurance fraud or similar crimes involving dishonesty to work in the insurance business, unless a person has received a letter of consent from an appropriate regulatory agency (EEOC, Meeting of November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records, *Statement of Rae T. Vann*, General Counsel, Equal Employment Advisory Counsel, 2013).
- Federal Deposit Insurance Act – This statute prohibits financial institutions from employing, without the prior consent of the Federal Deposit Insurance Corporation, any person who has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering (EEOC, Enforcement Guidance, 2012; EEOC, Meeting of November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records, *Statement of Rae T. Vann*, General Counsel, Equal Employment Advisory Counsel, 2013).
- Peace Corps – Volunteer applicants for the Peace Corps must undergo a background check that includes a criminal history which includes reporting any arrests, charges, or convictions of any offense related to alcohol or drugs as well as any charge or conviction of any felony offense (EEOC, Office of the Legal Counsel, Informal Discussion Letter, Title VII: Criminal Records: Comment on Peace Corps Volunteer Applications, 2013).
- United States Census Bureau – As a requirement for employment for the 2010 census, which involved hiring more than one million temporary workers, the Census Bureau required criminal background history. This request for criminal history pertained to nearly all job applicants and required arrest records regardless of whether a conviction resulted (EEOC, Meeting of July 26, 2011, Written Testimony of Adam Klein, 2013).

The preceding illustrations of federal laws and regulations place strict requirements on employers to utilize criminal background checks and to preclude from employment certain types of offenders. The employer's reliance on these laws should be sufficient to demonstrate the defense of "business necessity" in those situations where an "adverse impact" on a protected group is shown (EEOC, Meeting of November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records, *Statement of Rae T. Vann*, General Counsel, Equal Employment Advisory Counsel, 2013).

Nevertheless, the Equal Employment Opportunity Commission warns that, although compliance with a federal law or regulation requiring criminal background checks is a defense to Title VII liability, employers, including government agencies, still may be liable if their policies and practices go beyond the mandates of federal requirements (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013; EEOC, Enforcement Guidance, 2012).

## 2. State and Local

In addition to federal requirements, certain state and local governments have laws that mandate criminal background checks in employment. Furthermore, these laws can disqualify an applicant from employment for certain positions based on specific types of crimes. These laws pertain "especially (to) those employers hiring in heavily regulated organizations like nursing homes, hospitals, child care facilities (and) schools....State laws mandating employment background checks have been on the rise, especially in light of the random violence we have seen in the schools" (Preston, Employee Screen IQ Blog, *Stuck in the Middle*, 2013, p.1).

Saltzburg (EEOC, Meeting of July 26, 2011, *Written Testimony of Stephen Saltzburg*, 2013, p. 2) similarly indicates that many state licensing laws, for example, to acquire a license to be a cosmetologist or a barber or hair stylist can be denied due to a previous criminal conviction, regardless of how long ago the crime occurred. The EEOC notes that "most states regulate occupations that involve responsibility for vulnerable citizens such as the elderly and children" and that fifty states and the District of Columbia require criminal history background checks for several occupations, such as nurses, elder care-givers, day-care providers, residential care-giver providers, school teaches as well as other non-teaching school employees (EEOC, Enforcement Guidance, 2012, p. 32, note 165).

The EEOC provides an example – Hawaii, where the state’s Department of Human Services can deny an applicant a license to operate a child-care facility if the applicant or any prospective employee has been convicted of a crime (other than a minor traffic offense) or has been confirmed to have abused or neglected a child or threatened harm to a child, and the Department finds that the criminal history or child abuse record of the applicant or prospective employee poses a risk to the health, safety, and well-being of children (EEOC, Enforcement Guidance, 2012, p. 32, note 165). Harwin (2012, p. 2) similarly relates that “criminal convictions of whatever kind and whatever vintage serve as an automatic bar to employment in professions as diverse as barbering, plumbing, bartending, and ambulance driving.” Consequently, says Saltzburg (EEOC, Meeting of July 26, 2011, *Written Testimony of Stephen Saltzburg*, 2013, p. 2), “...a crime committed at age 18 can ostensibly deny a former offender the ability to be a licensed barber or stylist when he or she is 65 years old.”

However, regarding state and local laws and regulations that require or permit criminal background checks in employment, the EEOC emphasizes that these laws are preempted by the federal law Title VII. “Therefore, if an employer’s exclusionary policy or practice is not job-related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII disparate impact liability” (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013, p. 4). Moreover, in support of the EEOC’s position, one federal court, in *Waldon v. Cincinnati Public Schools* (2013), held that an Ohio state law requiring a criminal background check of current school employees raised a potential Title VII discrimination claim pursuant to the disparate impact theory of civil rights law. One legal commentator described the *Waldon* case and the concomitant lack of a legal “safe harbor” for employers who comply with state and local laws in the hiring process as follows: “This leaves many employers in a pickle” (Preston, Employee Screen IQ Blog. *Stuck in the Middle*, 2013, p.1)!

## **B. Statutory Restrictions on Criminal Background Checks**

The Civil Rights Act, it must be stressed, is a federal, that is, national law. Since the U.S. is a federal system, it accordingly must be noted that almost all states in the U.S. have some type of anti-discrimination law – law which may provide more protection to an aggrieved employee than the federal law does.

The Equal Employment Opportunity Commission accordingly notes that "several state laws limit the use of arrest and conviction records by prospective employers. These range from laws and rules prohibiting the employer from asking the applicant any questions about arrest records to those restricting the employer's use of conviction data in making an employment decision" (EEOC, Pre-Employment Inquiries and Arrest & Conviction, 2013, p. 1).

The use (and alleged discriminatory abuse) of criminal background checks in employment has engendered a lobbying effort to convince legislators on the federal, state, and local level to remove criminal inquiries from hiring at least in the initial stages of the hiring process. This effort has been called the "ban the box" campaign (Smith, 2014; Sturgill, 2012).

This campaign is a national initiative operating on all levels of government to remove the criminal history inquiry, that is, the pertinent "box," from employer job applications (Legal Services for Prisoners with Children, 2013). The "ban the box" legal effort was created to make criminal background checks by employers more fair for ex-offender job applicants (The Mayor's Office of Reintegration Services for Ex-Offenders, 2013). In plain terms, the "box" which is being referenced is the box next to the responses – either "yes" or "no" - in which a job applicant is asked if he or she has ever been arrested for or been convicted of a crime - felony or misdemeanor. The "ban the box" movement is designed to prevent applicants from being automatically barred from employment opportunities.

The law also intends to enable and persuade employers to focus more on the individual applicant's knowledge and skills and the person's suitability for a particular job or position (Smith, 2014).

Sturgill (2013, p. 504) relates that "the main purpose of the movement , which recognizes the link between recidivism and the obstacles that ex-offenders face while searching for employment, is to reduce re-arrest public safety by narrowing the scope under which ex-offenders' criminal histories can be considered during the hiring process." During the job application process, an otherwise very qualified job applicant could be automatically disqualified from consideration, even though his or her conviction may not be related to the job or position which the applicant is seeking to obtain. This automatic initial disqualification is what the proponents of "ban the box" laws are seeking to prevent.

As such, several states and many counties and municipalities have “banned the box,” reforming hiring policies to eliminate questions about job applicants’ criminal histories from mainly public-employment applications (Smith, 2014). However, Smith (2014, p. 213) notes that although “...jurisdictions that include private employers are still in the minority, the number of locations that cover private, in addition to public, employers is rising.”

## 1. State Law

This section of the legal analysis will examine the statutory success of the “ban the box” legislative campaign on the state level. In the past 4 years, “ban the box” state legislation has been established in 12 states (Price 2013).

Most laws only apply to public sector employment; and only a few prevent the private sector employers from asking these types of questions on job applications. On May 2, 2013, Maryland passed legislation removing this type of barrier to employees, and thus joined the 10 other states of California, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Mexico, New York, Pennsylvania, and Wisconsin (Smialek, 2014; Haase 2013). Also, as of the writing of this article in the spring of 2014, five more states (Delaware, Nebraska, New Hampshire, New Jersey, and Virginia) had “ban the box” bills pending in their legislative bodies (Rodriguez, 2014). These individual state legislative acts often contain varying degrees of prohibitions that employers should consider when drafting employment applications and conducting job interviews. Some of the more interesting examples of these state laws are identified below; but the vast majority of U.S. job applicants remain unprotected from these types of pre-employment questions.

a) Rhode Island. Rhode Island is one of the few states that have “ban the box” legislation that is applicable to both public and private employers.

Rhode Island’s “Fair Employment Practices” applies to employers who employ 4 or more employees and strictly regulates the timing of an employer’s query into a job applicant’s past convictions (R.I. Statutes, Section 28-5-6 (7)).

Except as to a few job occupations, such as law enforcement, covered employers may not inquire into whether a job applicant has ever been convicted of a criminal offense before the first interview, and can then only ask about convictions and not arrests or charges (R.I. Statutes, Section 28-5-7). Rhode Island's prohibitive law in this area, which has wide reaching application, is probably the most extensive area of employment law.

b) Hawaii. Hawaii was the first state to pass "ban the box" type statewide protections; and that jurisdiction also shares Rhode Island's unusual characteristic in applying to most public and private employers (Haase, 2013). The law specifically prohibits solicitation of this information on initial job applications for most professions and occupations; and, furthermore, dialogue on the issue can only be raised after a conditional job offer has been extended to the job applicant. Specifically, Section 378-2.5 of the law, titled "Employer inquiries into conviction record," states:

(a) Subject to subsection (b), an employer may inquire about and consider an individual's criminal conviction record concerning hiring, termination, or the terms, conditions, or privileges of employment; provided that the conviction record bears a rational relationship to the duties and responsibilities of the position.

(b) Inquiry into and consideration of conviction records for prospective employees shall take place only after the prospective employee has received a conditional offer of employment which may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position. (Haw. Rev. Stat. § 378-2.5)

The law, however, does allow for exemptions to its application by further stating:

(d) Notwithstanding subsections (b) and (c), the requirement that inquiry into and consideration of a prospective employee's conviction record may take place only after the individual has received a conditional job offer, and the limitation to the most recent ten-year period, excluding the period of incarceration, shall not apply to employers who are expressly permitted to inquire into an individual's criminal history for employment purposes pursuant to any federal or state law other than subsection (a).

This section then itemizes 18 areas of employment and professions that fall outside its application, which include job applicants seeking employment in the public library system, judicial branch, financial institutions, educational institutions, and many more (Haw. Rev. Stat. § 378-2.5 (d)).

**c) Minnesota.** Minnesota was the first state to require public employers in Minnesota to wait until someone is selected for an interview before asking about criminal records. Minnesota Statute 364.021, titled "Public Employment; Consideration of Criminal Records," states:

- (a) A public employer may not inquire into or consider the criminal record or criminal history of an applicant for public employment until the applicant has been selected for an interview by the employer.
- (b) This section does not apply to the Department of Corrections or to public employers who have a statutory duty to conduct a criminal history background check or otherwise take into consideration a potential employee's criminal history during the hiring process.
- (c) This section does not prohibit a public employer from notifying applicants that law or the employer's policy will disqualify an individual with a particular criminal history background from employment in particular positions.(Minn. Stat. 364.021)

Minnesota's restrictions go further by requiring some relationship or nexus between the applicant's former conviction and the job or position responsibilities being sought, so as to make the person undesirable to the employer. The Minnesota statute Section 364.03 titled, "Retaliation of Conviction to Employment or Occupation," states:

Subdivision 1.No disqualification from licensed occupations.

Notwithstanding any other provision of law to the contrary, no person shall be disqualified from public employment, nor shall a person be disqualified from pursuing, practicing, or engaging in any occupation for which a license is required solely or in part because of a prior conviction of a crime or crimes, unless the crime or crimes for which convicted directly relate to the position of employment sought or the occupation for which the license is sought.

Subd. 2. Conviction relating to public employment sought.

In determining if a conviction directly relates to the position of public employment sought or the occupation for which the license is sought, the hiring or licensing authority shall consider:

- (1) the nature and seriousness of the crime or crimes for which the individual was convicted;
- (2) the relationship of the crime or crimes to the purposes of regulating the position of public employment sought or the occupation for which the license is sought;
- (3) the relationship of the crime or crimes to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation. (Minn. Stat. 364.03)

In May 13, 2013, Governor Mark Dayton signed "Ban the box" legislation expanding Minnesota's laws to require private employers to wait until someone is selected for an interview before asking about criminal records (Maase, 2013). Thus, Minnesota joins Hawaii and Massachusetts as the three states that apply its bans in this area, with some exceptions to certain professions, to both public and private employers.

**d) Pennsylvania**

Pennsylvania is one of the other seven states which limit its "ban the box" legislation to public employment application processes. Pennsylvania law dictates how a public employer will handle information concerning an applicant's past convictions; and the law that actually requires the employer to disclose in writing to the job applicant if the basis for not hiring him or her is because of the criminal background results. Pennsylvania statute, Section 9125 titled, "Use of records for employment," states

- (a) *General rule.* --Whenever an employer is in receipt of information which is part of an employment applicant's criminal history record information file, it may use that information for the purpose of deciding whether or not to hire the applicant, only in accordance with this section.

(b) *Use of information.* --Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied.

(c) *Notice.* --The employer shall notify in writing the applicant if the decision not to hire the applicant is based in whole or in part on criminal history record information. (18 Pa. Cons. Stat. § 9125).

The Pennsylvania law is thus typical in that it applies to public employers, but atypical in that it requires disclosure in writing to an applicant rejected due to his or her criminal history.

e)New York. Under New York law, employers may not deny employment to any individual by reason of having been convicted of one or more criminal offenses, unless there is a direct relationship between the conviction and the employment sought, or granting or continuing employment would “involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public”, (N.Y. Correction Law § 752(2)).

Section 753 of the Correction Law lists eight factors that employers must consider in making this determination, including, among others: the specific duties of the position; the bearing, if any, the criminal conviction will have on the person's fitness or ability to perform the job duties; the age of the person at the time of the conviction; the time that has elapsed since the conviction; the seriousness of the offense; and any evidence of rehabilitation. Failure to consider the eight factors may constitute a violation of Article 23-A. Furthermore, under Section 201-f of the N.Y. Labor Law, employers must conspicuously post a copy of Article 23-A in the workplace where employees can have access to it, and under the Section 380-c of the N.Y. General Business Law must provide a copy to any applicant subject to a background check.

New York's law also prohibits public employers from rejecting applicants solely upon the basis for having been convicted of a criminal offense, except for enumerated professions and public positions. If there is a direct relationship between the conviction and the employment position sought, then the applicant can be rejected.

Article 23-A Sec. 752, titled "Unfair discrimination against persons previously convicted of one or more criminal offenses prohibited," states:

No application for any license or employment, to which the provisions of this article are applicable, shall be denied by reason of the applicant's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses, unless:

- (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought; or
- (2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. (Art. 23-A Sec. 752)

A violation of Article 23-A is considered to be an unlawful discriminatory practice and will also run afoul of the New York State Human Rights Law (Cania, 2012). Thus, employers must comply with Article 23-A of the New York Correction Law and the New York Human Rights Law (N.Y. Exec. Law § 296(15)) when considering an applicant's prior criminal conviction in determining suitability for employment. Even if a state does not have a "ban the box" law, a county and/or municipality in the state may have such a law. Following are a few illustrations of "local" acts.

f) Illinois. In October of 2013, the Governor of Illinois, Pat Quinn, by means of an Administrative Order, "banned the box" for most employment positions under the authority of the governor, such as state agencies, boards, and commissions. Accordingly, any questions about an applicant's criminal history are now removed from employment applications.

There are two instances, however, where criminal history later can be used in making employment determinations: first, where federal or state law prohibits hiring an individual with certain criminal convictions for a position; and second, where an applicant has been convicted of a crime that is reasonably related to the position sought, and denial of employment based on that criminal history is consistent with business necessity and the duty of the state to serve and protect its citizens. The rationale for the Governor's administrative order was stated in the Order: "

Employment is one of the most effective tools to reduce recidivism, resulting in safer communities and lower cost to taxpayers across Illinois. This Administration is committed to creating a more level playing field by not considering an applicant's criminal background history before beginning to evaluate an applicant's knowledge, skills and abilities."

## **2. Municipal Law**

This section of the legal analysis examines some of the principal statutory success of the "ban the box" legislative campaign on the municipal level.

A simple query through common Internet search engines reveals that local regulation in this area of employment law far exceeds the collection of states mentioned in the forgoing section. The pace of municipalities passing these types of "ban the box" ordinances has picked up at a pace of more than one jurisdiction per month (NELP 2012, p. 2). As of February 2014, there are 56 municipalities and counties that have passed some version of the "ban the box" legislation, thereby removing barriers to entry into workforces around the United States (Smialek, 2014). Sturgill (2012) also relates that there are efforts in Durham and Raleigh, North Carolina, to remove the "box" on applications for employment.

- a) Philadelphia, Pennsylvania. One example is the law from Philadelphia, Pennsylvania. The city law requires that employers remove from their employment applications the box asking if an applicant has been convicted of a crime (The Mayor's Office of Reintegration Services for Ex-Offenders, 2013). The law also states that an employer cannot ask about an applicant's criminal background until after the first interview (The Mayor's Office of Reintegration Services for Ex-Offenders, 2013).  
The law further prohibits employers from making hiring decisions based on arrests or criminal accusations which do not result in a conviction (The Mayor's Office of Reintegration Services for Ex-Offenders, 2013).
- b) Richmond, Virginia. Another illustration of a "ban the box" law is the city of Richmond, Virginia, which has eliminated the standard requirement that applicants for many city jobs acknowledge prior felony convictions on their initial applications. The objective at a minimum is to give ex-offenders a "foot in the door" on the same basis as any other applicant applying for the same position.

In an article for the *Richmond Times* (Zullo, 2013), Kevin Hunter, an ex-offender, stated that "I have never had rights in my life." He was convicted of a felony when he was 18, and is now 46. Kevin further stated that because he could not find a job based on his conviction, he found himself resorting to his "old ways" at times because he felt his employment situation was hopeless. Kevin stated that "I've never gotten a job when I've checked the box."

- c) Seattle, Washington. In 2009, the City of Seattle Washington implemented a city-wide personnel rule restricting job applications for city employment from asking if a job applicant has been arrested or convicted of a crime; and further limits the job categories which mandate a background check (Seattle P.R. 10.3.3). The city's applications for positions which require background check screenings include a written notice and disclaimer stating that such a check will be required prior to the applicant successfully proceeding through the interview process. However, Seattle's personnel rule does not require a complete silence on the issue, as a job applicant's past conviction history can be explored later in the hiring process but for only a certain few job categories (Seattle P.R. 10.3.3).
- d) Buffalo, New York. Buffalo, New York, on June 10, 2013, joined the increasing number of cities with ordinances limiting employers' ability to ask on the application about prior arrests or convictions. The ordinance amended Chapter 154 of the Code of the City of Buffalo; and is titled "Fair Employment Screening"; and is to be effective January 1, 2014. It applies to city employment, private employers with 15 or more workers, and contractors doing business with the Buffalo (Buffalo Code Ord. 154-26(e)). The Buffalo ordinance bans an employer from inquiring into criminal history, or requiring any applicant to disclose or reveal a past conviction of a crime, during the application process and prior to a first interview (Buffalo Code Ord. 154-27). However, this ordinance also allows for the employer to delve into the past conviction with the applicant during the actual first interview and thereafter (Buffalo Code Ord. 154-27). Similar to many of the ordinances and laws in this area, Buffalo allows for exceptions applicable to certain positions, such as law enforcement, fire rescue, education, and any occupation that offers services or care to children and the elderly (Buffalo Code Ord. 154-28). A fine of \$500.00 for the first violation and \$1,000.00 for subsequent violations is provided for in the ordinance (Buffalo Code, Ord. 154-29(c)).

- e) Richmond, California. On July 30, 2013, the city of Richmond, California, by a vote of 6 to 1, passed a local ordinance titled : *“Ban the Box” requiring any contractor, lessee, recipient of financial aid or their subcontractors to refrain from any inquiries regarding employment applicants’ prior criminal convictions*”(Richmond Ord. No. 14-13 N.S.). The ordinance limits any contracting party with the city from requesting prior conviction information on job applications, except for certain professions. The ordinance contains an enforcement provision that imposes a \$1,000.00 fine or up to 1% of the contract price, whichever is greater, for each violation (Richmond Code Chap. 2.65, Sec. 2.60.060(f)).

We can summarize some implications now. On the municipal level, therefore, in jurisdictions where there is a “ban the box” law in effect, this type of law would not completely preclude employers from conducting background checks on the criminal history of applicants, but typically would prohibit such inquiries on the initial application and in some cases before or during the first interview. Certainly, the criminal history “box” would be banned. Elimination of the criminal conviction box on job applications does not mean that employers would be forced to hire ex-offenders. Rather, it gives people with criminal records the opportunity to explain their situation in an interview setting, while employers would still have the power to decide against hiring someone based on his/her qualifications and suitability for a particular job or position. Typically, criminal background checks would be conducted, but only after the applicant is determined to be otherwise qualified for the position, and under some circumstances after a pending offer of employment has been made. In such a case, if a background check is conducted and an applicant is found to have a criminal offense that is likely to interfere with that applicant’s abilities to carry out the responsibilities of the position, the employer would be entitled to rescind the employment offer. This procedure, proponents of “ban the box” legislation assert, is the ethical way to handle this “second chance” of employment for ex-offenders.

One legal commentator maintains that such “ban the box” type law upholds public policy: The law “recognizes that delaying the upfront inquiry into criminal background by postponing criminal background checks until final hiring stages meets many public policy purposes. This expands the applicant pool and improves the chances of selecting the best-qualified individuals. It also could save employers the expenses associated with doing criminal background on applicants and reduces the likelihood of discrimination based on an unrelated record.

Perhaps most importantly it encourages individuals with prior convictions to apply for positions without the fear of immediate rejection and pledges a more holistic review will take place" (EEOC, Meeting of November 20, 2008, *Statement of Michael L. Foreman*, 2013, p. 3). Yet another legal commentator asserts that these "ban the box" laws are not the legal panacea for discrimination: "...The mere presence of a ban the box policy does not guarantee that employers will consider criminal background information in a manner that complies with Title VII.

Even in ban the box jurisdictions, employers retain substantial discretion in determining the weight they attach to an applicant's criminal record.

While ban the box policies are designed to encourage employers to keep an open mind when evaluating job candidates with criminal histories, employers may still be inclined to reject these applicants. It is also conceivable that ban the box policies may even, in some instances, be exploited by employers determined not to hire those with criminal records" (Smith, 2014, p. 216).

Overall, the majority of jurisdictions do not subscribe to the "ban the box" legal movement. Moreover, these "ban the box" laws typically prohibit the "box" only on applications for government employment. Consequently, most applicants with criminal histories who are peremptorily precluded from employment, particularly private sector employment, by checking the criminal box "yes" will have to utilize other legal means to contest their denial of employment. One principal legal measure that rejected applicants with criminal histories can use is Title VII of the Civil Rights Act, which prohibits discrimination in employment.

### C. Civil Rights Act – Title VII and the Disparate Impact Theory

The Civil Rights Act of 1964 is the most important civil rights law in the United States.

This statute prohibits discrimination by employers, labor organizations, and employment agencies on the basis of race, color, sex, religion, and national origin. The scope of the statute is very broad, for example, regarding employment, encompassing hiring, apprenticeships, promotion, training, transfer, compensation, and discharge, as well as any other "terms and conditions" and "privileges" of employment.

The Act applies to both the public and private sectors, including state and local governments and their subdivisions, agencies, and departments. An employer subject to this Act is one that has 15 or more employees for each working day in each of the more calendar weeks in the current or preceding calendar year. One of the major purposes of the Act is to eliminate job discrimination (Muffler, Cavico, and Mujtaba, 2010). The focal point of this article is Title VII of the Civil Rights Act, which prohibits discrimination in employment. Initially, it is important to point out that Title VII does not categorically prohibit the use of criminal background checks or records in employment as a basis for making hiring and other employment decisions (EEOC, 2013, Pre-Employment Inquiries and Arrest & Conviction).

The Equal Employment Opportunity Commission notes that criminal background checks and records as an employment screen may be lawful, legitimate, and even mandated in certain cases by statutes (EEOC, 2013, Facts About Race/Color Discrimination). However, as will be clearly seen in this article, employers who do engage in criminal background checks and who do use criminal records in making employment determinations must comply with the non-discrimination requirements of Title VII of the Civil Rights Act.

## **1. The Disparate Treatment Theory**

Discrimination, in employment or otherwise, can be direct and overt or indirect or inferential. Typically, discrimination claims against employers involving the hiring and promotion of employees fall into two categories. The first theory of recovery is called “disparate treatment,” which involves an employer who intentionally treats applicants and employees less favorably than others based on one of the protected categories, such as race (*Stephen Manley v. Invesco, Matrix Resources, Incorporated, and National Prosource, Incorporated*, 2014 ; *Wheeler v. Commonwealth of Pennsylvania Department of Labor and Industry*, 2012; Smith, 2014; Muffler, Cavico, and Mujtaba, 2010). The discrimination is intentional and purposeful, and the aggrieved employee or job applicant needs to show evidence of the employer’s specific intent to discriminate. The evidence can be direct or circumstantial.

By using the latter type of evidence the intent to discriminate can be inferred from the facts and circumstances of the case.

So, when a job applicant or an employee is a member of a protected class, for example, a racial minority, and is qualified for a position or a promotion, but is rejected by the employer while the employer continues to seek applicants, then an initial or *prima facie* case of discrimination can be sustained (*Stephen Manley v. Invesco, Matrix Resources, Incorporated, and National Prosource, Incorporated*, 2014 ;*Wheeler v. Commonwealth of Pennsylvania Department of Labor and Industry*, 2012; Smith, 2014; Muffler, Cavico, and Mujtaba, 2010).

The disparate treatment theory and analysis was first articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) and modified by *Community Affairs v. Burdine* (1981) and *St. Mary's Honor Center v. Hicks* (1993).

The analysis for a disparate treatment case also involves a shifting burden of proof, as follows: 1) first, the claimant must forth credible evidence to establish a *prima facie* case of discrimination; 2) if such evidence is established, the defendant employer must next articulate, through admissible evidence, a legitimate, non-discriminatory, job-related reason for its actions; and finally, 3) the burden then shifts to the plaintiff to establish that the employer's proffered reason is a pretext or fake one to hide discrimination (*Wheeler v. Commonwealth of Pennsylvania Department of Labor and Industry*, 2012; *Community Affairs v. Burdine*, 1981; *McDonnell Douglas Corp. v. Green*, 1973; Smith, 2014).

Disparate treatment discrimination can also rise to the level of "systemic disparate treatment," which is based on a long-standing pattern or practice of intentionally excluding members of a protected group from employment opportunities (*Wheeler v. Commonwealth of Pennsylvania Department of Labor and Industry*, 2012, pp. 18-19). Systemic disparate treatment also can be established by direct or circumstantial evidence, encompassing in the latter case statistical evidence of past treatment of the protected group and also "testimony from protected class members detailing specific instances of discrimination" (*Wheeler v. Commonwealth of Pennsylvania Department of Labor and Industry*, 2012, p.19).

## 2. The Disparate Impact Theory

The other avenue that civil rights claimants may travel to prove their employment discrimination claims is called “disparate impact” (or at times “adverse impact”) (*Stephen Manley v. Invesco, Matrix Resources, Incorporated, and National Prosource, Incorporated*, 2014 ; *Manley v. National Prosource, Inc.*, 2013; Muffler, Cavico, and Mujtaba, 2010). This legal doctrine is one of the key focal points to this article and is explicated fully in the context of criminal background checks in hiring. Disparate impact, it must be underscored, does not require proof of an employer’s intent to discriminate. Rather, superficially or facially neutral employment policy or practice may violate Title VII of the Civil Rights Act if it has a disproportionate, that is, disparate, discriminatory adverse impact on a protected class of employees. Consequently, such an employment policy or practice will be deemed illegal if it has this disproportionate discriminatory impact and the employer cannot justify the policy or practice out of business necessity (*Ricci v. DeStefano*, 2009; *Stephen Manley v. Invesco, Matrix Resources, Incorporated, and National Prosource, Incorporated*, 2014 ; *Manley v.*

*National Prosource, Inc.*, 2013; *Wheeler v. Commonwealth of Pennsylvania Department of Labor and Industry*, 2012; Muffler, Cavico, and Mujtaba, 2010). Disparate impact is different from the disparate treatment theory, which requires evidence of intentional discrimination based on a protected category. However, disparate impact contains a causation requirement, that is, the aggrieved party must produce evidence that the “facially neutral standard caused the significantly discriminatory hiring pattern” (*Wheeler v. Commonwealth of Pennsylvania Department of Labor and Industry*, 2012, pp. 20-21). To demonstrate causation, “the plaintiff must present statistical evidence of a kind and degree sufficient to show that the practice in question has caused exclusion of applicants for jobs or promotions because of the membership in a protected group” (*Wheeler v. Commonwealth of Pennsylvania Department of Labor and Industry*, 2012, p. 21). Furthermore, disparate impact claims require “system analysis” and evidence of “statistically significant disparities” (*Manley v. National Prosource, Inc.*, 2013, pp. 24, 37).

Disparate impact was first solidified as a legal doctrine in case law by the United States Supreme Court in *Griggs v. Duke Power* (1971) and modified in *Ricci v. DeStefano* (2009). In the seminal *Griggs* case, facially neutral, but mostly irrelevant, pre-employment tests administered by the employer had a disparate impact on African-American job applicants.

The Supreme Court in *Griggs* articulated the public purposes of the disparate impact doctrine, to wit: to correct past societal wrongs against minorities and other protected classes as well as to achieve equality of employment opportunities and to remove barriers which have operated to favor certain employees and applicants and discriminate against others.

Moreover, policies, practices, procedures, standards, and tests neutral on their face, and even neutral in terms of intent and application, nevertheless cannot be legally maintained if they operate to impact minorities adversely or to “freeze” a status quo of prior discriminatory practices in employment (*Griggs v. Duke Power*, 1971). Twenty years later, the Civil Rights Act of 1991 included a provision codifying the prohibition on disparate impact discrimination first articulated in the *Griggs* case. Specifically, the 1991 statute maintained that “an employee could prove his/her case by showing that an individual practice or group of practices resulted in a disparate impact on the basis of race, color, religion, sex, or national origin, and that the employer had failed to demonstrate that such a practice was required by business necessity” (Civil Rights Act of 1991).

The disparate impact theory of civil rights law is a critical legal doctrine when it comes to assessing the legality of the use of criminal background checks in employment.

However, if an applicant or employee is going to seek redress pursuant to the disparate impact doctrine, he or she is well advised not to misrepresent his or her criminal record on the application and/or during an interview, as such a “material misstatement” will preclude legal relief (*Stephen Manley v. Invesco, Matrix Resources, Incorporated, and National Prosource, Incorporated*, 2014 ; *Maurice Rocha v. Coastal Carolina Neuropsychiatric Crisis Services*, 2013, p. 10). As the Fifth Circuit Court of Appeals indicated, misrepresentation on employee documents can be a legitimate, nondiscriminatory reason for an “adverse employment decision,” such as not hiring a person (*Stephen Manley v. Invesco, Matrix Resources, Incorporated, and National Prosource, Incorporated*, 2014). Also, if an applicant is going to use the disparate impact theory in the context of his or her criminal record there must be evidence that the employer who rejected the applicant actually had knowledge of the applicant’s criminal record (*Stephen Manley v. Invesco, Matrix Resources, Incorporated, and National Prosource, Incorporated*, 2014).

### 3. Disparate Impact Case Law - Criminal Background Checks

The two leading federal cases regarding the legality of criminal background checks in employment in relation to the disparate impact theory are the 1977 Eighth Circuit decision in *Green v. Missouri Pacific Railroad* and the 2007 Third Circuit decision in *EI v. Southeastern Pennsylvania Transportation Agency*. In the *Green* case, the appeals court identified three factors that assess whether a criminal record exclusion is job-related and consistent with business necessity, to wit: 1) the nature and severity of the offense; 2) the amount of time elapsed since the offense or completion of the sentence; and 3) the nature of job sought or held (*Green v. Missouri Pacific Railroad*, 1977). Specifically, in *Green*, the court ruled that the employer's "absolute" policy of excluding any applicant convicted of a crime (except for minor traffic offenses) had a disparate impact against black applicants and could not be justified by business necessity (*Green v. Missouri Pacific Railroad*, 1977, p. 1292).

In the *EI* case, the court emphasized the importance of careful factual analysis for criminal record exclusions, encompassing assessing risks and accurately distinguishing between applicants who pose an unacceptable level of risk and those who do not (*EI v. Southeastern Pennsylvania Transportation Agency*, 2007). The court in *EI* did uphold the dismissal of a transit driver when the employer discovered a forty year old conviction for second-degree murder, which occurred when the employee was 15. The court, however, expressed skepticism of the agency's lifetime ban from employment due to the conviction; yet because the plaintiff employee produced no rebuttal evidence concerning the date of the crime and the current risk of maintaining the employee, the court felt constrained to support the employer (*EI v. Southeastern Pennsylvania Transportation Agency*, 2007, pp. 247-48). The *EI* case is also instructive because the court said that any guidelines emanating from the EEOC are entitled to "deference" but not "great deference" (*EI v. Southeastern Pennsylvania Transportation Agency*, 2007, p. 244).

The aforementioned *Waldon v. Cincinnati Public Schools* (2013) case is a recent and very instructive federal case. In *Waldon*, the state of Ohio enacted legislation in 2007 which required criminal background checks of current school employees, even those employees whose duties did not involve the care, control, or custody of children.

Moreover, an employee was disqualified for employment by the law for certain specified crimes, regardless of how far in the past the crimes occurred, and regardless of the relationship of the crimes to the employee's present position and qualifications. There also was no opportunity for an employee to show rehabilitation. The legislation required termination. As such, two long-time employees, who were African-Americans and who both had records of excellent service, were discharged pursuant to this law based on their criminal records, which were decades old. The school district discharged a total of ten employees, nine of whom were African-Americans. The plaintiffs claimed that their civil rights were violated pursuant to Title VII and specifically alleged discrimination in the form of disparate impact. The school system argued that it was merely following the state law, which did not purport to discriminate; and thus it asked the federal district court to dismiss the case. The court, however, denied the motion to dismiss, stating clearly: "The Court finds no question that Plaintiffs have adequately plead a case of disparate impact....Where, as alleged here, a facially-neutral employment practice has a disparate impact, then Plaintiffs have alleged a prima facie case" (*Waldon v. Cincinnati Public Schools*, 2013, pp. 9-10).

The federal district court did say that a school district employment policy as applied to "serious recent crimes" could be justified by "business necessity" due to the "employees' proximity to children" (*Waldon v. Cincinnati Public Schools*, 2013, p. 12). However, regarding the two employees in the case at bar, the court explained that the school district policy "operated to bar employment when their offenses were remote in time, when (one) Plaintiff's...offense was insubstantial, and when both had demonstrated decades of good performance.

These plaintiffs posed no obvious risk due to their past convictions, but rather, were valuable and respected employees, who merited a second chance" (*Waldon v. Cincinnati Public Schools*, 2013, pp. 12-13). In closing, the court stated simply: "Title VII trumps state mandates" (*Waldon v. Cincinnati Public Schools*, 2013, p. 14).

To compare, in the federal district court case of *Edmond v. Pikes Peak Direct Marketing* (2013), the defendant employer was successful in getting a disparate impact case dismissed. In *Edmond*, the plaintiff job applicant, an African-American, claimed he was discriminated against based on the disparate impact theory because the defendant employer had a "blanket" "no-felons" hiring policy.

However, the evidence indicated that the defendant did not in fact have such a broad disqualifying policy; and actually the application for employment explicitly stated that a conviction would not necessarily disqualify a person from employment.

However, for positions involving computer work with access to sensitive customer data, including credit card information, the defendant stated that it had to comply with Payment Card Industry (PIC) security standards, which required background checks, including criminal record reviews. Pursuant to the PIC security standards, persons convicted of a felony could not be hired, retained, maintained, or promoted for “computer-related positions of trust”; and about one-half of the defendant employer’s positions fell into this “trust” category. Accordingly, the defendant argued that it did not have a “blanket” policy but rather a “narrowly tailored screening process” for these computer-related trust positions and that its policy was in keeping with PIC security standards (*Edmond v. Pikes Peak Direct Marketing*, 2013, pp. 10-11).

Another major problem for the plaintiff job applicant in the case was the plaintiff’s inability to present to the court adequate “competent evidence” that the defendant’s hiring policy actually caused a disparate impact on African-Americans (*Edmond v. Pikes Peak Direct Marketing*, 2013, pp. 15-16). As a result, the court ruled in favor of the defendant employer and dismissed the lawsuit. Similarly, in the recent federal district court case of *Manley v. National Prosource, Inc.* (2013), the plaintiff job applicant, a black male with a criminal record, failed to produce sufficient evidence of statistically significant disparities based on race and gender to sustain a disparate impact case against a job referral organization. Although a credit background check case, as opposed to a criminal background case, the federal district court case of *EEOC v. Freeman* (2013) is instructive regarding the demanding nature of statistical evidence required in a disparate impact race-based case, to wit: “To use general population statistics to create an inference of disparate impact, the general populace must be representative of the relevant applicant....The general population pool ‘cannot be used as a surrogate for the class of qualified job applicants, because it contains many persons who have (and would not) be’ applying for a job with Defendant” (pp. 40-41). Moreover, the court in *EEOC v. Freeman* (2013) continued: “Under Title VII, it is not enough for the plaintiff to show that ‘in general’ the collective results of a hiring process cause disparate impact.

Statistical evidence must isolate and identify the discrete element in the hiring process that produces the discriminatory outcome....When a hiring process has multiple elements, the plaintiff must identify the element(s) that it is challenging and 'demonstrate that each particular challenged employment practice causes a disparate impact,' unless it can demonstrate that 'the elements' are not capable of separation for purposes of analysis" (pp. 42-43). Consequently, regarding the key issue on the level of evidence required by the plaintiff, Harwin (2012, p. 16), concluded that the courts have been "elevating the standards of proof required for plaintiffs to establish disparate impact," particularly regarding statistical analysis.

#### **4. Arrests v. Convictions**

The federal courts, moreover, make a clear distinction between arrests and convictions. To illustrate, one federal court said that the use of arrest records was "too crude" a predictor of an employee's predilection for theft when there were no procedures or safeguards to prevent reliance on unwarranted arrests (*Dozier v. Chupka*, 1975, p. 850).

Another federal court was more definitive and declared that a record of arrests without convictions was "irrelevant" to an applicant's suitability and qualifications for employment (*Gregory v. Litton Systems, Inc.*, 1970, p. 403).

#### **D. Equal Employment Opportunity Commission**

Civil rights laws are enforced in the United States primarily by the federal government regulatory agency – the Equal Employment Opportunity Commission (EEOC). Congress has delegated to the EEOC the power to interpret, administer, and enforce Title VII of the Civil Rights Act of 1964. The EEOC is permitted to bring a lawsuit on behalf of an aggrieved employee, or the aggrieved employee may bring a suit himself or herself for legal or equitable relief. However, Stoter (2008) points out that Congress only empowered the EEOC to institute a lawsuit against employers who engaged in a "pattern or practice" of discrimination; and as a result, the private cause of action allowed in Title VII became an instrumental component in employment anti-discrimination law and practice. Individual actions can be filed by workers, but only after they conform to strict pre-suit procedures which include filing their initial administrative complaint with the EEOC and "706" corresponding state agency.

The Civil Rights Act allows any person who is aggrieved by a violation of the statute to institute a civil action in any court of competent jurisdiction for any and all legal redress which will effectuate the purposes of the statute. However, a plaintiff must first fulfill certain administrative prerequisites (Lynch, 2006). When the EEOC finds "reasonable cause" the agency grants the aggrieved party a "right-to-sue" letter which allows the employee to proceed to the federal courts (Lynch, 2006).

Moreover, it should be noted that normally individuals who feel they have been discriminated against in the workplace have 180 days to file a complaint with the EEOC and their state's corresponding "706 agency," which is the individual state's administrative agency charged with investigating allegations of discrimination in the workplace, such as the State of Florida's Commission on Human Relations or the Texas Workforce Commission. Thereafter, aggrieved parties have 90 days to file their lawsuit when their "right to sue" letter is received.

Failing to follow these pre-suit procedures can result in a dismissal of the future federal court action as well as separate specific state antidiscrimination lawsuits (*Olivarez v. University of Texas at Austin*, 2009). In certain circumstances, these strict deadlines can be satisfied by either a work sharing agreement between the EEOC and local 706 agency, or "relation back" theories of tagging along additional discrimination claims after the filing of the lawsuit, such as was the case in *Ivey v. District of Columbia* (2008).

The EEOC itself actually may go to court on behalf of the complaining employee, or the employee may also choose to be represented by private legal counsel. Regardless, in either situation, the *prima facie* case is the required initial case that a plaintiff employee asserting discrimination must establish. Basically, *prima facie* means the presentment of evidence which if left unexplained or not contradicted would establish the facts alleged. Generally, in the context of discrimination, the plaintiff employee must show that: 1) he or she is in a class protected by the statute; 2) the plaintiff applied for and was qualified for a position or promotion for which the employer was seeking applicants; 3) the plaintiff suffered an adverse employment action, for example, the plaintiff was rejected or demoted despite being qualified, or despite the fact that the plaintiff was performing his or her job at a level that met the employer's legitimate expectations; 4) after the plaintiff's rejection or discharge or demotion, the position remained open and the employer continued to seek applicants from people with the plaintiff's qualifications. These elements, if present, give rise to an inference of discrimination.

The burden of proof and persuasion is on the plaintiff employee to establish the *prima facie* case of discrimination by a preponderance of the evidence (*Wheeler v. Commonwealth of Pennsylvania*, 2012).

## **1. Disparate Treatment Interpretation**

The EEOC construes disparate treatment as intentional discrimination based on race or the other protected categories. An example given by the agency is when a test of reading ability is given to African-American job applicants but not to their white counterparts (EEOC, *Employment Tests and Selection Procedures*, 2013). Another example given by the agency is when an employer does not hire an African American applicant with a criminal record but does hire a white applicant with a comparable criminal record (EEOC, *Enforcement Manual*, 2012).

The federal agency will utilize the following factors to determine if there is a presence of disparate treatment discrimination, to wit: 1) Were persons in protected categories treated differently? 2) Is there any direct evidence of bias, such as discriminatory statements? 3) What is the employer's reason for difference in treatment? 4) Does the evidence demonstrate that the employer's reason for the difference in treatment was not true? 5) Does the evidence show that the employer's real reason for the difference in treatment was race or another protected category (EEOC, *Employment Tests and Selection Procedures*, 2013)? The EEOC also points out that "stereotyped thinking" can rise to the level of illegal disparate treatment, when, for example, a decision is made to reject a job applicant based on racial or ethnic stereotypes about criminality as opposed to examining the applicant's qualifications and suitability for a position (EEOC, *Enforcement Guidance*, 2012, p. 5).

## **2. Disparate Impact Interpretation**

The EEOC construes disparate impact discrimination as the employer using a neutral test or selection procedure that has the effect of disproportionately excluding persons based on their race or other protected categories where the tests or selection procedures are not job-related and consistent with business necessity (EEOC, *Employment Tests and Selection Procedures*, 2013; EEOC, *Enforcement Guidance*, 2012).

The EEOC uses the following criteria to determine disparate impact liability, to wit: 1) Does the employer use a particular employment practice that has a disparate or disproportionate impact on race or other protected categories? 2) If there is a disparate impact, can the employer demonstrate that the selection procedure is job-related and consistent with business necessity? 3) Can the employer show that the selection criterion is necessary to the safe and efficient performance of the job? 4) Does the selection criterion sufficiently associated with the knowledge and skills to perform the job successfully? Even if the selection criterion is job-related and consistent with business necessity can the employer show that there is a less discriminatory alternative available (EEOC, *Employment Tests and Selection Procedures*, 2013; EEOC, *Enforcement Guidance*, 2012).

Finally, it is important to point out that even in the absence of any discriminatory intent, an employer can still violate Title VII if it uses a selection criterion that has a disparate impact (EEOC, Office of the Legal Counsel, *Informal Discussion Letter, Title VII: Criminal History & Arrest Records*, 2013).

In the context of criminal background checks, the EEOC explicitly points out that “because disproportionate members of African-Americans and Hispanics are convicted of crimes, the use of conviction records to make employment decisions is likely to have a disparate impact on these groups (EEOC, Office of the Legal Counsel, *Informal Discussion Letter, Title VII: EPA Information Collection Request, Background Checks*, 2013, p. 2). Furthermore, in its *Enforcement Guidance* manual, the agency states that the national data indicating disproportionate arrests and incarceration of black and Hispanic men “supports a finding that criminal record exclusions have a disparate impact based on race and national origin” (EEOC, *Enforcement Guidance*, 2012, p. 7). The agency also warns that “an employer’s evidence of a racially balanced workforce will not be enough to disprove disparate impact” (EEOC, *Enforcement Guidance*, 2012, p. 7). Furthermore, the EEOC warns employers that “national data supports a finding that criminal record exclusions have a disparate impact based on race and national origin” and thus that the “national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions” (EEOC, *Questions and Answers about the EEOC’s Enforcement Guidance on the Consideration of Arrest and Conviction Records*, 2014).

Consequently, if there is a disparate impact, an employer can only use criminal history information to make employment decisions when the information is job-related for the position, consistent with business necessity, and there does not exist an equally effective but less discriminatory alternative (EEOC, Office of the Legal Counsel, Title VII: EPA Information Collection Request, Background Checks, 2013). Furthermore, the EEOC advises that “with respect to exclusions based on criminal records, employers should assess the risk that a person with a criminal record may pose if employed, by relating the nature of the crime to the nature of the position, in light of the time elapsed since the crime” (EEOC, Office of the Legal Counsel, Informal Discussion Letter, Title VII: Criminal History & Arrest Records, 2013, p. 2).

Procedurally, the EEOC notes that “after the plaintiff in litigation establishes disparate impact, Title VII shifts the burdens of production and persuasion to the employer to ‘demonstrate that the challenged practice is job related for the position in question and consistent with business necessity’” (EEOC, Enforcement Guidance, 2012, p. 7). Evidence that the exclusionary policy is necessary for safe and efficient job performance will be a critical factor for the agency (EEOC, Enforcement Guidance, 2012, p. 7).

### **3. Arrests v. Convictions**

The EEOC counsels employer to make a distinction between arrests and convictions. The EEOC states that employers “...should be mindful that arrest records, by their nature, should be treated differently from conviction records (EEOC, Office of the Legal Counsel, Informal Discussion Letter, Title VII: Criminal History & Arrest Records, 2013, p.2). The EEOC explains the rationales for making this critical distinction:

A conviction record will usually serve as a sufficient indication that a person engaged in the reported offense because the criminal justice system requires the highest degree of proof (‘beyond a reasonable doubt’). However, most arrest records are unreliable indicators of guilt for several reasons. First, an arrest record is not persuasive evidence that the person engaged in the conduct alleged. Individuals are presumed innocent until proven guilty in a court of law, and ultimately, a prosecutor may decide not to press charges, or dismiss the charges after they have been filed, if the circumstances surrounding the arrest do not warrant formal charges.

Second, there is evidence that some state criminal record repositories fail to report the final disposition of arrests, which means that an applicant's criminal history information may be incomplete and may not reflect that his arrest charges have been modified or dropped. Finally, arrest records may be inaccurate due to a variety of factors including common names and personal identifying information, misspellings, clerical errors, or because individuals provide inaccurate information at the time of arrest (EEOC, Office of the Legal Counsel, Informal Discussion Letter, Title VII: Criminal History & Arrest Records, 2013, p. 2).

Arrest standing alone does not necessarily mean that a job applicant has committed a crime and thus the employer should not assume that the applicant committed the offense. Rather, the employer should allow the applicant the opportunity to dispute the arrest and to explain the circumstances of his or her arrest or arrests; and then the employer should make a "reasonable effort" to determine if the explanation is "reliable" (EEOC, Pre-Employment Inquiries and Arrest & Conviction, 2013). The focal point, according to the agency, is not the arrest itself but "whether the conduct underlying the arrest justifies an adverse employment action" (EEOC, Enforcement Guidance, 2012, p. 8). Thus, the employer must make a "fact-based analysis" of the conduct underlying the arrest (EEOC, Enforcement Guidance, 2012, p. 8). The agency thus explains that "although an arrest record standing alone may not be used to deny an applicant an opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes" (EEOC, Enforcement Guidance, 2012, p. 8).

Compared to arrests, the EEOC states that a conviction typically will serve as sufficient evidence that a person engaged in the particular conduct (EEOC, Questions and Answers about the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records, 2014); but nonetheless the agency also states that the conviction could be outdated or there could be errors in the record (EEOC, Enforcement Guidance, 2012). Convictions can preclude employment if the history of criminal conduct is job-related and any exclusion is consistent with business necessity (EEOC, Enforcement Guidance, 2012).

However, the EEOC counsels: "For exclusions based on convictions, this means that the criminal conduct must be recent enough and sufficiently job-related to be predictive of performance in the position sought, given the duties and responsibilities" (EEOC, Office of the Legal Counsel, Informal Discussion Letter, Title VII: EPA Information Collection Request, Background Checks, 2013, p. 2). Specifically, the EEOC holds that "an 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" (EEOC, Enforcement Guidance, 2012, p. 9). Finally, the EEOC questions whether criminal records, including convictions, which have been expunged or sealed pursuant to state law are even "probative" (EEOC, Office of the Legal Counsel, Informal Discussion Letter, Title VII: Criminal Records: Comment on Peace Corps Volunteer Applications, 2013, p. 7).

#### **4. Enforcement Guidelines for Criminal Background Checks**

It is important to emphasize that the EEOC does not prohibit the use of criminal background checks in employment. However, the agency also underscores that employers who use such records as an "absolute measure," which prevents a job applicant from being hired, could limit employment opportunities for some members of protected groups; and thus such "absolute" use would be deemed impermissible (EEOC, Pre-Employment Inquiries and Arrest & Conviction, 2013).

On April 25, 2012, the EEOC issued extensive "guidelines" for employers to consider the criminal justice history of a job applicant or employee. The agency thereby advises employers to do the following concerning the use of criminal background checks:

- Consider the nature and gravity of the crime, the elements of crime, the harm caused by the crime, and whether it is a misdemeanor or felony.
- Consider the number of offenses for which the person was convicted and the age of the person at the time of conviction or release from prison.
- Consider the relationship of the crime to the applicant's potential job.
- Consider how much time has passed since the criminal offense, conviction and/or completion of sentence; and note that the exclusion should be of unlimited duration.
- Assess the nature of the job held or sought and job duties and functions.

- Develop a narrowly tailored criminal record exclusion.
- Consider the level of supervision and oversight, the amount of interaction with co-workers or customers, and the degree of access to vulnerable people, such as children.
- Consider where the work is to be performed (for example, out-of-doors, in a warehouse, or in a private home).
- Consider if the individual performed the same type of work, post-conviction, with the same or different employer, with no known incidents of criminal conduct.
- Consider the length and consistency of employment history before and after the offense or conduct.
- Consider rehabilitation efforts, such as education and training.
- Consider employment and/or character references or any other pertinent information concerning the fitness of the applicant for the particular position.
- Consider whether the person is bonded under a federal, state, or local bonding program.
- Review each case individually.
- Inform an individual that he or she may be excluded from employment or a position due to a criminal record.
- Allow a person to show why he or she should be hired despite the conviction, for example, the exclusion does not properly apply to him or her, the employer's policy is not job-related and consistent with business necessity, and/or information indicating the individual was not properly identified in the criminal record and/or that the record is other inaccurate (EEOC, Enforcement Guidance, 2012; EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013; EEOC, Office of the Legal Counsel, Informal Discussion Letter, Title VII: EPA Information Collection Request, Background Checks, 2013).

These guidelines, the agency advises, should be used in the case of convictions and even for arrests when the employer believes in fact that the job applicant did engage in the conduct that he or she was arrested for, but in the latter case only to the extent that the applicant cannot be trusted to perform the duties of the position taking into consideration the preceding factors (EEOC, Pre-Employment Inquiries and Arrest & Conviction, 2013).

While these “guidelines” do not have the same force of law as formal agency “rules and regulations” promulgated through the quasi-legislative rulemaking process, informal guidelines will indicate how an administrative agency interprets the law and how it intends to enforce the law within its jurisdictional purview (Cavico and Mujtaba, 2008).

Commissioner Constance S. Barker at an agency meeting regarding the new guidelines in April of 2012 declared:

I oppose Guidance because of the real impact it will have on America's business....If I were a business owner, no matter what business I was in, I would never again conduct another criminal background check on a potential employee unless I'm required to under federal law, not just state law, but federal law....I'm afraid the reality is, the only real impact the new Guidance will have will be to scare business owners from ever conducting criminal background checks. Thus, the unintended consequences will be that, even those business owners who we all agree should conduct criminal background checks, simply will not. Why should they? The Guidance tells them that they are taking a tremendous risk if they do. The Guidance tells them that, even if they are not discriminating, if they are treating all races and ethnicities equally; they could be found guilty of unintentional discrimination under a disparate impact theory.... All this new Guidance does is to put business owners between a rock and a hard place. Conduct criminal background checks to protect your employees and the members of the public you serve, and you bear the risk of having to defend your actions as discriminatory. Don't conduct background checks, and you take the risk that an employee or a member of the public will be harmed. This is no help to American business owners....I object to the burden it places on business owners. I strongly oppose the Guidance and will vote against it (EEOC, Transcript of April 25, 2012 Meeting, 2013, p. 8).

Nevertheless, despite the objections and arguments of Commissioner Barker, the EEOC commissioners voted to approve the guidelines for criminal background checks in employment. Now this article will focus on very real practical legal ramifications to the EEOC guidelines.

## 5. EEOC Enforcement Actions

- a) The 2012 Pepsi Settlement. Despite the aforementioned strongly worded objections of one Commissioner, the EEOC not only voted for the guidelines but also in 2012 provided a “loud and clear” signal as to how it would exercise its “prosecutorial” discretion as per the guidelines regarding the use of criminal background checks in employment. The federal agency compelled a settlement with Pepsi Beverages (Pepsi) in which the company agreed to pay \$3.13 million as well as to provide job offers and training to resolve allegations of race discrimination filed by the EEOC. The money was to be distributed primarily to black applicants for employment with Pepsi.

The EEOC had found reasonable cause to believe that Pepsi’s criminal background policy discriminated against African-Americans in violation of Title VII of the Civil Rights Act. Under Pepsi’s (former) policy, job applicants who had been arrested pending prosecution were not hired for permanent positions even if they had not been convicted of a crime. Moreover, the policy had denied employment to applicants who had been arrested or convicted of certain minor offenses. The EEOC maintained that its investigation discloses that more than 300 African Americans were adversely affected and that the policy disproportionately excluded black applicants from employment (EEOC, Press Release, Pepsi to Pay \$3.13 Million, 2013).

The EEOC explained that the use of arrest and conviction records to deny employment will be deemed illegal pursuant to Title VII of the Civil Rights Act when such records are not relevant to the job, because such overbroad use can limit employment opportunities for applicants or employees based on their race or ethnicity and thus result in an illegal adverse or disparate impact. The EEOC in its Press Release on the Pepsi settlement also issued a warning to employers: “We hope that employers with unnecessarily broad criminal background check policies take note of this agreement and reassess their policies to ensure compliance with Title VII” (EEOC, Press Release, Pepsi to Pay \$3.13 Million, 2013). Apparently, however, two large employers did not take sufficient heed of the Pepsi agreement and explicit agency warning.

b) **The 2013 Dollar General and BMW Lawsuits.** Then, the EEOC in June of 2013 instituted discrimination lawsuits against two large employers for improperly using criminal background checks in hiring (EEOC, Press Release, EEOC Files Suit Against Two Employers for Use of Criminal Background Checks, 2013; Thurm, 2013). The EEOC contended that the two companies, Dollar General Corp. (a discount retailer) and the U.S. division of the German auto manufacturer BMW, improperly used the background checks in screening employees, which resulted in illegal discrimination against black applicants. The EEOC specifically asserts that the two companies prevented the hiring of the black applicants based on the broad use of criminal background checks; rather, according to the agency, the companies reviewing each applicant separately.

The legal theory that the EEOC used was the aforementioned disparate impact (also called the adverse impact) doctrine. The EEOC admitted that the two companies did not engage in purposeful race discrimination against the black applicants for employment; rather, the agency contended that the broad policies, although applied to all applicants, had a disproportionate negative impact on the black applicants (EEOC, Press Release, EEOC Files Suit Against Two Employers for Use of Criminal Background Checks, 2013; Thurm, 2013).

In the two aforementioned cases, the EEOC's general counsel stated that they were "very serious systemic race discrimination cases." For both companies the EEOC cited statistical disparities in the hiring rates of blacks and non-blacks after the companies ran criminal background checks. Specifically, the EEOC stated that Dollar General revoked conditional employment offers for 10% of its black applicants, but only for 7% of its non-black applicants between January 2004 and April 2007. And because there were more than 344,000 applicants involved, the resulting numbers created, the agency, said an improper "gross disparity" based on race. The company has 1000 stores in 40 states and more than 90,000 employees, 90% of whom are stockers and cashiers at the stores. Dollar General uses a formula including the crime and how old it is to decide whether to reject an applicant. The EEOC said that the policy is illegal because it is not adequately job-related and does not consider individual circumstances (EEOC, Press Release, EEOC Files Suit Against Two Employers for Use of Criminal Background Checks, 2013; Thurm, 2013). To illustrate, one Illinois woman was dismissed three days after her background check due to a six year old drug possession conviction.

Dollar General responded by saying the company prohibits discrimination in its hiring and employment practices. Moreover, the retailing company said its criminal background checks are structured to foster a safe environment for employees, customers, and to protect its assets in a non-discriminatory manner (Thurm, 2013). In the BMW case, the EEOC alleges that the auto maker hired a new logistics contractor at its Spartanburg, S.C., assembly plant in 2008. The company then required 645 employees of the prior contractor to undergo a new criminal background check. Of those employees, 55% were black, but 80% of the 88 terminated employees were black. BMW responded by saying that it complied with the law and will defend itself against the discrimination complaint.

The company also said that it has a “highly diverse” workforce as well as a “strong culture of non-discrimination” (EEOC, Press Release, EEOC Files Suit Against Two Employers for Use of Criminal Background Checks, 2013; Thurm, 2013). The EEOC stated in its Press Release that it attempted to resolve these matters through negotiation and settlement, as per the Pepsi settlement, but to no avail. As of the writing of this article in the spring of 2014, the EEOC lawsuits against the two companies are still pending (Smialek, 2014; Smith, 2014). One legal commentator (Smith, 2014, p. 225) notes that “both of these cases will provide an opportunity for the federal courts to weigh in on the EEOC’s new guidance, and will provide some perspective on how much deference judges are inclined to give to the EEOC’s recent pronouncements. But they also highlight the aggressive posture the EEOC has adopted.”

As a summary, we can say that the examination of EEOC legal interpretation and guidelines and the existence of the aforementioned legal proceedings by the agency indicate that the EEOC can bring a civil rights lawsuit if the agency believes that information regarding an applicant is being used to discriminate against the prospective employee; and the agency can use either the disparate treatment or disparate impact theories. Pertaining to criminal record background checks in hiring, the EEOC maintains, and is willing to enforce legally, that pursuant to Title VII disparate impact liability exists when the evidence demonstrates that an employer’s criminal background check policy or practice, though neutral on its face, disproportionately screens out and adversely affects a Title VII protected group.

Furthermore, on civil rights attorney predicts that "...although the EEOC's recent guidance has not yet been scrutinized by a court, there is reason to be cautiously optimistic that courts will determine that it is entitled to a considerable level of deference" (Smith, 2014, p. 226).

The employer, however, must be concerned not only with being sued by the federal agency for violating the Civil Rights Act by improperly using criminal background checks, but also being sued in common law tort for negligence for *not* using criminal background checks during the hiring process.

### **E. The Tort of Negligent Hiring**

Negligent hiring lawsuits are legal actions filed against an organization by an employee that claims an organization failed to conduct thorough background checks before hiring someone with a criminal record. The concern for negligent hiring lawsuits motivates employers to conduct thorough background checks, including investigating criminal records of applicants. These background checks are done to prevent negligent hiring lawsuits. Negligent hiring lawsuits are tort actions, premised on the common law tort of negligence, brought by individuals against employers if harmful actions are committed by the employee against fellow employees or others when a proper background check was not performed by the employer. That is, in the specific case of criminality, the ex-offender employee would not have been hired or placed in a certain position if a reasonable background check had been performed and the employer would have discovered the criminal record (EEOC, Meeting of November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records, *Statement of Rae T. Vann*, General Counsel, Equal Employment Advisory Counsel, 2013; Privacy Rights Clearinghouse, 2013; EEOC, Meeting of November 20, 2008, *Statement of Michael L. Foreman*, 2013). Sturgill (2013) explains a negligent hiring lawsuit in the context of workplace violence:

The cause of action, which normally turns on these two closely-related issues duty and foreseeability – asks whether the employer knew or should have known that a potential employee had a propensity for violence. The question of whether an employer should have known about an employee's propensity for violence requires employers to take reasonable steps to investigate their employees' backgrounds.

By conducting a reasonable investigation of a potential employee's background before hiring the employee, employers can satisfy their duty to determine whether the employee poses a foreseeable risk of harm to other employees or customers (p. 505).

Sturgill (2013, p. 510), however, in an examination of Virginia case law on negligent hiring notes that "the term 'reasonable investigation' remains undefined and unexplained."

The juxtaposition of negligent hiring lawsuits with enforcement actions by the EEOC presents a real dilemma for employers.

Foreman (EEOC, Meeting of November 20, 2008, *Statement of Michael L. Foreman*, 2013, p. 2) points out that the existence of negligent hiring tort liability places the employer in a "Catch-22" situation, that is, "...the employer must either adopt a hiring policy that includes discrimination based on criminal history and risk a possible Title VII disparate impact claim, or look past criminal history at the peril of a tort claim for negligent hiring." However, Foreman (EEOC, Meeting of November 20, 2008, *Statement of Michael L. Foreman*, 2013, p. 2) also states that the "a revised set of EEOC guidelines would provide employers with guidance as to what constitutes due care in hiring practices and indeed a safe harbor from negligence suits....(I)f an employer was sued for negligent hiring, reliance on EEOC guidelines which include as components, considerations of foreseeability and reasonable care should provide a defense to those claims." That "revised set of guidelines," of course, are now in existence. Even more beneficial to employers, at least in the state of Illinois, is a state statute that immunizes employers from lawsuits for negligent hiring if they hire an ex-offender who has been awarded a state certificate of rehabilitation, based on such factors as the length of time since release from incarceration, age at the time of the offense, nature of the offense, and any actions or conduct that the ex-offender can report that indicate good conduct and rehabilitation (EEOC, Meeting of July 26, 2011, *Written Testimony of Stephen Saltzburg*, 2013, p. 4).

Overall, the lawsuits by the EEOC demonstrate that the agency is increasing its scrutiny of criminal background checks (as well as credit checks), both of which are widely used in employment to screen job applicants.

The EEOC's recent use of the disparate impact theory to bring the aforementioned lawsuits clearly illustrates that employers must be very mindful of the unintended effects of their neutral hiring policies and practices, such as criminal background checks and requirements, on minorities.

Some state and local governments have regulated how an employer can use criminal background checks during the hiring process. Where there is some type "ban the box" law in effect, the initial employment application process typically would not permit an initial inquiry into an applicant's criminal justice history.

The essence of "ban the box" legislation is give applicants, who are ex-offenders, more of a level-playing-field when applying for employment by prohibiting peremptory disqualification by means of the "box" and thereby forcing employers to take an individualized case-by-case examination of an applicant's qualifications and suitability for specific jobs or positions.

## **Implications for Stakeholders**

There are many stakeholders that will be directly or indirectly affected by employers using criminal background checks in employment. Family, friends, employees, employers, government and the legal system, schools, churches, interest groups, local communities, and society as a whole will be affected in one way or another. These stakeholders have competing interests and values. The challenge is to devise a fair and workable criminal background check policy that balances the public interest and the need of the ex-offender to be rehabilitated fully into the local community and society with the interest of the employer and its stakeholders to minimize the possible risks and costs of employing people with criminal histories. This section of the article, therefore, will discuss the implications of the employers using criminal background checks in employment on certain key stakeholders.

### **1. Job Applicants and Employees**

Proponents of "ban the box" initiative argue that it is a promising and constructive policy innovation that furthers the important goal of effectuating the former offender's re-entry into the community and society. Deemphasizing at least initially past criminal convictions should help reduce job discrimination against ex-offenders.

The “ban the box” campaign thus represents a major step toward “regularizing” the status of ex-offenders in the hiring process. It is morally wrong to deny applicants with a criminal record the proverbial “second chance” to become part of the general labor force by means of an automatic exclusion as per the “box.”

There are still a large number of employers who will not interview, let alone hire, a person when the criminal box is checked in the initial application. This type of narrow thinking and attitude will harm many ex-offenders because they see no future in the work place and thus no productive role in the community.

Providing them with a “glimmer of hope” and an opportunity to apply for a job and to be fully considered on the merits, is what eliminating the “box” laws seek to accomplish.

The EEOC, by means of its interpretation of the disparate impact theory of civil rights law, its guidelines for the use of criminal records and its concomitant recent enforcement actions is also trying to prevent initial disqualification of applicants with criminal records and to compel employers to examine each job applicant on a thorough and individualized basis.

Employment, of course, provides a stable community foundation and financial benefit for those ex-offenders who can obtain jobs. The ex-offenders family will be affected positively too, as now that person will be able to work and provide financially for one’s family, which is especially important if that individual is the sole “bread-winner” within the household. Moreover, the now employed ex-offender will be a good role model, and hopefully an inspiration, for family members as well as others in the community. By means of “ban the box” legislation or EEOC action, former offenders will be granted another chance to seek employment on more of an “equal footing” and without peremptory discrimination due to the “box” or similar hiring attitudes by employers. A prior criminal history is not a fair basis to initially and automatically discriminate against an applicant and consequently to eliminate any opportunity for the ex-offender to “make a living” and to take care of himself or herself and family. The moral approach to take, according to the proponents of “ban the box” as well as the EEOC, is at least eliminate the “box” or any other automatic disqualifier on the initial job application so at least ex-offenders can get some individualized attention and perhaps secure an interview.

After the initial stage of the application process, employers will be able to acquire more information on the applicant as well as to have a chance to interact with the candidate on a one-to-one basis, where the applicant's criminal record can be examined, discussed, and assessed in relationship to the overall qualifications of the candidate and the nature of the particular job or position.

With the "box" or otherwise automatically excluding the applicant from consideration, he or she will stand no chance to obtain a position with the company.

The applicant may feel that the employer for that matter society as a whole are treating him or her immorally by not giving the applicant any opportunity to be considered for the position, particularly if he or she has been rehabilitated and is seeking to reenter society as a productive citizen.

The actions of the employer thus may be construed as harsh and unethical by the applicant and others in the community when the employer summarily rejects a job applicant away after the person checks the "box" or otherwise presents a criminal history. Instead of a peremptory disqualification, Foreman (EEOC, Meeting of November 20, 2008, *Statement of Michael L. Foreman*, 2013, p. 3) argues, "we should strive to put in place guidelines, policies, and statutes that provide incentives for those with criminal background histories to rehabilitate and prepare themselves for re-entry into the job market while rewarding employers who hire them. In part, we want individuals with criminal background histories to be supported and motivated to work hard to prepare themselves for employment post-incarceration."

There are, however, critics of "ban the box" type legislation who argue from the perspective of the job applicant or employee. These critics contend that such legislation, though well-intended, may actually impede job opportunities for ex-offenders, particularly minorities (Riley, 2013). One critic, writing in the *Wall Street Journal*, points to a 2006 study in the *Journal of Law and Economics*, entitled "Perceived Criminality, Criminal Background Checks, and Racial Hiring Practices of Employers," which found that employers who investigate the criminal backgrounds of job applicants are in general more likely to hire African-Americans (Riley, 2013, p. A11). The reason is presumed to be that employers who can check for criminal backgrounds will be less likely to discriminate on the basis of race when hiring people (Riley, 2013).

## 2. Employers

Why would employers do criminal background checks if they are not legally required to do so? Employers do have certain legitimate concerns. They want to be sure that people hired or promoted are suitable for certain positions; and criminal background checks can be critical in determining the suitability of a person for a position.

Employers do not want people convicted of financial crimes handling money or people with violent histories being in contact with customers, clients, or other employees. Employers are rightfully concerned with legal liability premised on the tort of negligent hiring. Safety and security at the workplace are thus legitimate issues for employers. Judge Robert W. Titus, writing the opinion in the federal district court case of *EEOC v. Freeman* (2013), succinctly stated the employer's rationales for criminal background checks, to wit:

"For many employers, conducting a criminal history or credit background check on a potential employee is a rational and legitimate component of a reasonable hiring process. The reasons for conducting such checks are obvious. Employers have a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their employers, engage in workplace violence, or who appear to be untrustworthy and unreliable....Careful and appropriate use of criminal history information is an important, and in many cases essential, part of the employment process of employers throughout the United States...Even the EEOC conducts criminal background investigations as a condition of employment for all employees, and conducts credit background checks on approximately 90% of its positions" (pp. 2, 4).

However, the employer today has to comply with the law, and that means Title VII of the Civil Rights Act, including disparate impact analysis, as well as the EEOC guidelines as enforced by the agency. Regarding the EEOC guidelines, one employment law attorney was quoted in the *Wall Street Journal* as saying the EEOC's criteria will be a "hard standard" for employers to meet. Another attorney said the agency's guidelines put employers "between a rock and a hard place" (Thurm, 2013).

A representative of the National Retail Association stated in *Bloomberg Businessweek* regarding the EEOC's policy that "we are caught in the middle" (Smialek, 2014, p. 31).

And an employment law attorney stated in the aforementioned magazine that all the regulation in this area "creates a risky environment for employers" (Smialek, 2014, p. 31). In addition, in a scathing editorial, the *Wall Street Journal* condemned the EEOC lawsuits, declaring: "We would have thought that criminal checks discriminate against *criminals*, regardless of race, creed, gender, or anything else. Such criminal checks are legal and have long been part of the hiring process at many companies. You can argue that criminals deserve a second chance in life, or even a third or fourth, but business owners and managers ought to be able to decide if they want to take the risk of hiring felons" (Review and Outlook, 2013, p. A14).

The *Wall Street Journal* (Review and Outlook, 2013) in the aforementioned editorial also underscored the diversity factor, to wit: "Even if a company has a racially diverse workforce, it can still be sued if its applicant pool doesn't meet the EEOC's statistical tests. So a retailer that decides it would rather not have proven thieves manning its cash registers could be guilty of racism if the convicted thieves in its applicant pool are disproportionately minority" (Review and Outlook, 2013, p. A14).

Similarly, David Burton, General Counsel of the National Small Business Association, condemned the agency's guidelines, especially taking aim at the agency's Enforcement Guidance manual:

I can assure you that virtually no small business owner is going to be able to read, absorb and apply the 55 page Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions...issued by the EEOC....The document includes 167 footnotes containing references to, and discussions of, case law, law review articles, studies and data....In the real world, small firms and their advisors are not going to be able to understand what the EEOC regards as permissible with respect to the use of criminal background checks. The reason is fairly straightforward. The EEOC has not clearly stated what it wants from the small business community. All the EEOC has done is indicate that it expects small firms to conduct a complex individualized assessment weighing numerous factors regarding their use of conviction records in each hiring decision.

How that is to be done in practice is anyone's guess (EEOC, Meeting of July 18, 2012 – Public Input into the Development of EEOC's Strategic Enforcement Plan, Written Testimony of David Burton, 2013, p. 2).

From the employer's perspective, one can argue that the employer has a legal and moral obligation to the owners of the firm and the employees of the company, as well as other stakeholders, to hire the best person for the specific position; and if the employer feels that a person with a "checkered past" will not provide the quality of work the employer requires, the employer can turn him or her away. The "box," however, on an initial application form, may also be seen as "crutch," and thus may be too facile a tool to expedite the hiring process of many applicants and even, perhaps, "help" a hiring manager go against his or her own benign feelings by summarily turning the ex-offender away.

Even in jurisdictions where "ban the box" laws apply or where the employer feels constrained by the EEOC, employers nevertheless will get the opportunity to interview the candidate on "equal grounds" to determine his or her suitability for a position. After interviewing the candidate, the employer will be able weigh the severity and time of the criminal record, and weigh that history against the opinion the employer formed of the individual during the interview process, and thus the employer will make a reasoned decision as to whether or not the applicant is a good fit for the position and thus whether or not the employer can overlook the ex-offender's former "indiscretions." Bear in mind the elimination of the criminal conviction box on job applications would not mean that employers would be summarily forced to hire ex-offenders. The objective of the "ban the box" laws as well as the EEOC enforcement is to allow an opportunity for consideration of the ex-offender's whole record without any summary judgment and discrimination resulting in disqualification.

The goal is for employers to interview the candidate and not merely to see the "box," and thus to fully see for what an applicant as an individual can "bring to the table." The employer will be acting in a socially responsible manner because the employer is treating all applicants fairly, and, in essence, by doing so the employer is really "giving back to community" by enabling unemployed individuals with criminal records to be gainfully employed and thus to support their families and the community.

Of course, and this is an essential point, the final decision as to hiring, though, would be up to the employers in order to see if the position aligns with the ex-offender's overall "track record," competencies, and competencies. Naturally, there may be very valid reasons for not hiring applicants with certain criminal records for certain types of jobs.

Another benefit for the employer once hiring an ex-offender is the tax credits companies may receive from government entities by hiring people with a criminal background.

It should be noted that some companies have already removed questions about an applicant's criminal history from the initial job application, thereby precluding the disqualification of job applicants who have criminal records. Smialek (2014) reports that Target will only ask questions regarding criminal records later in the interview process, and, moreover, will conduct background checks only after it makes a conditional job offer. Wal-Mart Stores has a similar policy.

The objective is to give applicants with criminal records "a chance to get their foot in the door" (Smialek, 2014).

### **3. Government**

Providing a second chance for ex-offenders will certainly boost labor force participation as well as presumably increase the number of more appreciative and thus more productive employees. Prohibiting criminal background checks as automatic initial exclusions to employment also will ease the burden for the government, which naturally uses taxpayer dollars to finance expenses associated with ex-offenders, especially unemployed ex-offenders. The government will benefit from increased employment of ex-offenders, as there will be less financial strain on government to finance ex-offenders, who may be back in prison due in part to a lack of a job, or if they are out of prison but unemployed and thus consuming state welfare resources. Saltzburg (EEOC, Meeting of July 26, 2011, *Written Testimony of Stephen Saltzburg*, 2013, p. 1) underscores the preceding point by noting the "substantial economic burden current incarceration rates impose on taxpayers – over \$56 billion a year" as well as the fact that "incarceration carries long lasting economic and social repercussions for ex-offenders, families, and communities."

#### **4. Interest Groups**

In addition to the proponents of the “ban the box” movement, many interest groups are involved in debate over the use of criminal background checks in employment. One important and active interest group so involved is the NAACP.

An attorney for the NAACP (Thurm, 2013) praised the EEOC guidelines and recent lawsuits, saying that people are trying to work and be productive citizens but are being prevented from being hired due to convictions, which may be old, and when these applicants pose little danger. The NAACP attorney, moreover, said that the issue of criminal background checks is a particularly important issue for the organization because blacks are convicted of crimes more often than whites (Thurm, 2013).

#### **5. Society**

Society on a whole stands to benefit from more individualized examination of candidates for jobs and positions as employment will be increased. People with suitable qualifications for certain positions will be, and will not be, hired. In the latter case, society must be protected, and thus some positions will still be subject to the criminal history disqualification, such as positions involving public safety like police and firefighters, positions with financial responsibilities and having access to confidential information, and those jobs which require working with children. Overall, however, there should be more employment and productivity within the labor force. Greater employment of ex-offenders will reduce recidivism and thus will help contribute to lowering crime rates. By eliminating automatic exclusions, society will be reinforcing an oft-stated principle of giving ex-offenders the “second chance” they deserve for “paying their debt” to society and rehabilitating themselves.

Accordingly, Foreman (EEOC, Meeting of November 20, 2008, *Statement of Michael L. Foreman*, 2013, p. 1) emphasizes that “rehabilitation and re-integration through meaningful employment is one way to restrict the flow of ex-offenders leaving and re-entering society through the jailhouse doors. Data shows that those returning to society who are able to establish a stable family and working environment are less likely to return to jail. The social effects of having a job cannot be understated.

A person with strong, entrenched family relations and a solid career has established ties to the community and within society, and is therefore much less likely to re-offend." Of course, all re-entry programs involve some risk of failure, but they also offer a great deal of hope to every ex-offender who seeks to reenter the workforce and thus become integrated into the normal work-a-day world of the community.

As such, there will be one less potential recidivist consuming expensive criminal justice, corrections, and societal resources. The individual ex-offender will benefit and society as a whole will benefit too.

In summary, there are certainly many ramifications on affected stakeholders by the use of criminal background checks in employment. Several key stakeholders are impacted by this hiring practice; and these stakeholders have at times conflicting interests and values. The objective is to seek to balance these interests and values in a legal, ethical, and practical manner.

### **Recommendations for Employers**

Based on the aforementioned legal analysis and stakeholder discussion, the authors offer the following recommendations to employers to achieve a legal, ethical, and practical criminal background check policy:

- Note initially that the EEOC does not prohibit employers from obtaining criminal background reports about job applicants or employees (EEOC, Questions and Answers about the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records, 2014).
- Administer employment selection standards and procedures in a fair manner, that is, without regard to race, color, national origin sex, religion, age, or disability.
- Ensure that employment selection standards and procedures are validated for the purposes and positions for which they are applicable; that is, make sure they are job-related.
- Ascertain if there are any laws that prohibit or limit the use of criminal background checks in hiring and the extent these laws apply to private sector employment.

- Conversely, ascertain if there are any federal laws and regulations that require such background checks; and note that the EEOC maintains that such laws that restrict or prohibit employing people with certain criminal records provide a defense to a Title VII lawsuit (EEOC, Questions and Answers about the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records, 2014).
- Be aware that Title VII of the Civil Rights Act is a federal law and thus will supersede any state or local laws mandating criminal background checks.
- Ensure that hiring policies with mandatory state or local criminal background checks nonetheless do not disqualify job applicants with criminal records beyond the extent permitted by the law.
- Avoid unnecessarily broad criminal background checks and policies and practices, which could create an "absolute measure" preventing any individual with a criminal record from securing employment (EEOC, Enforcement Guidance, Employer Best Practices, 2012).
- Be aware that a policy or practice that excludes everyone with a criminal record from employment will not be considered by the EEOC to be job-related and consistent with business necessity and thus will be construed as a violation of Title VII (EEOC, Questions and Answers about the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records, 2014).
- Be cognizant of the EEOC's advice to employer's regarding "disparate impact," to wit: "...Employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or other protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee" (EEOC, Background Checks, 2014).
- Develop a "narrowly tailored" written policy and procedure for screening applicants and employees based on criminal conduct, which entails an "individualized assessment" of the applicant or employee (EEOC, Enforcement Guidance, Employer Best Practices, 2012, p. 16).
- Develop a "targeted screen" to consider at a minimum the nature of the crime, the time elapsed since the crime, and the nature of the job or position (EEOC, Questions and Answers about the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records, 2014).

- Place appropriate time limits on disqualifications for employment; and be wary of lifetime prohibitions, which will be viewed negatively by the EEOC.
- Focus on the individual applicant or employee and his or her criminal history.
- Proceed on a case-by-case basis in reviewing an applicant's suitability for a position or promotion.
- Narrow the criminal history inquiry to convictions that are recent, serious, and related to the job in question.
- Be wary about disqualifying applicants with criminal records for entry-level jobs unless there is a business necessity.
- Be cognizant that excluding job applicants who have been convicted of recent, serious, violent, felony crimes should not violate the law if the prohibition is job-related and consistent with business necessity due to public safety concerns.
- When asking questions concerning criminal history, limit inquiries to records for which any exclusion would be job-related and consistent with business necessity (EEOC, Enforcement Guidance, Employer Best Practices, 2012).
- Give the applicant or employee a reasonable opportunity to dispute the validity of the conviction and/or explain the circumstances of the offense.
- Give the applicant or employee the opportunity to show past good performance at the employer or other employers.
- Give the applicant or employee the opportunity to show good conduct, fitness of character, and rehabilitation since the offense.
- Ascertain if a facially neutral employment practice, such as a criminal background check, has an adverse or disproportionate discriminatory impact on a protected group.
- If there is no disparate impact, be prepared to demonstrate that fact with adequate evidence to government regulators.
- If a case is brought against employer, be prepared to present local statistics, applicant data, and available recruitment pool data to demonstrate that its policies and practices do not have a disparate impact on protected classes.
- If there is an adverse or disparate impact, be prepared to justify the standard, such as no criminal record, as a job-related one as well as consistent with business necessity.
- If there is a risk in hiring an ex-offender, be prepared to show that the risk is sufficiently predictable and serious so as to be job-related and consistent with business necessity.

- If a selection standard or procedure, such as a criminal background check, disproportionately screens out a protected group, even though it arguably may be job-related as well as justified by business necessity, determine if there is an equally effective alternative measure with less discriminatory or adverse impact.
- Allow an applicant or employee to apply for another position for which the criminal conviction would not be a disqualifying factor.
- Provide training to managers, especially human resource managers, hiring officials, and other decision-makers as to employment legal principles generally and particularly as to the proper formulation and use of selection standards and procedures used in the hiring process in order to make sure managers understand the legal, appropriate, and effective use of such measurements for particular jobs or positions (EEOC, Enforcement Guidance, Employer Best Practices, 2012).
- Keep managers up-to-date with changes in job or position requirements and thus keep selection standards and procedures current.
- Develop a “targeted screen” that considers the nature of the crime, the time elapsed, and the nature of the job (EEOC, Enforcement Guidance, 2012, p. 9).
- Consider developing a “matrix” to assist human resource managers to make proper hiring decisions (EEOC, Meeting of November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records, *Statement of Rae T. Vann*, General Counsel, Equal Employment Advisory Counsel, 2013).
- Prepare a list of automatically disqualifying criminal reasons, such as recent felony convictions for violence, weapons possession, theft, and drug selling or distribution (EEOC, Meeting of November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records, *Statement of Rae T. Vann*, General Counsel, Equal Employment Advisory Counsel, 2013).
- Prepare a list of certain offenses not related to the job in question and thus not disqualifying, such as perhaps DUI and domestic violence convictions (EEOC, Meeting of November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records, *Statement of Rae T. Vann*, General Counsel, Equal Employment Advisory Counsel, 2013).

- Keep all information regarding applicants' and employees' criminal history and their records confidential; and use such information only for the legitimate purposes for which it was intended (EEOC, Enforcement Guidance, Employer Best Practices, 2012).

These recommendations, though imposing additional and more focused work and duties on employers, particularly human resource managers, are, in the authors' opinion, the steps now legally required based on the current state of the law. Yet the EEOC states that Title VII does not require the individualized assessment which is the "theme" of the preceding recommendations (EEOC, Enforcement Guidance, 2012).

However, the agency does say that 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" (EEOC, Enforcement Guidance, 2012, p. 12). So, by complying with these recommendations the employer will ensure that it is acting in a legal manner. The employer following these steps will be complying with civil rights laws as interpreted by the courts and the EEOC; and the employer by utilizing such a thorough and careful background check system will be able to ward off lawsuits for negligent hiring.

Moreover, the employer will be treating applicants and employees in a fair and ethical manner, particularly by giving the ex-offender that "second chance," which obviously is very good for job applicants with criminal records, but also good for society as a whole. The employer too will benefit itself in the long-run by expanding its hiring pool, clearly and specifically identifying the exact requirements for certain jobs and positions, and then finding the most suitable personnel to staff these jobs and assume these positions.

## **Summary**

This article has sought to present a fair and balanced examination of the important though perplexing topic of criminal background checks in employment.

As was underscored in this article, employers now find themselves between the proverbial “rock and a hard place” when it comes to criminal background checks in employment. There are in existence a patchwork of conflicting statutes governing this area of employment practice. Some statutes forbid criminal background checks to a certain degree; whereas other statutes require such inquiries; and in the latter case if the statutes are merely state and local ones compliance with the statute will not immunize the employer from liability pursuant to federal civil rights law. Furthermore, if employers hire ex-offenders they might be sued for negligent hiring if the employee harms other employees, customers, or clients; the employer might become victimized by theft; and the employer might be subject to negative attacks from its employees, the local community, or even the general society based on perceptions of the morality of hiring a former criminal. These attacks can harm the company’s image and by extension its profitability.

On the other hand, if the employer does not hire the ex-offender, the employer might come under attack for immorally not giving a “second chance” to a person who has “paid his debt to society.” Moreover, the employer may be subject to a discrimination legal action by the Equal Employment Opportunity Commission based on the disparate impact theory for illegally screening out applicants based on their criminal records. Any of the above approaches can engender negative consequences for the employer, which today is plainly in a legal, ethical, and practical quandary.

Accordingly, the authors hope that this article has brought some clarity to this perplexing area of employment law; and thus has helped employers and managers avoid this legal dilemma by using criminal background checks during the hiring process in a fair, just, and efficacious manner.

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