

→ Practical Implications of Complying with the EEOC's Enforcement Guidance on Use of Criminal Records



Brief History

Most employers recognize that blanket hiring policies disqualifying individuals with criminal history are unacceptable. But facially neutral policies resulting in adverse impact to a protected class could be considered violations of Title VII of the Civil Rights Act of 1964 if the employer fails to demonstrate that the hiring practice is job related and consistent with business necessity. The issued guidance focuses employers' attention squarely on performing targeted screens that only consider relevant criminal history.

While the EEOC's Guidance is not law, the Commission is authorized to enforce compliance with federal law such as Title VII. Relying on two primary enforcement mechanisms, the Commission can pursue the administrative process of investigation and conciliation, or it can aggressively pursue litigation where it files individual or class suits against employers in federal or state court. Needless to say, no employer wants to face a financially draining, invasive, and burdensome EEOC investigation and litigation.

Objective

Since the April 25th release of the Enforcement Guidance, many labor and employment law firms have issued client alerts, conducted webinars, and published articles providing a high level overview of the Guidance. The objective of this paper is to highlight key requirements and call employers' attention to some of the practical implications of complying. This paper also considers the special duties of healthcare employers making critical hiring decisions that could impact the safety of patients and staff. This paper is by no means an exhaustive interpretation of the Guidance or a guidebook itself on how to comply. Further, PreCheck does not provide legal advice, nor can PreCheck define an organization's risk tolerance or advise an employer whom to hire or reject.

Keeping You Informed

On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) issued its highly anticipated Enforcement Guidance on employers' use of arrest and conviction records in hiring.

PreCheck actively followed and covered the progress of this document up until the point of its release. The Commission considers this publication a consolidation and update of previously issued guidance, the last one released on February 4, 1987. Given the increasing number of Americans with criminal histories and the impact that information has on employers' hiring practices, the Commission has long been expected to update its position.



The Guidance and its Various Moving Parts

If the enforcement guidance can be summed up succinctly, it could very well be put this way: Inquiries into an applicant's criminal history shouldn't be posed up front, but when criminal records are involved, **employers need to perform individualized assessments and allow the applicant/employee the opportunity to first dispute the records' accuracy** and then explain what bearing that criminal history will have on the job at hand.

The sections below draw an employer's attention to best practices and considerations derived from the Guidance. It does not attempt to cover all outlined requirements. All items in quotation are cited directly from the Enforcement Guidance itself.

Part 1: The Background Screening Policy

- An employer must work closely with counsel to create a "narrowly tailored" background screening policy.
- One of the key pieces of the screening program is the actual relevance matrix that must not only include all job titles but should also include and demonstrate consideration of (1) the "nature of the job's duties;" (2) "circumstances under which the job is performed; (3) the environment in which those duties are performed.
- The policy must identify the "specific offenses that may demonstrate unfitness for performing such jobs."
- The more detailed and thorough the matrix, the greater protection afforded the employer against claims of Title VII violations.
- A detailed matrix ensures both consistent application of the policy balanced with the requisite step for individualized assessment.
- The employer must also "record the justification for the policy and procedures" and "note and keep a record of consultations and research considered in crafting the policy and procedures."
- Perhaps one of the more significant challenges for an employer is to determine, without the benefit of readily available resources and expertise, which criminal offenses would appropriately be considered disqualifications for which positions.

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Part 2 - Inquiries about Criminal History

- As a best practice, employers should not inquire about convictions on the employment application. However, healthcare employers serving patients and vulnerable populations may be able to successfully argue that its business necessitates inquiring about convictions at this earlier stage.
- During the interview process, an employer should only inquire about criminal history that directly relates to the position at hand. This should be based on the detailed relevance matrix.
- How can employers ensure that they are only considering an applicant's relevant criminal history? Perhaps one option for the employer to consider is relegating the criminal records review function to specific individuals within their organization who can edit the report for appropriateness and compliance with their relevance matrix before it goes off to a decision maker.
- Arrests may not be considered but an employer may ask an applicant/employee about the circumstances which led to the arrest. It is unlawful for an employer to take adverse action based on the arrest itself, but the EEOC distinguishes that the employer may take such an action based on the underlying conduct that the employer feels makes the applicant unfit for the job.

Part 3 - Individualized Assessment – How to Conduct It

- If there is criminal history, inform the applicant or employee that his/her criminal conviction may exclude him/her from consideration for the job.
- The employer must provide an opportunity for the individual to demonstrate that the conviction does not apply to the job sought or held
- The employer must carefully consider the information and details provided by the applicant/employee.



- If the applicant fails to provide any supporting materials, an employer may proceed with its hiring decision without such information. The Guidance itself does not specify any period of time an employer must grant the individual to provide supporting documentation.
- An employer must document its hiring decision and rationalization in light of the available information
- It must take care to keep all such information confidential.

Part 4 - Individualized Assessment – What to Consider

During the engagement with the applicant/employee to conduct the individualized assessment, the employer can gather and consider the following:

- The facts or circumstances surrounding the offense or conduct
- The number of offenses for which the individual was convicted
- Older age at the time of conviction, or release from prison
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct
- Rehabilitation efforts, e.g., education/training;
- Employment of character references and any other information regarding fitness for the particular position
- Whether the individual is bonded under a federal, state, or local bonding program



Validating the Individualized Evidence

The Guidance enumerates the above articles of evidence an employer may consider when conducting an assessment, but it is remarkably silent on the matter of verifying any of those materials or corroborating an applicant's/employee's explanation of a criminal record. A sound background screening practice involves validating and confirming for authenticity all applicant submitted documents or claims.

The underlying facts of an arrest or conviction best illustrate the true crime committed, especially when the official charge does not adequately describe the crime itself. Learning of the actual circumstances may lead an employer to proceed with hiring the applicant, even if the offense may sound egregious. However, an employer cannot rely solely on an applicant's version of events. A diligent employer must verify that explanation by requesting more information. If available, an employer can request a case file or pull a police report. There are fees associated with these services, and these items may take considerable time to retrieve. Further, it may contain some information that is no longer legally reportable to the employer and has to be redacted. If such is the case, the version the employer receives may not provide a complete picture and succeed in verifying the applicant's story.

Any employer can imagine that there are considerable complications when this needs to be done each and every time criminal history is involved. It seems compliant and thorough employers must expect to bear higher costs, expend greater internal resources, and wait longer for complete verification of criminal history before they can make a final hiring decision.



Additional Considerations

Employers should note that the two sections below from the Guidance potentially pose some challenges and should be discussed with counsel.

- *Less Discriminatory Alternatives* - Even if an employer drafts a thoughtful policy that demonstrates job relatedness and establishes business necessity, “A Title VII plaintiff may still prevail by demonstrating that there is a less discriminating alternative employment practice that serves an employer’s legitimate goals as effectively as the challenged practice but that the employer refused to adopt.”
- *Title VII Preempts State Laws* - Because state and local laws/regulations are preempted by Title VII of the federal Civil Rights Act of 1964, “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 liability.” **This is potentially a very legitimate area of concern for healthcare employers that must adhere to state statutes and exclude certain applicants** for specific healthcare positions based on established “barrier crimes.”

Conclusion and Final Considerations for Healthcare Employers

PreCheck suspects the sum of these “best practices” outlined by the EEOC would have the most impact on extremely large employers with complex hiring structures or those in industries with extremely aggressive and competitive hiring schedules. In either case, this describes the majority of healthcare employers. Engaging an applicant each and every time, waiting indefinitely for a response, having to pull case files to verify the applicant’s claims, etc.,

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collectively, these all contribute to extended hiring timelines that employers can scarcely afford. The truth is, most HR professionals and departments are already overburdened.

For this reason, it bears repeating that the EEOC's Guidance is not law. This reminder is not intended to deter healthcare employers from complying with the Guidance's best practices, but there is in fact a common expectation that hospitals must ensure patient safety. Certainly various state laws recognize that a healthcare employer's hiring standards need to be more aggressive than that of the average employer. So if a hospital is currently engaging in sound screening and hiring practices, it is in the best position to assess and recognize to what degree it must comply with each detail of the Guidance. Again, compliance with the Guidance provides a safe harbor from potential claims of discriminatory hiring. But a negligent hiring suit is likely to have much more devastating effects on a healthcare employer. That said, it is critical to work with counsel to achieve a balanced hiring policy that promotes fairness while ensuring that all legally allowable criminal history is considered in order to make the best hiring decision possible.

As employers work with their legal counsel to draft new policies, train managers and HR staff, and implement the practice points set forth in the guidance, they will also keep an eye towards enforcement efforts by the EEOC that will possibly shed light on the practical challenges of complying. Further, given the recentness of the guidance's release at the time of the writing of this paper, it remains to be seen if the current challenges to the Commission and the Guidance will have any effect on the Commission's ability to enforce the new rules. Should any remarkable developments occur, PreCheck will issue further communication on this subject.



Source Biographies

Vu Do

As PreCheck's Vice President of Compliance, Vu Do focuses on operational implementation of compliance programs as well as client and staff compliance training and education. With over 10 years' experience in the employment screening industry, Vu is responsible for ensuring procedural compliance across products, overseeing all matters involving the development, implementation, and enforcement of internal compliance programs. Vu is a Certified Compliance and Ethics Professional (CCEP) and received her Advanced Fair Credit Reporting Act (FCRA) certification from the National Association of Professional Background Screeners (NAPBS). She is currently a member of the NAPBS Board of Directors and earned both her B.A. in English and French, summa cum laude, as well as her M.A. in Literature from the University of Houston.



PreCheck Background Screening Solutions

Healthcare-Specific Background Checks — Streamlined for Maximum Efficiency

In a healthcare setting, comprehensive employment background screening is essential. It's a critical risk mitigation tool that impacts everything from compliance to accreditation to the safety of patients. With healthcare recruiting and orientation deadlines in place, it's imperative that your background screening process is also an efficient one.

That's why PreCheck has partnered with HRsoft to offer an integrated background check and applicant tracking service designed exclusively for the healthcare industry. Healthcare organizations of all sizes can quickly streamline their background check process with our applicant tracking system. It's a cost-effective way to speed up your hiring process and provide candidates with a superior experience.

5 Ways Our Applicant Tracking System Can Streamline Your Onboarding Process

1. Send candidates standardized e-mail messages with a link to an online background check authorization and release form.
2. When candidates complete the online authorization, the ATS is updated and your background checks can be ordered.
3. Orders are placed using the standard background check packages already established for your facility and/or each location.
4. Since information entered by the candidates is already in the ATS, it is used for conducting your background checks—eliminating duplicate data entry for placing orders.
5. Once investigations are completed, recruiters can access background check reports directly from the ATS.

Contact Us

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About PreCheck

PreCheck, Inc. was founded in 1983 as a background investigation services firm. Responding to the healthcare industry's need for background investigation services, the company started focusing on the specialized requirements of hospitals, clinics and other healthcare providers in 1993. Our client-focused business approach has allowed the company to develop products to meet the growing and evolving needs of the healthcare industry.

PreCheck is now the largest provider of background and credentialing services to the healthcare industry and has expanded its services to assist hospital executives, healthcare human resources and compliance professionals, medical staffing managers, and clinical program directors with other essential functions. Our suite of products includes outsourcing solutions for license management, health and drug screening, exclusion and sanction screening, immunization tracking, and online I-9 and E-Verify processing.



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