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COMMENTARY

The EEOC's Criminal Records Guidance: Understanding the Impact of Its Rescission

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On October 29, 2026, the Equal Employment Opportunity Commission ("EEOC") announced the rescission of longstanding enforcement guidance pertaining to an employer's use of arrest and conviction records in the job applicant screening process. [1] While EEOC guidance does not carry the force of law, it is an incredibly valuable tool for employers and shapes the workplace as we know it. The rescission is part of a larger agency goal of non-enforcement of disparate impact claims. [2]

The EEOC, Disparate Impact, and the 2012 Guidance

The main legal theory propping up the 2012 guidance is disparate impact.[3] Disparate impact is a theory of discrimination where a facially neutral employer policy has a discriminatory impact on a protected class.[4] An employer may be liable under Title VII regardless of their intent.[5]

When applied to arrest and criminal records, the disparate impact theory strives to prevent discriminatory screening policies. Arrest, conviction, and incarceration rates differ sharply by race, with Black and Hispanic men being more likely to have a criminal record.[6]

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[1] Press Release, Equal Emp. Opportunity Comm'n, *EEOC Votes to Rescind Enforcement Guidance on Arrest and Conviction Records* (Oct. 29, 2026), https://www.eeoc.gov/newsroom/eeoc-votes-rescind-enforcement-guidance-arrest-and-conviction-records.

[2] *See* Exec. Order No. 14281, 90 Fed. Reg. 17537 (Apr. 23, 2025).

[3] *See* Equal Emp. Opportunity Comm'n, EEOC-915.002, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012) (rescinded Oct. 29, 2026), https://www.eeoc.gov/sites/default/files/migrated_files/laws/guidance/arrest_conviction.pdf [hereinafter 2012 Guidance].

[4] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[5] *Id.* at 432.

[6] *See* 2012 Guidance at 9-10.

An employer's use of a "no felons" policy could screen out Black and Hispanic candidates at disproportionate rates.[7]

The 2012 guidance tried to remedy this by offering less discriminatory alternative screening solutions to employers. [8] Recommended best practices included developing policies that narrowly tailor the use of criminal records in screening procedures.[9] This includes limiting questions about criminal records on job applications to cases where the offense directly conflicts with the specific job requirements and the inquiry is justified by a business necessity. [10] The guidance also recommended the use of the *Green* factors, which evaluate whether an employer's choice to exclude an applicant from consideration due to a criminal record is related to the job alongside the severity of the crime and time elapsed since the offense. [11]

The Rescission of the 2012 Guidance

The Commission voted 2-1, with Chair Andrea Lucas and Commissioner Brittany Bull Panuccio voting in favor of the rescission.[12] Commissioner Kalpana Kotagal, the only Democrat on the Commission, dissented.[13] The Agency provided limited explanation regarding the reason for the rescission, but Chair Lucas stated "The Commission's rescission of the enforcement guidance reaffirms the agency's commitment to enforce Title VII consistent with the Constitution and the limits Congress placed on the EEOC's authority." [14] She added that the rescission does not provide grounds for employers to engage in discrimination and that Title VII "continues to prohibit discrimination based on race or national origin, including employment requirements that are proxies for intentional discrimination." [15]

The Larger Goal: Moving Away from Disparate Impact

The revision of the guidance is part of the Trump administration's larger policy goal of deprioritizing the use of disparate impact liability enforcement actions. On April 23, 2025, The White House published Executive Order 14281 titled "Restoring Equality of Opportunity and Meritocracy." [16] The stated policy of the Executive Order is to "to eliminate the use of disparate-impact liability in all contexts to the maximum degree

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[7] *Id*. at 10.
[8] *Id.* at 2, 14, 17-19.
[9] *Id.* at 25.
[10] *Id.*
[11] *Id.* at 17; *see* Green v. Mo. Pac. R.R., 523 F.2d 1290 (8th Cir. 1975).
[12] Stephan R. Woods, James R. Silvers, Gustavo A. Suárez, & Hera S. Arsen, *EEOC Rescinds Criminal Background Check Guidance*, OGLETREE DEAKINS (Oct. 30, 2026), https://ogletree.com/insights-resources/blog-posts/eeoc-rescinds-criminal-background-check-guidance/.
[13] *Id.*
[14] Press Release, Equal Emp. Opp. Comm'n, *supra* note 1.
[15] *Id.*
[16] Exec. Order No. 14281, 90 Fed. Reg. 17537 (Apr. 23, 2025).

possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals." [17] While the Commission did not cite specific reasons for rescinding the 2012 guidance at this time, the EEOC has been responsive to the President's executive orders.[18]

The Role of Guidance and What Happens Next

The EEOC is not authorized to promulgate substantive rules under Title VII, but it may issue procedural rules and guidance.[19] While guidance is helpful and alerts parties to the agency's priorities, it does not carry the force of law.[20] Title VII still remains intact, and employers may still be held liable for discriminatory practices. While the current administration is rolling back enforcement of disparate impact claims, this will not bind future administrations from changing directives. Further, despite the limited enforcement of disparate impact enforcement, disparate treatment or intentional discrimination enforcement remains in full force.[21] While the practical effects of the rescission may be modest, this agency action signals that the EEOC will leave disparate impact enforcement to state agencies or private litigants.

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[17] *Id.*

[18] *See* Press Release, Equal Emp. Opportunity Comm'n, *EEOC Delivers on Administration Priorities and President Trump's Executive Orders* (May 7, 2026), https://www.eeoc.gov/newsroom/eeoc-delivers-administration-priorities-and-president-trumps-executive-orders; *see also* Andrea Hsu, *Trump's EEOC Strikes Harassment Guidance Amid Debate Over Transgender Protections*, NPR (Jan. 23, 2026), https://www.npr.org/2026/01/22/nx-s1-5683134/eeoc-trump-gender-identity-harassment.

[19] *See* 42 U.S.C. § 2000e-12(a).

[20] KATE BOWERS, CONG. RSCH. SERV., LSB10591, AGENCY USE OF GUIDANCE DOCUMENTS (Apr. 19, 2021), https://www.congress.gov/crs_external_products/LSB/PDF/LSB10591/LSB10591.1.pdf. Nonetheless, EEOC guidance is largely used by employers when developing policies and employee handbooks.

[21] *See* Press Release, Equal Emp. Opp. Comm'n, *supra* note 1.