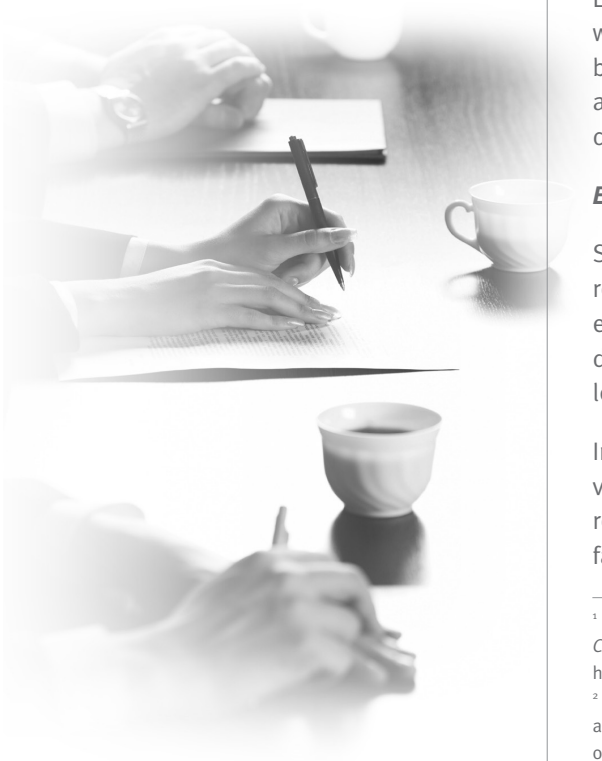
# No More Automatic Exclusions: Blanket "Fail" Policies Disqualifying Applicants Based On Criminal History Continue To Come Under Fire



An ever-increasing area of concern for the U.S. Equal Employment Opportunity Commission (the **"EEOC"**) and lawyers alike is global policies where potential applicants/employees are automatically disqualified from the employment process based on pre-determined criteria and/or scoring. Such blanket bans on hiring ex-offenders run afoul of employment and antidiscrimination laws, EEOC guidance and fair hiring practices. New York's Attorney General recently weighed in on automatic exclusion criteria and the writing is on the wall – blanket bans on hiring ex-offenders will not be tolerated and both employers and those who assist them with their hiring processes have and will continue to come under legal fire.

***EEOC Guidance: Automatic Exclusions Violate Title VII***

Since issuing its revised guidance on the application of Title VII to criminal records in April 2012,[1] the EEOC has actively sought to crack down on employers' broad use of criminal history information in making employment decisions. The Guidance has also been a spark in much of the "Ban the Box" legislation passed in recent years.[2]

In the Guidance, the EEOC concluded that across-the-board exclusions usually violate Title VII.[3] In citing the seminal Eighth Circuit decision involving criminal record exclusion, *Green v. Missouri Pacific Railroad*,[4] the EEOC cited three factors (known as the **"*Green* factors"**) that were relevant to assessing whether

[1] U.S.Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Actof 1964* (April 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (hereinafter, the **"Guidance"**).

[2] "Ban the Box" is named for the box appearing on many employment applications that anapplicant is asked to check to indicate that he or she has a criminal record. An estimated 65 million Americans (roughly one in four adults) have arrests or convictions that would show up in a background check. Proponents of such laws argue that these Americans often face employment discrimination, even where the arrest did not result in a conviction or where the crime was minor. In addition, proponents claim that for those who have been convicted and served a criminal sentence, unemployment resulting from discrimination only fosters the cycle of recidivism and repeat incarceration. The idea behind the "Ban the Box" movement is that by deferring the disclosure of past transgressions until an employer is already knowledgeable about an applicant's qualifications and experiences, an employer is more likely to objectively assess the relevance of such information.

[3] *Guidance*, at p.16.

[4] 523 F.2d 1290 (8th Cir. 1975).

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an exclusion is job related for the position and consistent with business necessity: (1) the nature/gravity of the offense, (2) the time that has passed since the offense or completion of sentence, and (3) the nature of the job sought.[5] As its justification for restricting overly broad screening policies, the EEOC reaffirms its position that the use of criminal records in employment decisions continues to have a disparate impact on minorities as they are over-represented in the criminal justice system.[6]

In June 2013, the EEOC filed its first lawsuits with respect to criminal history checks since issuing the Guidance. The suits were filed against discount retailer Dollar General Corp. and a BMW manufacturing plant in South Carolina, over their use of predefined blanket exclusion policies that automatically used criminal histories to screen-out applicants or fire employees.[7] In both cases, the agency claimed that the practice discriminates against African-Americans who have a higher arrest and conviction rate than whites. The EEOC alleged that the policies were not job related or consistent with business necessity.

While the EEOC has received backlash on the Guidance and its actions in suing BMW and Dollar General Corp.,[8] it has reiterated that the Guidance encourages a two-step process, with individualized assessments as the second step. The first step is an employer should use a "targeted screen" that considers at least the nature of the crime, the time elapsed and the nature of the job. The Guidance then encourages employers to provide opportunities for individualized assessment for those people who are screened out. By using individualized assessment in this manner, employers can ensure that they are not mistakenly screening out qualified applicants or employees based on incorrect, incomplete or irrelevant information, and individuals can correct errors in their records.

[5] *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977) (second hearing upon remand upholding the district court's injunction barring the employer from using an applicant's conviction as an absolute bar to employment but permitting it to take into account a criminal record as a factor in making individual decisions so long as these three factors were considered).

[6] Certain industries/positions, however, are still subject to federal prohibitions or restrictions on individuals with records of certain criminal conduct and Title VII does not preempt these federally-- imposed restrictions. For example, federally imposed restrictions on criminal records for law enforcement, security screeners, childcare workers and bank employees, among others, are not preempted by Title VII. Title VII also does not preempt federal regulations that govern eligibility for occupational licenses and registrations.

[7] See E*EOC v. Dolgencorp, LLC and Dollar General Corp. d/b/a Dollar General Store Bull Shoals*, Case No. 3:12-cv-03128 (W.D. Ark. 2013) and ***EEOC v. BMW Manufacturing Plan***, Case No. 7:13-cv-01583-HMH-JDA (D.S.Car.2013).

[8] In July 2013, a group of nine attorney generals from across the U.S. expressed concern over the agency's recent actions and urged the EEOC to reconsider its position on background checks. In a letter to the five-member Commission, West Virginia Attorney General Patrick Morrisey along with eight other Attorneys General, argued that the EEOC lawsuits against BMW and Dollar General are "misguided" and an example of "gross federal overreach." In addition, in November 2013, Texas Attorney General Greg Abbott filed a lawsuit against the EEOC challenging the lawfulness of the 2012 Guidance, referring to it as "unlawful hiring guidelines."

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With respect to the BMW and Dollar General cases, the EEOC reiterated its position that these lawsuits challenge criminal history screening processes that have a disproportionate impact on African-Americans and are not job related and consistent with business necessity, therefore they violate Title VII. Pre-defined blanket policies automatically excluding applicants based on criminal convictions history fly squarely in the face of the Guidance, discrimination law and fair hiring policies and will continue to come under the EEOC's scrutiny.

***New York Targets CRAs who Implement Blanket Exclusion Policies***

Now New York State has officially joined the fight and this could signal the beginning of an organized crackdown on the use by employers and consumer reporting agencies ("**CRAs**") of automatic exclusion criteria. On March 13, 2014, Attorney General Eric Schneiderman announced that his office had secured agreements with four of the nation's largest CRAs[9] that would prohibit them from automatically disqualifying applicants with convictions and require them to defer hiring decisions to the employers to conduct an individualized assessment of the candidates in accordance with the law. Pursuant to the agreements, the CRAs agreed to follow the state laws that make it illegal to automatically disqualify applicants based solely on criminal history. The CRAs specifically agreed not to issue automatic disqualification letters triggered by a conviction on behalf of employers to ensure that job applicants receive the required individualized assessment of a number of mitigating factors, including the "*Green* factors," required to be considered when making hiring decisions based on criminal history.

According to the Attorney General's press release, the office began reviewing the four companies' compliance procedures after it had received information that "it was industrywide practice to use grading criteria and instructions provided by employers to automatically disqualify job applicants based on the information contained in a criminal background report." [10] The Attorney General very directly and strongly stated that CRAs that "implement blanket bans on hiring ex-offenders are violating New York State law."[11]

As a result of the agreements, the CRAs are required to: (i) revise their policies and cease issuing disqualification letters triggered by an automatic disqualification; (ii) return all background reports to employers to make individualized hiring decisions about applicants with criminal convictions; and

[9] The Attorney General entered into agreements with HireRight Inc., First advantage, General Information Services (GIS) and Sterling Infosystems.

[10] See http://www.ag.ny.gov/press-release/ag-schneiderman-announces-agreements-background-check-agencies-end-illegal-hiring.

[11] Id.

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(iii) communicate these limitations on their roles to all current and prospective clients.[12] The distinction between the existing law and the Attorney General's actions in securing agreements with the CRAs is that while the law has made clear that employers cannot implement automatic exclusion policies, many employers have chosen to ignore the law and so the Attorney General is now targeting the CRAs that carry out the unlawful policies on behalf of the employers. By implementing the blanket exclusion policies, the CRAs are aiding and abetting employers in violating the statute.[13]

***Avoid Automatic "Fail" Criteria***

Coupling the Guidance with the recent actions by the New York Attorney General, it is clear that any employer who continues to enact and implement hiring policies that summarily exclude applicants from consideration based on predefined, automatic "fail" criteria will surely come under scrutiny. Any "fail" criteria – not just with respect to criminal history – could be viewed in the same light and such blanket policies should be avoided under all circumstances. While it is permissible to provide your CRA with welldefined, scoring criteria to apply consistently to the individual components of a background check, such scoring criteria should be used only as a preliminary tool to determine which results require review and which ones are acceptable or "clear" and require no further review. It is important that well-defined, consistently-applied scoring criteria is used only as a means of expeditiously filtering forward passing or clear results while holding for review those results that should be reviewed and considered on an individual basis. Scoring criteria may not be used as a means of making an adverse employment decision without any further individualized analysis.

By conducting an individualized review and considering the Guidance and the law, you can avoid running afoul of antidiscrimination laws and will afford an applicant the opportunity to be considered properly. Any scoring criteria that use terms like "fail" or "no-hire" should be avoided. Such criteria may be perceived as intended to be an absolute bar to employment or that an adverse employment decision has already been made. A primary goal of most background screening programs is to reduce and mitigate risk. Given the current climate, any blanket hiring policies that summarily exclude applicants from consideration based on predefined, automatic "fail" criteria only increase the risk of EEOC scrutiny, potential state agency actions and lawsuits.

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[12] Id.
[13] Id.