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# EEOC Rescinds Criminal-Record Guidance: Keep Asking What Your Background Checks Accomplish

The U.S. Equal Employment Opportunity Commission has voted to rescind its 2012 criminal-history guidance, effective immediately. For employers, the takeaway is straightforward. The agency has withdrawn guidance, not changed the underlying law. Do not treat the announcement as a reason to abandon lawful safeguards. Instead, review what your background checks tell you, how the results relate to the job, and whom your screening rules exclude.

## What Changed, and What Employers Should Keep Doing

The 2012 guidance built on earlier EEOC positions addressing the seriousness of the offense, elapsed time, job duties, and the distinction between an arrest and proof of misconduct. It focused on how employers used criminal-history information, not simply whether they obtained it, and described targeted screening with an opportunity for individualized assessment as one approach to establishing job-relatedness and business necessity, not a requirement in every case.

Two separate questions remain useful for employers: Is the information reliable, and does it justify the employment decision? Even an accurately reported conviction does not, by itself, answer whether it creates a meaningful risk in the particular job.

In announcing the rescission, EEOC Chair Andrea Lucas described the decision as reaffirming the agency's commitment to enforce Title VII "consistent with the Constitution and the limits Congress placed on the EEOC's authority." That is the Commission's stated rationale; it is not a judicial ruling that criminal-record screens are immune from challenge. Lucas also expressly cautioned that rescission does not give employers license to

discriminate and that Title VII continues to prohibit race and national-origin discrimination, including employment requirements used as proxies for intentional discrimination.

Against that history, the announcement's statement that rescission does not restore superseded policy statements means employers should not treat the withdrawal as a return to the EEOC's earlier policy documents. It is not a reset to the pre-2012 agency framework. Separately, the announcement says employers need not abandon lawful practices adopted in response to the 2012 guidance. The practical point is that a screening procedure's value does not depend solely on the continued existence of the document that prompted it: job-specific review can still serve sound decision-making and independent legal obligations.

The rescission does not itself amend Title VII, eliminate private disparate-impact litigation, or remove independent state requirements. Employers should distinguish the withdrawal of agency guidance from the obligations that continue to govern their screening decisions.

### **A Background Check Should Solve a Problem, Not Just Produce a Report**

Background checks represent investment: vendor charges, staff time, follow-up, and delays while information is reviewed. A poorly designed process can add legal exposure without producing a better hiring or promotion decision. Before deciding what should disqualify someone, an employer should be able to explain what it needs to learn and why that information matters for the particular position.

"We have always checked" is not a substitute for that explanation. Neither is "our vendor flags it." A report may identify a conviction accurately without answering whether it creates a meaningful risk in the job under consideration. Employers should distinguish the information they purchase from the employment rule they apply to it.

Background checks should not lull employers into a false sense of security. The absence of a criminal record is not a guarantee of sound judgment, safe conduct, or strong workplace performance, just as the presence of a record does not, by itself, establish the opposite. A check reports recorded interactions with the criminal justice system, not every instance of misconduct. Conduct may go undetected or uncharged, and discretionary decisions about enforcement, charging, and case resolution affect what ultimately appears in a record. Employers should therefore resist treating a report as a comprehensive assessment of character or a substitute for evaluating qualifications, references, demonstrated performance, and the safeguards appropriate to the job.

Rather than using a criminal record as a shorthand for performance, retention, or advancement potential, employers should assess the individual's qualifications and the requirements of the actual role.

This does not mean employers must stop checking backgrounds or ignore genuine safety, security, or other job-related concerns. It means the scope of the check and the response to its results should serve an identifiable purpose. Where a law requires a check or exclusion for a particular role, verify that requirement and its scope rather than treating it as justification for a broader rule.

### **Assess the Offense, Elapsed Time, and Job Duties**

The familiar legal considerations known as the *Green* factors remain useful even without the EEOC's guidance: the nature and gravity of the offense, the time elapsed since the offense or completion of the sentence, and the nature of the job. They help translate a broad concern about criminal history into a concrete question: Does this particular history bear on the risk presented by this particular position? They are a practical framework, not a universal safe harbor or a replacement for applicable legal requirements.

**Nature and gravity of the offense.** Look beyond the fact that a record exists. What conduct occurred, how serious was it, and what concern does it raise for the work? A theft conviction may warrant particular attention for a position involving control of company funds. That does not establish the same connection for every other position, or make the conviction automatically disqualifying. The point is to identify the actual risk rather than use "any record" as a stand-in for unfitness.

**Time elapsed.** Consider how much time has passed since the conduct and since completion of the sentence, as applicable. A recent offense and one from decades ago should not simply be assumed to carry identical implications. Review the intervening history and any relevant rehabilitation or mitigating information under the applicable framework. The question is what the history means for the present decision, not whether a conviction should remain a permanent mark against the person.

**Nature of the job.** Identify the actual duties and working conditions: access to funds or sensitive information, contact with vulnerable individuals, level of supervision, and opportunities for the relevant conduct to recur. A promotion may change that analysis because the new role presents different responsibilities and risks. The same record may warrant different treatment for different positions; the employer should be able to explain the connection rather than rely on a companywide assumption.

### **Keep Assessing Who the Policy Screens Out**

A policy can sound sensible on paper and still operate in ways the employer has not examined. Where lawful, employers should retain and review information showing who reaches the background-check stage, who is excluded by each criterion, and who ultimately receives the job or promotion. Aggregate results should be assessed by relevant protected category, position, and decision stage, with an

appropriate comparison group. An overall hiring rate may obscure what a particular screening rule is doing.

If a criterion disproportionately excludes Black candidates or another protected group, that is a reason to investigate, not an automatic finding of unlawful discrimination. Is the rule causing the disparity? Does it distinguish candidates who present a relevant job-related risk from those who do not? Could a narrower exclusion, different lookback period, or other race-neutral approach address the same legitimate concern with less discriminatory impact? Reviewing the offense, elapsed time, and job duties helps make that inquiry concrete.

Disparate impact does not require proof that the employer intended to discriminate. Conversely, a statistical difference alone does not establish liability. Title VII requires the relevant causal showing and provides a job-relatedness and business-necessity defense, subject to its alternative-practice provisions. Monitoring should support better, defensible, race-neutral criteria, not different standards for individual candidates based on race. Rescission of the guidance does not remove that framework or prevent private plaintiffs from invoking it.

### **State and Local Requirements Still Deserve a Close Look**

Assessment of the offense, elapsed time, and job duties can also overlap with binding state requirements. Employers should not assume that rescission makes individualized assessment or notice procedures optional everywhere. Independent fair-chance and criminal-history laws can regulate when inquiries occur, what information may be considered, and how an employer must reach and communicate an adverse decision.

For example, California's Fair Chance Act generally requires covered employers with five or more employees to wait until after a conditional offer to inquire into conviction history. Before a conviction-based denial, covered employers must conduct an individualized assessment, provide required preliminary notice and an opportunity to respond, consider the response, and provide required final notice. Exceptions and geographic limits apply.

Illinois likewise independently restricts conviction-based employment decisions through substantial-relationship and unreasonable-risk standards, required assessment factors, and notice and response procedures. Neither state's statute disappears because the EEOC withdraws guidance. Employers should check the rules applicable to the position and location, including local ordinances and any legally mandated screening requirements.

### **Practical Steps for Employers**

Start with the purpose. Identify the risk each check and exclusion is intended to address. Ask whether the information actually helps evaluate that risk and whether the process justifies its cost and administrative burden.

Assess the offense, elapsed time, and job duties. Review those factors before relying on broad disqualifiers. Reassess the connection when a promotion changes the person's responsibilities. Check applicable assessment requirements and any legally mandated exclusions.

Measure the screen's effects. Where lawful, evaluate hiring and promotion outcomes by screening criterion and relevant protected category. Use reliable data and an appropriate comparison group; do not assume a vendor's report or assurance answers the impact question.

Revisit rules that are broader than their purpose. Investigate disparities and consider whether a more tailored, race-neutral approach would address the same risk. Document the rationale for the screening rule and any changes, not just the fact that a check occurred.

Keep the process accurate and documented. Train decision-makers, preserve the reasons for decisions, and follow applicable notice and response requirements. Third-party background reports can also trigger separate Fair Credit Reporting Act and other state-specific obligations, including disclosure, authorization, and adverse-action procedures.

### **The Bottom Line**

The EEOC's rescission should prompt a review of background-screening practices, not an automatic retreat from lawful safeguards. Focus on whether the information is useful, whether the screening criteria fit the job, and whom those criteria exclude.

### **Contact Us**

Kevin Koronka leads the firm's Labor & Employment practice group, and Sarah Vincent focuses on preventative counsel and background-check compliance, including Fair Chance and Ban-the-Box laws. For questions about how this guidance applies to your organization, please contact Kevin Koronka, Sarah Vincent, or your Husch Blackwell attorney.

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