CLIENT ALERTS & INSIGHTS

EEOC Rescinds Criminal History Guidance

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Key Takeaways

- On October 29, 2026, the U.S. Equal Employment Opportunity Commission (EEOC) announced that it has rescinded its April 2012 enforcement guidance on employers' use of arrest and conviction records, effective immediately
- The underlying law has not changed. Title VII still prohibits employment practices that discriminate based on race or national origin, whether through intentional discrimination or through neutral policies that disproportionately screen out protected groups and are not job-related and consistent with business necessity.
- Employers should not treat the rescission as a reason to loosen existing screening practices.

By a 2-1 vote held on October 29, 2026, the EEOC rescinded its 2012 enforcement guidance on the use of arrest and conviction records in employment decisions.

The 2012 guidance explained how Title VII of the Civil Rights Act of 1964 applies when employers consider applicants' and employees' criminal histories. It focused largely on disparate impact, warning that facially neutral criminal-history screens can disproportionately exclude workers of certain races or national origins. Such screens are unlawful unless they are job-related and consistent with business necessity. The guidance explained that employers could generally meet that standard with a targeted screen that considered three factors: the nature and gravity of the offense, the time elapsed since the offense, and the nature of the job. It encouraged pairing that screen with an individualized assessment, giving the individual an opportunity to show why the exclusion should not apply. The guidance also addressed disparate treatment, cautioning employers that they risk liability if they treat individuals with similar criminal records differently based on race or national origin. It included hypothetical scenarios showing lawful uses of background checks as well as missteps that could lead to liability. At the time of its issuance, the EEOC described the guidance as consistent with its existing policy rather than a change in position.

Chair Andrea Lucas stated that the rescission "reaffirms the agency's commitment to enforce Title VII consistent with the Constitution and the limits Congress placed on the EEOC's authority." She also emphasized that the action "does not give employers license to engage in unlawful discrimination," and that the EEOC will continue to enforce Title VII's prohibitions on race and national origin discrimination, including requirements that function as proxies for intentional

discrimination. Commissioner Kalpana Kotagal criticized the vote in a written statement and urged employers to continue to maintain thoughtful screening policies.

The rescission is the latest in a series of EEOC votes during the second Trump administration to withdraw existing guidance.

Considerations for Employers

Rescinding guidance does not change the underlying law. Title VII remains in effect, and many states regulate the use of criminal history in hiring through “ban-the-box” laws that may restrict when employers can inquire about criminal history. Employers should avoid making sweeping changes to screening policies solely because the guidance was rescinded. Doing so could create compliance gaps and increase exposure to litigation. Instead, employers should ensure that recruiters apply criminal history screening criteria consistently and confirm that existing screening policies remain consistent with Title VII.

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