

# The 2012 EEOC Guidance on the Consideration of Arrest & Conviction Records in Employment Decisions

## Quick Facts: The 2012 EEOC Guidance

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- The Equal Employment Opportunity Commission's 2012 guidance<sup>1</sup> explains how an employer's use of criminal history may violate federal anti-discrimination law, namely Title VII of the Civil Rights Act of 1964, which bars employment discrimination on the basis of race, color, and other factors.
- The 2012 guidance is not binding on employers. Instead, it is designed to be a resource about how to assess criminal history in line with Title VII standards. This includes considering the nature of the person's offense, how much time has passed since the offense, and whether the offense is related to the job sought.
- Without this guidance, employers would have less clarity and confidence about how to comply with federal anti-discrimination law. This, in turn, would also disadvantage people with criminal records (disproportionately people of color).
- The EEOC's efforts in this area are not new. The 2012 guidance builds on well-established court decisions and agency policy statements that have existed for several decades. Moreover, the 2012 guidance was adopted by the EEOC with bipartisan support in a 4 to 1 vote.

## Why the EEOC's Guidance Matters

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- **The guidance helps to remove barriers to employment for people with criminal records.** This is critical, given that more than 70 million people—or nearly one in three adults—have arrest or conviction records, and 700,000 people (roughly equal to the population of Seattle, Washington<sup>2</sup>) re-enter their communities following a term of incarceration every year.<sup>3</sup> A large majority of these individuals will never return to prison again, underscoring the importance of reconnecting them with the workforce.<sup>4</sup>

- **The guidance is even more critical in an era when criminal background checks are the norm.** Studies show that nearly 9 in 10 employers conduct background checks on some or all job candidates.<sup>5</sup> Even minor involvement with the criminal justice system—such as a single arrest—dims employment prospects more than any other factor,<sup>6</sup> leaving upwards of 60 percent of people who have been incarcerated unemployed one year after release.<sup>7</sup>
- **The guidance promotes racial justice in the employment context.** On account of racial discrimination in the criminal justice system, 1 in 87 working-aged white men is in prison or jail, compared with 1 in 36 Hispanic men and 1 in 12 African American men.<sup>8</sup> Not only are African Americans and Latinos arrested and convicted at much higher rates than their share of the population, but the stigmatization that flows from a criminal record is more potent for people of color than for whites. Studies have found that the effect of a criminal record on employment is 40 percent larger for black applicants than white applicants.<sup>9</sup> In fact, white applicants *with* criminal records receive more callbacks from employers than black applicants *without* records.<sup>10</sup>
- **The guidance is also critical for women with records.** One study found that men were nearly twice as likely to be called back for a job interview as women (57 percent versus 30 percent), even when the applicants had identical criminal records.<sup>11</sup> There is a racial divide in this context as well: according to one study, the odds for a positive response (job interview or offer) from an employer is 93 percent higher for white women with records than black women with records.<sup>12</sup>

## How the EEOC's Guidance Benefits *Everyone*

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- **Removing job barriers for people with records benefits employers.** When companies have clear policies in place regarding the hiring of people with criminal records, studies show they are more likely to hire applicants with records.<sup>13</sup> The EEOC guidance is a helpful and important resource that employers can refer to when establishing company policies.

Employees with criminal records are less likely to leave voluntarily, likely to have a longer tenure, and are no more likely than people without records to be terminated involuntarily.<sup>14</sup> A study of individuals with a felony record serving in the U.S. military found that they were promoted more quickly and to higher ranks than other enlistees, and were no more likely than people without records to be discharged for negative reasons.<sup>15</sup>

- **Removing job barriers for people with records bolsters the economy.** Stigmatization of people involved in the criminal justice system slams the brakes on our economy, reducing the nation's gross domestic product by as much as \$87 billion in 2014 alone.<sup>16</sup>

Employing people with records also benefits taxpayers. A 2011 study found that putting 100 formerly incarcerated persons back to work increases their lifetime

earnings by \$55 million, increases their income tax contributions by \$1.9 million, and boosts sales tax revenues by \$770,000, while saving more than \$2 million annually by keeping them out of the justice system.<sup>17</sup> A Florida study estimated that increasing employment for individuals released from state prisons by 50 percent would save \$86 million annually in costs related to future recidivism.<sup>18</sup> According to one estimate, if states could lower recidivism rates by just 10 percent, they could save an average of \$635 million annually.<sup>19</sup>

- **Removing job barriers for people with records improves public safety.** A 2011 study of the formerly incarcerated found that employment was the single most important influence on decreasing recidivism, and that two years after release, nearly twice as many employed people with records had avoided another brush with the law than their unemployed counterparts.<sup>20</sup> Another three-year recidivism study found that formerly incarcerated persons with one year of employment had a 16 percent recidivism rate over three years as compared to a 52.3 percent recidivism rate for all Department of Correction releases.<sup>21</sup>
- **Removing job barriers for people with records strengthens families.** Today, 54 percent of inmates are parents with minor children (ages 0-17), including more than 120,000 mothers and 1.1 million fathers. Formerly incarcerated men can expect to work nine fewer weeks per year and earn 40 percent less annually, for an overall loss of \$179,000 even before the age of 50.<sup>22</sup> Even in the year after an incarcerated father is released, family income drops 15 percent, relative to pre-incarceration levels.<sup>23</sup> The EEOC guidance, by helping to boost employment prospects for people with records, helps to reduce the generational impact of a criminal record and build stronger communities.

## Endnotes

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<sup>1</sup> Equal Employment Opportunity Commission, *Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII* (2012), <http://bit.ly/2wForHC>

<sup>2</sup> See U.S. Census Data (2016 Estimate); [https://factfinder.census.gov/faces/nav/jsf/pages/community\\_facts.xhtml](https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml)

<sup>3</sup> Anastasia Christman & Michelle Natividad Rodriguez, Nat'l Emp't Law Project, *Research Supports Fair Chance Policies 1 & n.1* (Aug. 1, 2016), <http://bit.ly/1sk48Nn>

<sup>4</sup> William Rhodes, *Following Incarceration, Most Released Offenders Never Return to Prison* (2014)

<sup>5</sup> Soc'y for Human Res. Mgmt., *Background Checking—The Use of Criminal Background Checks in Hiring Decisions* 3 (Jul. 19, 2012), <http://bit.ly/2mhlrzh>.

<sup>6</sup> Scott H. Decker, "Criminal Stigma, Race, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment" (National Institute of Corrections, 2014); <http://bit.ly/2w3mVT1>

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<sup>7</sup> Joan Petersilia, Nat'l Inst. of Justice, *When Prisoners Return to the Community: Political, Economic, and Social Consequences* 3 (2000), <http://bit.ly/2sr7gao>.

<sup>8</sup> Bruce Western and Becky Pettit, "Collateral Costs: Incarceration's Effect on Economic Mobility," Washington, D.C.: The Pew Charitable Trusts, 2010; <http://bit.ly/1YjcAau>

<sup>9</sup> Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. of Sociology 937, 955-58 (2003), <http://bit.ly/1vNQBJk>.

<sup>10</sup> *Id.*

<sup>11</sup> Decker, *supra*.

<sup>12</sup> Decker, *supra*.

<sup>13</sup> Sara Lageson, *Legal Ambiguity in Managerial Assessments of Criminal Records*, Law & Social Inquiry (2014), <http://bit.ly/2wbZqb6>

<sup>14</sup> Dylan Minor, Nicola Persico, and Deborah M. Weiss, "Criminal Background and Job Performance," (2017), <http://bit.ly/2vJT5jR>

<sup>15</sup> Jennifer Lundquist, Devah Pager, and Eiko Strader, "Does a Criminal Past Predict Worker Performance? Evidence from American's Largest Employer," Working Paper (2016)

<sup>16</sup> Cherrie Bucknor & Alan Barber, Ctr. for Econ. & Policy Research, *The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies* 1 (2016), <http://bit.ly/2atNjBu>.

<sup>17</sup> "Economic Benefits of Employing Formerly Incarcerated Individuals in Philadelphia," Philadelphia, PA: Economy League of Greater Philadelphia, 2011; <http://bit.ly/2m2dei3>

<sup>18</sup> American Civil Liberties Union, *Back to Business: How Hiring Formerly Incarcerated Job Seekers Benefits Your Company* (2017), <http://bit.ly/2sfork>

<sup>19</sup> Pew Center of the States, "State of Recidivism: The Revolving Door of America's Prisons, 2011; <http://bit.ly/2vIQoir>

<sup>20</sup> Mark T. Berg and Beth M. Huebner, "Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism," *Justice Quarterly* (28), 2011; <http://bit.ly/2w3dtis>

<sup>21</sup> "Safer Foundation Three-Year Recidivism Study, 2008," Chicago, IL: 2008, <http://bit.ly/2ndo4T3>

<sup>22</sup> Western, *supra*.

<sup>23</sup> *Id.*

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