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Hands-Tied Hiring: How the EEOC's Individualized Assessment is Taking Discretion Away From Employers' Use of Criminal Background Checks

Carrie Valdez

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HANDS-TIED HIRING: HOW THE EEOC’S INDIVIDUALIZED ASSESSMENT IS TAKING DISCRETION AWAY FROM EMPLOYERS’ USE OF CRIMINAL BACKGROUND CHECKS

CARRIE VALDEZ*

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I. INTRODUCTION

Imagine that Patty and Scotty Blake own the Blake Family Diner in Shreveport, Louisiana. Being the largest local restaurant, the Diner is a local business staple. Sadly, after over thirty years in business, the diner is closing after losing a multi-million dollar negligent hiring lawsuit brought by the family of one of its waitresses,

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Bonnie, who was raped and killed by a fellow employee, Dan. The Blakes were devastated. Up until six months ago, they had conducted criminal background checks on all applicants to ensure a safe workplace. They chose to stop conducting criminal background checks, though, in response to recent Equal Employment Opportunity Commission (EEOC) Guidance aimed at decreasing the discriminatory effect of criminal background checks on the hiring opportunities of minorities. The Blakes abandoned criminal background checks because the new Guidance imposed a heightened “individualized assessment” to which they could not practically comply. Had they conducted a criminal background check, Dan’s record would have revealed a recent conviction for violent felony assault and the Blakes would likely not have hired him in the first place.¹

Tragic possibilities like this have haunted employers since the EEOC released its 2012 Enforcement Guidance. Responding to increasing U.S. incarceration rates,² and specifically the disproportionate incarceration of minorities,³ the EEOC initiated new hiring guidelines directed at all U.S. employers. The EEOC specified that the purpose of the Guidance is to reduce the discriminatory effect of criminal background check policies on the employment opportunities of blacks and Hispanics.⁴ Citing “Eliminating Barriers in Recruitment and Hiring” as one of its top national priorities,⁵ the EEOC announced it would “target facially neutral

¹ Hypothetical used to introduce arguments later developed in the article. Workplace homicides are a real occurrence. In 2012, homicide was the leading cause of on-the-job death for women and the fourth overall cause of on-the-job death. U.S. DEP’T OF LABOR, U.S. BUREAU OF LABOR STATISTICS (2013), available at <http://www.bls.gov/iif/oshwc/foi/cfch0011.pdf>.

² Approximately 6,977,700 adults were under correctional supervision (probation, parole, jail, or prison) in the United States in 2011. U.S. BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES (2011), available at <http://bjs.gov/content/pub/pdf/cpus11.pdf>. In 1991, only 1.8% of the adult U.S. population had served time in prison. THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 4 Table 3 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf>. By 2001, that figure increased to 2.7%. *Id.* By the end of 2007, 3.2% or 1 in every 31 U.S. adults had gone through the prison system. *Id.* If incarceration rates remain steady, it is estimated that 1 in 15 Americans born after 2001 will be incarcerated during their lifetime. *Id.*

³ EEOC, No. 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, AS AMENDED, 42 U.S.C. § 2000E ET SEQ. 3 (Apr. 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm [hereinafter ENFORCEMENT GUIDANCE].

⁴ *See id.* If incarceration rates remain unchanged, while 1 in 17 white males are expected to be incarcerated during their lifetime, 1 in 6 Hispanic males and 1 in 3 black males are expected to be incarcerated during their lifetime. *Id.*

⁵ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION’S STRATEGIC ENFORCEMENT PLAN FY 2013-2016 9 (Approved Dec. 17, 2012), available at <http://www.eeoc.gov/eeoc/plan/sep.cfm> [hereinafter STRATEGIC ENFORCEMENT]. The EEOC identifies and publishes a strategic plan including national priorities to ensure that all of its resources are targeted in these specific areas. *Id.* at 8. The strategic plan and priorities were first determined by a Work Group consisting of EEOC field and headquarters staff from different EEOC offices. *See id.* at Appendix A for a complete list of the Work Group members. Following formation of the

recruitment and hiring practices that adversely impact particular groups” by scrutinizing employers’ use of criminal background checks in the hiring process.⁶

From mom-and-pop shops to Fortune 100 enterprises, most employers rely on criminal background checks⁷ as a “highly effective and vital tool to help prevent criminal recidivism in the most harmful contexts, protect at-risk populations, and assist employers in making fully informed hiring decisions and in protecting their employees, their clients and customers, their assets, and the public at-large.”⁸ The EEOC’s goal to eliminate the discriminatory impact of criminal background checks on blacks and Hispanics seeks to serve an important societal interest. The EEOC’s purported solution, however, has consequences not only for the future of hiring practices, but also for the viability of employers, like the Blakes, trapped between a rock and a hard place— either cease conducting background checks and place their businesses, employees, or customers at foreseeable risk by not considering indications of violence or dishonesty; or continue conducting background checks and risk litigation from the EEOC for having a policy that adversely impacts minorities.

This article argues that the 2012 EEOC Guidance should not be given deference by the courts. Specifically, the Guidance’s individualized assessment, which imposes a heightened requirement on employers to justify their background check policies, is problematic in three important ways. First, the individualized assessment places an impractical burden by *what* it requires and *whom* it requires to conduct such an assessment. Second, employer liability for negligent hiring may actually increase if employers perform individualized assessments. Finally, the practical effect of the individualized assessment may be decreased employer reliance on criminal background checks, and the result will likely not be a better hiring outcome for minority applicants. Part II of this article provides a background of the disparate impact theory of discrimination and the defense of business necessity, surveys employers’ use of criminal background checks, explains the theory of negligent hiring, discusses the EEOC, the individualized assessment, and the EEOC’s initiative to aggressively regulate employers’ use of background checks, and examines recent cases litigating this issue. Part III analyzes the impractical burden

strategic plan and its priorities, the EEOC solicited written input, held a public meeting, and released a draft for public comment before publishing. *Id.* at 20.

⁶ *Id.* at 9.

⁷ A 2012 survey conducted the Society for Human Resources Management stated that 69% of the responding employers reported that they conducted criminal background checks on all of their job candidates, 18% reported that they conducted criminal background checks on selected job candidates, and a mere 14% reported that they did not conduct criminal background checks on any of their candidates. *SHRM Survey Findings: Background Checks-The Use of Criminal Background Checks in Hiring Decisions* slide 3 (July 19, 2012), available at <http://www.slideshare.net/shrm/background-checkingthe-use-of-criminal-background-checks-in-hiring-decisions> [hereinafter SHRM Survey]. The survey also reported the reliance on criminal background checks by organizational staff size- 48% of employers with 1 to 99 employees conduct criminal background checks; 69% of employers with 100 to 499 employees conduct checks; and 83% of employers with 2,500 to 24,999 employees reported to conduct criminal background checks for all candidates. *Id.* at slide 4.

⁸ HUMAN RESOURCES MANAGEMENT – COMPENSATION GUIDE, ¶ 31,616 EXPERTS HIGHLIGHT CONTROVERSY SURROUNDING EEOC’S CRIMINAL BACKGROUND CHECK GUIDANCE-FEDERAL NEWS, 2012 WL 6629328 (Wolters Kluwer ed., Dec. 21, 2012).

the EEOC's individualized assessment places on employers, argues that enforcement of the individualized assessment may increase employer liability for negligent hiring, and explores the contention that fewer minorities will, in fact, be hired if fewer employers rely on criminal background checks in making their hiring decisions. Part IV offers a solution that aims to satisfy the EEOC's goal of eliminating the adverse impact of criminal background checks on blacks and Hispanics while simultaneously avoiding the impracticalities, inconsistencies, and other problems of the new Guidance.

II. BACKGROUND

A. The Disparate Impact Theory of Discrimination and the Business Necessity Defense

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate against applicants and employees on the basis of race, color, sex, religion, and national origin.⁹ While Title VII's goal to eliminate intentional employment discrimination was at the forefront of initial enforcement of the Act, courts soon adopted an additional theory of discrimination, which broadened the scope of employment safeguards afforded to protected groups.¹⁰ The disparate impact theory of discrimination refers to "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."¹¹ Under the disparate impact theory of discrimination, courts have scrutinized employment practices, and have struck down policies that, while fair in form, have presented "artificial, arbitrary, and unnecessary barriers to employment" that have a substantial adverse effect on employment opportunities of members of a protected class.¹²

Not all employment practices that have an adverse impact on protected classes have been rejected.¹³ A touchstone of disparate impact analysis is business

⁹ 42 U.S.C. § 2000e (2012).

¹⁰ See Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and The Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1977) (maintaining that the legislative purpose of Title VII was to create equal employment opportunities and remove barriers which tended to favor white employees over blacks).

¹¹ *Teamsters v. United States*, 431 U.S. 324, 335 (1977).

¹² *Griggs*, 401 U.S. at 431. In prohibiting the employer from using a standardized general intelligence test as a condition of employment, the Court found significant that the test requirements were not shown to bear a demonstrable relationship to the successful performance of the jobs for which the standards were used. *Id.* The Court also found the test requirements operated to disqualify black applicants at a substantially higher rate than white applicants. *Id.* at 426. The employer's lack of discriminatory intent was not controlling because courts were required to look to the consequences of the employment practices, not simply the motivation. *Id.* at 432.

¹³ See, e.g., *El v. SEPTA*, 479 F.3d 232 (3d Cir. 2007) (finding employer lawfully rejected African American transit driver applicant based on past criminal conviction policy); see also *Lanning v. SEPTA*, 308 F.3d 286 (3d Cir. 2002) (concluding employer lawfully rejected female applicants because they could not meet minimum qualifications of physical test necessary to perform successfully in the job of transit police officer); *Franklin v. Local 2 of the Sheet Metal Workers Int'l Ass'n*, 565 F.3d 508 (8th Cir. 2009).

necessity.¹⁴ Even after a claimant proves that a facially neutral employment practice is discriminatory in its operation, the practice is not prohibited if the employer can adequately justify the practice by showing its business necessity.¹⁵ The term “business necessity” as applied in the analytical framework of disparate impact claims originated in case law and means that the employer must “meet the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.”¹⁶ Congress later amended Title VII to codify the disparate impact theory and the concept of “business necessity” as follows:

An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.¹⁷

At its inception, the disparate impact framework was intended to be applied with relative ease by courts. Over time, however, this theory has developed into a complex and controversial body of law.¹⁸ The intricacies and debates currently surrounding the disparate impact theory in general,¹⁹ and the meaning of “business

¹⁴ *Griggs*, 401 U.S. at 431.

¹⁵ *Id.*; see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (establishing burden-shifting scheme that disparate treatment and disparate impact claims follow). In a disparate impact claim, the Title VII plaintiff bears the burden of showing that a particular employment practice causes a disparate impact; the burden then shifts to the defendant to demonstrate that the practice is job related and consistent with business necessity. If the defendant satisfies this burden, the plaintiff can still prevail by demonstrating that an alternative employment practice exists, and defendant refuses to adopt it. *Allen v. City of Chicago*, 351 F.3d 306, 311 (7th Cir. 2003). This note only analyzes the defendant’s burden of demonstrating business necessity within the 2012 EEOC Guidance requirements. While the Guidance implicates other issues in disparate impact analysis, those are beyond the scope of this note.

¹⁶ *Griggs*, 401 U.S. at 432.

¹⁷ 42 U.S.C. § 2000e-2(k) (2012). Codification came after the Supreme Court had significantly broadened the meaning of “business necessity” in *Wards Cove*. The Court held that an employer could prove business necessity simply by showing that its policy “serves, in a significant way, the legitimate employment goals of the employer.” *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989). The Civil Rights Act of 1991 arguably restored the meaning of business necessity to the pre-*Wards Cove* meaning which required a correlation between the employer’s policy and the position in question. *Lanning v. SEPTA*, 181 F.3d 478, 488-89 (3d Cir. 1999).

¹⁸ See generally DIANNE AVERY ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 217 (8th ed. 2010).

¹⁹ Debates range from challenging the very existence of the theory of disparate impact, see HUGH DAVIS GRAHAM, *THE CIVIL RIGHT ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972* 386-89 (1990) (arguing that the Supreme Court’s adoption of the theory in *Duke Power* would have been met with disbelief in 1964), to suggestions that applying the theory may actually be disadvantageous to minority groups, see Brief for Township of Mt. Holly, New Jersey et al. as Amici Curiae Supporting Petitioner, *Township of Mount Holly, New Jersey v. Mt. Holly Gardens Citizens in Action, Inc.*, 2013 WL 4781606 (No. 11-1507)

necessity” in particular, are highly relevant in employers’ use of criminal background checks.

B. Employers’ Use of Criminal Background Checks

Data compiled in 2012 suggest that sixty-nine percent of U.S. employers conduct criminal background checks on all of their candidates.²⁰ What motivates employers to use this screening tool? Most employers use criminal background checks to protect themselves and reduce their legal liability for negligent hiring.²¹ Employers also use criminal background checks to screen out violent criminals who pose a threat to the safety of other employees or customers.²² Background checks also permit employers to avoid employing individuals who pose a risk to the employer’s assets because of theft, fraud, or other criminal activity.²³ Fundamentally, criminal background checks provide employers with objective information that permits them to assess important individual traits, such as honesty and reliability.²⁴ The link between one’s willingness to obey society’s rules is relevant to the likelihood of that individual being a trustworthy and dependable employee.²⁵

C. Employers’ Growing Reliance on Criminal Background Checks in the Face of Negligent Hiring Liability

The fear of negligent hiring liability and its consequences²⁶ is the primary motivation employers cite in choosing to conduct criminal background checks on

[hereinafter *Amici Curiae*] (contending that applying the disparate impact theory to employers’ use of criminal background checks may do more harm than good even for its intended beneficiaries).

²⁰ SHRM Survey, *supra* note 7, at slide 3. The survey was composed of 544 randomly selected HR professionals from the Society for Human Resources Management’s membership and collected data from December 28, 2011 – February 7, 2012. *Id.* at slide 17.

²¹ *Id.* at slide 6.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ See Don Livingston, Partner, Akin, Gump, Strauss, Hauer & Feld, Remarks at the U.S. Commission on Civil Rights Briefing on the Impact of Criminal Background Checks and the EEOC’s 2012 20 (Dec. 7, 2012), *available at* http://www.usccr.gov/calendar/trnsrpt/Transcript_12-07-12.pdf. Interestingly, the EEOC relies on criminal background checks to screen its applicants and in its own personnel handbook notes that the history or pattern of practice of criminal activity creates doubt about a person’s judgment, honesty, reliability, and trustworthiness. *Id.* at 19.

²⁶ Plaintiffs’ awards in negligent hiring lawsuits can be crippling. One study indicates that the average jury award in a negligent hiring lawsuit is \$1 million, and jury awards have been as high as \$26.5 million. ZURICH AM. INS. CO., NEGLIGENT HIRING: HOW TO REDUCE YOUR CHANCES OF HIRING A CLAIM 2 (2010), *available at* <http://hpd.zurichna.com/whitepaper/zurich-negligent-hiring.pdf>; see also John Marzulli, *The Estate of Angela Reid Will Get \$9.5 Million After She Was Fatal[ly] Struck by a Bus*, N.Y. DAILY NEWS (Jan. 4, 2012, 2:30 AM), <http://www.nydailynews.com/new-york/estate-angela-reid-9-5-million-fatal-struck-bus-article-1.1000612> (finding employer liable for negligently hiring bus driver by failing to adequately investigate driver’s background which would have revealed 31 past convictions); Jeremy

their applicants.²⁷ Statistics indicate that employers lose about seventy-five percent of negligent hiring lawsuits brought against them.²⁸ Employers' reliance on criminal background checks can be traced to plaintiffs' growing dependence on the tort theory of negligent hiring —²⁹ which holds an employer liable when it "knew or should have known" of an applicant's unfitness for a particular position, and notwithstanding hired the employee.³⁰ Although the theory's historical roots date back to the early twentieth century,³¹ its adoption and application by courts really didn't take off until the latter part of the century.³² In the oft-cited negligent hiring case of *Ponticas v. K.M.S. Investments*,³³ the court summarized the theory of negligent hiring as follows:

Liability is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been

Oberstein, *Apartment Owner is Liable for Death*, THE BURBANK LEADER (Jan. 19, 2008), http://articles.burbankleader.com/2008-01-19/local/blr-santos19_1_santos-tenants-criminal-case (awarding family of deceased apartment tenant \$12 million and holding apartment owner liable for negligent hiring in failing to conduct criminal background check before hiring convicted felon and registered sex offender maintenance man who raped and murdered tenant); Tom Aheam, *Jury Awards 7 Million Dollars to Family of Truck Driver Killed in Accident in Negligent Hiring Case*, EMPLOYMENT SCREENING RESOURCES (Nov. 15, 2011), <https://www.esrcheck.com/wordpress/2011/11/15/jury-awards-7-million-dollars-to-family-of-truck-driver-killed-in-accident-in-negligent-hiring-case/> (finding trucking company liable for negligent hiring in failing to conduct background check before hiring truck driver with two past license revocations who collided with and killed another driver).

²⁷ SHRM Survey, *supra* note 7, at slide 6.

²⁸ ZURICH AM. INS. CO., *supra* note 26, at 1.

²⁹ See generally Stephen D. Befort, *Pre-Employment Screening and Investigation: Navigating Between a Rock and a Hard Place*, 14 HOFSTRA LAB. L.J. 365, 366 (1997).

³⁰ *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 912 (Minn. 1983).

³¹ John C. North, *Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.-KENT L. REV. 717, 720 (1977). In *Missouri, Kansas, and Texas Railway Co. of Texas v. Day*, 136 S.W. 435, 440 (Tex. 1911), an employee was attacked by a coworker with a knife. The court held that the employer had breached its duty to hire safe employees where it knew of the possibility that the employee would attack a fellow employee. *Id.* at 440; see also Loftus, *Employer's Duty to Know Deficiencies of Employees*, 16 CLEV.-MARSHALL L. REV. 143, 145 (1967) (tracing the origins of negligent hiring to common law fellow-servant law, which imposed a duty on employers to select employees who would not endanger fellow employees by their presence on the job). The scope of negligent hiring was further extended to third party customers in *Priest v. F.W. Woolworth Five & Ten Cent Store*, 62 S.W.2d 926 (Mo. Ct. App. 1933). In *Woolworth*, the plaintiff injured her back when the assistant manager of the defendant department store pushed her over a counter. *Id.* at 927. The court found that the employer Woolworth owed the customer a duty of care in selecting its employees for hire. *Id.*

³² See generally Michael Silver, *Negligent Hiring Claims Take Off*, 73-MAY A.B.A. J. 72, 72 (1987).

³³ A search conducted on September 23, 2014 using Westlaw's KeyCite function reported that 91 law review articles cited the case; the same search conducted using LexisNexis's Shepardize function reported 75 citing law review articles.

discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.³⁴

Even though the basic elements of negligent hiring liability have been universally adopted, courts at all levels have inconsistently applied these elements in determining an employer's liability.³⁵ One of the greatest inconsistencies in determining negligent hiring liability has been in deciding the scope of an employer's duty to investigate applicants.³⁶ In particular, courts have inconsistently held how an employer's knowledge of an applicant's criminal past affects that employer's liability for negligent hiring.³⁷ While one court may hold that an employer knowingly hiring an applicant with a criminal record is a sufficient basis for negligent hiring liability,³⁸ another court may hold otherwise.³⁹ Thus, no consistent rule exists to guide employers in determining whether they must investigate the criminal background of applicants to avoid future liability for negligent hiring.⁴⁰

Employers' uncertainty about the scope of their duty to investigate applicants to avoid negligent hiring liability, combined with their desire to provide a safe work environment, protect their assets, and hire an honest and responsible workforce, seems to adequately justify employers' reliance on applicants' criminal backgrounds in making hiring decisions. But what once likely satisfied the business necessity defense will no longer withstand the EEOC's initiative to restrict employers' criminal background check policies. The added hurdle of the EEOC's individualized assessment makes it much more difficult for employers to successfully defend their well-intended criminal background check policies.

³⁴ 331 N.W.2d 907, 911 (Minn. 1983). In *Ponticas*, the court found the apartment complex employer liable for negligently hiring a building manager who raped a tenant. The court reasoned that based on the manager's criminal history, the unlawful conduct was foreseeable. Because of the employer's limited investigation into the building manager's background, the employer was liable under the negligent hiring theory. *Id.* at 915.

³⁵ Stephen P. Shepard, *Negligent Hiring Liability: A Look at How It Affects Employers and the Rehabilitation and Re-Integration of Ex-Offenders*, 10 APPALACHIAN J.L. 145, 158 (2011). The author quoted one commentator who noted that "employers, in the absence of a coherent legal standard, face a great deal of difficulty in assessing the sufficiency of their [hiring practices]." *Id.*

³⁶ *Id.* at 159.

³⁷ *Id.*

³⁸ *Id.*; see, e.g., *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744 (Fla. 1991).

³⁹ *Id.*

⁴⁰ *Id.* at 160.

D. The EEOC's Perspective on Criminal Background Checks, Business Necessity and the Individualized Assessment

The Equal Employment Opportunity Commission (EEOC)⁴¹ is the federal agency charged with enforcing employment anti-discrimination laws and promulgating regulations and guidelines to effectuate Title VII.⁴² While the EEOC's focus on the disparate impact of criminal background checks dates back over three decades,⁴³ the agency's directives on how employers conduct background checks consistent with "business necessity" have become increasingly onerous.⁴⁴

In its 1987 Guidance, the EEOC identified a three-part test to determine whether an employer's rejection of an applicant based on a criminal background check constituted a "business necessity." Known as the *Green* factors, the test requires the employer to consider: (1) the nature and gravity of the offense[s]; (2) the time that had passed since conviction and/or completion of the sentence; and (3) the nature of the job sought.⁴⁵ While the *Green* factors remained the EEOC's measure of business

⁴¹ The EEOC is composed of five members appointed by the President and confirmed by the Senate with one member serving as the Chair. STRATEGIC ENFORCEMENT, *supra* note 5, at 2. Congress granted the EEOC power to "prevent any person from engaging in any unlawful employment practice." *Id.* at 2 (quoting 42 U.S.C. § 2000e-5(a)). The EEOC investigates and reconciles charges brought by individuals or by the Commission on behalf of individuals. *Id.* The EEOC has the authority to litigate cases against private employers on behalf of individuals. *Id.*

⁴² *Id.* While EEOC Guidance (or Guidelines, the words can be used interchangeably) does not carry the force of law, courts have historically given great deference to agency interpretations. *See* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) (finding that the EEOC's guidelines interpreting Title VII of the Civil Rights Act of 1964 should be treated as expressing the will of Congress and therefore afforded great deference). *See, e.g.,* United States v. City of Chicago, 400 U.S. 8 (1970); Udall v. Tallman, 380 U.S. 1 (1965); Power Reactor Development Co. v. Electricians, 367 U.S. 396 (1961). *But see* El v. SEPTA, 479 F.3d 232 (3d Cir. 2007), *infra* note 46.

⁴³ Timothy M. Cary, *A Checkered Past: When Title VII Collides with State Statutes Mandating Criminal Background Check*, 28 A.B.A. J. LAB. & EMP. L. 499, n.43 (2013) (citing three cases from 1970s in which the EEOC brought claims against employers and challenged their use of criminal background checks as discriminatory in violation of Title VII).

⁴⁴ Compare EEOC POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000E ET SEQ. (1982) (2/4/87), available at http://www.eeoc.gov/policy/docs/convict1.html#N_6_ [hereinafter POLICY STATEMENT] (requiring one-step analysis), with ENFORCEMENT GUIDANCE, *supra* note 3, at 3 (requiring two part, multi-factor analysis); *see also* Thomas M. Hruz, *The Unwisdom of the Wisconsin Fair Employment Act's Ban of Employment Discrimination on the Basis of Conviction Records*, 85 MARQ. L. REV. 779, 815-18 (2002) (examining the evolution of the interpretation of "business necessity" as it relates to the disparate impact framework and concluding that the meaning remains deeply confused, with courts split over whether the defense should be interpreted narrowly (favoring ex-offender applicants) or broadly (favoring employers)).

⁴⁵ POLICY STATEMENT, *supra* note 44. The EEOC adopted the three-factor analysis of business necessity following *Green*, the leading Title VII decision regarding employer use of criminal records in hiring decisions. In *Green*, the 8th Circuit held that the defendant employer was prohibited from using the applicant's past conviction record as an absolute restriction to employment. The employer may consider a prior criminal record as one factor in the

necessity over the next twenty years, one court notably challenged the EEOC's imposition of the *Green* factors in its 1987 Guidance.⁴⁶ The Third Circuit criticized the EEOC for not thoroughly researching or persuasively presenting a justification for imposing this three-factor test and questioned the EEOC's right to deference on this matter.⁴⁷

Prompted by the criticism of its 1987 Guidance, its continued focus on the disparate impact of criminal background checks on the employment of black and Hispanic workers,⁴⁸ and growing public policy concern for reentry of ex-offenders into the workforce,⁴⁹ the EEOC issued updated Guidance in 2012. The Guidance

employment decision as long as the employer also took into account the three factors enumerated above. *Green v. Mo. Pac. R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977).

⁴⁶ *El*, 479 F.3d 232.

⁴⁷ *Id.* The court's interpretation serves as a reminder that EEOC Guidance does not carry the force of law. See *supra* note 42 and accompanying text. The court noted that while the Supreme Court in *Duke Power* assigned great deference to EEOC Guidelines, more recent cases have only assigned *Skidmore* deference. In *Skidmore*, the Supreme Court acknowledged the role of EEOC guidelines as follows:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (superseded by statute on unrelated grounds). The *El* court continued by finding that the EEOC's 1987 Guidelines "do not speak to whether an employer can take these factors into account when crafting a bright-line policy, nor do they speak to whether an employer justifiably can decide that certain offenses are serious enough to warrant a lifetime ban." *El*, 479 F.3d at 243. The court ultimately does not assign great deference to the 1987 Guidance because while it was rewritten to be in line with *Green*, the Guidance fails to analyze Title VII in connection with those three factors. *Id.* at 243-44.

⁴⁸ STRATEGIC ENFORCEMENT, *supra* note 5, at 9.

⁴⁹ Jacqueline Berrien, Chair, EEOC, Remarks at EEOC Public Meeting on Background Check Screening (July 26, 2011), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm>. Chair Berrien specifically recognized the societal consequences of employer use of criminal background checks to exclude ex-offenders from employment:

The American Bar Association reports that incarceration costs taxpayers \$56 billion annually and former offenders who do not obtain employment after release from prison are three times more likely to return to prison After release, the vast majority of these people will return to communities they came from; and it is in the interest not only of those communities, but public safety in general, to help them reconnect with society, find gainful employment, stay out of trouble and avoid returning to jail to the extent we can do that consistently with any public safety concerns. When reentry fails, public safety, our economy, the future of families and the community as a whole are placed at risk. President George W. Bush acknowledged this when he signed the Second Chance Act of 2007 and stated, and I quote, "The country was built on the belief that each human being has limitless potential and worth. Everybody matters. The work of redemption reflects our values.

established that to justify the exclusion of an applicant based on a past criminal record, an employer must show that its criminal record policy “operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.”⁵⁰ Accordingly, an employer who excludes an applicant based on its criminal record policy will only meet the business necessity requirement by following a two-step process: (1) the employer must show that it considered the *Green* factors in screening the applicant; and (2) the employer should engage in an individualized assessment by providing the applicant an opportunity to explain the circumstances surrounding his criminal record. Specifically, the employer must consider:

1. The facts or circumstances surrounding the offense or conduct;
2. The number of offenses for which the applicant was convicted;
3. The age at time of conviction or release from prison;
4. Evidence that the applicant performed the same type of work post-conviction with the same or a different employer, with no known incidents of criminal conduct;
5. The length and consistency of employment history before and after the offense or conduct;
6. Rehabilitation efforts, e.g., education/training;
7. Employment or character references or any other information regarding fitness for the particular position; and
8. Whether the applicant is bonded under a federal, state, or local bonding program.⁵¹

The EEOC advises that “[u]nderstanding business necessity is the heart of the Guidance.”⁵² While the agency maintains that an individualized assessment is not a mandatory component for compliance with Title VII in all circumstances, recent claims illustrate the EEOC’s expectation of such an assessment.

Two recently filed claims by the EEOC against major national companies BMW and Dollar General prompted an exchange of letters between nine state attorneys general (AGs) and the EEOC, specifically discussing the Guidance’s individualized assessment. The AG’s letter urged the EEOC to rescind its 2012 Guidance.⁵³ The

It also reflects our national interest. The high recidivism rate places a huge financial burden on taxpayers, it deprives our labor force of productive workers and it deprives families of their daughters and sons, and husbands and wives, and moms and dads. Our government has a responsibility to help prisoners to return as contributing members of their community.”

Id.

⁵⁰ ENFORCEMENT GUIDANCE, *supra* note 3, at 13.

⁵¹ *Id.* at 16-17.

⁵² Carol Miaskoff, Acting Associate Legal Counsel, EEOC, Remarks at the U.S. Commission on Civil Rights Briefing on the Impact of Criminal Background Checks and the EEOC’s 2012 Guidance 14 (Dec. 7, 2012), *available at* http://www.usccr.gov/calendar/trnscript/Transcript_12-07-12.pdf.

⁵³ Letter from Patrick Morrissey, West Virginia Attorney General, et al., to Jacqueline A. Berrien, EEOC Chair, et al. 5 (July 24, 2013), *available at* <https://doj.mt.gov/wp-content/uploads/EEOC-Letter-Final.pdf>.

AGs contend that the 2012 Guidance, and the individualized assessment in particular, is a gross overreach of federal power.⁵⁴ The AGs assert that the claims against BMW and Dollar General and the EEOC's 2012 Guidance only "briefly explains why screening for past criminal conduct has a disparate impact, but focuses primarily on making the case for individualized consideration of criminal background."⁵⁵ The EEOC's urging of individualized consideration of past criminal conduct, the AG's contend, is an unlawful expansion of Title VII.⁵⁶ Moreover, the AG's argue that forcing employers to engage in more individualized assessments will have the practical effect of unwisely adding burdensome costs on businesses at an economic time when they can't afford another yet another federal mandate.⁵⁷

EEOC Chair Jacqueline Berrien responded to the AG's criticism, calling it a "misunderstanding" of what the 2012 Guidance suggests.⁵⁸ In pertinent part, Chair Berrien responded:

The Guidance does not urge or require individualized assessments of all applicants and employees. Instead, the Guidance encourages a two-step process, with individualized assessment as the second step Once the targeted screen has been administered, the Guidance encourages employers to provide opportunities for individualized assessment for those people who are screened out. Using individualized assessment in this manner provides a way for employers to ensure that they are not mistakenly screening out qualified applicants or employees based on incorrect, incomplete, or irrelevant information, and for individuals to correct errors in their records. The Guidance's support for individualized assessment only for those who are identified by the targeted screen also means that individualized assessments should not result in "significant costs" for businesses Thus, the individualized assessment is a safeguard that can help an employer to avoid liability when it cannot demonstrate that using only its targeted screen would always be job related and consistent with business necessity.⁵⁹

Responding to the exchange of letters between the state attorneys and the EEOC, some commentators note that these letters highlight the remaining confusion the Guidance casts on employers' use of criminal background checks.⁶⁰

⁵⁴ *Id.* at 4.

⁵⁵ *Id.* at 2.

⁵⁶ *Id.* at 3.

⁵⁷ *Id.* at 4-5.

⁵⁸ Letter from Jacqueline A. Berrien, EEOC Chair, et al., to Patrick Morrissey, West Virginia Attorney General, et al. (Aug. 29, 2013), available at http://www.eeoc.gov/eeoc/newsroom/wysk/criminal_background_checks.cfm#fn12.

⁵⁹ *Id.*

⁶⁰ Iyse Wolens Schuman, *EEOC Clarifies Guidance on Criminal Background Checks*, LITTLER MENDELSON BLOG (Sept. 25, 2013), <http://www.littler.com/dc-employment-law-update/eeoc-clarifies-guidance-criminal-background-checks>; see also Gerald L. Maatman, Jr., Howard M. Wexler, *EEOC Responds To Attorneys' General Criticism Of EEOC's "Misguided" Position On Criminal Background Screens*, SEYFARTH SHAW BLOG (Sept. 23, 2013), <http://www.seyfarth.com/publications/3514> (commenting that "the EEOC's 'response'

E. Where We Are Post-Guidance: Recent Claims Litigating the Issue

Pursuant to its promise to target facially neutral hiring practices, the EEOC has recently filed claims on behalf of minorities who had allegedly been excluded from employment because of an employer's criminal background check policy. *EEOC v. Peplemark, Inc.* was the EEOC's first major systemic lawsuit based on criminal background check policies.⁶¹ In *Peplemark*, the EEOC filed a disparate impact claim on behalf of a plaintiff applicant against the defendant temporary staffing agency after the agency failed to refer the applicant for employment.⁶² The applicant was a two-time felon with convictions for housebreaking and larceny. The EEOC alleged that Peplemark maintained a background check policy patently excluding persons with criminal records from employment.⁶³ This policy allegedly had a disparate impact on the plaintiff and a similarly situated class of African Americans in violation of Title VII.⁶⁴ Eventually the EEOC dismissed its claim through a joint motion of the parties because the EEOC was admittedly unprepared to present statistical evidence to meet its prima facie burden of disparate impact.⁶⁵

In *EEOC v. Freeman*, the EEOC filed a nationwide lawsuit against the defendant employer alleging that Freeman's multi-step criminal background evaluation process had a disparate impact on African Americans and male applicants.⁶⁶ Pursuant to its background check policy, Freeman (1) considered the applicant's honesty about his or her criminal convictions on the application forms,⁶⁷ (2) examined pending outstanding arrest warrants, and (3) considered the existence of any criminal convictions which the applicant was committed, or was released from confinement for, within the past seven years.⁶⁸ Without addressing the adequacy of the employer's multi-step evaluation process in its holding, the court granted summary judgment in favor of Freeman on two grounds. First, the court ruled that the EEOC failed to identify a specific employment practice responsible for the disparate impact.⁶⁹ Second, the court found that the EEOC's expert testimony was unreliable.⁷⁰ With these findings, the court held that the EEOC did not make out its prima facie

arguably repackages the very same guidance that these Attorneys General complained about in their July 24 letter.”).

⁶¹ 732 F.3d 584 (6th Cir. 2013).

⁶² *Id.* at 588.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* The court entered judgment in favor of Peplemark upon a joint motion to dismiss. The district court awarded Peplemark costs and attorney's fees totaling \$751,942.48. The EEOC appealed this award and the Sixth Circuit affirmed the district court's award. *Id.* at 589.

⁶⁶ 961 F. Supp. 2d 783, 786 (D. Md. 2013).

⁶⁷ As a bright-line rule, an applicant who failed to disclose a conviction or seriously misrepresented the offense on the application was automatically disqualified. *Id.* at 788.

⁶⁸ *Id.*

⁶⁹ *Id.* at 786.

⁷⁰ *Id.* at 793.

claim of disparate impact.⁷¹ Although though the court did not specifically address the EEOC's Guidance, the court's concluding words perhaps foreshadow where federal courts will come out on this issue:

Indeed, any rational employer in the United States should pause to consider the implications of actions of this nature brought [by the EEOC] based upon such inadequate data. By bringing actions of this nature, the EEOC has placed many employers in the "Hobson's choice" of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers. Something more, far more, than what is relied upon by the EEOC in this case must be utilized to justify a disparate impact claim based upon criminal history and credit checks. To require less, would be to condemn the use of common sense, and this is simply not what the discrimination laws of this country require.⁷²

While no federal court has yet directly reached the issue of the individualized assessment, two recent EEOC claims targeting major national corporations indicate the inevitability of these issues being addressed by the courts. In *EEOC v. Dollar General* and *EEOC v. BMW Manufacturing*, the EEOC filed civil complaints on behalf of a class of African American employees and applicants who were allegedly denied employment based on past criminal convictions in accordance with the defendant employers' criminal background check policies.⁷³ In both complaints, the EEOC expressly pointed to the individualized assessment factors enumerated in its Guidance as evidence that the employers' policies failed to satisfy business necessity, and thus disparately impacted minority applicants in violation of Title VII.⁷⁴ Employers, legal scholars, and the public anxiously await the litigation of these lawsuits to see if and how the federal courts will treat the EEOC's individualized assessment.

Although federal courts have not reached the issue of business necessity or individualized assessments in the context of criminal background checks, state courts, including the Wisconsin Supreme Court, have faced similar issues.⁷⁵ Those determinations may predict how the federal courts will treat the EEOC's individualized assessment. Additionally, other federal anti-discrimination statutes, including the Americans with Disabilities Act (ADA), impose similar heightened business necessity standards. The courts' interpretations of those requirements may prove insightful to the issue of criminal background checks. There is no doubt that as these claims continue to be litigated, the courts will eventually reach the issue of

⁷¹ *Id.* at 803.

⁷² *Id.*

⁷³ Complaint, *EEOC v. Dolgencorp LLC d/b/a Dollar General*, No. 1:13-cv-04307 (N.D. Ill. June 11, 2013); Complaint, *EEOC v. BMW Mfg. Co., LLC*, No. 7:13-cv-01583 (S.D. S.C. June 11, 2013).

⁷⁴ *Id.*

⁷⁵ See discussion *infra* Part III.A.1

business necessity and will need to determine whether the individualized assessment imposed by the EEOC in its 2012 Guidance is deserving of deference.

III. DISCUSSION

With a significant number of U.S. employers relying on background checks, the 2012 EEOC Guidance has significant implications not only for the future of the hiring process, but also the potential viability of organizations that fail to meet the Guidance's onerous requirements. The EEOC's interpretation of "business necessity" in the context of employers' use of criminal background checks, as substantially modified by the individualized assessment, marks a significant change from the statutory language of "job related and consistent with business necessity." While federal courts have yet to fully consider the issue of the individualized assessment, recent pending cases indicate the subject will soon be addressed.

Once addressed, the EEOC's 2012 Guidance should not be given deference by the courts. The Guidance's individualized assessment is problematic in three important ways. First, the individualized assessment places an impractical burden on employers. The assessment requires a subjective, fact-specific inquiry which is impractical and contrary to the norms of the hiring process. The assessment also places an impractical burden on employers who are not qualified to perform such an assessment. Second, employers may be penalized whether they complete the assessments or not. On one hand, the EEOC may discipline employers who fail to complete the assessment. On the other hand, third parties may pursue negligent hiring claims against employers who do complete the assessment. Finally, the practical effect of the individualized assessment requirement may decrease employer use of criminal background checks, and the result will likely not be a better hiring outcome for minority applicants.

A. The Individualized Assessment Places an Impractical Burden on Employers

1. The Subjective, Fact-Specific Assessment is Impractical

While federal courts have not yet reached the issue of business necessity as it relates to criminal background checks, and more specifically the enforceability of the EEOC's individualized assessment "guidance," state courts have addressed a similar issue. Some states, including Wisconsin, have statutes that expressly prohibit employers from discriminating against applicants on the basis of past criminal convictions.⁷⁶ The Wisconsin statute provides an exception similar to the business necessity defense permitting an employer to reject an applicant previously convicted of a crime if the "circumstances of the particular offense 'substantially relate' to the particular circumstances of the job."⁷⁷ Just as Congress, the EEOC, and case law

⁷⁶ See WIS. STAT. § 111.335(c)(1) (2011) (conviction must "substantially relate" to the position in question); see, e.g., N.Y. CORRECT. LAW § 752 (McKinney 2009) (conviction must have a "direct relationship" to the position in question); HAW. REV. STAT. § 378-2.5(a) (2010) (conviction must have a "rational relationship" to the job to justify an adverse employment action); KAN. STAT. ANN. § 22-4710(f) (West 2011) (conviction must "reasonably bear[] upon . . . employee's trustworthiness, or the safety or well-being of the employer's employees or customers").

⁷⁷ While the inclusion of criminal record as a protected category in Wisconsin prohibits intentional discrimination by an employer against an applicant with a past criminal history, the

have interpreted the meaning attached to business necessity under Title VII differently, Wisconsin's "substantial relationship" exception has also been subject to conflicting interpretations.⁷⁸

Wisconsin's Labor and Industry Review Commission (LIRC), the state's counterpart to the EEOC, is charged with regulating employer compliance with state anti-discrimination provisions.⁷⁹ The LIRC initially interpreted the "substantial relationship" exception to require employers to consider specific factors similar to the EEOC's individualized assessment in determining whether the applicant's criminal record is of substantial enough relation to the position in question.⁸⁰ A consequence of the factor-specific approach imposed by LIRC, however, was that it placed an impractical burden on employers to establish an appreciably detailed factual record to lawfully exclude an applicant from employment.⁸¹

Recognizing the substantial nature of this burden, the Wisconsin Supreme Court rejected the LIRC's specific-factor test, refusing to require employers to investigate the factors involved with the applicant's criminal record to justify the applicant's exclusion from employment.⁸² "There must be a semblance of practicality about what the test requires . . . Employers and licensing agencies should be able to proceed in their employment decision in a confident, timely and informed way."⁸³

statute's "substantially relates" exception parallels Title VII's "business necessity" defense and can be used to analyze the business necessity requirements under disparate impact.

⁷⁸ Thomas M. Hruz, *The Unwisdom of the Wisconsin Fair Employment Act's Ban of Employment Discrimination on the Basis of Conviction Records*, 85 MARQ. L. REV. 779, 788 (2002).

⁷⁹ *Id.* at 789.

⁸⁰ *Id.* The factor-specific test articulated by LIRC included: (1) the public profile or nature of the applicant's job, (2) the principal duties of that job, (3) the time that had elapsed since conviction, (4) mitigating circumstances involved in the crime for which the conviction arose, (5) evidence of rehabilitation, and (6) the number and seriousness of the crimes. *Id.*

⁸¹ *Id.*

⁸² See *Gibson v. Transp. Comm'n*, 315 N.W.2d 346, 349 (Wis. 1982). The court found that defendant was not required to investigate the detailed factual circumstances of an armed robbery for which applicant was convicted before it denied the applicant a school bus driver's license for purposes of employment. The court refused to require an inquiry into the circumstances surrounding the applicant's previous criminal conviction. See also *Milwaukee County v. Labor and Indus. Review Comm'n* 407 N.W.2d 908, 916 (Wis. 1987). The Wisconsin Supreme Court overruled the LIRC determination that the defendant discriminated against the employee on the basis of his conviction record when it terminated employee for a homicide by reckless conduct conviction which employer argued was substantially related to the position he was in. The court found that the LIRC's requirement that the employer verify the circumstances surrounding the conviction was unnecessary and impractical.

⁸³ *Milwaukee County*, 407 N.W.2d at 917. The court's concerns about the impracticality and inefficiency of the factor-specific approach are similar to those raised by the nine state attorneys general in their recent letter to the EEOC. See Letter from Patrick Morrissey, *supra* note 53. In rejecting the LIRC's factor-specific test, The Wisconsin Supreme Court adopted a less burdensome elements-only test. The elements-only test requires an employer to look to the elements of the crime, which the applicant was formerly convicted, and compare those elements to the job duties in question. If the employer finds a nexus between the elements of the offense and the position in question, it may take an adverse employment action without be

The same practicality argument applies to the eight-factor individualized assessment imposed by the EEOC. For example, factor (7) of the individualized assessment⁸⁴ requires an employer to consider the “employment or character references or any other information regarding fitness for the particular position.” In practice, most employers have adopted a neutral reference policy whereby employers only verify name, dates of employment, and position of former employees in response to reference inquiries. This universal practice developed because of the former employer’s susceptibility to defamation liability for providing unfavorable substantive information related to the employee’s past employment, which subsequently hindered that individual’s ability to secure future employment.⁸⁵ This impractical burden on employers is similar for the other factors of the individualized assessment requirement.⁸⁶

Just as the Wisconsin Supreme Court recognized the impractical burden placed on employers by the factor-specific approach and subsequently rejected the LIRC’s test, federal courts eventually addressing the EEOC’s cumbersome individualized assessment should recognize the impractical burden such an assessment imposes on employers and reject it. As one critic of the EEOC’s Guidance noted, it is impractical “to do a full-scale analysis into every applicant and the circumstances of every single conviction.”⁸⁷

liable for discrimination based on the applicant’s past conviction record. The application of this test was illustrated in *Gibson*. The applicant, who was denied a school bus driver’s license, had formerly been convicted for armed robbery defined under Indiana law as “a finding that the person participated in the taking of another’s property by threatening to harm them with a dangerous weapon.” Those elements indicate one’s disregard for the personal and property rights of others and a propensity to use force or threat of force in accomplishing one’s purpose. The employer was justified in rejecting the applicant by finding these traits conflict with the level-headedness, patience, and avoidance of using force necessary to be a school bus driver. *Gibson*, 315 N.W.2d at 349.

⁸⁴ See list *supra* Part II.D.

⁸⁵ See Markita D. Cooper, *Beyond Name, Rank, and Serial Number: No Comment Job Reference Policies, Violent Employees, and the Need for Disclosure-Shield Legislation*, 5 VA. J. SOC. POL’Y & L. 287, 288-89 (1998). Unless the potential for defamation liability decreases, employers will hit a dead end when trying to obtain substantive information from a previous employer that will be helpful in predicting the applicant’s fitness for the position. See Kristen A. Williams, *Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. REV. 521, 524-25 (2007) (arguing that to place a burden on employers to evaluate ex-offender applicants is confusing and unfair; the more extensive the assessment required to link job relatedness to past criminal convictions, the more likely it is to depend on information to which employers do not typically have reliable access).

⁸⁶ Factors (1), (4), and (5) of the individualized assessment (see list *supra* Part II.D) require an employer to consider fact-specific information provided by the applicant about the criminal offense and about his or work patterns before and after conviction. At what length must the employer go to in order to corroborate this information? Inquiries such as these are inconsistent with the realities of the hiring process and what accurate information potential employers have access to concerning their applicants.

⁸⁷ Judy Greenwald, *Employers Struggle to Comply with Vague EEOC Rules*, BUSINESS INS., Aug. 25, 2013, <http://www.businessinsurance.com/article/20130825/>

2. Employers Are Not Qualified to Perform Individualized Assessments

One of the biggest impracticalities of the EEOC's individualized assessment is *who* the EEOC expects to conduct the assessment. The EEOC's individualized assessment looks similar to a comparable requirement under the ADA. Just like Title VII, the ADA prohibits employment discrimination against individuals of a protected class.⁸⁸ Likewise, the ADA provides a defense to a charge of discrimination where an employer's "qualification standards, tests, or selection criteria that screens out or tends to screen out . . . an individual with a disability has been shown to be job-related and consistent with business necessity."⁸⁹ The ADA further permits an employer to adopt a qualification standard lawfully excluding from employment an individual who poses a "direct threat" to the safety of others in the workplace.⁹⁰

Just as the EEOC's 2012 Guidance requires an employer to justify its exclusion of an applicant because of his criminal history through an eight-factor individualized assessment,⁹¹ the ADA requires an analogous assessment under its "direct threat test."⁹² The individualized assessments required by the ADA and the EEOC Guidance are distinguishable, however, in one important way. For an employer to lawfully exclude a disabled applicant who poses a direct threat to the safety of others in the workplace, the individualized assessment must be based on a "reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."⁹³

In stark contrast to an objective, medically supported judgment of an applicant's fitness to enter employment,⁹⁴ the eight-factor individualized assessment under the

NEWS07/308259972 (quoting Michael A. Warner Jr., a partner at Franczek Radelet P.C. in Chicago).

⁸⁸ In ADA claims, the protected class includes individuals with disabilities. The language of Title VII and the ADA mirror one another in protecting members of certain classes from employment discrimination.

⁸⁹ Equal Employment Opportunity Regulations Implementing the Americans with Disabilities Act, 29 C.F.R. § 1630.15 (2011).

⁹⁰ *Id.* The ADA 'direct threat' comparison to the EEOC individualized assessment relating to background checks is specifically instructive because both assessments permit an employer to screen out applicants who pose a risk to workplace safety. The primary reason employers conduct criminal background checks is to reduce the safety risks in the workplace. *See* background *supra* Part II.B.

⁹¹ *See* list *supra* Part II.D.

⁹² Equal Employment Opportunity Regulations Implementing the Americans with Disabilities Act, 29 C.F.R. § 1630.2(r) (2012). The ADA lists specific factors that are to be considered in the individualized assessment:

1. The duration of the risk;
2. The nature and severity of the potential harm;
3. The likelihood that the potential harm will occur; and
4. The imminence of the potential harm.

⁹³ 29 C.F.R. § 1630.2(r).

⁹⁴ Similar conflicts about the requirement of an individualized assessment have arisen in the ADA context as well. Although the ADA language prescribes an individualized

EEOC's 2012 Guidance is to be conducted by the non-expert employer. Under the Guidance, the employer who must make a judgment of the applicant's employability based on the applicant's responses to the eight-factor assessment.⁹⁵ It is impractical to impart the responsibility of making an objective judgment on a lay employer that is unfit to do so. Criminological studies examining how the risk of future criminal conduct relates to employment are still in their infancy.⁹⁶ This lack of evidence illustrating a connection between the likelihood of recidivism in certain jobs necessarily prevents employers from making an objective hiring decision. Instead, non-expert employers are required to take information provided by the ex-offender applicant about the circumstances surrounding his conviction, his purported rehabilitation efforts, etc., and make an entirely subjective judgment on the basis of that information.⁹⁷ Through its individualized assessment requirement, the EEOC "is

assessment to justify the exclusion of any disabled individual who poses a direct threat to the safety of others in the workplace, the 5th Circuit interpreted the ADA more narrowly than the EEOC. In *EEOC v. Exxon Corp.* the 5th Circuit held that where an employer has a safety-based qualification standard in place, i.e. no past substance abusers in safety-sensitive, unsupervised positions, the employer could defend its use of that qualification standard under a standard of "business necessity" without a particularized assessment for every single individual meeting that qualification standard. 967 F. Supp. 208, 210-11 (N.D. Tex. 1997). The court accepted the employer's argument for an impracticality exception based on the employer's argument that requiring it to make a prediction as to the likelihood of an employee's relapse into substance abuse is an impractical burden to place on employers. *Id.* In accepting this argument, the court rejected the EEOC's regulation which required an employer to perform an individualized assessment of every employee's potential for recidivism in order to determine if the individual poses a "direct threat." *Id.*

⁹⁵ ENFORCEMENT GUIDANCE, *supra* note 3, 16-17.

⁹⁶ See Allan G. King and Rod M. Fliegel, *Conviction Records and Disparate Impact*, 26 A.B.A. J. LAB. & EMP. L. 405, 418 (2011). The authors examine some of the best studies in recidivism but note that they are limited and only provide partial answers to questions employers face when making an assessment. "It is fair to conclude that criminological studies have not evolved to the point where an employer confidently can point solely to this literature as justifying any particular rule regarding ex-offenders." *Id.* Note that none of these studies dates back further than 2006. See, e.g., Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483 (2006); Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009); J. Liu, B. Francis & K. Soothill, *A Longitudinal Study of Escalation in Crime Seriousness* (July 25, 2010), <http://link.springer.com/article/10.1007/s10940-010-9102-x#page-1>. Moreover, the Bureau of Justice Statistics' recidivism data uses race as a factor in predicting recidivism. *Prisoner Recidivism*, Bureau of Justice Statistics, <http://www.bjs.gov/index.cfm?ty=datool&surl=/recidivism/index.cfm#> (last visited Sept. 23, 2014).

⁹⁷ An important issue is how the EEOC expects the information that an employer gathers through the individualized assessment to be corroborated. For example, if pursuant to factor (6) (*see list supra* Part II.D) an applicant provides information about education efforts he undertook to rehabilitate post-offense, is the employer required to confirm these purported efforts? If so, how is the employer to objectively assess the validity of that rehabilitation experience? Is participation in a state-sponsored rehabilitation program more or less objectively worthy of consideration than participation in a religious rehabilitation program? (not to mention that when drawing these comparisons the employer is actively participating in

injecting a lot of subjective analysis into a process where human resources' inclination is to try to keep everything fairly objective in this approach."⁹⁸

B. Negligent Hiring Liability May Increase When an Employer Conducts an Individualized Assessment

While the use of criminal background checks in the hiring process gained popularity in large part because of the increase in negligent hiring liability, one contention is that the individualized assessment will actually create a negligent hiring cause of action. The success of a negligent hiring claim hinges on whether the employer "knew or should have known" about an applicant's propensity to engage in criminal conduct. One argument is that the information revealed to an employer in an individualized assessment provides the ammunition a plaintiff needs to prove an employer "knew or should have known" about an applicant's propensity towards unlawful conduct, but hired him anyway. Thus, the employer should therefore be liable under the theory of negligent hiring for any injuries later caused by that employee.

To avoid the possibility that negligent hiring liability may actually be increased by conducting individualized assessments, more than a handful of states have enacted schemes to reduce employers' risk of liability for hiring known ex-offenders. These so called "immunity laws" have been introduced or passed in Colorado, Florida, Illinois, Massachusetts, New York, North Carolina, Texas, and Ohio.⁹⁹ These laws provide employers protections at varying levels from negligent hiring liability where employers have knowingly hired an ex-offender who later commits an unlawful act. While these immunity laws aim to decrease employer liability, it is too early to say what the interplay will be between these laws and employers' compliance with the 2012 Guidance.

C. Fewer Minorities Will Be Hired if Fewer Employers Rely on Criminal Background Checks in Making Their Hiring Decisions

If the courts give deference to the EEOC's onerous new Guidance, it's likely there will be a decline in employer use of criminal background checks in the hiring

a subjective judgment which could now open the door to accusations of disparate treatment, i.e. on the basis of religion).

⁹⁸ Greenwald, *supra* note 87 (quoting Peter J. Gillespie, of counsel at Fisher & Phillips L.L.P. in Chicago who criticized the vagueness of the EEOC's Guidance).

⁹⁹ Effective September 1, 2013, Texas passed a bill stating that a claim for negligent hiring cannot be based on "evidence that the employee has been convicted of an offense" unless (a) the offense was committed in the course of performing substantially similar job duties, or (b) the convictions involved a serious violent felony, e.g., murder, or aggravated kidnapping, robbery or sexual assault. Tex. H.B. No. 1188, 83rd Leg. (Tex. 2013). In late 2012, Ohio passed a bill creating total immunity for negligent hiring for employers who hire individuals who have a certificate of qualification for employment. Am. Sub. S. B. No. 337, 129th Gen. Assemb. (Ohio 2012). Colorado, Florida, Illinois, Massachusetts, New York and North Carolina have instituted similar employer protections. Rod Fliegel, William Simmons, & Inna Shelley, *Ohio Joins Handful of States that Offer Tort Liability Protections for Businesses that Hire and Employ Rehabilitated Ex-Offenders*, LITTLER MENDELSON, P.C. ASAP BLOG (Aug. 10, 2012), <http://www.littler.com/publication-press/publication/ohio-joins-handful-states-offer-tort-liability-protections-businesses->.

process. This result seems to be what the EEOC is aiming to achieve - the idea that with fewer employers conducting criminal background checks to aid in hiring decisions there would be a decreased discriminatory impact on minorities, specifically blacks and Hispanics. This supposition is arguably in error. An empirical study¹⁰⁰ shows that employers who conduct criminal background checks are, in fact, more likely to hire minorities, especially black males, than employers who do not conduct criminal background checks.¹⁰¹ Employers who forego criminal background checks in the hiring process are more prone to infer the likelihood of past criminal activity from traits such as race.¹⁰² These employers statistically discriminate against minorities by eliminating applicants based on perceived criminality.¹⁰³ By the EEOC imposing such a high standard for an employer to defend its use of criminal background checks and thereby curtailing their use, the very people whom the EEOC intend to benefit will be harmed.¹⁰⁴

The evidence that more minorities are hired when employers conduct criminal background checks caught the attention of members of the U.S. Commission on Civil Rights.¹⁰⁵ In their recent brief *amici curiae* submitted to the Supreme Court of the United States,¹⁰⁶ the *amici* articulated, “[I]f the [Guidance] discourages some employers from checking the criminal background of job applicants out of fear of liability, some will almost certainly shy away from hiring African-American or Hispanic males in the (not necessarily unfounded) belief that members of these

¹⁰⁰ Harry J. Holzer, Steven Raphael, & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451 (2006). The survey examined answers to survey questions provided by over 3,000 hiring managers from employers in Atlanta, Boston, Detroit, and Los Angeles during the early 1990s. *Id.* at 463. It found that employers who conduct criminal background checks are more likely to have recently hired a black applicant than employers who do not conduct these checks. *Id.* at 465. Highly significant, the employers who were unwilling to hire applicants with a criminal history but conducted a criminal background check, were almost 11% more likely to have recently hired a black applicant than an employer who did not conduct such a check. *Id.*

¹⁰¹ *Id.* at 451. “This positive association remains even after adjusting for an establishment’s spatial proximity to black residential areas and for the proportion of applications that come from African Americans.” *Id.* at 473.

¹⁰² *Id.* at 452.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 475.

¹⁰⁵ Gail Heriot, Peter Kirsanow, and Todd Gaziano (“Amici”) are three members of the eight-member U.S. Commission on Civil Rights. *Amici Curiae*, *supra* note 19, at 1. Note that the submission was filed in the Amici’s capacity as private citizens and not on the U.S. Commission on Civil Rights’ behalf. One cannot escape, however, the irony in three members of the U.S. Commission on Civil Rights, often referred to as the “Civil Rights Watchdog” and largely responsible for the change in public opinion on issues of equality (WIKIPEDIA, http://en.wikipedia.org/wiki/United_States_Commission_on_Civil_Rights (last visited Sept. 23, 2014)), advocating against the “lack of wisdom” expressed in the EEOC Guidance. *Amici Curiae*, *supra* note 19, at 1.

¹⁰⁶ The brief was submitted in a disparate impact claim not under Title VII but the Fair Housing Act. To make their argument, the Amici analogized the use of criminal background checks in employment decisions to the fair housing context.

groups are somewhat more likely to have criminal records than white or Asian American male applicants. Put differently, the EEOC's attempt to prevent the 'disparate impact effect' creates an incentive for a 'real discrimination effect.'"¹⁰⁷

IV. PROPOSED SOLUTION

Reintegration of ex-offenders into the workforce is undoubtedly an important societal interest. In pursuing this collective goal, the EEOC should institute a solution that removes the adverse impact of criminal background checks on employment opportunities of minorities while not placing the impractical burdens on employers of complying with a highly subjective individualized assessment. One such solution would be to place the responsibility of proving "Business Fitness" on the EEOC and the applicant by requiring an ex-offender applicant to produce an EEOC-sanctioned 'Certificate of Business Fitness.'

A. Implementing a Comprehensive Certification Program to Show "Business Fitness"

New York offers the oldest and most robust model of a state rehabilitation certificate program.¹⁰⁸ New York's approach to governing employer use of criminal background checks is an amalgam of both the Wisconsin specific-factor test and the ADA direct threat standard, analyzed above, that most closely resembles the EEOC's 2012 Guidance. By statute, New York prohibits an employer from denying employment opportunities to individuals previously convicted of a criminal offense.¹⁰⁹ An exception exists whereby an employer can lawfully exclude an applicant if there is either a direct relationship between that offense and the specific

¹⁰⁷ Amici Curiae, *supra* note 19, at 24. Amici offer a hypothetical that illustrates how the EEOC Guidance has the practical effect of accomplishing precisely the opposite of what it intended:

Suppose, for example, an employer regularly hires young, unskilled, high school dropouts as packers for his moving van business. Given the business location's demographics, this yields a labor pool that is disproportionately African American and Hispanic, but not overwhelmingly so. Until his lawyer instructed him that the requirement of "individualized assessments" made excluding applicants with criminal records too risky, he had been doing criminal background checks on all applicants and declining to hire most of those with a record. But after he stopped conducting those checks, he hired a young, white 19-year-old who ended up stealing from one of the employer's customers. Another recent hire turned out to have a serious drug problem. The employer does not know it, but criminal background checks would have identified these employees as risky. All the employer knows is that he is not satisfied with the employees he has been getting lately, so he decides to convert the full-time jobs that come open into part-time jobs and to advertise in the campus newspaper at a nearby highly competitive liberal arts college. He figures (rightly or wrongly) that the students there will likely be more trustworthy than the pool he had been hiring from. Given the demographics of the school, this yields an overall labor pool that has proportionately fewer minorities.

Id. at 25-26.

¹⁰⁸ Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 715 (2012).

¹⁰⁹ N.Y. CORRECT. LAW § 752 (McKinney 2009).

employment sought, or the granting of employment would pose an unreasonable risk to the safety or welfare of others.¹¹⁰ Unlike agency-imposed requirements, the New York legislature mandates specific factors an employer must consider concerning an applicant's previous criminal conviction before excluding him from employment.¹¹¹ The enumerated factors are similar to those prescribed in the EEOC's individualized assessment. The New York statute goes further, however, and requires that an employer "shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein."¹¹²

The EEOC should discard its 2012 Guidance and in its stead adopt a certificate program that carries with it a presumption of fitness for employment.¹¹³ An EEOC-administered certificate program would eliminate the discriminatory effect of criminal background checks on Hispanics and blacks,¹¹⁴ while also removing the

¹¹⁰ *Id.*

¹¹¹ N.Y. CORRECT. LAW § 753 (McKinney 2009).

1. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider the following factors:
 - a. The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
 - b. The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
 - c. The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
 - d. The time which has elapsed since the occurrence of the criminal offense or offenses.
 - e. The age of the person at the time of occurrence of the criminal offense or offenses.
 - f. The seriousness of the offense or offenses.
 - g. Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
 - h. The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

Id.

¹¹² *Id.*

¹¹³ The presumption of rehabilitation, which is a hallmark of the New York approach, provides ex-offender applicants with a mechanism to enforce relief sought by obtaining the certificate. Other states with certificate programs do not similarly render them presumptive of rehabilitation and therefore the civil barriers created by a past criminal conviction aren't removed with the same legal force. Radice, *supra* note 108, at 751.

¹¹⁴ *But see* Michael H. Jagunic, *The Unified "Sealed" Theory: Updating Ohio's Record-Sealing Statute for the Twenty-First Century*, 59 CLEV. ST. L. REV. 161, 178 (2011) (advocating for record-sealing as effective way to increase ex-offender's chances of re-employment and arguing that certificates of rehabilitation do little to change prejudices that

impractical burden placed on non-expert employers by the current, subjective individualized assessment. While full consideration of the requisite features of a successful certificate program is outside the scope of this particular article, highlighting its basic function while also recognizing some of the practical hurdles will illustrate the overall benefit of this suggested approach.

1. “Business Fitness” Certificates Correct the Necessarily Subjective Nature of the Individualized Assessment

The EEOC should work with state and federal departments of corrections to develop a robust certification program. While maintaining objectivity is an inherent problem with the individualized assessment as it is currently imposed, a certificate program will arguably inject greater objectivity, which is necessary to provide for nondiscriminatory consideration of an applicant’s past criminal record. Because of their expertise and access to information, state and federal corrections departments are much better-equipped than employers to gauge the rehabilitation and any potential risks posed by ex-offenders seeking re-entry into the workplace.

Corrections departments have developed risk assessment tools designed to make “more rational and accurate” recidivism predictions.¹¹⁵ Unlike employers, corrections departments have the expertise to modify assessments and develop more accurate and dynamic methods to link recidivism to employment in specific positions- an impossible task for employers.¹¹⁶ Additionally, corrections departments have access to a much broader range of information than employers, including educational and mental health data, statements of third parties, and information about the social background of the ex-offender.¹¹⁷ Access to this information permits corrections departments to take into account not only a greater amount of information than could likely be obtained by an employer, but also unquestionably more accurate information,¹¹⁸ thus creating an individualized assessment far more comprehensive than the one currently in force under the EEOC Guidance.

accompany a criminal conviction during the hiring process); *contra* Radice, *supra* note 108, at 747-50 (maintaining that pardons and expungements are politically unattractive alternatives compared to certificates of rehabilitation which are more politically endorsed because they removed civil barriers without dangerously erasing one’s criminal past).

¹¹⁵ Williams, *supra* note 85, at 527-28 (quoting JOAN PETERSILIA, WHEN PRISONERS COME HOME 71 (2003)). Corrections departments have specifically developed a factor-scoring system which provides a reliable means of differentiating between high- and low-risk offenders. *Id.*

¹¹⁶ *Id.* at 525.

¹¹⁷ *Id.* at 529.

¹¹⁸ While not discussed in this article, inaccurate criminal reporting has gained much attention. See generally Persis S. Yu and Sharon M. Dietrich, *Broken Records: How Errors By Criminal Background Checking Companies Harm Workers and Businesses*, NAT’L CONSUMER LAW CENTER (Apr. 2012), <http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf> (advocating for the “Wild West” of employment screening to be reined in because background screening mistakes are greatly affecting applicants’ abilities to gain employment).

2. Practical Hurdles to a Meaningful Certification Program- Efficiency and Access

Efficiency in the hiring process is often just as critical to applicants as it is to employers. One practical obstacle of a successful certificate program is the efficiency by which certificates are issued. Administrative delays are the most fundamental hurdles faced in New York's certificate program with issuing decisions ranging anywhere from one to five years.¹¹⁹ Overly lengthy waiting periods would diminish the very purpose of the EEOC's goal to reintegrate ex-offenders into the workforce.¹²⁰ Therefore a successful certificate program would require a commitment of resources to ensure adequate staffing and procedures amenable to the thorough, yet expedient, issuing of certificates to ex-offenders seeking employment.

Another practical consideration of a successful certificate program is accessibility to the certificates. Unawareness of the availability of certificates of rehabilitation amongst ex-offenders has been problematic in the states that have instituted certificate programs. From 1995 to 2005, for example, New York issued an average of only 261 certificates per year.¹²¹ After an effort to increase awareness by incorporating certificate eligibility into the parole process, the issuance of New York certificates jumped to an average of 2,040 per year between 2007 and 2010.¹²² For reintegration to be realized, the EEOC will need to provide a mechanism to make ex-offender applicants aware of this remedy so certificates eventually become as commonplace as the employment application itself.

V. CONCLUSION

High U.S. incarceration rates, specifically among minorities, are a proven fact and unquestionably present an important societal concern as approximately 700,000 ex-offenders are being reintegrated into society every year.¹²³ The EEOC, however, has improperly tasked employers with the Herculean task of providing both a safe work environment and advancing the reintegration of ex-offenders into the workforce. The highly subjective individualized assessment imposed by the 2012 EEOC Guidance places an impractical burden on non-expert employers to properly balance these interests. Moreover, employers' reliance on criminal background checks grew out of a risk for negligent hiring liability. The risk of such liability is increased when employers perform individualized assessments. Finally, the practical effect of the onerous individualized assessment will be that fewer employers will rely on background checks in the hiring process.

Fewer background checks could translate into fewer employment opportunities for minorities because of perceived biases of criminality. For all of these reasons, the 2012 EEOC Guidance and its individualized assessment should not be given deference by the courts. Instead, an EEOC-administered "Business Fitness" certificate program is the proper solution. A certificate program provides employers

¹¹⁹ Radice, *supra* note 108, at 761-62.

¹²⁰ ENFORCEMENT GUIDANCE, *supra* note 3, at 4.

¹²¹ Michael Lorden, *Removing Roadblocks: Certificates of Good Conduct and Relief From Disabilities*, 18 PUB. INT. L. REP. 107, 109-10 (2013).

¹²² *Id.*

¹²³ E. Ann Carson and William J. Sabol, *Prisoners in 2011*, U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS 1 (Dec. 2012), <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

an objective measure of fitness for employment and a formal acknowledgment that an applicant should not be denied employment just because of his criminal past. For “Business Fitness” certificates to be a meaningful solution, however, the EEOC, employers, and applicants must embrace the program as an integral part of the modern-day hiring process.