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Criminal Records, Collateral Consequences, and Employment: the FCRA and Title VII in Discrimination Against Persons with Criminal Records

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ABSTRACT

Arrests and criminal convictions lead to many more consequences than fines, jail time, or rehabilitation programs. Arrests and criminal charges produce records that can haunt a person for a lifetime. More and more, individuals experience these negative consequences as the US criminal justice system continues to grow. This article discusses the current problem with the misuse of criminal records in hiring and highlights two solutions under federal law: Title VII of the Civil Rights Act (Title VII) and the Fair Credit Reporting Act (FCRA). Section I briefly reviews the consequences of a criminal record in the United States and explains why the consequences are, in most instances, overly punitive. Section II provides an overview of how the law currently provides relief, focusing on the FCRA and Title VII. Section III reviews the relief and limitations of the FCRA. Section IV discusses how Title VII jurisprudence has evolved to handle the issue. Finally, Section V provides suggestions for further improvement of Title VII enforcement.

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I. COLLATERAL CONSEQUENCES: THE STIGMA OF A CRIMINAL OR ARREST RECORD

A. History

The United States has the highest incarceration rate in the world, incarcerating its residents at a rate four to seven times higher than other industrialized nations.[1] This level of incarceration is relatively new: over the past 40 years, the number of people in the criminal justice system has quadrupled nationally.[2] In 1980, fewer than two million people were under some form of correctional control, but today the national criminal justice system now comprises over seven million men and women.[3] More than 3.2 percent of the US population is under correctional control.[4]

Increased crime rates do not account for this large and steady growth.[5] Rather, decades of "tough on crime" policy agendas that focus on increasing penalties for non-violent drug crimes have led to laws criminalizing more behavior, increasing punishment, and creating more barriers for those transitioning from the correction system back into society.[6] Forty years of tough on crime policies are responsible for one in

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[1] Christopher Hartney, *US Rates of Incarceration: A Global Perspective*, NAT'L COUNCIL ON CRIME AND DELINQUENCY, 2 (Nov. 2006), *available at* http://www.nccdglobal.org/sites/default/files/publication_pdf/factsheet-us-incarceration.pdf.

[2] *1 in 31: The Long Reach of American Corrections Minnesota*, THE PEW, *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_factsheet_MN.pdf. (Minnesota increasing from 1 in 98 to 1 in 26 in the time between 1982 to 2007); *See also* 1 in 31 U.S. Adults are Behind Bars, On Parole or Probation, THE PEW, (Mar. 2, 2009), *available at* http://www.pewtrusts.org/news_room_detail.aspx?id=49696.

[3] *Id.*

[4] *Criminal Justice Fact Sheet*, NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), http://www.naacp.org/pages/criminal-justice-fact-sheet (last visited June 27, 2013).

[5] *Job Applicants with Criminal Records: What Every Employer Needs to Know*, COUNCIL ON CRIME & JUSTICE, http://www.crimeandjustice.org/pdfFiles/GAUGE%20Manual-12-17-10.pdf (last visited June 27, 2013).

[6] *Id.; See also* Jeff Severns Guntzel, *Aging Inmates, Racial Disproportionality, and Other Facts About Minnesota Prisons*, MINNPOST (Dec. 2, 2010), http://www.minnpost.com/intelligencer/2010/12/aging-inmates-racial-disproportionality-

every 12.5 working-age Americans, or 12 million individuals, having felony records.[7] If you factor misdemeanor as well as felony records, the number of those with criminal records may be as high as 30 percent of individuals.[8] This rate of punishment is unprecedented in American history; because of this, employers should change their screening processes rather than contribute to the culture of punishment.[9] Further, persons with criminal records have skills, training, and other attributes employers need.[10]

B. Collateral Consequences from Criminal Records Place Substantial Burdens and Complications on Applicants, Employers, and Society

Criminal records can create barriers to securing jobs and housing. These barriers are legal sanctions referred to as collateral sanctions or collateral consequences.[11] What once required a visit to the local police station or courthouse is now accessed with a few simple keystrokes; the public availability of records has not caught up with realities of the Internet age.[12] The use of criminal background checks in making hiring decisions has

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and-other-facts-about-minnesota-prison (discussing tough on crime policy as reason why number of older inmates is increasing and charting increase in correctional control); *see also* Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 255 (2002).

[7] *C.f.* Nat'l Fund for Workforce Solutions, Limitations of Criminal Record Information 1 (2010), *available at* http://www.jff.org/sites/default/files/NFWS_LimitationsCriminal Record_062210.pdf (citing Devah Pager, *The Mark of a Criminal Record*, 108 A.J.S. 937, 938 (2003)).

[8] *Written Testimony for Amy Solomon Senior Advisor*, n.7, U.S. EQUAL EMP'T OPPORTUNITY COMM'N MEETINGS (July 26, 2011) *http://www.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm* ("A previous DOJ report stated that 30 percent of the Nation's adult population has a criminal record on file with the states.").

[9] COUNCIL ON CRIME & JUSTICE, *supra* note 5, at 2.

[10] *See infra* Part I.B.2.

[11] Collateral consequences include collateral sanctions, but also includes the negative impact of a criminal record due to individual policies outside of legal regulation. *See National Inventory of the Collateral Consequences of Conviction*, AM. BAR ASS'N, http://www.abacollateralconsequences.org/ (last visited July 17, 2013).

[12] Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment* 1 (2011), *available at* http://nelp.3cdn.net/c1696a4161be2c85dd_t0m62vj76.pdf.

greatly increased over the last decade.[13] However, obtaining an accurate and complete criminal records report is not as easy as data providers advertise.[14] Further, without understanding the complex nature of criminal proceedings, even accurate criminal records reports unnecessarily punish individuals with records and impose unnecessary costs on employers and society.[15]

1. Applicants with Criminal Records Suffer Tremendous Hardships Finding Employment

As of late 2012, the American Bar Association has catalogued over 38,000 statutes that impose collateral consequences on people convicted of crimes.[16] These statutes create barriers to opportunities such as housing,[17] education,[18] and voting.[19] Over half of these laws involve the denial of employment opportunities.[20]

Inability to secure employment significantly increases the chances an individual with a criminal record will commit another crime.[21] Despite this

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[13] *Id*.

[14] *See Criminal Background Checks for Employment Purposes*, NAT'L ASS'N OF PROF'L BACKGROUND SCREENERS, (2005), *available at* http://www.napbs.com/files/public/Learn_More/White_Papers/CriminalBackgroundChecks.pdf (the process of obtaining a proper background check is fraught with difficulties that vary from state to state and even county to county).

[15] *See infra* Part I.B.1.

[16] Rabiah Alicia Burks, *Laws Keep Ex-Offenders from Finding Work, Experts Say*, A.B.A. NEWS SERV. (July 26, 2011), http://www.abanow.org/2011/07/laws-keep-ex-offenders-from-finding-work-experts-say/.

[17] *See, e.g.*, Fla. Stat. § 723.061.

[18] *See, e.g.*, 20 U.S.C. § 1091(r)(1).

[19] *See, e.g.*, Va. Code Ann. § 24.2-101: 737.

[20] Rabiah Alicia Burks, *Laws Keep Ex-Offenders from Finding Work, Experts Say*, A.B.A. NEWS SERV. (July 26, 2011), http://www.abanow.org/2011/07/laws-keep-ex-offenders-from-finding-work-experts-say/ ("The most current data shows that, while there are many barriers people face as a result of their records, 84 percent of those are job-related.").

[21] John H. Laub & Robert J. Sampson, Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70 (2003); Xia Wang, et. al., *Race-Specific Employment Contexts and Recidivism*, 48 CRIMINOLOGY 1171 (2010) (finding that Blacks released into an area with high Black unemployment significantly increased the likelihood of recidivism).

fact, many employers discourage applicants with criminal records from applying for jobs by stating in recruitment postings that a clean record is required to apply.[22] Even when employers consider applicants with criminal records, they often reject those individuals when they discover the record.[23]

In a 2012 poll, the Society for Human Resource Management found that 87 percent of employers conduct criminal background checks on all, or selected, job applicants.[24] A copy of an individual's criminal record is easy to acquire, but employers can easily misread these records because criminal background reports require some legal knowledge to understand them. Employers may falsely assume that they are only viewing convictions displayed in the report.[25] Further, employers need to be aware that plea-bargaining, false convictions, and simple error may cause an individual's criminal record to convey a story that is worse than what actually happened.[26]

2. The Business Costs of Discrimination

a) Employers Miss Out on Incentives and Diversity by Not Hiring Persons with Records

Employers who deny applicants based on information in a criminal record may be missing out on significant benefits. For instance, the Work Opportunity Tax Credit (WOTC) provides tax incentives for employers who hire persons with felony records within one year from the date of conviction

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[22] Natividad Rodriguez & Emsellem, *supra* note 12, at 11.
[23] *See id.* at 9 (discussing employment practices of Accenture).
[24] *See Background Checking—The Use of Criminal Background Checks in Hiring Decisions,* SOC'Y FOR HUMAN RES. MGMT, (July 19, 2012), http://www.shrm.org/research/surveyfindings/articles/pages/criminalbackgroundcheck.aspx.
[25] Bookings and arrests appear in background checks. Chris Jay Hoofnagle, *Big Brother's Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C.J. INT'L L. & COM. REG. 595, 602 (2003).
[26] *See infra* Part III.C.1.

or release from prison.[27] This includes any individual who has been convicted of a felony.[28]

Additionally, refusing to hire persons with records contributes to low diversity within the workforce.[29] Racial diversity in the workforce is widely recognized as important to economic success because "diversity is associated with increased sales revenue, more customers, greater market share, and greater relative profits."[30] However, employers miss out on the benefits of having a racially diverse workforce by excluding people with criminal records from employment.

There is an undeniable disparate impact of the criminal justice system on communities of color. The per capita incarceration rate among Blacks is seven times greater than that of Whites.[31] One in three black men between the ages of 20 and 29 is under criminal justice supervision in prison or jail, or on probation or parole.[32] Latinos and other minority groups are also much more likely to have criminal records than Whites.[33] While 16.3 percent of the United States population is Latino, approximately 22.3 percent of the United States' prison population is Latino.[34]

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[27] U.S. Dep't of Labor Emp't and Training Admin., Employers: 8 Ways to Earn Income Tax Credits for Your Company 3 (2012), *available at* http://www.doleta.gov/business/incentives/opptax/PDF/wotc_fact_sheet_new.pdf.

[28] *Id*.

[29] *See infra* Part IV (discussing disparate impact of records screening on people of color).

[30] Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 Am. Soc. Rev. 208, 219 (2009).

[31] David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 Geo. L.J. 1059, 1074 (1999).

[32] *Id*.

[33] Ronald Barry Flowers, Minorities and Criminality 46 (1990).

[34] *Compare* U.S. Census Bureau, The Hispanic Population 2010 3 (2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf, *with* Guerino et al., Prisoners in 2010 26 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf.

b) Employers Sustain Significant Long-term Costs by Not Hiring Persons with Records

When employers reject applicants with records, employers must screen more applicants, which results in spending more resources on hiring and screening to find skilled job replacements. Additionally, when employers hire persons with records and then later perform background checks, the disqualified employees may be able to receive unemployment insurance.[35] These costs may not be necessary; one study conducted among the Johns Hopkins Hospital workforce found that employees with criminal records had higher retention rates than those without a record.[36] The study also found that those with records generally were not terminated for disciplinary problems.[37]

Employers must also be prepared to face a shrinking applicant pool, as the amount of skilled workers remains stagnant.[38] The number of skilled workers that are currently employed is also likely to decrease as a byproduct of the increasing retirement age during the "Silver Tsunami"—the growing population of individuals over age 65.[39]

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[35] Eligible workers that become unemployed through no fault of their own may be eligible for unemployment insurance. *See Unemployment Insurance (UI)*, US DEP'T OF LABOR, http://www.dol.gov/dol/topic/unemployment-insurance/ (last visited Mar. 25, 2014). *Cf. also Jeffrey Grogger,* The Effect of Arrests on the Employment and Earnings of Young Men, 110 Q. J. ECON. 51 (Using data from Unemployment Insurance claims to track the employment success of young men with arrest records).

[36] Pamela D. Paulk, *The Johns Hopkins Hospital Workforce Development: Creative Approaches to Fill Vacancies* 33-34, *available at* http://www.milwaha.org/PDFs/bach-session-2.pdf (last visited July 31, 2013).

[37] *Id*. at 34 ("Anecdotal observation – zero 'problematic' terminations were ex-offenders.").

[38] Governor's Workforce Dev. Council: Policy Solutions that work for Minnesota, All Hands on Deck (2011), *available at* http://www.gwdc.org/policy/all_hands_on_deck.html.

[39] *See, e.g.*, Martin Amis, *The Silver Tsunami*, The Economist, Feb. 4, 2010, *available at* http://www.economist.com/node/15450864.

As mentioned above, minority groups are disproportionately more likely than Whites to have a criminal record.[40] Accordingly, screening persons with records has a disproportionate impact on people of color. In some instances, this can lead to investigations or charges brought by the Equal Employment Opportunity Commission (EEOC) for unlawful discrimination and potential monetary liability.[41]

Such charges and litigation can be time consuming and very costly. For example, in early 2012, Pepsi Bottling Company in Minneapolis settled a lawsuit brought by the EEOC on behalf of 300 African-Americans who were rejected from employment due to Pepsi's policy of screening applicants for criminal records.[42] Pepsi rejected many applicants who had been arrested, even though those applicants were never convicted, and also rejected applicants convicted of minor offenses that were not job related.[43] Pepsi settled for $3.13 million and offers of job training.[44]

These costs may seem modest assuming that the employer is protecting itself from harm by refusing to hire an applicant who has committed a crime. However, criminal records are complex and often cannot reliably indicate that a particular person is any more of a threat than the average person.[45] Employers may also fear the risk of hiring a dangerous individual, which may result in liability for negligent hiring or negligent retention.[46]

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[40] *See supra* text accompanying notes 31-34.

[41] *See infra* Part IV. The EEOC enforces federal laws concerning discrimination in hiring. *See The Charge Handling Process*, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/employers/process.cfm (last visited July 31, 2013).

[42] Press Release, Pepsi to Pay $3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans, U.S. Equal Emp't Opportunity Comm'n (Jan. 11, 2012), http://www1.eeoc.gov/eeoc/news room/release/1-11-12a.cfm.

[43] *Id.*

[44] *Id.*

[45] *See infra* note 58 and accompanying text.

[46] Many states impose liability on employers for negligent hiring. Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Minn. Ct. App.1993) (discussing the standard for negligent hiring liability in Minnesota).

Protecting guests and staff is important, but this can be done without fear of tort liability even when hiring individuals with criminal records.[47]

3. The Social Costs of Discrimination

Discrimination against people with records hurts both employers and applicants, and society ends up paying the costs. As stated above, some studies have shown that the inability to secure housing and employment are strongly related to the chances of recidivism.[48] When people recommit crimes, it costs the state tremendously. An average adult prison or jail sentence can cost a state over $40,000.[49] Moreover, even if individuals are not recommitting offenses, failure to secure gainful employment because of a criminal record means that such individuals are not part of the tax base and are more likely to apply for public assistance.

B. Discrimination Against People with Records is Unfair and Unnecessary

Discrimination against persons with records is often based on unreliable information because records can be inaccurate. According to a 2006 report by the Department of Justice, as many as 50 percent of FBI records are incomplete or inaccurate.[50] Further, employers have several protections that can limit any damage incurred when an employee with a record commits a crime while employed.[51] Although, in most instances, these protections are unnecessary because after just a few years from the time of arrest the likelihood a person will recommit an offense declines sharply.[52]

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[47] *See infra* Part I.C.1.
[48] Laub & Sampson, *supra* note 21, at 70.
[49] *See Criminal Justice and Judiciary: How much does it cost to incarcerate an inmate?*, Legislative Analyst's Office, (2008), *available at* http://www.lao.ca.gov/laoapp/laomenus/sections/crim_justice/6_cj_inmatecost.aspx?catid=3.
[50] U.S. Attorney Gen., The Attorney General's Report on Criminal Background Checks 3 (2006), *available at* http://www.justice.gov/olp/ag_bgchecks_report.pdf.
[51] These include insurance bonds and limitations on negligent hiring and retention. *See infra* Part I.B.1.
[52] *See infra* Part I.B.2.

1. Employers Have Many Protections that Limit Potential Damage if a Person with a Record Commits a Crime

Employers can limit potential harm that could occur if a person with a criminal record is hired. Employers who hire persons with criminal records are eligible to receive insurance in the form of bonds, which an employer may cash in if the employee causes a loss to the employer.[53] These bonds cover losses including theft, forgery, larceny, embezzlement, and also liability for lawsuits such as negligent hiring and retention.[54]

a) Negligent Hiring and Retention Only Pertains to Some Jobs or Individuals with Very Violent Tendencies

Negligent hiring or retention means that an employer may be liable for any damage that results when he or she hires or retains an employee who causes injury to someone, and the employer should have known that the employee was likely to cause the harm.[55] However, negligent hiring and retention requires a level of negligence far beyond the opportunities that anti-discrimination laws require of employers. It is possible for employers to both shield themselves from liability and comply with anti-discrimination laws.

For example, in Minnesota, to be liable for this type of negligence: 1) the employer must owe a duty of care to an injured person; 2) the employer must breach the duty of care; and 3) the employer's action must have caused the injury.[56] The injury must also be actual or threatened physical injury.[57] An employer will only have a duty of care if he or she could have

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[53] *See* The Mclaughlin Company, *Program Background*, http://www.bonds4jobs.com/program-background.html (Jan. 9, 2014).
[54] *See* Taja-Nia Y. Henderson, *New Frontiers in Fair Lending: Confronting Lending Discrimination Against Ex-Offenders*, 80 N.Y.U. L. REV. 1237, 1271 n. 144 (2005).
[55] *See* Ryan D. Watstein, *Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects*, 61 FLA. L. REV. 581, 584-88 (2009).
[56] *See Yunker*, 496 N.W.2d at 422.
[57] Bruchas v. Preventive Care, Inc., 553 N.W.2d 440, 443 (Minn. Ct. App.1996).

foreseen that the person would be a threat to the public because of the circumstances of that person's employment.[58] This means that an employer knew of, or should have known, of an employee's potential to do harm to the public.[59] A felony, even for a violent crime, is not evidence that a person is a threat to public safety for negligent hiring unless the job would allow the applicant access to people in vulnerable situations.[60] Where the employment involves limited interaction with the public, a prior felony conviction will not make an employer liable for negligent hiring or retention. In many instances, fears of negligent hiring and retention liability are not proportionate to the likelihood of occurrence.

2. Persons with Records Less Likely to Commit Theft than the Average Person

Recent studies have suggested that after a few years, a person with a criminal record is less likely than persons without a criminal record to commit crimes.[61] A National Institute of Justice study found that, depending on the crime and time since the last offense, the likelihood of committing another crime falls below that of the general population in a few years. For example, 3.8 years after a first arrest, the probability a person will commit burglary begins to fall below the probability that a member of the general population will commit burglary.[62]

However, it is also important to give those who have immediately been released an opportunity to support themselves and their families, lest they

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[58] *Id*.
[59] *Yunker*, 496 N.W.2d at 423 (quoting Garcia v. Duffy, 492 So.2d 435, 438–39 (Fla. Dist. Ct. App. 1986)).
[60] *See id*. (finding that a job as a maintenance worker would not foreseeably create a danger to the public).
[61] Alfred Blumstein & Kiminori Nakamura, *'Redemption' in an Era of Widespread Criminal Background Checks*, NIJ JOURNAL 263 (2009).
[62] *Id*.

become a drain on society. Employment lowers recidivism and makes society a safer place.[63]

II. HOW THE LAW PROVIDES RELIEF: EXPUNGEMENTS, THE FCRA, AND TITLE VII

In some situations and in some jurisdictions, individuals with criminal records are eligible to have their government records sealed or expunged.[64] This is an imperfect solution because private data miners might retain records even if the government records are sealed.[65] However, the FCRA can assist when expungements fail to provide a meaningful remedy.[66] The FCRA allows persons the opportunity to respond to employers if rejected based in whole or in part on a criminal record, and also allows them to correct errors in privately maintained databases.[67] Title VII provides further relief by preventing employers from using records to exclude protected races from discrimination.[68]

III. THE FCRA

The FCRA is a federal statute, which was originally enacted in 1970 and is enforced by the Federal Trade Commission (FTC).[69] The law's goal is to

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[63] Wang, *supra* note 21 (finding that blacks released into an area with high black unemployment significantly increased the likelihood of recidivism).
[64] *See* Lahny Silva, *Clean Slate: Expanding Expungements And Pardons For Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155 (2010).
[65] Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. TIMES, Oct. 17, 2006, at http://www.nytimes.com/2006/10/17/us/17expunge.html?pagewanted=all&_r=0
[66] *See infra* Part III.
[67] *Disputing Errors on Credit Reports*, FED. TRADE COMM'N, (Mar. 2014), http://www.consumer.ftc.gov/articles/0151-disputing-errors-credit-reports.
[68] *See infra* Part IV.
[69] See *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations,* FED. TRADE COMM'N (July 20, 2011), http://www.ftc.gov/opa/2011/07/fcra.shtm [hereinafter FTC Staff Report] for more information on the FTC's role in enforcing the FCRA.

protect consumers[70] through improving the accuracy of consumer reports.[71] This is done through regulating the collection and dissemination of consumer reports obtained through background checks conducted by Consumer Reporting Agencies (CRAs).[72] CRAs consist of private companies who gather information from government databases and sell the information to employers and others.[73] Understanding the FCRA[74] is imperative for employers who conduct background checks on applicants.

Most people who are familiar with consumer reports know of them through checking personal credit history and credit scores. But these reports may also contain criminal background information, such as conviction records and, in some cases, even records of arrests that did not lead to

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[70] In enacting the FCRA, Congress intended "to promote efficiency in the Nation's banking system and to protect consumer privacy." TRW Inc. v. Andrews, 534 U.S. 19, 22 (2001).

[71] The FCRA defines "consumer report" as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" used to make eligibility determinations concerning credit, insurance, employment, etc. The Fair Credit Reporting Act § 603, 15 U.S.C. § 1681(a) (2006).

[72] *See* § 602 of FCRA:

> It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

Id.

[73] CRA is "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. . . ." § 603(f), 15 U.S.C. § 1681(a) (2006). Some well-known CRAs include LexisNexis, HireRight Solutions, and USIS Commercial Services. CRAs may furnish consumer reports to anyone who intends to use the information for employment purposes. § 604(a), 15 U.S.C. § 1681(b) (2006).

[74] 15 U.S.C. § 1681 (2006). The FCRA's provisions are sections 601–29 of the Consumer Credit Protection Act and are commonly cited by those section numbers. This paper will cite the FCRA's provisions according to those section numbers.

convictions.[75] Some of the information that may appear in a consumer report includes criminal records, civil records, and driving records.[76]

Employers and landlords are among the main groups that utilize CRAs to compile consumer reports in order to run background checks on individuals.[77] Employers are increasingly utilizing CRAs to conduct background checks on applicants and obtain consumer reports.[78] Recent surveys indicate that 87 percent of employers conduct criminal background checks on all, or selected, job applicants.[79] Factors such as negligent hiring liability and technological advances are among those contributing to the increasing number of employers conducting background checks.[80]

The FCRA regulates CRAs, those who receive information from CRAs (such as employers), and also those who provide information to CRAs.[81] Importantly, because the FCRA only governs background checks conducted

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[75] While most adverse information, such as arrest records, must be removed from an individual's consumer report after seven years, conviction records may remain on the report indefinitely. § 605(a)(5). 15 U.S.C. § 1681(c) (2006).

[76] "Information included in consumer reports generally may include consumers' credit history and payment patterns, as well as demographic and identifying information and public record information (e.g., arrests, judgments, and bankruptcies)." FTC Staff Report, *supra* note 69, at 1. A consumer report is broader in scope than a credit report. *Id.* (explaining that a consumer report contains credit history as well as other details such as demographic information and criminal history).

[77] Under the FCRA, a CRA may only furnish a report to those who have a permissible purpose for the information. § 604(a); 15 U.S.C. § 1681(a) (2006). Using the information within a consumer report for employment purposes is a permissible purpose. § 604(a)(3)(B); 15 U.S.C. § 1681(b)(a)(3)(B) (2006).

[78] *See* Blumstein & Nakamura, *supra* note 57.

[79] *See Background Checking, supra* note 24.

[80] *See, e.g.*, Blumstein & Nakamura, *supra* note 61 (noting that growing concerns about employer liability and advances in information technology contribute to the high number of employers who conduct background checks); Ryan D. Watstein, *Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects*, 61 FLA. L. REV. 581 (2009) (describing the "criminal record revolution").

[81] This paper is focused mainly on the sections of the statute regulating employers, as opposed to the regulations controlling CRAs (*see* §§ 607, 15 U.S.C. § 1681(e) (2006); 611, 15 U.S.C. § 1681(i) (2006)) and furnishers of information (*see* § 623; 15 U.S.C. § 1681(s-2) (2006)).

utilizing CRAs, it does not apply when an employer checks public records on his or her own. However, this is often not the case because most employers utilize third parties to conduct background checks.[82] Because the FCRA regulates multiple entities, knowing what is required to comply with the law can be difficult. Luckily, the requirements employers must fulfill to be in full compliance are relatively straightforward.

A. Employer Requirements

Under the FCRA, when an employer utilizes a CRA to conduct a background check on an applicant, the employer will be subject to several requirements: (1) notice and authorization; (2) pre-adverse action procedures; and (3) adverse action procedures. Below are more details for each requirement.[83] These requirements are not too burdensome and can prevent employers from facing major legal issues down the road.[84]

1. Notice and Authorization

Before an employer may request a background check on an applicant or a current employee,[85] the applicant or current employee must be informed in writing of the employer's intent to do so.[86] The disclosure needs to be "clear and conspicuous" and must be a separate document—not within another

[82] Natividad Rodriguez & Emsellem, *supra* note 12, at 1 (noting the expansion of the private background check industry).

[83] See Les Rosen, *Complying with the Fair Credit Reporting Act (FCRA) in Four Easy Steps*, EMP'T SCREENING RES., http://www.esrcheck.com/articles/Complying-with-the-Fair-Credit-Reporting-Act.php (last visited July 8, 2013) for more information on employer compliance with the FCRA in a few simple steps; *See also Using Consumer Reports: What Employers Need to Know*, Bureau of Consumer Protection, http://business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know (last visited July 8, 2013).

[84] *See infra* Part III.C.

[85] Though this paper focuses on applicants, these also apply when a background check is conducted on a current employee. § 603(h); 15 U.S.C. § 1681(h) (2006).

[86] §§ 604; 15 U.S.C. § 1681(b) (2006), 606; 15 U.S.C. § 1681(d) (2006).

document, such as an application.[87] The authorization form may only contain minor additional information and may not include "extraneous or contradictory information" such as a request for waiver of rights under the FCRA.[88] In order for the background check process to continue, the applicant must give authorization, which may be given electronically.[89] The employer must also certify to the CRA that it has made this disclosure, received authorization, and that the employer "will not use the report to violate employment opportunity laws."[90]

2. Pre-Adverse Action Procedures

If an employer considers taking "adverse action"[91] against an applicant based on the information in the CRA-prepared criminal background report, certain procedures must be followed under the FCRA.[92] Before adverse action may be taken, the applicant must be given a copy of the background report and the document "A Summary of Your Rights Under the Fair Credit

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[87] The FCRA requires that "a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes. . . ." § 604(b)(2)(A)(i); 15 U.S.C. § 1681(b)(b)(2)(A)(i) (2006).

[88] FTC Staff Report, *supra* note 69, at 51.

[89] If the applicant does not give authorization, no background check can be conducted, but the applicant may also be disqualified from employment and this will not create a basis for employer liability under the FCRA since employers are entitled and allowed to conduct background checks on applicants. *See* § 604(b)(2)(B); 15 U.S.C. § 1681(b)(b)(2)(B) (2006).

[90] § 604(b)(1); 15 U.S.C. § 1681(b)(b)(1) (2006); *see also* FTC Staff Report, *supra* note 69, at 50.

[91] Examples of adverse action include denying employment, denying promotion, or termination. § 603(k); 15 U.S.C. § 1681(a)(k) (2006).

[92] Other state and federal fair hiring laws are also implicated if an employer decides not to hire an applicant based on information within a criminal background report. *See infra* Part III.B. Some critics have argued that the FCRA should be amended to require employers to give job applicants the results of background checks in every instance, not just when the report is used as a basis for making an adverse action.

Reporting Act."[93] This document explains what the FCRA is and informs the individual of certain rights, such as the right to see the consumer report and to dispute any inaccurate information.[94]

Under the FCRA, there is no specific time period that an employer must wait after providing these pre-adverse action materials before taking adverse action against the applicant.[95] The FTC has stated that the amount of time must be "reasonable" and that "the minimum length will vary depending on the particular circumstances involved."[96]

3. Adverse Action Procedures

After adverse action is taken, additional information must be provided to the applicant.[97] This information includes notice that adverse action has been taken, contact information about the CRA that supplied the report, a statement that the CRA did not make the decision, and a notice of the individual's right to dispute the information in the report.[98]

Even though some of this information may seem repetitive to the materials furnished during the pre-adverse action procedure, it is necessary that these two steps are separate and that different documents are provided to the applicant.[99] A primary purpose behind the FCRA is to give applicants

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[93] The CRA provides this document to employers with the consumer report, and employers must give it—along with a copy of the report—to the applicant. § 604; 15 U.S.C. § 1681(b) (2006). *See A Summary of Your Rights Under the Fair Credit Reporting* Act, FED. TRADE COMM'N, http://www.consumer.ftc.gov/sites/default/files/articles/pdf/pdf-0096-fair-credit-reporting-act.pdf (last visited Mar. 25, 2014) (displaying a copy of this document).

[94] *See A Summary of Your Rights Under the Fair Credit Reporting Act*, Fed. Trade Comm'n, *available at* http://www.ftc.gov/os/2004/07/040709fcraappxf.pdf.

[95] FTC Staff Report, *supra* note 69, at 52.

[96] *Id.* For a more detailed discussion on the interpretation of a "reasonable" time period see *infra* Part III.D.2.

[97] § 615; 15 U.S.C. § 1681(m) (2006).

[98] *Id.*

[99] FTC Staff Report, *supra* note 69, at 52; *see also* FTC Informal Staff Opinion Letter from the FTC to Eric J. Weisberg, FED. TRADE COMM'N (June 27, 1997), http://www.ftc.gov/os/statutes/fcra/weisberg.shtm. "Although there is some duplication of disclosures required by those two subsections . . . the duplication may be (at least in

a chance to review and dispute information within CRA-prepared reports. Thus, there must be a window of time for applicants to do so, and the steps employers take before and after this window must be distinct. Complying with the FCRA and following the three-step process outlined above is in the best interest of employers.[100] It is imperative that employers follow the FCRA's requirements to avoid litigation—especially as class action lawsuits under the FCRA have been increasing in recent years.

In addition to the FCRA, employers must also keep in mind other laws when making hiring decisions. The FCRA is only one piece of the fair hiring puzzle. While EEOC guidelines, and Title VII, regulates *when* an employer may refuse to hire an applicant based on information within a criminal record, the FCRA regulates the process of conducting a background check. In addition, state regulatory laws that are similar to the FCRA also apply when an employer utilizes a third-party to conduct a background check.[101]

B. Employer Liability for FCRA Violations

Within recent years, there has been a noticeable increase of lawsuits filed for employer violations of the FCRA.[102] Many costly class actions[103] are

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part) intended by the drafters . . . . The dispute rights are among the most important the FCRA gives consumers; thus, the Section 615(a) notice highlights these rights, even though they will have already been included in a general summary of consumer rights that the consumer received pursuant to Section 604(b)."*Id.*

[100] Natividad Rodriguez & Emsellem, *supra* note 12, at 24.

[101] *See, e.g.,* MINN. STAT. § 332.70 (2010).

[102] A few reasons for this are that there has been a decrease in plaintiffs' claims in other areas of the law and lawyers are becoming more familiar with FCRA requirements. Craig Bertschi, *FCRA Class Action Lawsuits: The Sharks are Circling*, NAT'L ASS'N OF PROF'L BACKGROUND SCREENERS JOURNAL, 10, (Jan.-Feb. 2011) *available at* http://www.kilpatricktownsend.com/~/media/Files/articles/2011/CBertschi%20FCRA%20Class%20Action%20Lawsuits%20-%20The%20Sharks%20Are%20Circling.ashx; *see also* Natividad Rodriguez & Emsellem, *supra* note 12, at 9–11 (explaining that there has been a recent wave of impact litigation concerning civil rights and consumer protection).

[103] Class action suits are common in FCRA litigation because even in cases of willful violations of the FCRA, individual damages may not add up to a significant amount.

initiated for easily avoidable FCRA breaches, such as failure to obtain an applicant's permission to conduct a third-party background check. By complying with the FCRA, employers not only protect themselves from liability, but they are protecting an applicant's rights and creating a fair hiring environment.

Because many FCRA cases are settled, it can be difficult to identify binding legal standards to interpret ambiguous sections of the statute. Fortunately, the FTC has released staff opinion letters and reports that, while not binding, assist in interpreting the FCRA's provisions.[104] Additionally, the majority of FCRA cases involve similar types of employer violations, so companies can learn from the mistakes of others. What follows is a selection of recent FCRA cases discussing (1) common mistakes employers are making; (2) obtaining clear authorization to conduct a background check; and (3) damages for FCRA violations.

1. Common Employer Violations: *Hall v. Vitran Express*

Frequent FCRA violations on the part of employers involve the failure to follow the three-step process outlined above.[105] Employers commonly ignore one or more of these steps. *Hall v. Vitran Express, Inc*.[106] is illustrative. In this case, an employer failed to obtain permission from applicants to conduct background checks and subsequently failed to provide required documentation to applicants after the background checks were conducted.[107]

Bertschi, *supra* note 102, at 11. Additionally, if an employer violates the FCRA, it is often more than a single case of noncompliance. *Id.*

[104] Many courts have called these letters and staff reports persuasive. *See* FTC Staff Report, *supra* note 69, at 6. Developments in the law, such as the newly-granted regulatory responsibilities of the Consumer Financial Protection Bureau, may affect future FCRA enforcement. *See* Michael Ferachi et al., *Fair Credit Reporting Act Update*, 65 CONSUMER FIN. L. Q. REP. 34, 44 (2011).

[105] See *supra* Part III.A for an overview of the process.

[106] Hall v. Vitran Express, Inc., 2009 WL 3242051 (N.D. Ohio 2009) (order granting in part and denying in part Defendant's motion to dismiss).

[107] *Id.*

Plaintiff Thomas Hall applied for a commercial truck driving position with Defendant Vitran Express.[108] Vitran utilized a CRA, USIS Commercial Services, to conduct a criminal background check on Hall.[109] In violation of the FCRA, Vitran did not first obtain authorization from Hall for the background check.[110] The report from USIS erroneously indicated that Hall had 27 felony convictions, and Vitran decided not to hire Hall based on this information.[111] However, Vitran did not give Hall an adverse action report as mandated by the FCRA.[112] Additionally, Vitran never gave Hall a copy of the background check report; instead, he received a copy several weeks later from USIS Commercial Services.[113]

A class action suit was filed. Included in the class were other applicants about whom Vitran obtained consumer reports without providing written notice or obtaining authorization.[114] The plaintiffs alleged a "willful, wanton and reckless" violation of the FCRA.[115] Under a willful violation, plaintiffs may request both statutory and punitive damages.[116] This class

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[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 1. Even if the felony convictions within the report were accurate, Vitran still could have faced liability for FCRA noncompliance. "Employers must comply with the pre-adverse action disclosure requirement even where the information contained in the consumer report (such as a criminal record) would automatically disqualify the individual from employment or lead to an adverse employment action." FTC Staff Report, *supra* note 69, at 53. "Indeed, this is precisely the situation where it is important that the consumer be informed of the negative information in case the report is inaccurate or incomplete. If the report is in error, the employer may reconsider his or her tentative decision to take adverse action." Rosen, FTC Informal Staff Opinion Letter, Fed. Trade Comm'n, (June 9, 1998), http://www.ftc.gov/os/statutes/fcra/rosen.shtm.
[112] Hall v. Vitran Express, Inc., 2009 WL 3242051 (N.D. Ohio 2009).
[113] *Id.*
[114] *Id*.
[115] *Id.*
[116] *See infra* Part III.C.3.

action, resulting in a $2.6 million settlement, shows the importance of employer transparency when conducting background checks.[117]

2. Clearly and Conspicuously Obtaining Authorization to Conduct a Background Check

Some employers have obtained applicants' authorization for a background check, but the authorization did not meet FCRA standards of "clear and conspicuous disclosure" in writing. The FCRA mandates that this authorization not be within another document—the so-called "stand-alone" requirement.[118] Employers have violated this provision of the FCRA for including the disclosure within the employment application. For instance, in *Smith v. Capital One*,[119] Capitol One faced penalties under the FCRA for burying the authorization to conduct a background check within the employment application.

Another well-known employer also recently came into the spotlight for similarly violating the FCRA authorization provisions. In *Singleton v. Domino's Pizza*,[120] individuals who started working at Domino's were subsequently fired after their background checks came back.[121] The case is

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[117] Raymond J. Carey, *Secretly Conducting Criminal Background and Credit Checks of Prospective Employees Exposes Employers to Liability*, LABOR & EMP'T L. PERSPECTIVES (Apr. 21, 2011), http://www.laboremploymentperspectives.com/2011/04/21/secretly-conducting-criminal-background-and-credit-checks-of-prospective-employees-exposes-employers-to-liability/.

[118] §§ 604(2)(A)(i); 15 U.S.C. § 1681(b)(b)(2)(A)(i) (2006); 15 U.S.C. § 1681(d) (2006).

[119] Press Release, Nichols Kaster, PLLP Files a Class Action Lawsuit Against Capital One on Behalf of Employee for Its Unauthorized and Improper Use of Consumer Reports, PRWeb (Dec. 13, 2011), http://www.prweb.com/releases/2011/12/prweb9039707.htm. *See also* Len Rosen, *New Class Action Lawsuit Against Major Financial Institution for FCRA Violations Demonstrates Importance of Legal Compliance*, EMP'T SCREENING RES. (Dec. 15, 2011), http://www.esrcheck.com/wordpress/2011/12/15/new-class-action-lawsuit-against-major-financial-institution-for-fcra-violations-demonstrates-importance-of-legal-compliance/.

[120] Singleton v. Domino's Pizza, WL 245965 (D. Md. 2012).

[121] *See id.*

still pending and has survived a motion to dismiss.[122] The lawsuit also alleges that the plaintiffs were made to sign an unlawful release of liability.[123] Recent FTC opinion letters[124] have indicated that such a release of liability is not consistent with the FCRA because the disclosure is meant to "stand alone."

3. Damages for FCRA Noncompliance

Businesses may be liable for substantial damages when FCRA requirements are violated. The FCRA allows plaintiffs to receive damages for both willful [125] and negligent [126] noncompliance. Both types of noncompliance allow for recovery of attorney's fees.[127] In addition, the FTC may file civil actions in federal court and recover civil penalties up to $3,500 per violation.[128] Accordingly, employer violations of the FCRA can be extremely costly.

In *Bateman v. American Multi-Cinema*, the Ninth Circuit recently ruled that a FCRA suit could proceed even though the case "could result in

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[122] *See* Len Rosen, *Background Check Class Action Against Employer for Violations of the Fair Credit Reporting Act Survives Challenge*, Emp't Screening Res. (Jan. 30, 2012), http://www.esrcheck.com/wordpress/2012/01/30/background-check-class-action-against-employer-for-violations-of-the-fair-credit-reporting-act-survives-challenge/.

[123] The authorization stated: "I release, without reservation, you and any person or entity which provides information pursuant to this authorization, from any and all liabilities, claims or causes of action in regards to the information obtained from any and all of the above reference sources used. I acknowledge that this is a standalone consumer notification. . . ." *Singleton*, WL 245965 at *1.

[124] In one letter, the FTC indicated that such language would violate the FCRA because the form would not consist "solely" of the disclosure. *See* Hauxwell, FTC Informal Staff Opinion Letter, Fed. Trade Comm'n, (June 12, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/hauxwell.shtm. Another letter elaborated that authorization under the FCRA requires a form that is "not encumbered by any other information" so that consumers are not distracted. Brinckerhoff, FTC Informal Staff Opinion Letter, Fed. Trade Comm'n, (Sept. 9, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/leathers.shtm.

[125] § 616; 15 U.S.C. § 1681(n) (2006).

[126] § 617; 15 U.S.C. § 1681(o) (2006).

[127] §§ 616; 15 U.S.C. § 1681(n) (2006), 617; 15 U.S.C. § 1681(o) (2006).

[128] FTC Staff Report, *supra* note 69, at 4.

enormous liability completely out of proportion to any harm suffered by the plaintiff."[129] Another class action against First Group America,[130] a bus company, resulted in a $4.3 million settlement.[131] In that case, employers failed to obtain proper authorization from applicants and current employees to conduct background checks.[132] Had the company complied with the FCRA's procedures, it would have been able to avoid the multi-million dollar payout.

a) Willful Violations

Under a willful violation, plaintiffs may request both statutory[133] and punitive damages. Because plaintiffs may receive statutory damages for willful noncompliance, it is not necessary to prove actual harm.[134] The Supreme Court discussed willful noncompliance of the FCRA in *Safeco Insurance v. Burr*.[135] There, the Court held that willful violation of the FCRA includes not only knowingly breaking the law, but also reckless violations.[136] In *Safeco*, the Court determined that the insurance company's violation was not willful since the statute was less than clear and Safeco's interpretation was reasonable.[137] Today, there is much more guidance from the FTC in interpreting what the FCRA's provisions require.[138] Therefore, it

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[129] Bateman v. American Multi-Cinema, Inc., 623 F.3d 708, 711 (9th Cir. 2010).
[130] Two separate suits were filed against First Group subsidiaries First Student and First Transit. *See* Shawn Perry, *Bus Drivers File Class Action Suits Against First Group*, PR NEWSWIRE (Oct. 5, 2009), http://pressrelated.com/press-release-bus-drivers-file-class-action-suits-against-first-group.html.
[131] Les Rosen, *Class Action for Failure to Follow Fair Credit Reporting Act for Employment Screening Settles for $4.3 Million*, EMP'T SCREENING RES. (Mar. 18, 2011), http://www.esrcheck.com/wordpress/2011/03/18/class-action-for-failure-to-follow-fair-credit-reporting-act-for-employment-screening-settles-for-4-3-million/.
[132] *Id.*
[133] This includes either actual damages or damages in the amount of $100 to $1,000 per violation. § 616(a)(1)(A); 15 U.S.C. § 1681(n)(a)(1)(A) (2006).
[134] *See* § 616; 15 U.S.C. § 1681(n) (2006).
[135] Safeco Ins. Co. of America v. Burr, 551 U.S. 47, 60, 69 (2007).
[136] *Id.*
[137] *Id.* at 69–70.
[138] *E.g.*, FTC Staff Report, *supra* note 69.

is unlikely that an argument similar to that in *Safeco* would hold up in court today.

Relying on *Safeco's* interpretation of willful noncompliance with the FCRA, "courts have found assertions that a defendant repeatedly violated the FCRA sufficient to allege reckless—and, therefore, willful—misconduct."[139] "In addition, assertions that a defendant was aware of the FCRA, but failed to comply with its requirements, are sufficient to support an allegation of willfulness and to avoid dismissal." [140] Willful noncompliance with the FCRA may not be too difficult to prove. Indeed, many FCRA class actions allege willful violations and request statutory damages.[141]

b) Negligent Violations

Damages from negligent violations of the FCRA are limited to the actual harm sustained by a consumer.[142] In *Lagrassa v. Jack Gaughen, LLC*,[143] a FCRA claim was dismissed because the employer's violations were negligent, rather than willful, and the plaintiff had not experienced actual harm.[144] The plaintiff only alleged a single violation of the FCRA.[145] The employer in this case had a policy in place to comply with the FCRA, but inadvertently failed to obtain the proper authorization before the background check was conducted.

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[139] Singleton v. Domino's Pizza, WL 245965 at *4 (D. Md. 2012).
[140] *Id.*
[141] Bertschi, *supra* note 102, at 11 ("FCRA class action lawsuits are often litigated even though the plaintiff and members of the class were not injured in any way by the defendant's actions.").
[142] § 617(a)(1); 15 U.S.C. § 1681(o) (2006). Neither the FCRA nor the FTC Staff Report provide any guidance on how to calculate actual damages sustained by an applicant who is denied employment because of a FCRA violation.
[143] Lagrassa v. Jack Gaughen, LLC, 2011 WL 1257371, at *1–2 (M.D. Penn. 2011).
[144] *Id.* at *2. Plaintiff conceded no actual damage.
[145] *See id.* Therefore, Plaintiff's alternative claim of willful noncompliance also failed.

C. Problems with the FCRA

Though the FCRA has accomplished a great deal to protect job applicants—as well as consumers in general—the law remains weak in a few key areas. Notably, there are problems concerning (1) the information within a CRA-prepared background report and (2) an applicant's practical opportunity to dispute any inaccuracies within the report. Under the FCRA, ensuring information within a consumer report is up to date and accurate, as well as investigating when a dispute arises, is mainly the responsibility of CRAs, rather than employers. However, it is important for employers to understand these problematic aspects of the law in order to comply with employer regulations and to more fairly consider all applicants.

1. Information within a CRA-Generated Background Report

Information within a consumer report may contain criminal records, civil records, driving records, and other personal information.[146] It is the responsibility of a CRA to ensure that this information is accurate and up to date.[147] Problems may arise when inaccurate information appears within a CRA-generated background report. Another problem is that convictions may stay on a consumer report indefinitely.[148] This contributes to an environment where employers, landlords, and others rely too heavily on criminal records. Finally, the FCRA could better protect rehabilitated ex-offenders by clarifying how expunged records should be treated under the law.

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[146] *See* § 603(d)(1); 15 U.S.C. § 1681(a)(d)(1) (2006) (defining consumer report); FTC Staff Report, *supra* note 69, at 1 (further explaining information found in a consumer report).

[147] One obligation of CRAs is to have procedures in place to attempt and ensure accuracy of information. § 613; 15 U.S.C. § 1681(k) (2006). To prevail on an action alleging CRA violation of this provision, there must be a showing that the inaccuracy resulted from the CRA's failure to "follow reasonable procedures to assure maximum possible accuracy." Hauser v. Equifax, Inc., 602 F.2d 811, 814 (8th Cir. 1979). In Minnesota, CRAs are required to abide by specific periods of time in order to ensure accurate and up to date information. *See* Minn. Stat. § 332.70.

[148] *See infra* Part III.D.1.b.

a) The Problem of Inaccurate Reporting

Commercially-prepared background checks can be inaccurate,[149] which is one of the reasons why the FCRA mandates that employers must allow an applicant to review and contest the information within a CRA-prepared background report.[150] In one instance, a CRA falsely reported that an individual was a sexual offender.[151] In another example, mistaken identity precluded an innocent man from being offered employment.[152] These types of mistakes are increasing as private data miners outsource their work to other companies.[153] Therefore, it is of the utmost importance that employers comply with the FCRA and give applicants a chance to look over their reports.

b) Criminal Convictions Remain on a Consumer Report Indefinitely

Criminal conviction records can remain on a consumer report indefinitely.[154] However, the word "conviction" is not defined within the FCRA, and, accordingly, records may unlawfully reflect more than just

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[149] Natividad Rodriguez & Emsellem, *supra* note 12, at 7.

[150] Even though a consumer has a legal right to dispute any information within the report, the process may not always be practical for job applicants. *See infra* Part III.C.2.

[151] Les Rosen, *Class Action Case Shows Importance of Background Screening Firms Following Fair Credit Reporting Act when Reporting Sexual Offender Data*, EMP'T SCREENING RES. (Aug. 30, 2011), http://www.esrcheck.com/wordpress/2011/08/30/class-action-case-shows-importance-of-background-screening-firms-following-fair-credit-reporting-act-when-reporting-sexual-offender-data/.

[152] Tom Ahearn, *Case of Mistaken Identity in Background Check Shows Importance of Accurate Employment Screening*, EMP'T SCREENING RES. (Feb. 23, 2011), http://www.esrcheck.com/wordpress/2011/02/23/case-of-mistaken-identity-inbackground-check-shows-importance-of-accurate-employment-screening/.

[153] *See, e.g.*, Michael R. Guerrero, *Disputing the Dispute Process*, 47 CAL. W. L. REV. 437, 438 (2011) (discussing CRA outsourcing of consumer disputes to third-party contractors in Costa Rica or the Philippines, where at least twenty-two disputes are processed each hour).

[154] § 605(a)(5); 15 U.S.C. § 1681(c)(a)(5) (2006) (prohibiting the inclusion within a consumer report of "[a]ny other adverse item of information, *other than records of convictions of crimes* which antedates the report by more than seven years") (emphasis added).

convictions after seven years.[155] Criminal records can be difficult to understand. Not all crimes are resolved with a conviction; various dispositions may appear within one's criminal record.[156] If CRAs do not fully understand these various dispositions, the record may unlawfully report nonconvictions, such as arrests, for decades. Additionally, convictions that have been expunged should not be found within a consumer report, but because the scope of an expungement order may vary by jurisdiction, the statute is not entirely clear on this issue.[157]

The FCRA's allowance to leave criminal convictions on a consumer report indefinitely not only may result in confusion and inaccuracies, but it also places too much emphasis on a negative background report. Employers should not make hiring determinations based solely on a conviction as this may be unlawful.[158] Moreover, refusing to hire an individual based on a past conviction may not be the best practice as criminal records are not always relevant indicators of criminal tendencies or likelihood of recidivism.[159]

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[155] Though the term "conviction" is used in the FCRA, it is not defined in the statute's definition section. *See* § 603; 15 U.S.C. § 1681(a) (2006).

[156] Dispositions may include, for example, arrest, dismissal, continuance for dismissal, stay of adjudication, stay of imposition, or stay of execution. COUNCIL ON CRIME & JUSTICE, *supra* note 5, at 3-4.

[157] For example, the absence of any guidance on expunged records in MINN. STAT. § 332.70 subdiv. 4. "A business screening service that disseminates a criminal record that was collected on or after July 1, 2010, must include the date when the record was collected by the business screening service and a notice that the information may include criminal records that have been expunged, sealed, or otherwise have become inaccessible to the public since that date." *Id*.

[158] Discrimination claims under Title VII are discussed *infra* Section IV. Additionally, not only do discrimination laws create a basis of liability, but under the FCRA, employers must certify to a CRA that they will not violate employment opportunity laws. § 604(b)(1); 15 U.S.C. § 1681(b)(b)(1) (2006); *see also* FTC Staff Report, *supra* note 69, at 50.

[159] *See, e.g.*, Blumstein & Nakamura, *supra* note 61, at 13–14 (describing a study about recidivism rates and explaining that in most cases after seven years an ex-offender has "redeemed" themselves and presents the same risk as the general population); Natividad Rodriguez & Emsellem, *supra* note 12, at 6–7 (explaining that criminal records alone are not an adequate measure of an individual's likelihood of contributing to a safe work environment).

Instead, by hiring ex-offenders, employers can contribute to reducing recidivism rates, which benefits society as a whole.[160]

c) Expunged Records and the FCRA

The FCRA does not do enough to protect the rights of ex-offenders who have successfully completed the arduous process of record expungement. While expungements serve as evidence of rehabilitation,[161] this may not be the case if an expunged conviction remains on a consumer report. Though an individual may have proven to the court that he or she has rehabilitated himself or herself, the rehabilitation will not be apparent when expunged convictions remain on consumer reports. And because expungements do not always result in the public losing access to all records of an incident,[162] it is possible that records that have been expunged could appear in a CRA-prepared background report. Although the federal statute does not speak directly to the issue of expunged records, the objectives of the FCRA support a liberal interpretation of the statute, reporting only current information.[163] Additionally, CRAs have a duty not to include expunged records within a criminal background report.[164]

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[160] *See supra* Part I.B.

[161] "If the court grants an expungement, the court does not foresee a future need for the record, and effectually finds that the person is no more likely to commit a crime than anyone else." COUNCIL ON CRIME & JUSTICE, *supra* note 5.

[162] *Id.*

> In Minnesota, an expungement does not necessarily result in the public losing access to all records related to a criminal incident. Often, the court will expunge court records without expunging law enforcement, correctional, and other records of the incident. This means that court-expunged records may appear on a job applicant's criminal background check.

Id. The same is true for other states, such as Washington.

[163] *See, e.g.*, Cortez v. Trans Union, LLC, 617 F.3d 688, 706 (3d Cir. 2010) ("[A}ny interpretation of [the FCRA] must reflect those [consumer-oriented] objectives").

[164] MINN. STAT. § 332.70 subdiv. 3(b) (2012).

A recent lawsuit spoke to the issue of expungements and the FCRA compliance. In *Henderson v. HireRight Solutions, Inc*.,[165] plaintiffs alleged that the CRA HireRight Solutions violated the FCRA because it reported records that had been expunged and failed to maintain procedures to ensure accuracy of records.[166] In Philadelphia, where the records were located, expunged records are generally hidden from public view within days of an expungement order.[167] Because the FCRA does not speak specifically to a CRA's duty to delete expunged records from a consumer report, it is likely that records of expunged offenses may continue to appear within CRA-prepared background reports, as was the case in *Henderson*. Of course an applicant may initiate the FCRA's dispute process when such records wrongfully appear in a report,[168] but this process is not always a practical solution for job applicants.

2. Disputing Information in a Consumer Report: Is the Dispute Process Practical for Job Applicants?

One of the main purposes of the FCRA in the context of employment is to give applicants an opportunity to dispute inaccurate information within their consumer reports.[169] While a good rule in practice, the realistic timing

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[165] Henderson v. HireRight Solutions, No. 10-459, 2010 WL 2349661 (E.D. Pa. June 7, 2010).

[166] The complaint alleged Defendant regularly and illegally reports criminal records that have been expunged by court order, so that the individual's criminal history appears more serious than it actually is. *Id.* at *1.

[167] Expungement procedures differ across states. Watstein, *supra* note 80, at 599. Though not all states will physically destroy copies of criminal records, the Expungement Orders in this case directed the arresting agency to destroy all information relating to the expunged records and also "directed the Pennsylvania State Police to request that the Federal Bureau of Investigation return to them all records pertaining to the arrests, to be destroyed upon receipt." *Id.* This type of expungement order is likely not typical as expungement laws vary from state to state. *See generally* Watstein, *supra* note 80, at 599 (discussing various state approaches to expungement and sealing of criminal records).

[168] *See* § 611.

[169] Section 611 of the statute outlines the process for disputing information in a consumer report.

of making hiring decisions may hinder an applicant's rights under the FCRA.[170] It is of the utmost importance that employers provide applicants with a reasonable amount of time to dispute their consumer reports after the report is provided and before adverse action is taken.[171] Unfortunately, the FCRA does not prescribe a time limit, and the little guidance there has been concerning what amount of time is reasonable for an employer to wait before taking adverse action is not very informative.

The FCRA is silent on this time frame, yet the FTC has stated that the period of time must be "reasonable."[172] If an employer fails to give the applicant a reasonable period of time to dispute the information in the consumer report before denying employment based on the report, there is a potential claim of violating the pre-adverse action requirements of the FCRA. However, it is difficult to know what is reasonable, as it will depend on the circumstances in each case. Importantly, this cryptic window of time encompasses the heart of the FCRA as it is within this window that consumers may assert their rights and challenge information with a report.

The FTC released an opinion letter in 1997 concerning this timing issue.[173] In response to an attorney's question about what is reasonable, the FTC noted that there is no time given in the statute, but that five business days seemed reasonable.[174] Many other letters have been written in response

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[170] For additional information on the FCRA's dispute process see Fed. Trade. Comm'n, Report to Congress on the Fair Credit Reporting Act Dispute Process (2006), *available at* http://www.ftc.gov/os/comments/fcradispute/P044808fcradisputeprocessreporttocongress.pdf; Guerrero, *supra* note 153 (arguing that the process for submitting disputes is not adequate).

[171] *See supra* Part III.A.

[172] *See* FTC Staff Report, *supra* note 69, at 52.

[173] Weisberg, *supra* note 99.

[174] *Id.* The letter explained the following:

> The final issue raised by your letter concerns the period of time that an employer must wait after supplying the materials required by Section 604(b), before taking adverse action, an issue on which the section is silent. You suggest a period of five business days from the date of the notice. Although the

to the same question, but the answer is always the same: the time must be reasonable, reasonableness depends on the circumstances, and employers should consult with their lawyers to determine what amount of time is reasonable in a particular situation.[175]

To further complicate the issue, a CRA usually has 30 days to complete an investigation when a consumer disputes the information within his or her background report.[176] This investigation includes at a minimum "checking with the original sources or other reliable sources of the disputed information and inform[ing] them of all relevant information and evidence submitted by the consumer as part of his or her dispute, stat[ing] the consumer's position, and then ask[ing] whether the source would confirm the information, qualify it, or accept the consumer's explanation."[177] The

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> facts of any particular employment situation may require a different time, the five day period that you proposed appears reasonable.

Id.

[175] *See, e.g.*, Informal Staff Opinion Letter from the FTC to Harold R. Hawkey (Dec. 18, 1997), *available at* http://www.ftc.gov/os/statutes/fcra/hawkeycb.shtm ("The wording of Section 604(b) and its relation to Section 615(a) mandate that some period of time elapse between the pre-adverse action disclosure and the employment action that triggers the Section 615(a) adverse action notice. The law, however, does not set forth what specific procedures must be followed by employers. For example, the law is silent as to how long the employer must wait after making the Section 604(b) pre-adverse action disclosure before actually taking adverse action. Employers may wish to consult with their counsel so that they develop procedures that are appropriate, keeping in mind the clear purpose of the provision to allow consumers to discuss reports with employers or otherwise respond before adverse action is taken."); Informal Staff Opinion Letter from the FTC to Sidney F. Lewis (June 11, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/lewis.shtm. "The amount of time that an employer should wait before taking adverse action will vary depending upon the circumstances, such as the nature of the job involved and the way that the employer does business. Employers may wish to consult with their counsel in order to develop procedures that are appropriate, keeping in mind the purpose of the provisions to allow consumers to discuss the report with employers before adverse action is taken." Informal Staff Opinion Letter from the FTC to Sidney F. Lewis (June 11, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/lewis.shtm.

[176] *See* FTC Staff Report, *supra* note 69, at 2 (discussing 1996 Amendments to FCRA that required CRAs to complete an investigation within thirty days).

[177] *See id.* at 76. *See also* Cortez v. Trans Union, 617 F.3d 688, 713 (3d Cir. 2010) ("Although the parameters of a reasonable investigation will often depend on the

timing required for a CRA to complete a satisfactory reinvestigation will likely take longer than what an employer considers to be a reasonable amount of time to wait before taking adverse action.

A recent state court decision, *Johnson v. ADP Screening & Selection Services*, elaborated on what amount of time is reasonable between pre-adverse action and adverse action.[178] Though the plaintiff-applicant had received notice of his rights under the FCRA, he wished to challenge the information in his consumer report.[179] When Johnson was disqualified from employment, he argued that the FCRA mandated the time between notice and adverse action must be reasonable, and that ten business days was not reasonable. The court disagreed, noting that Johnson's interpretation of the FCRA "would create untenable constraints on employers."[180]

From the above jurisprudence and FTC opinion letters, it appears that a reasonable time frame an employer must wait after initiating pre-adverse action procedures, and before taking adverse action, is somewhere between five and ten business days. This is nowhere near the 30 days that a CRA has to conduct a re-investigation when a consumer disputes information within her report.[181] Applicants and employers alike are left with an unclear answer about what amount of time is reasonable between pre-adverse action and adverse action.

D. Suggestions for Employers

It is important for employers to understand the weaknesses mentioned above in part because of an employer's obligation under the FCRA not to

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circumstances of a particular dispute, it is clear that a reasonable reinvestigation must mean more than simply including public documents in a consumer report or making only a cursory investigation into the reliability of information that is reported to potential creditors.").

[178] Johnson v. ADP Screening & Selection Servs., 768 F. Supp. 2d 979, 983–84 (D. Minn. 2011).

[179] *Id.* at 984. One of the mistakes was that the report incorrectly listed Johnson's race. *Id.*

[180] *Id.* at 983.

[181] *See* § 611(a).

violate any fair hiring laws.[182] If an employer makes an adverse decision based on an applicant's inaccurate or out of date background check, fair hiring laws may be implicated.

In making hiring decisions, employers should consider whether a background check should be a part of the hiring process, and if so, the employer should appropriately tailor the background check to search for only the necessary information (crimes of dishonesty, crimes within the last seven years, or convictions only).[183] If an employer does conduct a background check, compliance with the FCRA and other laws is necessary. Employers should also keep in mind that many CRA-prepared reports may contain errors.[184] Applicants should be given a chance not only to dispute information within a criminal background report, but also to explain it.

IV. TITLE VII MAY BAN THE USE OF CRIMINAL AND ARREST RECORDS TO SCREEN APPLICANTS

This Section describes how criminal records screening of job applicants may create liability for employers under Title VII. This Section describes the elements of disparate impact claims, as well as the EEOC's interpretation of the doctrine. This Section closes with recommendations for the EEOC to update the guidelines to provide more substantial policy solutions to the problem of overzealous use of criminal background checks.

A. Violations of Title VII require that i) an Employer's Practice ii) has a Disparate Impact iii) on a Protected Class iv) Without a Business Necessity Defense

Title VII of The Civil Rights Act of 1964 protects certain classes of individuals from discrimination in employment decisions.[185] Employers

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[182] § 604(b)(1). *See also* FTC Staff Report, *supra* note 69, at 50.
[183] In Minnesota, employers are protected from hiring liability in many instances. *See* MINN. STAT. § 181.981 subdiv. 1 (2012).
[184] *See supra* Part III.D.1.a.
[185] 42 U.S.C. § 2000e *et seq.* (1982).

who use criminal records to screen applicants risk violating Title VII because of the disparate impact that rejecting persons with records from employment has on people of color.[186] In brief, three basic components make up a claim for disparate impact under Title VII. First, a plaintiff must make a prima facie showing that an employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[187] Next, the burden of production shifts to the employer to show that there is a business necessity behind the requirement.[188] Finally, the plaintiff can rebut the employer's business necessity claim by showing that either the practice is not job related or that a less discriminatory means is available.[189] The two major issues that tend to arise revolve around fulfilling the plaintiff's burden of production to prove a prima facie case of disparate impact and the employer's defense of business necessity.[190]

1. More Than One Incident of Record Screening is Usually Required to Show an Employment Policy or Practice

A plaintiff must point to an employment practice that, although facially non-discriminatory, has a disparate impact.[191] Denying individuals with criminal records employment opportunity is an employment practice under

[186] U.S. Equal Emp't Opportunity Comm'n, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. [hereinafter 2012 EEOC Guidelines].
[187] 42 U.S.C. § 2000e-2(k)(1)(A)(i).
[188] *Id.* If the employer can show that the disparity is not a result of the employment practice, or that no disparity actually exists, it may be unnecessary to go through the business necessity analysis. 42 U.S.C. § 2000e-2(k)(1)(B)(ii).
[189] Griggs v. Duke Power Co., 401 U.S. 424 (1971).
[190] *See infra* Part IV.A.2-3.
[191] 42 U.S.C. § 2000e-2(k)(1)(A)(i). If the practice is facially discriminatory, Title VII disparate treatment is the proper cause of action. *See* Int'l Bhd. Teamsters v. U.S., 431 US 324, 335 n.15 (1977) (discussing difference between disparate treatment and disparate impact).

Title VII.[192] Generally, a plaintiff must show that others have been treated in the same way.[193] Isolated incidents may not be employment practices for purposes of Title VII.[194]

a) After-Acquired Evidence Like Application Fraud or Dishonesty Can Limit Damages But Not Act as a Defense

The biggest danger at this initial stage of disparate impact litigation is that many applicants fail to disclose whether they have a criminal conviction. This issue is referred to as after-acquired evidence, meaning evidence "of the employee's or applicant's misconduct or dishonesty which the employer did not know about at the time it acted adversely to the employee or applicant."[195]

Some courts have barred claims where applicants fail to disclose their record on their applications.[196] In *Avant v. Bell*, the applicant, a black man, failed to disclose a petty larceny conviction in an employment application.[197] The employer later discovered the record and rejected the applicant as a result of his intentional omission.[198] The court found that the plaintiff in *Avant* was not aggrieved by a policy that rejected those with criminal records, but only by the employer's policy of rejecting persons who commit fraud on their applications.[199] The plaintiff in *Avant* stated that Blacks are arrested and convicted more than Whites, but this was not enough to make a prima facie case because he would have to show that

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[192] *See* 2012 EEOC Guidelines *supra* note 186.
[193] *See* Wynn v. Columbus Mun. Sch. Dist., 692 F. Supp. 672 (D. Miss. 1988) (rejecting a claim brought by a female who was denied a position as a director because to be qualified she needed to have a job only filled by men).
[194] *See id.*
[195] West v. The Salvation Army, 07-10269, 2007 WL 1839984, at *4 n.2 (E.D. Mich. June 27, 2007).
[196] *See*, *e.g.*, Avant v. S. Cent. Bell Tel. Co., 716 F.2d 1083, 1087 (5th Cir. 1983); *see also* E.E.O.C. v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 748 (S.D. Fla 1989).
[197] *Avant*, 716 F.2d at 1087.
[198] *Id*.
[199] *Id*.

Blacks fail to disclose criminal convictions on their applications more than Whites.[200]

However, cases like *Avant* are outliers in most jurisdictions. Dismissal would likely only occur where an applicant lies about, rather than omits, their record. Although, if the employer rejects all applicants for failing to answer any question on a job application, the employer may succeed in a dismissal for disparate impact, but the employer would have to show that either the employer rejects *all* incomplete applications or the employer may be faced with a disparate treatment claim.[201] If the employer only rejected applications that failed to answer a question about a criminal record, it would have to prove business necessity as discussed in Part IV.A.3.

Generally, after-acquired evidence can only be used to limit damages and may not act as a defense to a Title VII claim.[202] The Supreme Court articulated in *McKennon v. Nashville Banner Pub. Co* that after-acquired evidence can be used to limit a plaintiff's damages when the severity of wrongdoing uncovered by the after-acquired evidence could have affected the employer's decision to reject the applicant.[203] In *McKennon*, a secretary took home confidential records and showed them to her husband.[204] After being terminated for another reason she brought a discrimination suit under the Age Discrimination in Employment Act.[205] The court remanded for the lower court to reduce damages if "the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it."[206]

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[200] *Id*.
[201] *See infra* Part IV.A.3.
[202] Waag v. Thomas Pontiac, Buick, GMC, Inc., 930 F. Supp. 393, 408 (1996); Walters v. U.S. Gypsum Co., 537 N.W.2d 708, 710 (1995) (discussing the split and resolution by McKennon).
[203] McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 362–63 (1995).
[204] *Id*. at 355.
[205] *Id*.
[206] *Id*. at 362-63.

2. Statistics Usually Support a Prima Facie Case of Disparate Impact

Disparate impact is most often established when an employer's hiring or promotion rates reflect a high statistical disparity in the percentage of non-white job applicants rejected for white applicants.[207] However, three issues must be examined before determining whether disparate impact exists: the scope of the comparison group, the level of disparity, and the causal link between the practice and disparity.[208]

a) What is the Comparison Group?

The choice of a comparison group can greatly affect whether a plaintiff can make a prima facie case for discrimination. The EEOC (interpreting *Green*) has found that three statistical methods may determine disparate impact.[209] The comparison group may differ depending on the statistical method used. Minority representation in an employer's applicant flow is generally preferred in cases involving criminal or arrest records.[210] But an employer's workforce has been compared to both qualified persons in the relevant labor market and the general population in successful disparate impact claims.[211] However, employers can avoid liability if they can offer a more relevant comparison group that fails to reflect a statistical disparity.[212]

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[207] Although, Title VII also protects whites from adverse employment action based on race. *See* Ricci v. DeStefano, 557 U.S. 557, 593 (2009).
[208] *See infra* Part VI.A.2.a-c.
[209] 2012 EEOC Guidelines, *supra* note 186 (citing Green v. Mo. Pac. R. Co., 523 F.2d 1290, 1293 (8th Cir. 1975)).
[210] *See* Michael Connett, *Employer Discrimination Against Individuals with A Criminal Record: The Unfulfilled Role of State Fair Employment Agencies*, 83 TEMP. L. REV. 1007, 1025 (2011); *see also infra* Part IVA.2.(a)(2).
[211] *See* Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D.Cal.1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972) (citing national arrest statistics showing that blacks suffered a disproportionately high percentage of arrests).
[212] *See, e.g.,* Matthews v. Runyon, 860 F. Supp. 1347, 1357 (E.D. Wisc. 1994) (finding that just because blacks in Milwalkee are arrested more than whites is not enough to make a prima facie case).

(1) The Labor Market: Whether a Protected Class in the Area Would be Excluded by the Use of Criminal Records Screening at a Significantly Higher Rate Than Whites

In *Green v. Missouri Pacific Railroad Company*, the Eighth Circuit held that a disproportionate racial impact could be established by three statistical methods.[213] This approach has been adopted by the EEOC as a general policy.[214] First, a court may determine "whether blacks as a class . . . are excluded by the employment practice in question at a substantially higher rate than whites."[215] In terms of criminal records, this method requires a court to examine, in a relevant area, the percentage of minority applicants who would be eligible for a job and the percentage of Whites who were eligible for the same job after passing the background check. In the past, these statistics were generally quite broad.[216] However, an employer will likely dispute this broad level of statistics and will try to point to a more relevant comparison pool, which can rebut the prima facie case.[217]

The first landmark case on criminal records and Title VII provided an illustration of this comparison group by citing national statistics that Blacks are arrested at a much higher rate than Whites.[218] In *Gregory*, the plaintiff applied for and was accepted to a position as a mechanic, after which the employer required the applicant to disclose all previous arrests prior to starting work.[219] After disclosing his arrest record, the defendant retracted

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[213] Green v. Mo. Pac. R.Co.,523 F.2d 1290, 1293 (8th Cir. 1975).
[214] *See* 2012 EEOC Guidelines, *supra* note 186.
[215] Green, 523 F.2d at 1293 (citing Griggs v. Duke Power Co., 401 U.S. at 430 n. 6) (finding only 12 percent of black males had completed high school while 34 percent of white males had done so); Gregory v. Litton Systems, Inc., 316 F. Supp. 401, 403 (C.D.Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972) (citing national arrest statistics showing that blacks suffered a disproportionately high percentage of arrests).
[216] *See Gregory*, 316 F. Supp. at 403.
[217] *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); *see also infra* notes 220–23 and accompanying text.
[218] *Gregory*, 316 F. Supp. at 403.
[219] *Id*.

the offer of employment.[220] The plaintiff prevailed on a Title VII suit.[221] The court in *Gregory* found that, in light of the disproportionate arrest levels, a blanket ban on individuals with arrest statistics would have an unlawful disparate impact on blacks.[222]

Since *Gregory*, disparate impact litigation has become significantly more complex. Now courts generally prefer very specific statistical pools in Title VII cases and scrutinize data for over or under inclusivity.[223] In fact, from the early 1980s to the early 2000s, the success of disparate impact litigation has declined from 48 to 12 percent.[224] Although *Gregory* suggests that state or national statistics showing that Blacks or Hispanics have higher arrest or criminal conviction rates would support a prima facie case of disparate impact, plaintiffs must be willing to amend their complaints and perform additional research if the defendant can show that a more relevant statistical group exists.[225]

(2) Applicant Flow Data: the Percentage of a Protected Group that is Actually Excluded by Criminal Records Screening by a Specific Employer

A second alternative for the comparison group is applicant flow data. This is defined as "the percentage of black and white job applicants actually excluded by the employment practice."[226] In other words, the court would determine if a protected racial class would not be eligible for a job at substantially higher rates than Whites.

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[220] *Id*.
[221] *Id*.
[222] *Id*.
[223] *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 585–86 (1979); *see also infra* notes 220–23 and accompanying text.
[224] Connett, *supra* note 210, at 1026.
[225] Linda Lye, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LABOR L. 315, 343 (1998) ("courts frequently subject these data to stringent review, and often ultimately reject them").
[226] *Id*.

In *Green v. Missouri Pacific Railroad Company,* an employer used conviction records for all crimes other than a traffic offense to disqualify applicants.[227] The plaintiff compared the number of black applicants thereby excluded to the number of white applicants excluded to successfully prove a prima facie case:

> [Defendant's] records of employment applications at its corporate headquarters during the period from September 1, 1971, through November 7, 1973, disclose that 3,282 blacks and 5,206 whites applied for employment. Of these individuals, 174 blacks (5.3 percent of the black applicants) and 118 whites (2.23 percent of the white applicants) were rejected because of their conviction records. Thus, statistically, the policy operated automatically to exclude from employment 53 of every 1,000 black applicants but only 22 of every 1,000 white applicants. The rejection rate for blacks is two and one-half times that of whites under this policy.[228]

This method of looking at who was actually screened is often helpful because it only requires statistics from a single employer.

The other methods require evidence compiled by experts of the labor market or geographical area, which can be difficult to ascertain and expensive to collect. In some instances, however, single-employer evidence may be just as difficult to compile if an employer's hiring records are not well organized. For example, the employer might fail to record whether an applicant was rejected due to being unqualified or because the person had a criminal record. The applicant flow method is most easily applied to cases where a record was an automatic ban to employment because if a criminal record were only a factor in an employment decision,[229] a plaintiff would

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[227] *Green*, 523 F.2d at 1293.
[228] *Id*.
[229] Such blanket ban policies are also most likely to violate title VII. Field v. Orkin Extermination Co., No. Civ. A. 00-5913, 2002 WL 32345739, at *1 (E.D. Pa. Feb. 21, 2002) ("[A] blanket policy of denying employment to any person having a criminal conviction is a [*per se*] violation of Title VII.").

have to engage in a more intensive analysis of the employer's records and hiring decision rationale.[230]

Another problem with applicant flow data, albeit theoretical, is that courts generally favor looking into the relevant and qualified labor market rather than at the people who are applying to a single employer because the employer, to some extent, lacks control over who applies for open positions.[231] Additionally, courts have not rejected a prima facie case for the sole reason that it did not take into account the very specific labor market level of comparison instead of applicant flow data. In fact, it appears courts favor applicant flow data.[232]

(3) The General Population: Whether the Percentage of Protected Class Members Employed by a Company is Much Smaller than the Population of that Class in the Area

The third alternative is to look at "the level of employment of [people of color] by the company . . . in comparison to the percentage of [people of color] in the relevant geographical area."[233] This statistical method, in many circumstances, is the weakest evidence on which to base a prima facie case because general population statistics typically do not take into account whether a person was qualified for a job.[234] However, if this method is used, a plaintiff would want to compare the number of qualified minorities in the labor market to the number of minorities employed rather than just comparing the number of minorities in the broader geographic area to the number of minorities.[235] Unless the job in question is unskilled, general

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[230] In light of this complication enforcement policies should focus on blanket bans. *See infra* Part IV.E.
[231] *See infra* notes 223 and accompanying text.
[232] *See* Connett, *supra* note 210, at 1025.
[233] *Id*.
[234] *See*, *e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).
[235] *See* Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 649 (1989) ("It is such a comparison—between the racial composition of the qualified persons in the labor market

population figures may be irrelevant if the number of qualified minorities in the geographic area is relatively low.[236]

This final type of statistical proof may be more probative in pattern or practice disparate treatment litigation. Disparate treatment would include cases in which people of color, but not Whites, with criminal records were rejected. This proof could, theoretically, be used to establish a prima facie case where an employer uses criminal records to screen unskilled jobs, but the employer keeps poor records *and* the plaintiff is unable to present reliable statistics regarding the rate of arrests and convictions of the protected class in state or relevant labor market.

b) How Much Disparity Constitutes Disparate Impact?

After the comparison group is selected, a court must determine whether the disparity represents an unlawful disparate impact. Bright-line statistical cut offs do not determine whether a disparity rises to the level of disparate impact. All that is required is that the practice "selects applicants for hire or promotion in a racial pattern significantly [different] from that of the pool of applicants."[237]

The EEOC focuses its enforcement efforts on employers who employ a "selection rate for any race, sex, or ethnic group which is less than eighty percent (80%) of the selection rate for the group with the highest selection rate."[238] This rule of thumb is not a legal test of whether disparate impact exists, but a disparity at this level indicates that a disparate impact is

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and the persons holding at-issue jobs—that generally forms the proper basis for the initial inquiry in a disparate impact case.").

[236] *See Int'l Bhd. of Teamsters*, 431 U.S. at 324 ("So it is almost exclusively in cases of jobs involving a relatively low skill level, where a large proportion of the general population is qualified to apply for the position and the racial composition of the available work force will mirror that of the general population, that comparison with gross population figures will have a high probative value.").

[237] Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

[238] *Adoption of Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures*, Fed. Register (Mar. 2, 1979), http://www.eeoc.gov/policy/docs/qanda_clarify_procedures.html.

likely.[239] Because Blacks and several other minorities have conviction and arrest rates much higher than Whites, blanket exclusions of persons with criminal backgrounds almost always have a disparate impact on these groups.[240] However, an employer may rebut a prima facie showing of disparate impact by presenting more specific or more current statistics from the narrower region or applicant pool.[241]

c) Proving that the Screening and Disparity are Linked

The 1991 Civil Rights Amendment states that the complaining party "shall demonstrate that each particular challenged employment practice causes a disparate impact."[242] *Wards Cove* significantly elaborated on this issue:

> [Plaintiffs] also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. To hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.'[243]

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[239] *See id*.

[240] *See* U.S. Equal Emp't Opportunity Comm'n, Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, 1982 (Sept. 7, 1990), *available at* http://www.eeoc.gov/policy/docs/arrest_records.html [hereinafter EEOC Arrest Records]. *Cf.* Gregory v. Litton Systems, 316 F. Supp. 401, 403 (C.D. Cal. 1970).

[241] EEOC Arrest Records, *supra* note 240.

[242] 42 U.S.C. § 2000e-2(k)(1)(B)(i). This issue is frequently argued in promotion cases, and less so with hiring cases. *See* 2-21 Larson on Employment Discrimination, § 21.04 (2011); *see also* Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 649 (1989).

[243] Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. at 657 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988)). Wards Cove was superseded by the 1991 Civil Rights Amendment, but Wards Cove is still cited where it explained previous Title VII law. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2555 (2011).

Essentially, this means that the plaintiff must show that the statistical imbalance exists and is traced directly to records screening.[244] In *Matthews v. Runyon*, a black man who was rejected from the US Postal Service (USPS) pointed to statistics showing that Blacks in Milwaukee are arrested more than Whites.[245] It would seem intuitive that with this type of disparity in the criminal justice system disparate impact would be inevitable. However, the applicant in *Runyon* failed to show causation because he failed to show that a disparity in the workforce existed at all. The plaintiff did not point to any statistics that showed the USPS had a disproportionate amount of Whites in its workforce, so the case was dismissed.[246]

Still, a racially balanced workforce in itself will not preclude liability; there is no "bottom line" defense under Title VII.[247] The employer can still be liable for discrimination if, despite having a racially balanced workforce, the employer's policy of records screening has the effect of denying opportunity to certain racial groups.[248] This may happen if the public perceives the employer from not hiring persons with records, which causes those with records to not apply and would prevent a statistically perceivable impact in the applicant flow data. Nevertheless, this situation could still amount to disparate impact if the comparison group selected was the relevant labor market.[249]

3. Business Necessity

After the prima facie case is established the employer may rebut the prima facie case.[250] If a prima facie case of adverse impact is established without rebuttal, the burden of production shifts to the employer to show

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[244] Williams v. Carson Pirie Scott, 92 C 5747, 1992 WL 229849, at *2 (N.D. Ill. Sept. 9, 1992) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).
[245] Matthews v. Runyon, 860 F. Supp. 1347, 1357 (E.D. Wis. 1994).
[246] *Id*.
[247] Connecticut v. Teal, 457 U.S. 440, 449 (1982).
[248] *Id*. at 451.
[249] 2012 EEOC Guidelines, *supra* note 186.
[250] *See* Int'l Bhd. of Teamsters, 431 U.S. at 339 (1977).

business necessity.[251] If the employer successfully rebuts the claim with a showing of business necessity, the employer will not be liable under Title VII.[252] The EEOC advises that to meet business necessity the screening should either include some kind of individual assessment, a consideration of the *Green* factors, or have a narrowly tailored screen that identifies "criminal conduct with a demonstrably tight nexus to the position in question."[253]

a) Courts Have Not Defined How Perfect a Practice Must be Tailored to Fit Business Necessity

Unfortunately, business necessity has not been defined by the legislature, and courts struggle to define its bounds.[254] The Supreme Court stated that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge."[255] However, some circuits hold that a practice need not be perfectly tailored to successful job performance.[256] In *El v. SEPTA*, the Third Circuit held that to maintain a business necessity defense, an employer need only show that an applicant is more likely to perform the job successfully.[257] Similarly, the Eighth Circuit requires that an employer "prove that the practice was related to the specific job and the required skills and physical requirements of the position."[258] The employer only has to show that "the procedure is sufficiently related to

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[251] 42 U.S.C. § 2000e-2(k)(1)(A)(i).
[252] § 2000e-2(k)(1)(A)(ii). The employer does not have to show business necessity if no prima facie case is established. *See id.*
[253] *See* 2012 EEOC Guidelines *supra* note 186; Green v. Mo. Pac. R. Co., 523 F.2d 1290, 1293 (8th Cir. 1975); *see also* Part IV.A.3.(c).
[254] *See* Susan S. Grover, *The Business Necessity Defense in Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C.L. REV. 1479, 1520 (1996).
[255] Dothard v. Rawlinson, 433 U.S. 321, 331, n.14 (1977).
[256] El v. Se. Pa. Transp. Auth., 479 F.3d 232, 242 (3d Cir. 2007).
[257] *Id.* (accepting a business necessity justification on the grounds that individuals with violent criminal records may be more likely to commit violent acts on members of the public they may interact with on the job).
[258] E.E.O.C. v. Dial Corp., 469 F.3d 735, 742 (8th Cir. 2006) (citing Belk v. Sw. Bell Tel. Co., 194 F.3d 946, 951 (8th Cir.1999)).

safe and efficient job performance."[259] However, in the Eighth Circuit, conclusory testimony is not enough to meet the employer's burden; some other evidence of business necessity must be offered as well.[260] Although courts have not yet come to a consensus on how closely the screening mechanism must be, the EEOC gave additional guidance regarding this point in April of 2012.[261]

b) EEOC Guidelines

In the case of criminal convictions and interactions with the courts (as opposed to arrests), the EEOC has not laid out an exhaustive list of all the permissible ways an employer can prove business necessity, but at a minimum, the employer must "effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position."[262] The employer need not necessarily perform an individualized assessment of each applicant's record. An employer may utilize any of three general means.

First, an employer may validate their screening method by using the Uniform Guidelines on Employee Selection Procedures.[263] Although, the EEOC seems to suggest that following these guidelines are not even necessary so long as the employer tailors the screening to "identify criminal conduct with a demonstrably tight nexus to the position in question."[264] In this situation, an individual assessment, beyond a reading of the record date and activity responsible for the record, would not be necessary.[265] However, the EEOC clarifies that a blanket rejection of all applicants with a conviction or arrest will almost never survive scrutiny.[266] If employers tried

[259] Hawkins v. Anheuser–Busch, Inc., 697 F.2d 810, 815–16 (8th Cir. 1983).
[260] *Id*.
[261] 2012 EEOC Guidelines, *supra* note 186.
[262] *Id*.
[263] 29 C.F.R. § 1607.5 *et seq*. (2012).
[264] 2012 EEOC Guidelines, *supra* note 186.
[265] *Id*.
[266] *Id*.

to articulate a business necessity defense based on information they gather after the rejection, at most they could limit damages in accord with the doctrine of after-acquired evidence described in *McKennon*.[267] An example of this would be if employer X had a blanket ban on all applicants with felony convictions. An applicant convicted of felony drug possession five years ago marks "yes" that he or she has been convicted of a felony and is rejected. The applicant then brings suit under Title VII; employer X could not then use the *Green* factors to fashion a business necessity defense because any information he or she would have received would only be after-acquired evidence.[268] Any defense based on the *Green* factors, or other factors, could only limit the damages that the applicant received.

Second, an employer may use the considerations discussed in *Green v. Missouri Pacific Railroad Company* to determine whether criminal record searches are related to the job.[269] The first factor is the nature and gravity of the offense.[270] The second factor is length of time since the arrest or conviction.[271] The third factor is the nature of the job the employee wants or has.[272] For the nature and gravity of the offense prong, courts could look at whether the crime in question reflects poor judgment or an attitude of retaliation.[273] As for timing, some courts have actually rejected this as a factor to consider and upheld lifetime bans for some violent crimes, such as murder.[274] Factors that could weigh against a plaintiff in regards to the

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[267] *See supra* notes 192–93 and accompanying text.
[268] *Id*.
[269] Green v. Mo. Pac. R. Co., 523 F.2d 1290, 1293 (8th Cir. 1975).
[270] EEOC Arrest Records, *supra* note 240.
[271] *Id*.
[272] *Id*.
[273] McCray v. Alexander, No. 82-1984, 1985 WL 15467 (10th Cir. July 19, 1985) (supervisory guard was discharged for killing a motorist, while off-duty, in a traffic dispute because employer concluded that, despite his acquittal, the conduct showed poor judgment on the use of deadly force).
[274] EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 753 (S.D. Fla. 1989) (court upheld trucking company's lifetime bar for theft crimes and cautioning against the rationale of *Green v. Missouri*).

prong of the nature of the job include whether the position is security sensitive,[275] or whether the individual will have access to the property of others.[276]

Finally, and most difficult, the employer could develop a targeted screen while considering the three *Green* factors [277] and then "provide an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity."[278]

The first and third of these approaches build on the EEOC's prior interpretation of Title VII, but do not substantially shift from the framework laid out in *Green*. The EEOC clarifies, as most circuits other than the Eighth Circuit have suggested, that the *Green* factors are not the only standards by which an employer can establish a business necessity defense.[279] Further, EEOC guidelines are not binding, and other circuits do not necessarily follow them as discussed in Part IV.C below.

c) Employers Shoulder the Burden of Proof for Proving Business Necessity

If the employer carries the burden of proving it has a valid business necessity, the plaintiffs may show that an alternative employment practice exists that would have a less discriminatory effect.[280] Who carries the burden for the final level analysis of whether an alternative practice exists?

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[275] Osborne v. Cleland, 620 F.2d 195 (8th Cir. 1975).
[276] Richardson v. Hotel Corp. of Am., 332 F. Supp. 519 (E.D. La. 1971), *aff'd* 468 F.2d 951 (5th Cir. 1972) (bellman was discharged after his conviction for theft and receipt of stolen goods was discovered since bellmen had access to guests' rooms and was not subject to inspection when carrying packages).
[277] The nature of the crime, the time elapsed, and the nature of the job. Green ,523 F.2d at 1293 (8th Cir. 1975).
[278] 2012 EEOC Guidelines, *supra* note 186.
[279] *Id*.
[280] Ricci v. DeStefano, 557 U.S. 557, 624 (2009) ("If the employer carries that substantial burden, the complainant may respond by identifying "an alternative employment practice" which the employer "refuses to adopt.") (citing § 2000e–2(k)(1)(A)(ii)).

It varies. In the Eighth Circuit, "the burden is on the defendant employer to prove both a '"compelling need'" for the challenged policy, and the lack of an effective alternative policy that would not produce a similar disparate impact."[281] However, in the Fifth Circuit, the plaintiff still carries the burden of proof for showing that an alternative exists.[282]

A plaintiff may not need much evidence to show that a less discriminatory practice exists. For example, in *El*, the Third Circuit noted that if expert testimony was presented at trial to show that the likelihood of recidivism significantly declines after a certain period of time, demonstrating the lifetime ban on murder convictions is overbroad, summary judgment could have been avoided.[283] This suggests that the ruling in *El* could be distinguished in later cases so long as some evidence is presented to rebut that the policy was overbroad.

B. Special Considerations with Arrest Records

In the case of arrests, the employer not only must consider the relationship of the charges to the position sought, as articulated by the EEOC guidelines, but also must consider the likelihood that the applicant actually committed the conduct alleged in the charges.[284] The EEOC does not require an informal trial or extensive investigation, but it does suggest at least allowing the person an opportunity to explain what happened and investigating the credibility of the statement when it would be reasonably easy to do so.[285]

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[281] Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 797 (8th Cir. 1993); *see also* Houghton v. SIPCO, Inc., 38 F.3d 953, 958 (8th Cir. 1994).
[282] Int'l Bhd. of Elec. Workers, AFL-CIO, Local Unions Nos. 605 & 985 v. Mississippi Power & Light Co., 442 F.3d 313, 318 (5th Cir. 2006).
[283] El v. Se. Pa. Transp. Auth., 479 F.3d 232, 247 (3d Cir. 2007). The result in El could be attributed to poor litigation strategy by the plaintiff. *See id.*
[284] *See* Gregory v. Litton Sys., 316 F. Supp. 401 (C.D. Cal. 1970); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).
[285] EEOC Arrest Records, *supra* note 240.

The employer may not perfunctorily "allow the person an opportunity to explain" and ignore the explanation where the person's claims could easily be verified by a phone call, i.e., to a previous employer or a police department. The employer is required to allow the person a meaningful opportunity to explain the circumstances of the arrest(s) and to make a reasonable effort to determine whether the explanation is credible before eliminating him/her from employment opportunities.[286]

Consider the example given by the EEOC regarding the extent to which an employer should inquire about an arrest:

> Wilma, a Black female, applies to Bus Inc. in Highway City for a position as a bus driver. In response to a pre-employment inquiry, Wilma states that she was arrested two years earlier for driving while intoxicated. Bus Inc. rejects Wilma, despite her acquittal after trial. Bus Inc. does not accept her denial of the conduct alleged and concludes that Wilma was acquitted only because the breatholizer [sic] test which was administered to her at the time of her arrest was not administered in accordance with proper police procedures and was therefore inadmissible at trial. Witnesses at Wilma's trial testified that after being stopped for reckless driving, Wilma staggered from the car and had alcohol on her breath. Wilma's rejection is justified because the conduct underlying the arrest, driving while intoxicated, is clearly related to the safe performance of the duties of a bus driver; it occurred fairly recently; and there was no indication of subsequent rehabilitation.[287]

In this example, no violation of Title VII occurred because of the probable cause that the employer discovered.

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[286] *Id*.
[287] *Id*.

C. Problems with EEOC Guidelines

1) EEOC Guidelines are Not Binding

The EEOC guidelines are not binding law. Courts are instructed to follow them in line with the principals of EEOC's "thoroughness of its consideration, the soundness of its reasoning, and its consistency with prior and future pronouncements."[288] This lack of deference to EEOC guidelines first arose in *General Electric Company v. Gilbert* when the Supreme Court ignored an EEOC policy directive because it was inconsistent with the EEOC's previous stance.[289] The Supreme Court has upheld the policy of merely applying agency directives as non-controlling guidelines since it decided in opposition to a directive of the Fair Labor Standard Act's administrator in *Skidmore v. Swift*.[290] Nevertheless, the EEOC's policy has not changed substantially over time. It has modified the requirements for finding business necessity, but this was more of a clarification than a reversal of position as was the case in *Gilbert*.[291]

2) EEOC Guidelines Lack Clarity as to What is Business Necessity

Although EEOC guidelines regarding conviction records have remained relatively stable, the remedial spirit of Title VII and EEOC guidelines has been limited by some courts. In *El*, the Third Circuit found that employers may use criminal records to screen applicants so long as barring employees with certain criminal convictions is sufficiently related to the job and

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[288] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991) (quoting Gen. Elec, Co. v. Gilbert, 429 U.S. 125, 142 (1976)).

[289] In *Gilbert*, the court found that the EEOC was inconsistent in its stance on pregnancy-based exclusions in health benefit plans. The EEOC had issued an opinion originally upholding them, but about ten years later reversed opinion. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976).

[290] Skidmore et al. v. Swift & Co., 323 U.S. 134, 139 (1944).

[291] U.S. Equal Emp't Opportunity Comm'n, 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) *available at* http://www.eeoc.gov/policy/docs/convict1.html#N_6_.

business necessity.[292] The court pointed to the fact that the EEOC failed to mention whether the three business necessity factors in *Green* should be considered in making bright-line bans on offenses like murder.[293] Although the decision in *El* seemed to cut against the spirit of the EEOC guidelines, the court correctly pointed out serious problems in the lack of definiteness of the guidelines.[294] These problems have been mostly addressed by the EEOC's 2012 guidelines.[295]

Nevertheless, many employers reject all applicants with any sort of conviction, which is significantly distinguishable from *El*. The case of *El* involved a blanket ban on murder.[296] A useful enforcement strategy would be to target organizations with overbroad blanket policies. An example of this strategy is the case of *EEOC v. Pepsi*.[297] In this case, a successful $3.1 million settlement was awarded to a class of black applicants in late 2011.[298] These applicants claimed Pepsi's policy of screening applicants with arrests on their records and pending prosecution discriminated against Blacks.[299] This case illustrated that employers should tailor their use of background checks as narrowly as possible to make them related to the job to avoid liability for disparate impact.

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[292] El v. Se. Pa. Transp. Auth., 479 F.3d 232, 245 (3d Cir. 2007) ("[i]f a bright-line policy can distinguish between individual applicants that do and do not pose an unacceptable level of risk, then such a policy is consistent with business necessity.").
[293] *Id*.
[294] *See id*.
[295] *See* Nat'l Emp't Law Project, Highlights of EEOC's New Criminal Record Guidance (2012), *available at* http://nelp.3cdn.net/57956bd228c5ef2b1d_5xm6ii1as.pdf.
[296] El v. Se. Pa. Transp. Auth., 479 F.3d 232 (3d Cir. 2007).
[297] U.S. Equal Emp't Opportunity Comm'n, *supra* note 41.
[298] *Id*.
[299] *Id*.

D. The Limitations of Title VII

Title VII only applies to employers with 15 or more employees working 20 hours a week or more.[300] Additionally, Title VII only applies to those in an employer-employee relationship; some contingent workers like independent contractors would not qualify for relief.[301] However, other contingent workers, such as those employed through temp agencies, could find relief under Title VII because the language of Title VII encompasses employment agencies.[302]

One problem with using Title VII in preventing race discrimination due to criminal background checks is the lack of clarity in regards to business necessity. Although the EEOC clarified the breadth of business necessity, wide room for interpretation of business necessity exists due to the EEOC's inability to promulgate binding rules. In some circuits, an employer could point to anecdotal evidence, which may pass muster under business necessity precedent.[303]

Another limitation of Title VII is that it will not protect non-minorities with criminal records. For example, rejection of persons with felony convictions does not disproportionately affect Whites. Because of this, Whites will not be able to show they have been aggrieved unlawfully because if a criminal record screen harms them,[304] they will not be in the class that is disproportionately affected by it. This may be less of a problem for non-minorities if employers tailor their background checks narrowly to only reject those with offenses related to the job in order to comply with

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[300] 42 U.S.C. 2000e-1(b). However, the Minnesota Human Rights Act applies to all employers with one or more employees in Minnesota. Minn. Stat. § 363A.03 subd. 15.
[301] *See, e.g.,* Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir. 1983).
[302] Williams v. Grimes Aerospace Co., 988 F. Supp. 925, 934 (D.S.C. 1997) (citing 42 U.S.C. § 2000e–2(b)).
[303] Carter v. Maloney Trucking and Storage Inc., 631 F.2d 40, 43 (5th Cir. 1980) (employer refused to rehire an ex-employee who had murdered a co-worker, not solely because of his conviction, but because he was a dangerous person and friends of the murdered man might have tried to retaliate against him while he was on the job).
[304] *See* 42 U.S.C. § 2000e-5 (2012).

Title VII. For example, a bank that rejected persons with any type of conviction might narrow their policy to only exclude those with theft-related offenses. In this situation, non-minorities will benefit just as Blacks or Hispanics will because of the narrowness of the record searches.

V. CONCLUSION AND SUGGESTIONS FOR EEOC GUIDELINE IMPROVEMENTS

Employers should not be allowed to screen applicants on the basis of having arrest records that are older than seven years. Such a policy would coincide with the FCRA, which requires CRAs to remove arrest records from background reports after seven years. Although it would be better to institute a complete ban on using arrests without convictions as disqualifiers, the fact that the EEOC once allowed old records to be the basis for applicant screening would mean that this interpretation of Title VII by the EEOC would not be adopted by courts due to the *Skidmore* standard.[305]

Similarly, employers should never be able to use conviction records after a defined date, as mentioned above, seven years is an appropriate time limit. As with arrests, a ban for using records seven years or older is good policy because recidivism generally decreases significantly at this point. This would prevent *El* type situations where a 40-year-old record could come back to haunt a person.

Further, employers should not be allowed to ask applicants if they have a record during the application process due to the disproportionally adverse effects that this practice has on minorities. Screening should occur only after a conditional hire. Minnesota and other states have instituted this policy for public employers; the EEOC should recommend all employers undertake this policy for positions not dealing with vulnerable individuals, security, or valuable property. Although screening after a conditional hire

[305] *See supra* note 278 and accompanying text.

would help applicants, the EEOC should still allow some room in its guidelines for business necessity when vulnerable individuals, or security of the public, are involved. Employers must be allowed to be scrupulous in hiring candidates for sensitive positions.

While far from perfect, Title VII and the FCRA provide job applicants with some protections against discrimination. Unfortunately, the law in this area is relatively complex and far too few applicants actually enforce the rights they are given under the FCRA and Title VII. This problem highlights the fact that the effects of having a criminal record in the US are overly punitive. However, until widespread reform of our criminal justice system is instituted, these legal protections will have to continue to evolve to meet the needs of applicants who have been unjustly discriminated against due to their records.