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WHEN CONVICTS NEED NOT APPLY:
PROPOSING CLARIFICATIONS TO THE
EEOC’S 2012 GUIDELINES

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I. AN INTRODUCTION TO TITLE VII

When President George H.W. Bush signed the Civil Rights Act of 1991, a bipartisan effort to reform the duty of American employers to refrain from racial discrimination when hiring job applicants, he stated that “[i]t is extremely important that the statute be properly interpreted by executive branch officials, by the courts, and by America’s employers so that no incentives to engage in such illegal conduct are created.” To that end, the Equal Employment Opportunity Commission (“EEOC”) gave employers new guidelines in 2012 for considering job applicants with conviction records.

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Changing statistics play a role in whether an employer's hiring practices are discriminatory.\(^6\) Where African-Americans and Hispanics\(^7\) are convicted at higher rates than Caucasians,\(^8\) America's employers may engage in illegal conduct by rejecting applicants with conviction records.\(^9\) In light of new criminal statistics\(^10\) and the fact that employers have increased access to applicants' criminal histories,\(^11\) the EEOC thought it prudent to offer insight into practices that could incur Title VII liability\(^12\) and avoid it.\(^13\)

While the new guidelines answer many questions,\(^14\) others

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10. Guerino, supra note 8, at 27; see also Sean Rosenmerkel et al., Felony Sentences in State Courts, 2006 — Statistics Tables 1, 19 (2010), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (detailing that an average of six more African-Americans in 2006 were incarcerated for felonies than Caucasians).

11. See Carl R. Ernst & Les Rosen, National Criminal History Database 1, 18 (2002), available at http://www.brpub.com/articles/CriminalHistoryDB.pdf (concluding that employers could use online databases to review a job applicant’s criminal history); see also Soc’y for Human Res. Mgmt., Background Checking: Conducting Criminal Background Checks 1, 4 (2010), www.slideshare.net/shrm/background-check-criminal?from=share_email (reporting that 73% of all surveyed employers conduct criminal background checks through applicants’ consumer reports); see also Keisha-Ann G. Gray, Requesting a Criminal-Background Check, HUMAN RES. EXEC. ONLINE (Sept. 10, 2012), http://www.hreonline.com/HRE/story.jsp?storyId=533350656 (advising New York employers on how to conduct background checks under the EEOC’s 2012 Guidelines).


When Convicts Need Not Apply

remains. What the guidelines suggest and what Title VII requires do not match up neatly. In particular, the EEOC “recommends that employers not ask about convictions on job applications.” At the same time, the EEOC provides that such hiring practices could be defended as a business necessity without requiring individualized assessments.

Accordingly, employers must choose between either following the EEOC’s recommendation or narrowly tailoring questions about the convictions they find impermissible to avoid disparate impact liability. While the EEOC recommends that employers not ask about convictions on employment applications, an employer can legally do so and deny employment based on the answers given when the disqualifying convictions are consistent with a business necessity.

Section II of this Comment examines the analytical history of Title VII disparate impact claims leading up the 2012 Guidelines. Section III illustrates the ambiguities that can arise in interpreting these guidelines. Finally, Section IV proposes areas for clarification in future guidance.

II. THE DEVELOPMENT OF DISPARATE IMPACT CLAIMS UNDER TITLE VII

A. Disparate Impact Analysis in the U.S. Supreme Court

The EEOC is an executive agency that primarily enforces Title VII, the federal law making it illegal for employers to discriminate on the basis of race or national origin in their hiring practices. Not only does Title VII explicitly proscribe facially-

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16. See id. (emphasizing that non-compliance with the EEOC’s broad outlines for best practices that the EEOC provides is not necessarily prohibited by Title VII nor indefensible as a business necessity).
18. See id. (advising that Title VII may not require an individualized assessment depending on the case, but that the employers screening process must have a “demonstrably tight nexus” between the disqualifying conviction and the job for which the applicant has applied).
19. See id. at 18 (incorporating the factors considered to determine whether a hiring practice is narrowly tailored under Green v. Mo. Pacific R.R. Co., 549 F.2d 1158 (8th Cir. 1977), into the EEOC’s guidelines).
20. See infra p. 3.
racial hiring policies, it also proscribes racially-neutral policies
that disproportionately favor one race over another, called a
“disparate impact.” Seven years after Title VII passed, the
Supreme Court acknowledged in *Griggs v. Duke Power Co.* that,
where the disparate impact is attributable to race, Title VII’s
prohibitions on discrimination control. Therefore, an employer
cannot evaluate a person in the abstract when the result is that
people of one race are hired more often than another.

An employer is permitted to evaluate each applicant for a job
with a hiring practice that is related to the job in question. The
extent to which a hiring practice is so related became an
employer’s defense to disparate impact claims under Title VII.
Thus, where a plaintiff has pled sufficient facts of a disparate
impact arising from an employer’s hiring practice, the employer
could rebut it with legitimate business reasons in the so-called
“business necessity defense.” Yet, how an employer had to prove
the business necessity defense was unclear. Contradictory
notions of what an employer had to prove in court were apparent
in the Court’s jurisprudence.

In 1988, the Supreme Court clarified the employer’s burden of

for the first time in Supreme Court’s jurisprudence that Title VII’s purpose of
eliminating racial discrimination in employment encompasses hiring policies
beyond explicitly race-based criteria).
26. See *id.* at 430 (remarking that, in their employment applications,
African-Americans passed the employer’s intelligence test at lower rates
because of the inferior education received in segregated schools).
27. *Id.* at 434.
28. *Id.* at 436.
29. *Id.*
30. *Id.* at 431.
31. See *Watson*, 487 U.S. at 998 (holding that an employer can meet the
requirements of the business necessity defense by presenting evidence that
the allegedly discriminatory practice is justified).
32. See *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (holding that a
district court may rely on generalized national statistics to prove a disparate
impact in evaluating a plaintiff’s prima facie case).
33. *Watson*, 487 U.S. at 998-99 (noting that the burdens imposed on
employers can be weighed in determining whether an employer’s policy serves
business interests and that an employer may find it easier to determine
whether its employment decisions bear a relationship to the job in question
with a discretionary policy).
34. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03
(1973) (detailing the manner in which a plaintiff may make a prima facie case
of disparate impact while not detailing how the defendant-employer could
rebut that case).
35. Compare, e.g., *Watson*, 487 U.S. at 997 (stating that the plaintiff bears
the burden of persuasion on every aspect of a Title VII disparate impact claim)
with *Dothard*, 433 U.S. at 329 (stating that an employer must prove a
business necessity defense).
proof in *Wards Cove Packing Co., Inc. v. Atonio*. The Court held that, in any Title VII disparate impact claim, the employer merely had to present some evidence that the practice was related to employment. The Court also held that the applicant always had the burden of persuasion. During the course of disparate-impact jurisprudence, the employer's burden got lost in translation. Meanwhile, Congress had made no efforts to alter the Court's conception of the business necessity defense.

**B. Congressional Reform**

Then, in the early nineties, many in the 102nd Congress sought to tighten the lenient standard that *Wards Cove* had given to employers' business necessity defense. The biggest question was how to do it. Congress first tried in 1990 to overturn *Wards Cove* with legislation.

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36. See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 659 (1989) (holding that an employer only had to provide evidence that the policy was related to the job in question, and that the defendant employer had no burden of persuasion in Title VII claims).

37. *Id.*

38. *Id.*

39. See *id.* at 664-65 (Stevens, J., dissenting) (explaining the history of disparate-impact jurisprudence following *Griggs* and arguing that the majority has reversed what courts had previously required employers to establish to meet a business necessity defense).

40. See *id.* at 666 (stating that "Congress has declined to act . . . to limit the reach of this 'disparate-impact' theory.").


42. See also *Wards Cove*, 490 U.S. at 652 (expressing concern that without deference to an employer's rational business concerns, employers would be subject to overwhelming discrimination suits and thus may be tempted to adopt illegal quotas in order to avoid expensive litigation); cf. Presidential Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701 (Nov. 21, 1991) (affirming that The Civil Rights Act of 1991 would not create "incentives for employers to adopt quotas or unfair preferences.").


debates that went unresolved. When the Civil Rights Act of 1991 was presented on the Senate floor, Senator Danforth introduced an interpretative memorandum aimed directly at reversing *Wards Cove.* Thus, Sections 104 and 105 of the Act put the burden of proof on the defendant-employer that a disparate hiring practice was a business necessity. The question remained as to how much an employer had to prove, but not as to what had to be proven. This burden shifting became the hallmark compromise in reforming discriminatory hiring post-*Wards Cove.*

C. Changes in the Statistical Landscape

Even with a burden-shifting framework in Title VII, some old problems of proof remained. Specifically, unlike disparate treatment claims where an applicant could prove discrimination

45. See Cynthia L. Alexander, *The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise,* 44 Vand. L. Rev. 595, 616 (1991) (explaining that the debates regarding codifying an employer’s burden in establishing business necessity resulted in proposals that were either unsatisfactorily lenient or unsatisfactorily strict, many of which did not address the holding in *Wards Cove*).

46. See 137 Cong. Rec. S15,273-01 (1991) (clarifying that “the terms ‘business necessity’ and ‘job related’ are intended to reflect the concepts enunciated by the Supreme Court in *Griggs*... and in the other Supreme Court decisions prior to *Wards Cove*.”); see also, Civil Rights Act of 1991, S. 1745 102nd Cong. § 105(b) (1991) (requiring that “no statements other than the interpretive memorandum... shall be considered legislative history, or relied upon in any way as legislative in construing... [b]usiness necessity.”). But see Philip S. Runkel, *The Civil Rights Act of 1991: A Continuation of the Wards Cove Standard of Business Necessity?* 35 Wm. & Mary L. Rev. 1177, 1239 (1994) (concluding that the Civil Rights Act of 1991 is ambiguous such that courts could apply the *Wards Cove* standard in contravention of the Act’s stated purpose in the interpretative memorandum).


49. See Rotunda, *supra* note 41, at 927 (remarking that Congress did not define the term “business necessity” with any particularity).


51. *Id.*

through facially-racial hiring policies, disparate impact claims usually required the plaintiffs to provide statistics because the policy was race-neutral on its face. The sufficiency of statistical evidence needed to prove a Title VII claim was particular to each case. However, the employers did not have any control over the statistical realities against which their hiring practices would be judged. This presents a unique issue in the case of conviction statistics, as many employers have hiring practices against applicants with such records.

1. Disparate Impact from Conviction Rates.

Between 1974 and 2001, the number of former prisoners living in the United States more than doubled, from 1,603,000 to 4,299,000. The number of convicts in a twenty-five year period has risen by nearly 274 percent. In the last five years, one in every hundred people was behind bars.

Conviction rates have a special relationship with the development of disparate impact jurisprudence because demographics do not bear out evenly. As of 2010, African-American men were imprisoned at a rate of 3.07%. Hispanic men

53. See Watson, 487 U.S. at 992 (noting that disparate impact claims will inevitably consider statistical information).


56. 2012 EEOC Guidelines, supra note 5, at 1.


60. See One in 31, supra note 58, at 5 (reporting that African-American adults were four times as likely as whites and two and a half times as likely as Hispanics to be in the criminal justice system).

61. See Guerino, supra note 8, at 27 (reporting that 3074 of a 100,000 population of African-Americans had been sentenced under state and federal jurisdiction in 2010).
were imprisoned at 1.26%.\textsuperscript{62} White men, by contrast, were imprisoned at a rate of only 0.46%.\textsuperscript{63} This statistical backdrop affects disparate impact claims.\textsuperscript{64}

2. Introduction of the Green-Factor Test.

In Green v. Mo. Pacific R.R. Co., the Eighth Circuit dealt with whether Title VII contemplates protecting minorities against discrimination when an employer refuses to hire anyone with a conviction.\textsuperscript{65} In that case, the employer refused to hire anyone with a conviction for anything other than a minor traffic offense.\textsuperscript{66} The court examined the relevant statistics\textsuperscript{67} and found that it established a \textit{prima facie} case.\textsuperscript{68} But under Griggs,\textsuperscript{69} the question turned to the business necessity defense.\textsuperscript{70}

The employer offered a scattershot defense.\textsuperscript{71} In the face of statistical evidence that the employer’s policy would disproportionately exclude African-Americans,\textsuperscript{72} the Eighth Circuit held that the hiring policy could not be justified,\textsuperscript{73} remarking that “blacks . . . still suffer from the burdens of discrimination . . . [and denial of job opportunities] because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.”\textsuperscript{74}

On remand,\textsuperscript{75} the district court ordered an injunction.\textsuperscript{76} In its order, the district court listed three factors by which the employer should consider an applicant’s criminal history.\textsuperscript{77} First, the employer had to take the nature and gravity of the applicant’s

\begin{itemize}
  \item \textsuperscript{62} Id. (reporting that 1258 of a 100,000 population of Hispanic men had been sentenced under state and federal jurisdiction)
  \item \textsuperscript{63} Id. (reporting that 459 of a 100,000 population of White men had been sentenced under state and federal jurisdiction).
  \item \textsuperscript{64} 2012 EEOC Guidelines, \textit{supra} note 5, at 3.
  \item \textsuperscript{65} \textit{Green v. Mo. Pacific R.R. Co.}, 523 F.2d 1290, 1292 (8th Cir. 1975).
  \item \textsuperscript{66} Id.
  \item \textsuperscript{67} Id. at 1293-94.
  \item \textsuperscript{68} Id. at 1295.
  \item \textsuperscript{69} \textit{Griggs}, 401 U.S. at 431.
  \item \textsuperscript{70} \textit{Green}, 523 F.2d at 1293.
  \item \textsuperscript{71} \textit{See id.} at 1298 (offering business necessity defense on the grounds that the employer feared theft, negligent hiring claims for hiring violent offenders, and problems of recidivism).
  \item \textsuperscript{72} Id. at 1294.
  \item \textsuperscript{73} Id. at 1299.
  \item \textsuperscript{74} Id. at 1298.
  \item \textsuperscript{75} \textit{See id.} at 1299 (ordering remand at which “the district court . . . [had to] determine whether on the date of his application [the plaintiff’s] background and experience qualified him for any position with [the employer].”).
  \item \textsuperscript{76} \textit{See Green v. Mo. Pacific R.R. Co.}, 549 F.2d 1158, 1160 (8th Cir. 1977) (recounting and affirming the district court’s orders from the remand ordered in 1975).
  \item \textsuperscript{77} Id.
\end{itemize}
conviction into account. Second, the employer had to consider the time that had passed since the applicant was either convicted or released from prison. Third, the nature of the job in question would be considered. Because employers’ hiring policies that took these factors into consideration would be narrowly-tailored, the Eighth Circuit affirmed this order.

Then, in El v. SEPTA, conviction statistics played a role in another discrimination suit based on a disparate impact theory. In that case, an African-American paratransit driver was rejected because he had been convicted of homicide forty years prior to applying. The EEOC, in adopting the Green test, had concluded that the employer was unable to establish that its hiring policy was suitable.

The Third Circuit acknowledged that the United States Supreme Court had never dealt with the issue of convictions as the basis for employment discrimination head on. Relying on other Supreme Court precedent, the court remarked that an employer’s “common-sense”-basis for barring an applicant for any conviction would be insufficient; rather an employer’s hiring policy must “distinguish between applicants that pose an unacceptable level of risk and those that do not.” The court upheld the policy in that case.

78. Id.
79. Id.
80. Id.
81. Id.
83. Id. at 235.
84. See id. at 243 (remarking that the EEOC, in its compliance manual following the passage of the Civil Rights Act of 1991, had adopted Green’s three-factor test).
85. Id. at 248.
86. Id. at 240. But see McDonnell Douglas Corp., 411 U.S. at 793 (holding that an employer could refuse to rehire an employee who had engaged in illegal protests); see also Beazer, 440 U.S. at 587 n. 31 (holding that a government employer could refuse to hire methadone users because of safety concerns).
87. See Dothard, 433 U.S. at 332 (explaining that an employer cannot evaluate an applicant in the abstract out of business necessity).
88. See El, 479 F.3d at 240 (relying on Dothard for the proposition that employer must present empirical proof that exclusionary policy is an accurate indication of the applicant’s job performance).
89. Id. at 245.
90. Id. at 249 (holding that there was no evidence in the record that the employer could adopt a less discriminatory alternative practice that would serve business necessities such that the plaintiff could overcome the employer’s business necessity defense).
D. The Emergence of the 2012 EEOC Guidelines

The EEOC has incorporated both Green and El into its new 2012 Guidelines. Employers should develop targeted screening processes and offer individualized assessments. Yet, the EEOC explains that policies narrowly-tailored to Green may be permissible without individualized assessments. Ambiguously, the EEOC both recommends that an employer not ask about convictions on applications while implying that denying employment for the answer given might be permissible under Green as an exception to its individualized assessment recommendation.

When an employer cannot ask about convictions on an application, the employer has “Banned the Box.” Many local governments have “Banned the Box,” and these policies carry social and economic benefits. Yet, the question remains for private employers whether they need to “Ban the Box” as well. Indeed, after the release of the new 2012 EEOC guidelines, the

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91. 2012 EEOC Guidelines, supra note 5, at 11, 15 (establishing that the EEOC will use the Green factors to determine whether specific criminal conduct is related to the job in question in Title VII claims absent a valid study under Uniform Guidelines standards and approving of the holding in El that a hiring policy must appropriately gauge the risk an applicant poses to the employer’s business).

92. See id. at 15-16 (explaining that a targeted screening process will link specific criminal conduct to the position sought based upon the nature of the offense, the time elapsed, and the nature of the job).

93. Id. at 18 (advising that an individualized assessment should allow the applicant to explain the offense and demonstrate that the applicant should not be disqualified because of it).

94. Id.

95. Id. at 13-14.

96. Id. at 25.

97. See McGowan, supra note 15 (explaining that many government employers are proscribed by statute from asking about convictions on initial job applications under “Ban the Box” legislation; see also Mass. Gen. Laws ch. 151b, § 4 (2012) (proscribing employers from asking applicants about arrests not leading to convictions or certain minor misdemeanor convictions during the hiring process).


issue is in dispute.\textsuperscript{100}

III. AN ANALYSIS OF HOW AMBIGUITIES IN THE 2012 GUIDELINES INDICATE A NEED FOR CLARIFICATION

The analysis below explores three chief ambiguities that arise from the 2012 Guidelines. First, employers must hypothesize on how the Green-Factor test would work. Because the Guidelines lack specificity on this issue, clarifying the test must be accomplished through one of the Guidelines’ examples and with respect to previous cases. Second, we question whether employers face the level of Title VII exposure that Guidelines predict, especially in light of employers’ economic interests at stake. Finally, the analysis explores the policy interests that the Guidelines do not explicitly address. These ambiguities reveal the need for proposed clarifications.

A. The First Ambiguity: The 2012 Guidelines Do Not Provide an Example of Permissive Hiring Questions under Green

The Guidelines do not have an example of a permissible, narrowly-tailored question about an applicant’s prior convictions without an individualized assessment.\textsuperscript{101} However, Example 7 in the Guidelines can show how such an analysis might work.\textsuperscript{102} In this example, a Hispanic applicant seeks a job with a community center that will reject any applicant with a theft crime conviction in the last four years.\textsuperscript{103} The applicant has a conviction for credit card fraud, and he is subsequently rejected after undergoing an individualized assessment.\textsuperscript{104} During the assessment, he was presumably told of the employer’s concern with his criminal history and given a chance to explain the offense.

The analysis should remain unchanged if no individualized assessment had been provided.\textsuperscript{105} The EEOC’s analysis concludes

\textsuperscript{100} McGowan, \textit{supra} note 15.

\textsuperscript{101} \textit{See generally} 2012 EEOC Guidelines, \textit{supra} note 5, at 18-20 (providing two fact-pattern examples, one in which an employer uses an individualized assessment and one in which it does not, and the corresponding analyses on Title VII).

\textsuperscript{102} \textit{Id.} at 18-19.

\textsuperscript{103} \textit{See id.} at 19 (explaining that the community center adopted this targeted exclusion based on statistical data and recidivism research).

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} \textit{See id.} (providing a chapeau to the individualized assessment guidance which states that “an employer may be able to justify a targeted criminal records screen solely under the Green factors.”); \textit{but see} Antonio L. Ingram II, \textit{EEOC Updates Guidance on Using Criminal Records in Hiring Decisions, EMP’T LAW COMMENTARY}, July 2012, at 1, 3, \textit{available at} http://www.jdsupra.com/legalnews/jdsupra-24710/ (recommending that employers let applicants know that the applicant’s criminal record is the reason for the rejection and allow the applicant to explain the conviction).
that the screen was properly tailored\textsuperscript{106} to assess risk.\textsuperscript{107} This means that the exclusion is consistent with a business necessity and there is no violation.\textsuperscript{108} There should be no violation whether the employer learned about the conviction through an individualized assessment or from an answer on an application.\textsuperscript{109} The Guidelines, however, are silent on the precise analysis.

Thus, the only remaining way for employers to understand how to use Green-Factors in hiring questions is based on previous, successful examples.

One example is \textit{Avant v. South Cent. Bell Tel. Co.}, where an African-American male brought a Title VII action against a telephone company that had rejected his application because he had answered yes on an application to the conviction question.\textsuperscript{110} The plaintiff presented statistical evidence\textsuperscript{111} of a disparate impact, similar to evidence that gave rise to the EEOC’s concerns in the 2012 Guidelines.\textsuperscript{112} Yet, the Fifth Circuit upheld the district court’s dismissal,\textsuperscript{113} because such an exclusion was responsive to a legitimate business need.\textsuperscript{114}

Asking about the conviction in that case and subsequent rejection on that basis fits neatly into the \textit{Green} analysis. Provided that the exclusion considers the nature of the offense,\textsuperscript{115} the time since conviction,\textsuperscript{116} and job sought,\textsuperscript{117} the exclusion meets the business necessity defense.\textsuperscript{118} The exclusion would apply

\begin{itemize}
\item \textsuperscript{106} \textit{Green}, 523 F.2d at 1292.
\item \textsuperscript{107} \textit{El}, 479 F.3d at 235.
\item \textsuperscript{108} 42 U.S.C. § 2000e-2(k).
\item \textsuperscript{109} \textit{But see} Brian Carlson, \textit{New EEOC Guidance Underscores Importance of “Individualized Assessment” in Employers’ Review of Criminal Records}, \textsc{Schwartz Hannum PC} (Sept. 2012), http://shpclaw.com/Schwartz-Resources/new-eec-guidance-underscores-importance-of-“individualized-assessment”-in-employers’-review-of-criminal-records/ (suggesting that employers can generally forgo individualized assessments only when a federal law prevents that applicant from fulfilling the job position).
\item \textsuperscript{110} \textit{See} \textit{Avant v. South Cent. Bell Tel. Co.}, 716 F.2d 1083, 1085 (5th Cir. 1983) (detailing that the conviction which the employee put on his application was not the same conviction for which the employee was rejected, but that the latter was discovered upon a background check).
\item \textsuperscript{111} \textit{See id.} at 1087 (arguing that, because there is a disparate conviction rate between African-Americans and Caucasians, rejecting employment because of convictions results in a disparate impact).
\item \textsuperscript{112} 2012 EEOC Guidelines, \textit{supra} note 5, at 8.
\item \textsuperscript{113} \textit{Avant}, 716 F.2d at 1087.
\item \textsuperscript{114} \textit{Id.; see also} Osborne v. Cleland, 620 F.2d 195, 199 (8th Cir. 1980) (upholding a district court’s dismissal of a plaintiff’s discriminatory impact case where he was terminated because, had he properly disclosed his past conviction on his application, the employer would have had an legitimate business reason for denying employment).
\item \textsuperscript{115} \textit{Green}, 549 F.2d at 1160.
\item \textsuperscript{116} \textit{Id}.
\item \textsuperscript{117} \textit{Id}.
\item \textsuperscript{118} 2012 EEOC Guidelines, \textit{supra} note 5, at 15.
\end{itemize}
irrespective of the individualized assessment, and rejection based on the answer “yes” is protected.

Similarly, in a request to the EEOC entitled Buckley, an African-American male brought a disparate impact claim against the United States Postal Service when he was denied employment because he disclosed convictions in an interview. The Postal Service argued that its rejection did not have to comply with Green because it “did not apply to this case where the agency decided appellant was ‘undesirable’ after appellant disclosed his past history in an interview.”

The EEOC disagreed, stating that Green did in fact apply, the employer had not met the factors, and that “there is no significant difference between rejecting appellant before he is placed on a list of eligibles or after an interview.”

Accordingly, while the EEOC found the employer liable, it suggests that narrowly-tailored exclusions under Green are employers’ best defense when it rejects an employee who discloses past convictions, irrespective of any individualized assessment.

These two examples are some of the few accessible EEOC documents demonstrating how Green could be successfully used by employers; yet, their lack of analysis and scant attention to facts leave employers mostly in the dark. The uncertainty is especially evident with respect to their specific practices, which the EEOC should have addressed when it took up this issue in the 2012 Guidelines.

119. See id. at 18 (stating that “Title VII thus does not necessarily require individualized assessments in all circumstances.”).
120. See Pre-Employment Inquiries and Arrest & Conviction, EEOC, http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm (last visited Oct. 22, 2012) (affirming that there is “no Federal law that clearly prohibits an employer from asking about arrest and conviction records.”).
121. See Buckley, EEOC Request No. 05800039, 1992 WL 598875 at *2 (July 26, 1982) (detailing that the applicant had been denied employment because he had been on probation, had made a false statement to a previous employer, and had attempted to cash a fraudulent check).
122. Id.
123. Id. at *3.
124. Id.
125. Id.; see also, Maxwell, EEOC Petition No. 03930138, 1994 WL 1841045 at *4 (Mar. 22, 1994) (applying the Green factor analysis in a disparate impact claim against a federal agency’s rejection of an application upon his disclosure of prior arrests and convictions).
B. The Second Ambiguity: The Extent of Title VII Liability when Employers Ask about Convictions

The 2012 Guidelines’ recommendation that employers not ask about convictions in applications is an implicit warning that doing so can expose an employer to Title VII liability. With a more in-depth treatment of Green in the Guidelines, employers are best shielded by also providing individualized assessments. This is because the employer cannot defend against disparate impact claims with statistics from their applicant pool; rather, employers must rely on their hiring procedures for that defense.

To the extent the question is not tailored under Green, Title VII liability is a possibility. Without a thorough explanation of Green in the Guidelines, employers might try to curtail liability by posing the conviction question to an applicant and provide that any false statement the applicant gives will result in discharge. By doing so, the employer serves their business interest of not hiring a person with a conviction while “objectively assess[ing] the relevance of an applicant’s conviction if it becomes known when the employer is already knowledgeable about the applicant’s qualifications and experience.” This would be an expensive alternative, whereas clarified Guidelines would permit the Green-factor business necessity justification to serve employers a less expensive alternative.

But to be sure, the Green-factor analysis is not the only manner in which an employer can raise a business necessity defense to Title VII liability. The EEOC first recommends that employers validate the targeted screen against such records

127. 2012 EEOC Guidelines, supra note 5, at 25 (recommending that considering questions should also be limited to those convictions relevant to the employer’s business necessity).
128. Id. at 18.
129. See Dothard, 433 U.S. at 330 (remarking that an employer’s application process might not reflect the potential applicant pool against which discrimination occurred because the number that did not apply is indeterminate).
130. See, e.g., Buckley, 1982 WL 598875 at *2 (July 26, 1982) (finding liability for an employer that did not tailor its targeted screen according to Green as it related to an applicant’s prior conviction).
134. Id. at 14.
pursuant to the Uniform Guidelines on Employee Selection Procedures ("UGESP").

However, the EEOC’s recommendation on the UGESPs assumes that “data about criminal conduct as related to subsequent work performance is available and such validation is possible.” This validation appears unlikely because the studies would require “an investigation of suitable alternative selection procedures.” Moreover, supposing it were possible, such validation is difficult for most employers to meet. Thus, given that Green still supports a business necessity defense, which can encompass questions on applications, Green offers employers a less expensive alternative to strict compliance with the 2012 Guidelines.

The EEOC’s recommendation that employers not ask about convictions on the application lengthens the hiring process because they will continue to consider the applicant until that information is later revealed. Yet, Title VII has never required that employers adopt unduly burdensome hiring practices. Because waiting to ask about an applicant’s conviction record lengthens the process for which the applicant may not ultimately be eligible, the EEOC’s recommendation incurs a cost for the employer. Indeed, reviewing and screening any one applicant could cost an employer upwards of $687.50.

135. Id.; see also 29 C.F.R. § 1607.5 (2013) (providing the applicable standards for validation).
137. 29 C.F.R. § 1607.3 (2013); see also 2012 EEOC Guidelines, supra note 5, at 13-14 (implying that not asking about convictions is a less discriminatory alternative because an employer will be more likely to assess the individual applicant).
139. See id. (recommending that employers consider the Green factors, when revising their hiring policies to comply with the guidelines, as they relate to that employer’s business necessities).
141. See id. at 13-14 (emphasizing that the employer should already have knowledge of the applicant’s qualifications in the hiring process before asking about prior convictions).
142. See Watson, 487 U.S. at 998 (acknowledging cost to the employer as a factor that courts should consider in determining whether the hiring practice has a less-discriminatory alternative).
143. See McGowan, supra note 15 (quoting former EEOC general counsel’s remarks that the 2012 Guidelines’ recommendation would be an “extremely burdensome process” because the employers only learn of disqualifying convictions after time and money has been spent in the hiring process).
For example, even if an applicant is not asked about convictions initially, the employer is still permitted to perform a background check. Indeed, most employers do. The employer bears this cost, and cost can be a factor in determining if an alternative hiring practice is available. This suggests that, where an employer has tailored the questions about convictions according to Green, the employer can both have a Title VII permissible screen and save costs.

C. The Third Ambiguity: The Guidelines Do Not Readily Spell Out All of the Policy Considerations at Play

Given that Title VII does not forbid asking about criminal convictions nor require that employers take on applicants who present an unacceptable level of risk, applicants with criminal histories have considerable trouble finding employment.

employer faces at any one of six stages in the hiring process).


146. See 2012 Guidelines Q & A, supra note 14 (advising employers that Title VII itself does not regulate the extent to which an employer can acquire an applicant’s criminal history).


149. See Deborah Sudbury & Elaine Rogers Walsh, The EEOC Revisits Criminal Background Checks, THE PRACTICAL LAWYER, Aug. 2012, at 31, 35 (explaining that the 2012 Guidelines do not define alternative employment practices with respect to background checks, but that the draft of the guidelines stated that cost to the employer is a factor evaluating alternatives).

150. See also LEGAL ACTION CTR., CRIMINAL RECORDS AND EMPLOYMENT: PROTECTING YOURSELF FROM DISCRIMINATION 7 (2001), available at http://www.lac.org/doc_library/lac/publications/CriminalRecordsAndEmployment.pdf (providing sample questions and answers regarding convictions that can arise in an interview and incorporating features of individualized assessments into the sample answers).


152. E.I, 479 F.3d at 245.

 Accordingly, the EEOC’s 2012 Guidelines have been praised not only for reducing racial discrimination, but for also facilitating convicts’ reintegration. The Guidelines themselves do not specifically cite convict reintegration as one of its goals. However, many other mechanisms recently put in place can effectuate those goals while not requiring employers “Ban the Box” on applications the way that the 2012 Guidelines suggest.

For example, the Attorney General’s Federal Interagency Reentry Council has highlighted the Work Opportunity Tax Credit as a powerful incentive for employers to consider hiring felons. If employers want to receive the credit, they could tailor hiring policies around the tax credit’s qualifications. Given that other efforts are being made for effective reintegration of formerly incarcerated persons, an employer’s narrowly-tailored questions, which are permitted under Title VII, are unlikely to impede those efforts.

Further, the Guidelines do not extensively explore “Banning the Box” hiring policies. For instance, many government entities have “Banned the Box,” prohibiting check boxes on applications about criminal histories. Supporters of “Ban the Box” argue that

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154. See McGowan, supra note 15 (quoting EEOC assistant legal counsel that employers cannot use criminal information to discriminate).

155. Martin, supra note 153.

156. 2012 EEOC Guidelines, supra note 5, at 3 & 29 n. 16 (citing the Attorney General’s reintegration projects as “other developments” that prompted the EEOC to release updated guidance).

157. Id.


160. See I.R.C. § 51(d)(4) (West 2011) (defining an ex-felon for the purposes of the tax credit).

161. 2012 EEOC Guidelines, supra note 5, at 3 & 29 n. 16.

162. 2012 EEOC Guidelines, supra note 5, at 15.


164. See, e.g., HAW. REV. STAT. § 378-2.5(b) (2012) (prohibiting questions about conviction records until a conditional offer of employment is made which can only be withdrawn consistent with a business necessity); MINN. STAT. § 364.021(a)(2009) (providing that the applicant must be selected for an interview before questions about convictions can be asked); CONN. GEN. STAT. § 46a-80(b) (1973) (prohibiting questions about conviction records until the employer has found the applicant to be otherwise qualified).

the laws serve a policy of giving ex-offenders the chance to interview while allowing employers to interview applicants that they might not otherwise have considered. The EEOC’s new guidelines echo these laws: “[t]he policy rationale is that an employer is more likely to objectively assess the relevance of an applicant’s conviction . . . [and thus] the Commission recommends that employers not ask about convictions on job applications.” Because employers can comply with the Guidelines using Green questions, and because the guidelines and “Ban the Box” laws have parallel policies, Green questions do not necessarily impede policies served by “Ban the Box” laws.

Questions about convictions are more permissible than those about arrests because a conviction allows the presumption that the underlying conduct was actually done. In contrast, an arrest is an accusation, not adjudication. Some “Ban the Box” laws recognize the same distinction, prohibiting only those questions that did not lead to a conviction. Accordingly, questions about convictions themselves and “Ban the Box” laws need not conflict.

The EEOC’s Guidelines should provide the blueprint for employers to create targeted exclusions under Title VII. Thus, an employer can refuse to hire an ex-convict where the nature of the offense, the time since the conviction, and the nature of the job illustrate that the exclusion is related to the job.

Many “Ban the Box” laws mirror the business necessity exception. For example, Hawaii explicitly incorporates business necessity, which the EEOC’s guidelines state the Green factor analysis satisfies. Accordingly, asking about convictions tailored under Green does not impede the policy of “Ban the Box” laws.

IV. PROPOSED CLARIFICATIONS TO THE 2012 GUIDELINES

The Green-Factor analysis, affirmed by the EEOC in its 2012 Guidelines, can protect employers from Title VII liability for

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166. See id. (quoting the president of a computer consulting and staffing firm in support of Philadelphia’s “Ban the Box” law ordinance).
168. Id. at 13.
169. Id. at 12.
170. See, e.g., MASS. GEN. LAWS ch. 151B, § 4 (2012) (proscribing employers from asking applicants about arrests not leading to convictions or certain minor misdemeanor convictions at any time during the hiring process).
171. 2012 EEOC Guidelines, supra note 5, at 15.
172. Id.
173. Id.
174. Id. at 16.
175. Id. at 13 & 41 n. 108.
176. HAW. REV. STAT. § 378-2.5(b) (2012).
177. 2012 EEOC Guidelines, supra note 5, at 15.
questions about an applicant’s conviction history. Asking about convictions with “the box” is a hiring practice which, “depending on the facts and circumstances, an employer may be able to justify . . . solely under the Green factors.” Yet, the EEOC desires that employers not ask about convictions immediately, and rather base their employment decisions on the business’s needs. Accordingly, the EEOC should close the gap between its implied legal analysis and its recommendations. The EEOC would thus better inform employers on Title VII compliance. The following are proposed clarifications that could be made.

A. The First Clarification: How Questions About Convictions Relate to the Legal Elements of Crimes

The first Green-factor requires employers to consider the nature and gravity of the offense. The EEOC adopted this prong of Green because the “nature of the offense or conduct may be assessed with reference to the harm caused (e.g., theft causes property loss).” The nature of the offense, with reference to the harm caused by it, helps an employer distinguish between applicants that do and those that do not pose an unacceptable level of risk.

The elements of a crime are also instructive, as they delineate the harms that the criminal code seeks to prevent. However, the connection between past behaviors resulting in these harms and counter-productivity in employment remains attenuated.

By requiring employers to ask only questions related to the harms resulting from the crimes, rather than about the convictions themselves, the EEOC (1) ensures that the questions

178. See supra Part III.B (analogizing the Green-factor analysis with courts’ decisions finding no Title VII for questions about convictions on job applications).
179. 2012 EEOC Guidelines, supra note 5, at 18.
180. Id. at 13-14.
181. See supra notes 95-96 (emphasizing discrepancies between the EEOC’s Green analysis and its “Ban the Box” recommendation).
182. See Carlson, supra note 109 (arguing that the 2012 EEOC Guidelines require an individualized assessment even if an employer is presumptively unqualified because of business necessity under Green).
183. Green, 549 F.2d at 1160.
185. El, 479 F.3d at 249.
186. See, e.g., OHIO REV. CODE ANN. § 2913.02 (West 2012) (providing that aggravated theft includes elements of deception, threat, or intimidation).
187. See Brent W. Roberts et al., Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study, 92 J. APPLIED PSYCHOL. 1427, 1427 (2007), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1044&context=managementfacpub (reporting that criminal convictions and prior employment were unrelated to counter-productivity in employment).
are narrowly-tailored under Green and (2) that the employer will be more likely to follow up with specific questions about the incident because the applicant’s answers would be vague. Therefore, the EEOC can refine its Green analysis by requiring employers only ask about the harms inherent to disqualifying offenses.

The EEOC should also provide bright-line rules on durations of criminal conduct exclusions. Under Green, an employer’s complete disregard for the time since the conviction or incarceration fails the business necessity defense. Indeed, the employer has to tailor the duration for the criminal conduct exclusion to the extent that “there is a time at which a former criminal is no longer any more likely to recidivate than the average person.” It is here, however, that the EEOC’s guidance on durations for criminal conduct exclusions ends, because whether “the duration of an exclusion is sufficiently tailored . . . will depend on the particular facts and circumstances of each case.”

While the EEOC may be encouraging its recommended individualized assessments by adopting case-specific requirements, such assessments are not required. Given the cost of individualized assessments, employers could benefit from clearer guidelines that resolve debates about employer practices.

Employers would benefit from guidelines that incorporate statistical data on the relationships between recidivism and the time since the conviction. In particular, employers should be

188. See 2012 EEOC Guidelines, supra note 5, at 15 (providing the EEOC’s summary of the “Nature and Gravity of the Offense or Conduct” analysis under Green).
189. See Sudbury, supra note 149, at 35 (noting that employers should ask about the circumstances surrounding a conviction when making individualized assessments).
190. See Ellen Jean Hirst, Business Risks Rise in Criminal History Discrimination, CHI. TRIB. (Oct. 21, 2012), http://articles.chicagotribune.com/2012-10-21/business/ct-biz-1021-eec-felony-20121021_1_criminal-records-eec-chicago-district-office-court-case/2 (reporting that one Chicago employer would hire ex-offenders that were qualified and does background checks “only after he knows he wants to hire someone, as a precaution.”).
191. Green, 523 F.2d at 1298.
192. El, 479 F.3d at 246.
193. See 2012 EEOC Guidelines, supra note 5, at 15 (adopting a fact-specific analysis to the second prong of Green).
194. Id. at 18.
195. Id.
196. See Ciccone, supra note 144 (examining the costs employers incur during the hiring process for each employee).
197. See McGowan, supra note 15 (summarizing debates resulting from ambiguities in the EEOC’s 2012 Guidelines).
198. See Alfred Blumstein & Kiminori Nakamura, Redemption in the Presence of Widespread Criminal Background Checks, 47 CRIMINOLOGY 327,
made conscious of the ways other employment since incarceration reduces the likelihood of recidivism.\footnote{199} By tying such empirical data to a duration of time for the criminal conduct exclusion, an employer will more likely assess each individual applicant with respect to that data.

B. The Second Clarification: Information on Services that Provide Employment and Character References

Under \textit{Green}, an employer’s criminal conviction exclusion must be related to the nature of the particular job applied for.\footnote{200} Yet, in its new guidelines, the EEOC’s analysis of this prong is all in litigious hindsight; it does not illustrate when and where a criminal conduct exclusion would or would not be sufficiently related to the nature of the job an applicant wanted.\footnote{201}

For permissible, targeted exclusions, employers need access to the services that facilitate convicts’ integrations, "especially those programs that provide the ongoing support for the riskier hires."\footnote{202} To this end, the EEOC should provide employers with guidance on the demand-side resources that would "reduce the costs, both tangible and intangible, absorbed by employers hiring former prisoners."\footnote{203} Such programs “typically provide intensive job placement.”\footnote{204} Accordingly, by providing employers guidance on placement programs, the EEOC would enhance “successful employment-related interventions that engage private-sector employers and former prisoners [to the] benefit [of] the former

\footnote{346 (2009), available at http://www.search.org/files/pdf/Redemption_Blumstein_Nakamura_2009Criminology.pdf (concluding that employers should be given statistical information on the diminished value of criminal records over time as an incentive to hire ex-offenders).


\footnote{200. See \textit{Green}, 549 F.3d at 1160 (quoting the trial court’s injunctive order on the employer’s hiring practice).

\footnote{201. See 2012 EEOC Guidelines, supra note 5, at 16 (citing \textit{Griggs} for the proposition that a hiring practice resulting in a disparate impact can only survive where related to successful performance of a particular job).


\footnote{204. See id. at 22 (reporting that employers who take advantage of job placement in Welfare to Work programs have similarly low turnover rates as other placement programs).}
prisoner."\textsuperscript{205}

\textbf{C. The Third Clarification: How Green Analyses Resolve Competing Interests}

On the question of an employer’s “box” on the application, there are two competing interests that need to be reconciled. The first is the employer’s business interests.\textsuperscript{206} The second is the convict’s rights to not be discriminated against on account of race or national origin.\textsuperscript{207}

This Comment has suggested that the “box” on an employment application might not incur as much liability as the EEOC’s Guidelines imply.\textsuperscript{208} However, when the employer does incur that liability, the damages that it must pay can be considerable.\textsuperscript{209} To the extent that the “box” is a discriminatory practice, it gives rise to suits by every potential employee wrongfully turned away.\textsuperscript{210} A refined \textit{Green} analysis will help employers avoid such catastrophic outcomes.

It’s clear that the EEOC would like employers to “Ban the Box” so that they “objectively assess the relevance of an applicant’s conviction.”\textsuperscript{211} The policy rationale for this is well-founded, given that minorities with convictions face an up-hill battle in the job market.\textsuperscript{212} The EEOC will serve these applicants’ interests with \textit{Green} refined.

\textsuperscript{205} \textit{Id.} at 5.
\textsuperscript{206} \textit{See} \textit{Griggs}, 401 U.S. at 431 (stating that an employer’s business necessity is the touchstone of reconciling interest between employers and applicants under Title VII).
\textsuperscript{208} \textit{See supra} Part III.B (assessing potential Title VII liability in light of the 2012 guidelines).
\textsuperscript{209} \textit{See generally Starbucks Corp. v. Superior Court}, 86 Cal. Rptr. 3d 482, 485 (Cal. App. 4th Dist. 2008) (noting that the plaintiffs seek “statutory damages of $200 per applicant—a remedy which, by [employer’s] estimation, could total a whopping $26 million” for having asked the “convictions question”).
\textsuperscript{210} \textit{See generally Starbucks Corp. v. Superior Court}, 86 Cal. Rptr. 3d 482, 485 (Cal. App. 4th Dist. 2008) (noting that the plaintiffs seek “statutory damages of $200 per applicant—a remedy which, by [employer’s] estimation, could total a whopping $26 million” for having asked the “convictions question”).
\textsuperscript{211} \textit{2012 EEOC Guidelines, supra} note 5, at 13.
\textsuperscript{212} \textit{See, e.g.}, Jason Meisner, \textit{Dad who posted Facebook picture of girl bound, gagged is found guilty}, \textit{CHI. TRIB.} (Nov. 9, 2012), http://www.chicagotribune.com/news/local/ct-met-facebook-domestic-abuse-20121109,0,2344445.story (reporting on defendant’s attorney’s comments to the press asking “[d]o you know what it’s like to be a black man in America with a felony in your background? Who’s going to hire him?”).
V. CONCLUSION

The EEOC would prefer employers not ask about convictions,213 but as the Guidelines now stand, the Green analysis may still permit such questions without individualized assessments.214 By providing employers with refined guidelines,215 the EEOC will reconcile the employer and applicant.216

213. See, 2012 EEOC Guidelines, supra note 5, at 13-14 (recommending that, as a best practice, employers “Ban the Box”).
214. See supra Part IV.A (examining the Green-Factor business necessity as it applies to conviction questions).
215. See supra Parts IV.A-C (proposing possible ways in which Green may be refined on the issue of application questions).
216. See supra Part IV.C (illustrating the adverse interests between an employer and an ex-offender in the hiring process).