



EEOC's Criminal Record Guidance One Year Later: Lessons from the Community

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About Community Legal Services of Philadelphia

Community Legal Services, Inc. was established by the Philadelphia Bar Association in 1966. Since then, CLS has provided legal services to more than one million low-income Philadelphia residents, representing them in individual cases and class actions, and advocating on their behalf for improved regulations and laws that affect low-income Philadelphians. As the city's largest provider of free legal services, CLS assists more than 12,300 of Philadelphia's poorest residents with their legal problems each year.

For more information, please visit www.clsphila.org.

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Introduction

April 25, 2012 was a very significant day for many millions of Americans: It was the day that the Equal Employment Opportunity Commission (the EEOC) adopted an updated enforcement guidance governing criminal records, replacing prior guidances reaching back to the 1980s.¹ The Guidance reaffirmed that an employer's decision making based on criminal records could constitute race or national origin discrimination in violation of Title VII if the employer's criteria has a racially disparate impact and is not job related and consistent with business necessity.

Unlike prior versions, the 52-page Guidance is a detailed discussion of employer consideration of criminal records, including thorough reviews of the applicable law and social science and the endorsement of certain principles, such as individualized assessment of job candidates to determine the level of risk that they present. While it has received extensive public support, the Guidance is not without some detractors, particularly from some in the employer community and the management bar.

This paper shares the experience Community Legal Services, Inc., of Philadelphia (CLS) with respect to the Guidance. As we annually represent many hundreds of people whose criminal records (including non-convictions) present an employment barrier, we have seen how a large and broad set of employers has responded to the Guidance. We also can speak to the significance of the Guidance to job applicants. We offer this snapshot with the hope that it can inform evaluation of the importance and the outcomes of the Guidance, including employer compliance, after a year. Our conclusions are the following.

- The Guidance is extremely important to the approximately 28% of the adult population that has a criminal record presenting an intractable employment barrier.
- While there is hope that these people's employment prospects have brightened as many employers have attempted to comply with the Guidance, we have many examples of employers, including major national companies with workforces in the tens of thousands, that have not.
- Employers that are over-broadly rejecting people with criminal records from their applicant pools are eliminating a large percentage of the labor force and depriving themselves of excellent job candidates.

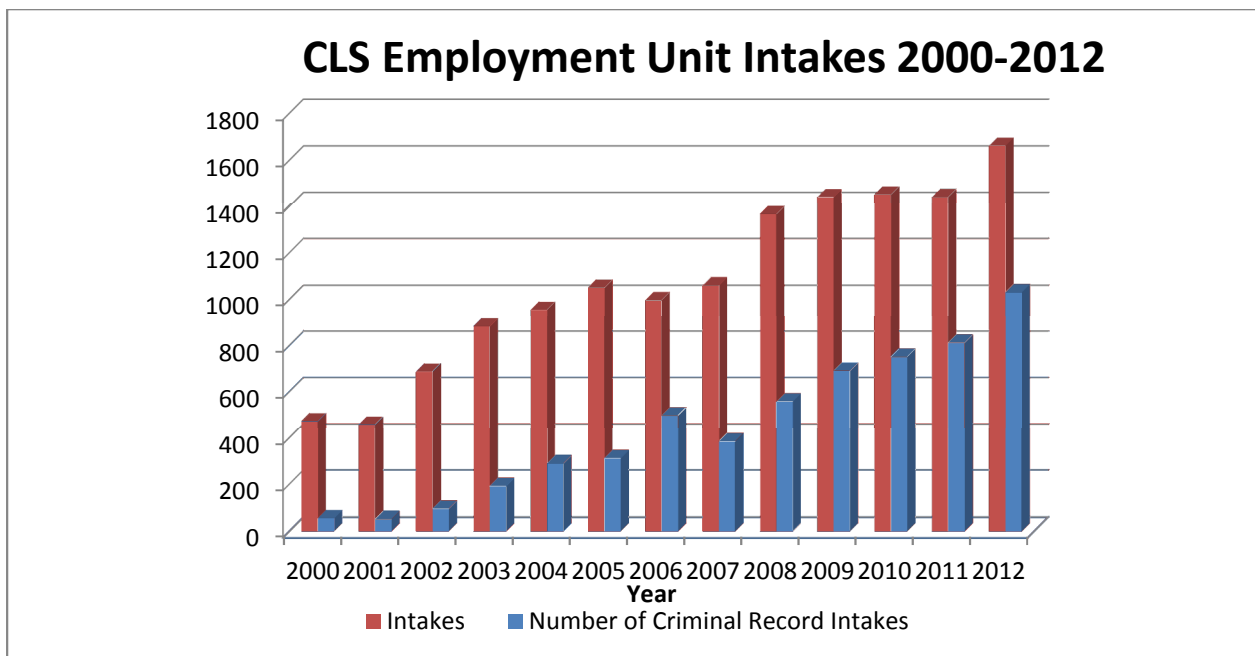
At the Grassroots Level, Criminal Records Are an Intractable Barrier to Employment

Perhaps surprisingly, there is no unanimously agreed-to number of Americans with criminal records.² One well-regarded estimate is that 65 million people, or 27.8% of American adults, have criminal records.³ Whatever the number, no one disputes that one-quarter or more of the population has a criminal record. Accordingly, the issue of criminal records as an employment barrier is a mainstream concern within the labor force, not a "fringe" issue affecting a few bad apples or dangerous criminals. And as recognized in the Guidance, African Americans and Hispanics constitute a disproportionate percentage of

this large number, because they are arrested at 2 to 3 times of the rate of the general population.⁴

As the largest provider of civil legal services to the low income residents of Philadelphia, CLS sees the scope and the impact of this issue on a daily basis. Our employment law practice receives requests for representation in around 1,400-1,600 cases every year. Our practice spans a broad array of employment law services in response to our clients' needs; we are not a specialized reentry provider.

Despite the breadth of our practice, easily the most common reason clients come to CLS for employment issues is because their criminal record is an employment barrier. Demand for criminal record issues has risen sharply over the last decade, with no end in sight.



In 2012, 1,032 of our 1,662 employment intakes were related to the applicant's criminal record. This is true despite the fact that we perform no specific outreach for our criminal record work.

CLS develops its employment law priorities based on the issues that our clients present to us. Without question, the employment barriers presented by criminal records are our community's largest employment law concern and thus our highest representational priority. Consequently, we have represented thousands of people with criminal records individually over the last fifteen years, as well as having engaged in impact litigation and legislative and policy advocacy on their behalf. Because of our representation of so many people with criminal records, we have learned a great deal about the employment experiences of people with criminal records.

What we have learned is this: the barriers that criminal records create for our clients are often intractable. Criminal background checking is ubiquitous, with surveys indicating that 87% of employers conduct criminal background checks on their applicants.⁵ While many of these employers have good criminal background policies that take into account the factors suggested in the Guidance, others turn people with criminal records away solely for offenses that are neither arguably job related nor potentially indicative of future risk.⁶ Day after day, we see cases of people having been denied work for criminal cases that are decades old, extremely minor, and often not even resulting in a conviction. People with established track records of good job performance are fired based on their criminal record when their employer decides to perform a background check or the state decides to retroactively disqualify workers from their jobs.

The incidence of criminal records among people seeking representation from CLS is not an aberration; we encounter it everywhere. For instance, I recently attended a jobs club meeting of a community group that CLS often represents. Although not a “reentry program,” the room was full of people who shared that their criminal background checks were a, and often the, major obstacle to their employment. They were highly motivated to overcome this barrier, going to great lengths to find work. Group members discussed working the graveyard shift and traveling a long distance to work in a slaughterhouse as among their desperate efforts to bring home a paycheck. Others were frustrated by their repeated denials based on their background checks and fearful that ever getting any job might be elusive. This is a familiar story for workforce development professionals, reentry specialists, court employees, and many others.

From CLS’s experience, the individual and community impact of the overbroad rejection of people with criminal records from employment cannot be overstated. The exclusion of large numbers of people who want to and need to work contributes greatly to the growing poverty in our communities.⁷ For these reasons and because non-whites are far more likely to have a criminal record, I believe that employer consideration of criminal records is the most significant civil rights issue of the present day. In this context, the EEOC Guidance, and employer adherence to its principles, are critically important workforce issues.

Impact of the Guidance: Some Changes in Employer Behavior, But Miles to Go

Cause for Optimism

Has the Guidance helped people with criminal records get jobs? By the nature of CLS’s practice, we are perhaps not as well positioned to see the successes so much as the failures to comply with the Guidance, as people come to lawyers when they have problems to be resolved. Despite that, we do have cause for optimism based on the experiences of some of our clients and on some reports of employer responses.

CLS has used the Guidance to help clients get jobs where employers were not willing to hire them in the past. We have done this by writing advocacy letters to employers who have rejected or appear likely to reject clients. As an example, I wrote a letter to an employer in July 2013 in support of Ronald Lewis, one of my highly motivated but long-term

underemployed clients, who had two 2004 misdemeanor convictions, for drugs and retail theft. In my letter, I summarized the Guidance and emphasized not only the time that had passed without rearrest and the minor nature of his offenses, but also his work history, his vocational training, his extensive mentorship of young people, and his excellent character reference letters (prepared in connection with a pardon application). Happily, Mr. Lewis got the job that he needed, and the employer got a very committed worker.

A broader measure of employer compliance is a survey conducted by EmployeeScreenIQ, a background checking company, in December 2012 - January 2013.⁸ Out of a total of 992 respondents, representing employers of all sizes, 68% had reviewed the Guidance, and 32% had made changes to their policies as a result.⁹ This is good news. However, another 10% of the employers were aware of the Guidance but had not reviewed it, and 22% were totally unaware that the Guidance existed.¹⁰ Despite the efforts of the EEOC, advocates and management lawyers, there is clearly still work to be done to make employers aware of the Guidance and to ensure compliance.

The survey also provided some insight into employers' compliance with some of the major principles of the Guidance.

- **Age of records considered:** Nearly half (46%) of employers said that they look back at criminal history older than 7 years.¹¹
- **Individualized assessment:** 61% of employers said that they perform individualized assessment.¹²

Overall, these results, to the extent that they are representative of the larger employer community, suggest that progress is being made, although compliance is far from perfect.

Cause for Concern

Unfortunately, consistent with the EmployeeScreenIQ survey's findings that a sizable number of employers had not reviewed the Guidance and reevaluated their background screening policies, CLS's experience since the Guidance was implemented has revealed plenty of room for improvement. We continue to see blatant violations, by both small businesses and national companies employing tens of thousands, of the clear principles of the Guidance, not nuanced cases where lines between what is legal and what is not are blurry. The following cases have all arisen since the Guidance's effective date of April 25, 2012. They do not represent all such cases that we have seen, but rather some representative ones.

1) Rejections because of arrests not resulting in convictions¹³

Expungements in Pennsylvania are primarily available for arrests that did not result in convictions, as almost no convictions can be expunged under state law. We handle hundreds of expungements a year for clients who, despite the Guidance are living the reality of having been turned away by employers based solely on arrests.¹⁴

All of my colleagues and I have had clients who had started jobs and then were about to be let go because of their records, but once we provided evidence to the employers that we were helping the clients with expungements, the clients were able to keep their jobs. We also all have had clients whom we represented at expungement hearings who testified about employers rejecting them but telling them to come back once certain arrests on their records had been expunged. Even larger numbers of clients have simply been told they are unwanted because of their arrest records.

We have no doubt that if someone interviewed the scores of expungement candidates who appear each day in Room 504 of Philadelphia’s Criminal Justice Center, such stories would be legion. Each such story represents employer action that is inconsistent with one of the most straightforward and accepted principles of the Guidance.

RM is a 20-year-old whose record contained nothing but misdemeanor and summary offense charges, all of which had been withdrawn. She applied to work in home health care, but was told that she would not be hired unless she got the charges expunged. After advocacy by CLS, she was offered the job.

A large healthcare employer in suburban Philadelphia told another CLS client that with her relevant experience and strong references, she would make an excellent personal care attendant, but the corporate office would not permit her to work so long as she had any entries on her criminal record. The only case that she had was a single arrest in which the charges were dropped.

2) Rejections because of minor offenses¹⁵

Most states have a grade of convictions that are characterized as “non-serious offenses” and that do not rise to the level of a misdemeanor. Common examples are disorderly conduct, loitering, public intoxication, harassment, and the like. Often, these non-serious offenses do not involve formal arrests, but are comparable to traffic citations that are resolved by payment of a fine without a court appearance. In Pennsylvania, they are known as “summary offenses,” and employers are prohibited by state law from considering them.¹⁶ Nevertheless, Pennsylvania employers do continue to reject job applicants based on these minor records.

CLS represents SM in a case against a national company that provides business communications products and services. The company fired SM after she worked for a few days because her background check revealed two summary offense convictions for disorderly conduct that she had incurred as a juvenile. Under neither state law nor the Guidance should these summaries have been considered, but SM lost her job nonetheless. We have an EEOC charge pending for this client.

3) Rejections because of blanket bans

Along with rejections for arrests that did not lead to conviction, the most clear cut violation that we continue to see is admitted blanket bans on criminal records, requiring applicants to have a “clean record.” The Guidance is clear that across-the-board exclusions usually violate Title VII.¹⁷

Ronald Lewis brought CLS an offer letter from a building management employer in February 2013 (almost a year to the date after the Guidance had been issued) that stated:

[Employer] requires that no one with a criminal record be permitted to work on our projects.

We wrote a letter to the employer indicating that this policy was inconsistent with the Guidance, resulting in a call from a management lawyer and, later, an offer to the client of “on call” work. Unfortunately, he never got “called” for this job, which paid very well and which he wanted very much.

4) Rejections of employees with successful track records

One of the enlightening examples provided by the Guidance disapproves the firing of existing employees with no performance issues because a new employer taking over a business learns of a record when conducting background checks of the workforce.¹⁸ Unfortunately, employers do not always heed this example.

SK worked from 2005-2011 for a company that performs medical billing and financial management for doctors across the country. SK left the company in 2011 to take extended leave after the birth of her daughter. Upon leaving, she was solicited to return to the company when she reentered the workforce because of her good work performance. When she reapplied for a position eight months later, the company rejected her because of a twelve year old conviction that they knew about when they first hired her in 2005. CLS represents SK in a pending state discrimination charge against the company.

CLS recently represented EA when he was turned down for a food service job in a Philadelphia hospital by his former employer, a national provider of healthcare services management. He had worked for the hospital in food service from 2000 to 2008, having been given raises and promotions. He left the job on good terms when he moved out of town. In February 2013, back in Philadelphia and desperately seeking work, EA was told that he could not be rehired based on his criminal record, primarily a conviction for forgery in 2000. With our intervention quoting the Guidance, he was rehired. Incredibly, we still represent a former colleague of his in a pending EEOC charge against the same employer who lost his job in similar circumstances when the company took over as the food service vendor in the hospital in 2005.

5) Rejections because of old convictions¹⁹

Since CLS first started representing people with criminal records, we have seen sometimes astonishingly old convictions used to justify rejection of job applicants. Over the last decade, social science research has corroborated the long-held legal principle that the more time has passed since a conviction without a new offense, the less likely that conviction is to predict risk of future offending.²⁰ Yet we continue to see people rejected for convictions that occurred decades ago.

DS was denied a promotion from a seasonal job to a full-time position and then terminated from his job as a customer service representative by a nation-wide relocation service company in early 2013. The reason was his 1995 robbery conviction, which is now 18 years old. The company made no effort to individually assess DS' work history, competence and qualifications for the job. DS was told that the company would not hire anyone with a felony conviction, and indeed a review of job advertisements by the company supported that proposition. The CLS lawyer handling this case spoke to the Vice President of Human Resources, to no avail. We recently filed an EEOC charge in this case.

Case Study: Repeated rejections of CLS clients by a national employer

CLS's experience with a national convenience store chain has raised questions about its compliance with the Guidance in the year since it was adopted. In April 2012, I began representing JS, a very frustrated man who had just been fired while in training for a job as an assistant manager, a job that he very much needed. His record contained drug convictions from 2000 and 2001. My initial demand letter requesting that JS be reinstated was sent to the company's centralized human resources headquarters two weeks before the Guidance was issued. Having heard no response, I sent a follow-up in early June 2012, drawing attention to the new Guidance and noting that the company surely had not conducted an individualized assessment in this case. Following that letter, JS was indeed offered his job back. I was thrilled that a national employer with many jobs that are appropriate for my clients seemed to have recognized the importance of the Guidance and perhaps changed its ways.

But not so fast. Since then, CLS has seen several other cases involving the same employer, with the same results as before the Guidance was issued. For instance, employee TW had been convicted four years earlier of the misdemeanors of simple assault and hindering prosecution. While the evaluation of her record might be debatable if she were a new applicant, she was instead an incumbent employee of several months who was being promoted from cashier to assistant manager. Despite job performance that was strong enough to warrant a promotion, TW was fired as a result of her background check. She was reinstated as a result of our negotiations on her behalf.

A new client, JC, was fired after 30 days on the job, when his background check came back. He had a 2010 case in which he was charged with misdemeanor theft offenses, for which he had received a diversionary sentence that subjects the case to expungement upon completion of his probation. As with summary offenses, cases with such diversionary sentences may not be considered by employers under Pennsylvania law, because they are not convictions.²¹

The point here is not to debate these particular cases. Rather, it is to raise the question of whether a large national employer has conformed its background checking policies to the Guidance, more than a year after it was issued and after several contacts by CLS. Given that these stories raise several of the scenarios flagged by the Guidance – a job applicant with a lengthy time period since a conviction, an incumbent employee whose performance was exemplary, a new employee with a non-conviction – we are dubious, and concerned that our clients will be disqualified from more jobs for which they are well-suited.

Overcoming Criminal Record Stigma to Facilitate Good Employment Relationships

From our vantage point, criminal background checking has become a shorthand for evaluating job applicants that has taken on a life of its own. Many employers dismiss applicants with criminal records out of hand, without further evaluation. This phenomenon, which has slammed the door shut on large numbers of job seekers, is exactly what EEOC's updated Guidance addresses, by identifying some bright line rules and by urging individualized assessment.

But job applicants with criminal records are not the only ones who can benefit from the Guidance. Given that more than one out of every four American adults has a criminal record, many employers are over-broadly foreclosing from their consideration a huge portion of the applicant pool. And given the intense desire that many people with criminal records have to find a job, they are losing some of the best and most dedicated workers that they could employ.

Take the case of Marcus Stones. His record consists of a 2002 drug felony conviction, when he was 20 years old, and a 2010 summary offense of disorderly conduct, which arose when he was arrested for selling items without a vendor's license. Mr. Stones is no longer the person who was involved in drugs as a youth. He now has two daughters and a wife to support. He has taken vocational training in building maintenance and truck driving to give himself marketable skills. He is well-liked in his community for his service, including

working with children to keep them on the straight and narrow. He is extremely motivated to find a job. Recently, he volunteered to spend a full shift accompanying a driver to show how hard he will work if hired. When an employer gives him a chance – and hopefully someone will soon – he will be the most loyal and hardworking employee on staff.

Or take the case of Capreece Lackey. She spent the 1990s addicted to crack and living on the street. From 1995 through 1999, she was convicted of a half-dozen offenses related to prostitution. Miraculously, she rebuilt her life, including having healed her relationship with her family. She helped guide her son through college; he is now a member of the Philadelphia Police Department and is very proud of his mother. She took in two nieces when their parents died and has raised them as her own children. She has been clean of drugs for 14 years. Ms. Lackey provides so much help to others in trouble that she got a second telephone line for that purpose. And yet, she has been rejected for more jobs than she can count, because of the results of her background checks. Fortunately, on July 3, 2013, Governor Tom Corbett pardoned Ms. Lackey's offenses, and they are in the process of being expunged. Employers tell her to come back once her record is expunged. Why? She is the same person, whether or not her record shows those victimless crimes 15 years ago. She will be a very grateful and conscientious worker for some employer who finally gives her a chance.

To be sure, there are job applicants whose criminal background checks will rightly raise flags that lead to their being rejected. But the stories of Marcus Stones and Capreece Lackey are unique only in the degree of their desire and suitability to work. In my experience, there is a whole ignored labor pool that is just waiting to contribute. Hopefully, as EEOC's Guidance continues to take hold, the job seekers will get new opportunities that will prove to be a win-win for their employers as well.

Conclusion

Advocates for people with criminal records recognize that background checking is with us to stay and that employers have legitimate reasons to want to avoid employing people who present risk to them. But in a more ideal world, employers would correct for the over-shift towards excluding job seekers solely based on what their criminal records show.

Exclusions would be more reasonably tailored to the risks that job applicants' criminal records actually present, as required by law and as supported by a growing body of social science research that indicates that people can be "redeemed" from past criminal behavior.

Most important, in such a world, employers would better understand that criminal records do not define people. Their criminal records show one aspect of whom they are, but do not preclude plenty of good and admirable qualities. If and when employers more uniformly implement EEOC's Criminal Record Guidance, we will move much closer to that more ideal world.

¹ EEOC Enforcement Guidance, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, No. 915.002 (April 25, 2012) [hereinafter EEOC Criminal Record Guidance], available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf. Most notably, this Guidance updated the EEOC’s seminal guidance on convictions adopted in 1985, under the signature of then-EEOC Chairman Clarence Thomas, now Associate Justice of the U.S. Supreme Court.

² This number is unknowable because there is no one public record database that tracks all unique individuals with criminal cases. The database of the Federal Bureau of Investigation (“FBI”) comes closest, but it does not include all criminal offenses. The FBI database is also criticized for its inaccuracy. See Madeline Neighly and Maurice Emsellem, Wanted: Accurate FBI Background Checks for Employment (National Employment Law Project, July 2013). The combined databases of the states are both over-inclusive (individuals may have criminal cases in multiple states) and under-inclusive (offenses for which fingerprints were not taken may not be included). Michelle Natividad Rodriguez and Maurice Emsellem, 65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment (National Employment Law Project, March 2011)[hereinafter 65 Million “Need Not Apply”], at 27 n. 2.

³ 65 Million “Need Not Apply”, *supra* note 3, at 3.

⁴ EEOC Criminal Record Guidance, *supra* note 2, at 3.

⁵ Society for Human Resource Management, Background Checking—The Use of Criminal Background Checks in Hiring Decisions, at 2 (July 19, 2012).

⁶ The most recent and extensive appellate court decision applying Title VII to criminal background checks indicated that measuring risk is the touchstone of the business necessity analysis. El v. Southeastern Pennsylvania Transportation Authority, 479 F.3d 232, 244-45 (3d Cir. 2007)).

⁷ See John Tierney, Prison and the Poverty Trap, New York Times (Feb. 18, 2013).

⁸ EmployeeScreenIQ, Employment Screening Practices & Trends: The Era of Heightened Care and Diligence (2013).

⁹ *Id.* at 5, 15.

¹⁰ *Id.*

¹¹ *Id.* at 10.

¹² *Id.* at 13.

¹³ As with previous versions of the guidance, the updated version generally disapproves employer consideration of arrests. EEOC Criminal Record Guidance, *supra* note 2, at 12.

¹⁴ Despite the hundreds of expungement cases handled by CLS and other providers annually, there is a large unmet need for expungement services by job seekers in Philadelphia. Samantha Melamed, More People are Seeking Expungements, But Funding Is Scarcer Than Ever, Philadelphia City Paper (Sept. 5-11, 2013), at 5.

¹⁵ The Guidance continues to emphasize consideration of “the nature and gravity of the offense,” characterizing it as the first step in determining relevance. EEOC Criminal Record Guidance, *supra* note 2, at 15 (citing Green v. Missouri Pacific Railroad Co., 523 F.2d 1290 (8th Cir.1975), on appeal after remand, 549 F.2d 1158 (8th Cir. 1977)).

¹⁶ Pennsylvania law provides that felony and misdemeanor convictions may be considered in hiring decisions to the extent which they relate to the applicant’s suitability for employment for a particular job. 18 Pa. C.S.A. § 9125(b). Thus, under this provision, employers may not consider summary offenses, which are a lesser grade than felonies and misdemeanors.

¹⁷ EEOC Criminal Record Guidance, *supra* note 2, at 16.

¹⁸ EEOC Criminal Record Guidance, *supra* note 2, at 20, Example 8.

¹⁹ The Guidance also continues to emphasize consideration of “the time that has passed since the offense, conduct and/or the completion of sentence.” EEOC Criminal Record Guidance, *supra* note 2, at 15 (*citing* Green, 523 F.2d at 1298, and EJ, 479 F.3d at 247).

²⁰ The Guidance points employers to the relatively new “desistance” research. EEOC Criminal Record Guidance, *supra* note 2, at 43 n. 118. *See, e.g.*, Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement, 53 *Crime & Delinquency* 64 (2007)(concluding that after seven years, the risk of a new offense approximates that of a person without a criminal record).

²¹ *See* note 17.