The EEOC cited a large and increasing disparity in the percentage of minority workers who have criminal records compared to the percentage of white workers.  The Commission noted that, if incarceration rates remain unchanged, about one in 17 white men are expected to serve time in prison during their lifetime; compared with one in six Hispanic men and one in three black men. A disproportionate number of those with criminal records come from low income communities of color.  African Americans and Latinos are more likely to be arrested than whites, more likely to be charged once arrested, and more likely to be convicted and incarcerated when charged.

The following will highlight those parts of the Enforcement Guidance which are worthy of attention – some are new, some are justified by more compelling documentation and argument.

* **Arrest Records**. The Guidance expressly states that an arrest record by itself may not be used by an employer to deny employment. Under certain circumstances, where the underlying conduct for which the person was arrested indicates that the person is not qualified for the specific job in question, the employer may deny the individual employment. For example, an applicant for a teaching job arrested for exposing himself may be denied the job.
* **No Lifetime Bans on Employing Persons With Criminal Convictions.** Lifetime bans on hiring persons with criminal convictions violate the Guidance. Workers with criminal histories should not be excluded from the employer’s consideration unless the particular criminal record is job-related. **If you are denied a job because the employer screens out all persons with criminal convictions or categories of criminal convictions, e.g. felonies, contact the Lawyers’ Committee via our** [**online intake questionnaire**](http://www.lawyerscommittee.org/contact/intake)**.**
* **Presumption of Disparate Impact.** To challenge an employment practice that excludes applicants with a criminal record, the applicant must prove that the employer’s policy has a disparate impact on minorities. As a result of the disparity in arrest, conviction and incarceration rates of minorities, the Guidance directs EEOC staff, when investigating a charge of discrimination, to presume that the use of criminal history as a screen for employment will have a disparate impact on minorities. This presumption will not apply at the litigation stage. One of the biggest problems in filing lawsuits attacking bans on employing persons with criminal convictions has been the difficulty in obtaining employer applicant records that are needed to prove that the employer’s policy has a disparate impact. Many employers do not keep applications and many applications do not contain any identifying information. The statistics cited by the EEOC to support the presumption of disparate impact show such a stark disparity, particularly as to African American men, that there is now a much better chance that legal counsel for employees will be able to persuade courts to accept national or regional data as proof of disparate impact where the employer has not kept useful applicant data.  In order for an employer to prove that its criminal history exclusion policy does not have a disparate impact on its own hiring of minority employees, the employer must develop and maintain application forms that include information on applicants’ characteristics, such as race, national origin, and gender.
* **Individualized Assessment.** If a criminal background check has a disparate impact on minorities the Guidance provides a detailed process employers should go through in order to justify a particular criminal background screening policy as job related. The heart of this process is the need for employers to conduct an individualized assessment concerning whether the exclusion of an applicant is job related. This is a three step process:

I. The employer should analyze its criminal history exclusion in relation to the specific job and consider (1) the nature of the offense; (2) the length of time since the commission of the offense or the completion of the sentence; and (3) the nature of the job.  The key question is whether “the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.”  (V-B-4) On this basis the employer may determine that persons with certain convictions within a specific length of time should be screened out of the applicant pool. **The employer may not screen out all persons with a criminal conviction for life.** The screen must be targeted to the offense, the duties of the particular job, and the length of time for which the individual remains a risk.

II. For those applicants or employees who are screened out due to their criminal record, the employer should inform them that they are being screened out and provide the individual with an opportunity to respond by correcting inaccurate records and/or providing an explanation of the circumstances of the conviction and evidence of rehabilitation before making a final decision.

III. The employer should then conduct an individualized assessment taking into account any explanation provided by the applicant and other factors that tend to reduce the risk presented by the applicant, in spite of the prior conviction. These factors may include age at time of conviction, length of time since conviction or incarceration, employment history, and education since the conviction or incarceration.

* **Employers Introducing a Restriction Against Criminal Convictions For the First Time.** New or present employers who want to introduce for the first time a restriction against employing people with conviction records are prohibited from discharging an employee who has successfully worked for the company for many years  just because that employee has an old conviction that the new employer wants to make a disqualification.
* **Federal Laws That Require a Criminal Background Check.** The Guidance makes clear that any employer who must conduct a criminal background check in order to comply with a federal law will not violate Title VII. For instance, the federal government requires that contractors conduct criminal background checks on all employees who will be working on federal government projects that require a security clearance.
* **State and Local Laws That Require a Criminal Background Check**. The guidance takes precedence over state or local laws that impose more stringent background check requirements. This means that if an employer conducts a background check pursuant to state law that imposes e.g. a lifetime ban on employing felons for the position in question, the employer may be in violation of Title VII and may not be protected from liability simply because it followed the state or local law.
* **Federal and State Statutes With a Cut-Off for Exclusion** Where a state or federal statute determines that an employer may not refuse to hire persons whose conviction is more than a certain number of years old (cannot employ someone who has had a theft conviction **in past 10 years**), the statutory period is binding on the employer; in other words, the employer cannot exclude all applicants who have had theft convictions in the past 20 years just because they think it will be “less risky.”