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OHIO EMPLOYER SNAPSHOT: WHAT THE EEOC'S CRIMINAL RECORDS REVERSAL MEANS (AND DOESN'T MEAN) FOR YOUR HIRING PROCESS

Insights
Nov 18, 2026

Ohio Employer Snapshot: What the EEOC's Criminal Records Reversal Means (and Doesn't Mean) for Your Hiring Process

Ohio employers that conduct criminal background checks still have federal and state rules to follow, even though the EEOC recently voted to rescind its 2012 guidance on the use of arrest and conviction records. If you're hearing that you can now screen out any applicant with a record, that isn't what happened. The agency withdrew its own reading of Title VII, not the law itself. Meanwhile, one Ohio law that bears directly on your hiring decisions did just change. As of September 23, many people released from incarceration for a felony can seek a Certificate of Qualification for Employment (CQE) sooner, and a CQE can give you immunity from a negligent hiring claim. Here's what Ohio employers need to know and six steps to consider before you revise your screening process.

What Happened?

The EEOC voted on October 28 to immediately withdraw its 2012 guidance under Title VII of the Civil Rights Act, which cautioned employers against blanket exclusions of applicants with criminal records and distinguished between arrests and convictions. The Obama-era guidance encouraged employers to consider the nature and gravity of the offense, the time elapsed since the offense or completion of the sentence, and the nature of the job. It also

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recommended that employers conduct an individualized assessment giving applicants a chance to explain.

The EEOC's announcement set two important limits. The rescission does not revive the older EEOC policy statements the 2012 guidance replaced, and employers are not required to abandon lawful practices they adopted in response to it. EEOC Chair Andrea Lucas also stated that Title VII still prohibits race and national origin discrimination, including "employment requirements that are proxies for intentional discrimination."

Deeper Dive: The move aligns with the federal government's retreat from enforcing disparate impact claims potentially based on unintentional discrimination. For more details about the EEOC's recent actions, read our full insight here: **EEOC Rescinds Criminal Records Guidance, but "Fair Chance" Laws Still Apply: 5 Steps for Employers**

What Does This Mean for Employers?

The 2012 guidance was the EEOC's **interpretation** of Title VII, so rescinding it doesn't change the actual law. Here are a few key considerations under federal law that apply to Ohio employers:

- **Disparate treatment.** Applying a criminal history policy more harshly to applicants of one race or national origin than to others is **intentional discrimination** under Title VII. The EEOC's current enforcement plan prioritizes these claims.
- **Disparate impact.** The Supreme Court recognized disparate impact liability under Title VII in its 1971 decision in *Griggs v. Duke Power Co.*, and Congress codified it in the Civil Rights Act of 1991. Under this rule, if a plaintiff shows that a particular practice causes a disparate impact based on race or national origin, even if unintentional, the employer must demonstrate that the practice is "job related for the position in question and consistent with business necessity." An executive order or an agency vote cannot repeal that text.
- **Private lawsuits.** Applicants can still pursue these claims on their own. Title VII requires them to file a charge and receive a right-to-sue notice first, but the EEOC's decision

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not to pursue the disparate impact theory does not stop a private plaintiff from bringing a claim based on it. The practical effect is that background check risks shift from agency investigations toward private litigation.

- **Courts still demand proof, which is expensive.** A ruling from the 6th Circuit, which covers Ohio, illustrates this point. Notably, disparate impact cases turn on statistics. In *EEOC v. Kaplan Higher Education Corp.*, the appellate court ruled in favor of an employer after the EEOC's expert testimony challenging the employer's credit checks was excluded as unreliable. The employer won, but only after litigating through expert discovery. A better defense is a screening policy you can tie to the job from the start.

- **The FCRA.** If you use a third-party background check company, the Fair Credit Reporting Act (FCRA) still requires a clear and conspicuous, standalone disclosure, the applicant's written authorization, a copy of the report, and a summary of rights before you take adverse action based on it, and an adverse action notice afterward. None of those obligations depended on the EEOC's guidance.

What Unique Rules Apply to Ohio Employers?

Ohio adds its own layer of rules that are independent of the EEOC's guidance:

- **No statewide ban-the-box law for private employers.** Ohio's ban-the-box statute bars public employers (state agencies and political subdivisions) from asking about an applicant's criminal history on employment application forms. It does not apply to private employers. A bill that would extend ban-the-box restrictions to private employers, S.B. 143, has been pending in the Ohio Senate Workforce Development Committee since March 2025. However, if you also hire in other states or cities, their fair chance rules still apply.

- **Sealed and expunged records carry special protection.** Under Ohio law, an applicant may not be questioned (on an employment application or in any other inquiry) about certain sealed or expunged records, such as dismissals, acquittals, and grand jury no-bills. If an employer asks anyway, the applicant may respond as if the underlying arrest and proceedings did not occur, and they may not be subjected to adverse action because of those records or their response. For convictions, with limited exceptions

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under the statute, you may only ask about those that haven't been sealed, unless the question bears "a direct and substantial relationship to the position for which the person is being considered."

- **Ohio's civil rights law runs parallel to Title VII.** Ohio's law separately prohibits race and national origin discrimination in hiring. The Ohio Supreme Court has long held that federal case law interpreting Title VII generally applies to these state claims. State law generally requires a job applicant or employee to file a charge with the Ohio Civil Rights Commission before suing and gives them two years to bring a claim.
- **Some jobs require background checks by law.** This includes many positions in Ohio schools, childcare, and long-term care.

What Just Changed in Ohio?

A Certificate of Qualification for Employment is issued by an Ohio court of common pleas to a person with a criminal record after a review process. The court may issue one only if the person shows, among other things, that the certificate will materially assist in obtaining employment or licensing and that granting it poses no unreasonable risk to public safety.

For employers, a CQE carries three protections:

- **Negligent hiring immunity.** In a negligent hiring claim, a CQE provides immunity for the employer if the employer knew of the certificate at the time of the alleged negligence.
- **Evidence of due care.** In other negligence claims, a CQE may be introduced as evidence of the employer's due care in hiring or retaining the person, again if the employer knew of it.
- **A higher bar for retention claims.** If a CQE holder later demonstrates dangerousness or is convicted of or pleads guilty to a felony and the employer keeps the person on, a retention claim requires proof that the person with hiring and firing responsibility had actual knowledge and was willful in retaining the employee.

A new law took effect on September 23 that makes CQEs available sooner. Before the change, a person incarcerated

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for a felony had to wait one year after release and all periods of supervision before petitioning. Now the one-year clock starts when a person is released, so they can petition while still under supervision.

> ✓ **Practical takeaway:** You may see more applicants with CQEs, and earlier in their reentry. Because the immunity turns on whether you knew of the certificate, your process should give applicants with a conviction a clear opportunity to tell you whether they hold one.

6 Steps for Ohio Employers

1. Keep your individualized assessment process. The EEOC said you do not have to abandon lawful practices, and the logic behind them is still the core of a disparate impact defense. Continue to weigh the nature and gravity of the offense, the time elapsed, and the duties of the job. Give the applicant a chance to explain, and document the decision.

2. Take a hard look at blanket exclusions and arrest-only rejections. Unless a law requires disqualification, a categorical bar (for example, no felony convictions, ever) is harder to defend as job related than a criterion tied to specific duties. An arrest that did not lead to a conviction does not by itself show that the applicant did anything wrong. If the underlying conduct matters for the job, evaluate that conduct.

3. Remove sealed and expunged records from your questions. Review applications, interview guides, and onboarding forms so criminal history questions expressly exclude sealed and expunged records. Train recruiters and hiring managers not to ask about them, and do not treat an applicant's lawful nondisclosure as dishonesty.

4. Build the CQE into your process. When a background check or an applicant's own disclosure reveals a conviction, ask whether the applicant holds a CQE and keep a copy of any certificate in the hiring file. Documenting that you knew of the certificate when you hired is what supports immunity under Ohio law.

5. Audit your FCRA workflow. Confirm that you have a standalone disclosure form, you obtain written authorization, and your pre-adverse action and adverse action notices go out in the right order with the required content. If your

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background check vendor applies screening criteria on your behalf, make sure those criteria match your written policy.

6. Apply your policy consistently and check the results. Train decisionmakers to follow the written process, because inconsistent treatment of similar records can lead to a disparate treatment claim. Consider having legal counsel periodically review whether any screening criterion excludes applicants of a particular race or national origin at disproportionate rates, which can help keep that analysis privileged.

Conclusion

We will continue to monitor developments in Ohio and provide updates as warranted, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, any attorney in our Ohio offices, or any member of our FCRA and Background Screening Practice Group.

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