U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C.

Commissioner
Kalpana Kotagal

October 29, 2026

Commissioner Kotagal's Statement on the Rescission of the Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964

I voted against the rescission of the Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 ("Guidance"). The Republican majority's decision to rescind this Guidance, in full, is shortsighted and inconsistent with the Commission's longstanding leadership on this issue. Since at least 1969, the Commission has investigated and resolved Title VII charges related to employers' unfair or overbroad use of criminal records to make employment decisions, recognizing that doing so helps to ensure that more qualified people have a role in our workplaces.

The number of adults with either an arrest or conviction in the United States is almost the same number of adults with a four-year college degree – that is 1 in 3 adults or up to 100 million workers.[1] Addressing overbroad criminal record screening in employment has traditionally garnered bipartisan attention and support—the Commission issued three of the four EEOC guidance documents analyzing this issue under two Republican Chairmen, including former Chairman Clarence Thomas. Prior Republican leadership understood that grappling with unfair or overbroad criminal record screens advances the agency's mission of preventing and remedying workplace discrimination. Protecting workers from this kind of discrimination enables them to contribute to the economy and their communities, and to support their families. Despite all of this, the Republican majority voted to rescind a comprehensive resource that impacts the employment opportunities of a broad swath of workers and did so based on faulty and politically motivated reasoning. Nonetheless, the ill-advised rescission vote does not change a few fundamental facts.

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[1] Keesha Middlemass, Brookings, *Clean slate laws boost the economy and public safety* (Apr. 28, 2026), https://www.brookings.edu/articles/clean-slate-laws-boost-the-economy-and-public-safety/; *see also* National Employment Law Project, *Research Supports Fair Chance Policies*, 1 (Apr. 2024), Research-Supports-Fair-Chance-Policies-Apr.2024.pdf ("NELP conservatively estimates that roughly 80 million people in the United States (nearly one in three adults) have some sort of criminal record.").

Specifically, the law at the center of the Guidance—Title VII—remains unchanged. This means that employers are still at risk of Title VII liability if they treat workers with the same or similar criminal records differently because of a protected characteristic such as race or national origin. Also, even though the EEOC has abdicated its responsibility to enforce disparate impact law, employers can still face disparate impact liability regarding their overbroad use of criminal record exclusion policies. The Department of Justice's Office of Legal Counsel's Opinion (Opinion) on the constitutionality of disparate impact law is not a reliable resource. Its disparate impact analysis is inconsistent with the Constitution, the text of Title VII and relevant caselaw, and it is not binding on courts. Indeed, private parties, as well as state or local authorities, should look to existing judicial and statutory precedent interpreting disparate impact law to challenge criminal record exclusion policies if they screen out qualified people for reasons unrelated to the job.

Regrettably, the rescission of the Guidance will likely cause confusion among employers. The Guidance encouraged employers to take a targeted approach to implementing criminal background exclusion policies that considered the nature and gravity of the offense, the time that passed since the offense, and the nature of the job held or sought.[2] Alternatively, the Guidance recommended that, to the extent possible, employers validate their policies using the Uniform Guidelines on Employment Selection Procedures. Rescinding the Guidance signals to employers that these common-sense approaches, especially those grounded in caselaw, are no longer needed and many will abandon such efforts as a result. This, in turn, will likely lead to diminished employment opportunities for qualified workers. Such an outcome would undercut a shared goal for everyone—studies have consistently demonstrated that stable employment is one of the most effective ways to reduce recidivism rates.[3]

I urge employers to stay the course regarding Title VII compliance and thoughtful screening policies. I cannot, in good conscience, support the rescission of yet another resource for addressing workplace discrimination.

[2] *Green v. Mo. Pac. R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977).
[3] Middlemass, *supra* note 1; *see also* NELP, *supra* note 1 at 2 ("A 2011 study of people released from incarceration found that employment was the single most important influence on decreasing the likelihood of rearrest. Two years after release, nearly twice as many employed people had avoided rearrest as compared to those who did not find employment.").