

On August 6, 2019, in *State of Texas v. Equal Employment Opportunity Commission*, the U.S. Court of Appeals for the Fifth Circuit ruled that the Equal Employment Opportunity Commission (EEOC) overstepped its limited rulemaking and enforcement power when it issued its 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. While this ruling and its related injunction are limited on their face to the State of Texas, the decision opens the door to future challenges to the validity of the EEOC Guidance by other employers, in and outside the Fifth Circuit (Louisiana, Mississippi, and Texas).

### **Enforcement Guidance**

Citing statistics showing that Hispanics and African Americans have arrest and incarceration rates “disproportionate to their representation in the general population,” the EEOC’s Guidance takes the position that the use of criminal history by an employer has a potentially adverse impact on applicants and employees in these groups. Thus, the Guidance says, an employer’s use of criminal history information subjects it to liability under Title VII unless the use of the information is job related and consistent with business necessity. Such a determination hinges on an employer’s use of various complex procedures detailed by the Guidance, including a targeted screen and individualized process. The Guidance prohibits the use of no-felony rules and the like.

### **Procedural History**

The State of Texas sued the EEOC in the U.S. District Court for the Northern District of Texas, challenging the EEOC’s Guidance, after a former Texas state job applicant filed a complaint with the EEOC based on Texas’s no-felon hiring policy. In making its case, the State of Texas argued, in part, that the Guidance was an overstep of the EEOC’s authority because the agency was not authorized to promulgate substantive rules to implement Title VII, and that the Guidance was, in essence, an impermissible substantive rule.

After a lengthy and complex procedural history, the district court held that the EEOC was enjoined from enforcing the Guidance against the State of Texas because the EEOC had failed to comply with the Administrative Procedure Act’s (APA) notice-and-comment requirements to promulgate an enforceable substantive rule. However, the district court’s ruling seemingly allowed future enforcement by the EEOC, once it complied with the notice-and-comment requirements.

Both the EEOC and the State of Texas appealed.

### **The Fifth Circuit’s Decision**

On appeal, the Fifth Circuit agreed with the State of Texas and held that the Guidance was a substantive rule and that the “EEOC lacked power to promulgate the Guidance at all.” As such, the Guidance would have been invalid even if the EEOC had complied with the APA’s notice-and-comment requirements. Accordingly, the Fifth Circuit upheld the district court’s injunction and expanded it to prohibit the EEOC or the Attorney General from enforcing the Guidance against Texas or treating “the Guidance as binding in any respect.” This ruling impacted the Guidance as a whole, not just a specific section or prohibition.

While the specific injunction expressly applies only to EEOC actions against the State of Texas, the Fifth Circuit’s finding that the EEOC did not have the authority to issue the Guidance could provide a basis for challenging the Guidance—perhaps in response to an EEOC investigation or threatened litigation. Whether other courts will accept this holding or its reasoning remains to be seen, but this case may signal that the days of rigid adherence to the EEOC’s Guidance may be numbered.

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