

# ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S CONVICTION RECORDS POLICY



BRIEFING  
REPORT



DECEMBER 2013

U.S. COMMISSION ON CIVIL RIGHTS  
Washington, DC 20425  
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U. S. Commission on Civil Rights

Assessing the Impact of Criminal Background  
Checks and the Equal Employment Opportunity  
Commission's Conviction Records Policy

A Briefing  
Washington, DC

December 2013



## UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 Pennsylvania Ave, NW • Suite 1150 • Washington, DC 20425 [www.usccr.gov](http://www.usccr.gov)

### Letter of Transmittal

The President  
The President of the Senate  
The Speaker of the House

Sirs:

The United States Commission on Civil Rights ("Commission") is pleased to transmit this report, *Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's ("EEOC") Conviction Records Policy*. The report is drawn from a briefing that the Commission held on December 7, 2012 that examined the effects of the EEOC's updated guidance policy on the use of conviction records by employers on African-American and Latino job applicants, with or without a criminal record.

The Commission received testimony from seventeen speakers drawn from differing points of view, including social science scholars, the EEOC, employment lawyers, nonprofit advocates who work to place former offenders in jobs, a victim advocate, an employment background check service, associations for sectors such as home care, retail, hospitality, and small business, and a large employer.

Supporters of the updated EEOC guidance discussed its importance in ensuring that former offenders are given an opportunity to demonstrate employability. Critics of the guidance discussed changes in the guidance that might increase the risk that employers would attract EEOC scrutiny.

This is an important topic for your consideration as it affects the type of society we will be: one that provides opportunity for redemption, or one that will continue to relegate a segment of our citizenry-- who are predominantly African-American and Latinos-- to a cycle of poverty and recidivism.

The report, not including Commissioners' individual Statements, was unanimously approved on August 16, 2013 by Chairman Martin R. Castro, Vice Chair Abigail Thernstrom, and Commissioners Roberta Achtenberg, Todd Gaziano, Gail Heriot, Peter Kirsanow, David Kladney, and Michael Yaki.

For the Commission,

A handwritten signature in black ink, appearing to read "Martin R. Castro".

Martin R. Castro  
Chairman

## TABLE OF CONTENTS

SUMMARY .....	1
INTRODUCTION AND BACKGROUND .....	2
Views of Briefing Speakers .....	7
Recent Cases .....	10
Constitutional Question .....	11
Surveys and Research Provided by Speakers .....	11
Public Comments .....	13
BRIEFING SPEAKERS' REMARKS TO COMMISSION .....	14
Panel One Speakers .....	15
Carol Miaskoff .....	15
Don Livingston .....	17
Harry Holzer .....	19
Alfred Blumstein .....	22
Jeffrey Sedgwick .....	24
Panel Two Speakers .....	45
Roberta Meyers .....	45
Glenn E. Martin .....	48
Lucia Bone .....	51
Julie Payne .....	54
Richard Larson .....	56
Garen Dodge .....	58
Panel Three Speakers .....	75
Montserrat Miller .....	75
Nick Fishman .....	78
Todd Mccracken .....	81
Jonathan Segal .....	83
Richard Mellor .....	86
William Dombi .....	88
SPEAKERS' WRITTEN STATEMENTS .....	109
Alfred Blumstein .....	109
Lucia Bone .....	123
Garen E. Dodge .....	126
William A. Dombi .....	162
Nick Fishman .....	169
Harry J. Holzer .....	173
Richard S. Larson .....	179
Donald R. Livingston .....	183

Glenn E. Martin .....	194
Todd McCracken .....	204
Richard T. Mellor .....	210
Roberta Meyers.....	216
Carol R. Miaskoff.....	220
Montserrat Miller.....	232
Julie T. Payne.....	239
Jeffrey Leigh Sedgwick .....	250
Jonathan A. Segal .....	265
SPEAKERS' BIOGRAPHIES.....	271
Alfred Blumstein.....	271
Lucia Bone.....	272
Garen E. Dodge.....	272
William A. Dombi .....	273
Nick Fishman .....	274
Harry J. Holzer.....	275
Richard S. Larson .....	275
Donald R. Livingston.....	276
Glenn E. Martin .....	277
Todd McCracken .....	280
Richard T. Mellor .....	281
Roberta Meyers.....	281
Carol R. Miaskoff.....	282
Montserrat Miller.....	282
Julie Payne .....	283
Jeffrey L. Sedgwick .....	283
Jonathan A. Segal .....	284
COMMISSIONERS' STATEMENTS .....	286
Statement of Chairman Martin R. Castro .....	286
Statement of Commissioner Peter N. Kirsanow, Joined by Vice Chair Thernstrom and Commissioner Gaziano.....	289
Statement and Rebuttal of Commissioner Gail Heriot .....	308
Statement of Commissioners David Kladney and Roberta Achtenberg.....	341

## *Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy*

### **SUMMARY**

On December 7, 2012 the United States Commission on Civil Rights held a briefing to examine the disparate impact provisions of the Equal Employment Opportunity Commission's (EEOC) April 2012 guidance concerning the use of criminal background histories (2012 Guidance or "new guidance").<sup>1</sup> The Commission wished to learn about the effects of the EEOC's revised policy on employers and on black and Hispanic applicants with or without a criminal record.

The briefing's seventeen speakers included a high-ranking EEOC official, scholars, attorneys, social scientists, personnel executives, a former offender now policy director of an advocacy and job placement service, a family member of a victim slain by an unscreened ex-convict sent to the victim's home as a contractor six months earlier, ex-felon advocacy groups, business associations representing home care, small business and retail, and a security company currently under investigation by the EEOC.

The speakers gave views on the effects of the 2012 Guidance, its legal complexities, the sufficiency of its evidentiary basis, and on whether the 2012 Guidance would result in a negative disparate impact on the very groups the agency intends to protect. Former-offender advocacy groups welcomed the 2012 Guidance for its virtual prohibition on blanket exclusionary policies and its strongly suggested consideration of applicants and employees with criminal records of many kinds on a narrowly drawn or case-by-case basis. These records included arrest records only, criminal citations, misdemeanor convictions, expungements, and felony convictions, among others.<sup>2</sup> Speakers representing employers discussed whether the majority of employers, who for legal, statutory mandate, business and/or safety reasons must exclude applicants with particular criminal convictions, might as a result reduce hiring overall, increase automation, or move some jobs overseas. Some thought that such reduction in hiring of entry-level workers would likely have the unfortunate effect of disproportionately lowering job opportunities and reducing employment among blacks and Hispanics.

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<sup>1</sup> EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 [hereinafter *2012 Guidance* or *new guidance*], available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

<sup>2</sup> Hereinafter termed "ex-offender" or "former offender" for convenience, even though some may only have had a non-felony, non-conviction brush with the law.

## INTRODUCTION AND BACKGROUND

Disparate impact theory posits that any use of a selection method that is facially non-discriminatory may still be held discriminatory if it affects proportionally more of one protected group than of another, and the selecting entity, in this case an employer, cannot show that the selection criteria are job-related and consistent with business necessity.

Disparate impact theory is invoked by plaintiffs in private discrimination suits and by various enforcement agencies. In addition to the EEOC, examples of such enforcement agencies are the U.S. Department of Justice's Civil Rights Division, the U.S. Department of Housing and Urban Development, the Consumer Financial Protection Bureau, and the U.S. Department of Education, among others.

The EEOC's mission is enforcement of anti-discrimination and other federal equal employment opportunity laws as authorized under Title VII of the Civil Rights Act of 1964 (the Act).<sup>3</sup> Since the statute does not authorize the agency to issue regulations on this subject, the agency makes known its interpretation of the statute by issuing guidance and policy statements. Employers excluded by statute from its jurisdiction are those with fewer than 15 employees and American Indian tribes.<sup>4</sup> The U.S. Department of Justice litigates Title VII against States and municipalities.

The Civil Rights Act as passed in 1964 did not address disparate impact, although the Supreme Court accepted disparate impact theory with regard to intelligence tests and high school graduation requirements in the 1971 case *Griggs v. Duke Power Company*.<sup>5</sup> Twenty-five years after the Act's passage, Congress amended the Act's Title VII to include disparate impact discrimination as a statutory basis for suits against employers as part of the Civil Rights Act of 1991<sup>6</sup> after a series of Supreme Court decisions that weakened the reach of disparate impact theory.<sup>7</sup> The amended law did not address criminal histories, and the EEOC's 2012 Guidance acknowledges that "having a criminal record is not listed as a protected basis in Title VII."<sup>8</sup> Since at least 1972,<sup>9</sup> however, the EEOC has asserted that disparate impact theory drawn from the *Griggs*<sup>10</sup> decision forbids the blanket exclusion by an employer of all applicants with criminal histories. The EEOC does not prohibit or restrict employers from asking for or obtaining background histories, although eliminating the

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<sup>3</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 265 (codified as amended at 42 U.S.C. § 2000e *et seq.* (2013)).

<sup>4</sup> The EEOC has jurisdiction over federal employment, but may not challenge federal statutes concerning consideration of criminal background histories, See 42 U.S.C. § 2000e-16(a) (prohibiting discriminatory employment practices by federal departments and agencies).

<sup>5</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>6</sup> 42 U.S.C. 2000e-2(k) (disparate impact).

<sup>7</sup> For an account of the cases and legislative history, see Peter M. Leibold, Stephen A. Sola & Reginald E. Jones, *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 Rutgers L. Rev. 1043 (1993).

<sup>8</sup> 2012 Guidance at 6.

<sup>9</sup> 2012 Guidance at 3, n.15.

<sup>10</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

question from the face of an application is identified as a “best practice”<sup>11</sup> and some members of the public who submitted comments appear to believe that it is still considering the elimination of the question. Many of the public comments sent to the EEOC concerning its new guidance mistakenly objected to the perceived restriction or prohibition against obtaining background checks.<sup>12</sup>

To pursue a claim under Title VII in federal or state court, an aggrieved applicant or employee must first file a charge with EEOC or with a state or local fair employment practices agency authorized to accept charges on the EEOC's behalf. If the EEOC investigates and does not find reasonable cause to believe that discrimination occurred, it will automatically send the charging party a "Notice of Right to Sue," after which the charging party will have 90 days to file a lawsuit.<sup>13</sup>

If EEOC investigates and finds reasonable cause to believe that discrimination occurred, the agency will attempt to resolve the charge informally through conciliation. If the attempt to conciliate the charge is unsuccessful, the EEOC will decide whether to file suit. If EEOC decides not to file suit, it will send the charging party a Notice of Right to Sue, and the same 90-day suit-filing period will apply. Once a Notice of Right to Sue has been issued, the agency usually takes no further action on the charge. If EEOC does file suit, the charging party may intervene in that lawsuit but generally may not sue separately.<sup>14</sup> In any lawsuit the EEOC's policies and guidance statements remain important but not necessarily dispositive considerations for a court in deciding the outcome.

The EEOC's 2012 Guidance is the most recent policy statement concribing employee selection. It supersedes all earlier criminal history policies.<sup>15</sup> Because the 2012 Guidance is so recent, Commission briefing speakers based their comments on its expected effects, in addition to the EEOC's enforcement policy and actions under prior guidances issued in 1987 and 1990.<sup>16</sup>

Still in force are the 1978 Uniform Guidelines on Employee Selection Procedures (1978 Selection Guidelines) on allowable methods of selection. The 1978 Selection Guidelines,

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<sup>11</sup> 2012 Guidance at 13.

<sup>12</sup> At our request, the EEOC graciously supplied the nearly 300 public comments it received with personal information redacted.

<sup>13</sup> The charging party has the right to receive, if requested, a "Notice of Right to Sue" once 180 days have passed from the day he filed the charge regardless of whether the agency has yet investigated the charge.

<sup>14</sup> Procedural description provided by the EEOC to the U.S. Commission on Civil Rights at our request.

<sup>15</sup> This includes the 1987 and 1990 policies on criminal histories and arrest histories, respectively. *See* 2012 Guidance at 3.

<sup>16</sup> EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982) (2/4/87) available at <http://www.eeoc.gov/policy/docs/convict1.html>; EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment, U.S. Equal Emp't Opportunity Comm'n (July 29, 1987) at <http://www.eeoc.gov/policy/docs/convict2.html>; Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII, U.S. Equal Emp't Opportunity Comm'n (Sept. 7, 1990) at [http://www.eeoc.gov/policy/docs/arrest\\_records.html](http://www.eeoc.gov/policy/docs/arrest_records.html).

issued 35 years ago and not updated since, are in use by various federal agencies.<sup>17</sup> Critics of the 1978 Selection Guidelines allege that accepted standards incorporating advances in validity generalization are not available to employers under these guidelines.<sup>18</sup> Validity generalization would allow employers to develop employee qualification standards that would be applicable to a class of jobs, not just one job. Although the 2012 Guidance acknowledges as a legitimate selection concern the physical or other security risks to customers or other employees inherent in hiring any employee,<sup>19</sup> it leaves employers exposed to the discretionary judgment of the EEOC as to individual hiring decisions.

Among those policies apparently superseded<sup>20</sup> is the 1987 policy distinguishing between crime-specific and non-crime-specific data to control employers' use of statistical data in excluding former offenders (1987 Statistics Policy).<sup>21</sup> This policy allowed employers where the policy was crime-specific to present data showing that their practices would not adversely affect blacks and Hispanics in the employer's actual pool as to that particular crime; the new guidance also allows employers to make this showing.<sup>22</sup> Also superseded is the 1990 policy guidance restricting employers' use of arrest records (1990 Arrest Records Policy),<sup>23</sup> the policy limiting but not eliminating use of arrest records is now included in the new guidance.

The Title VII statute does not distinguish between intentional and inadvertent actions, meaning that an employer may make good-faith efforts to adhere to the guidance and still be in violation of the law. The EEOC has the authority to bring a systemic investigation against several employers alleging a pattern or practice of discrimination and add additional affected employees and/or bases such as national origin.<sup>24</sup>

Some years ago, the EEOC began an initiative called "E-RACE" that adds greater scrutiny to employer practices such as making hiring selections based on "names, arrest and conviction records, employment and personality tests, and credit scores."<sup>25</sup> The 2012 Guidance does not discuss the relation of E-RACE to the Guidance.

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<sup>17</sup> Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. pt. 1607 (1978).

<sup>18</sup> See 2012 Guidance at 15 ("Although there may be social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications, and thereby provide a framework for validating some employment exclusions, such studies are rare at the time of this drafting."); see, e.g., Posting of DCI Consulting Group "Abolish the Uniform Guidelines" to <http://ofccp.blogspot.com/2011/04/dci-staff-present-at-siops-26th-annual.html> (Apr. 26, 2011, 02:43 EST).

<sup>19</sup> For example, the 2012 Guidance at 6 states merely: "Employers have reported" that they use criminal background information to "combat theft and fraud... workplace violence... and negligent hiring."

<sup>20</sup> 2012 Guidance at 3, n.15.

<sup>21</sup> EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (7/29/87) available at <http://www.eeoc.gov/policy/docs/convict2.html>.

<sup>22</sup> 2012 Guidance at 10.

<sup>23</sup> Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. (1982) available at [http://www.eeoc.gov/policy/docs/arrest\\_records.html](http://www.eeoc.gov/policy/docs/arrest_records.html).

<sup>24</sup> As is true for any agency, courts may limit the charges if they violate the law. In *EEOC v. Freeman*, the U.S. District Court dismissed all EEOC claims that arose from hiring decisions made prior to 300 days before charges were filed. 2011 WL 337339 (D. Md. Jan. 31, 2011).

<sup>25</sup> [http://www.eeoc.gov/eeoc/initiatives/e-race/why\\_e-race.cfm](http://www.eeoc.gov/eeoc/initiatives/e-race/why_e-race.cfm)

The 2012 Guidance states categorically that any employer policy disfavoring persons with criminal records disproportionately affects racial and ethnic minorities, particularly black or Hispanic with criminal records nationwide.<sup>26</sup> It bases this declaration on data from the U.S. Department of Justice's Bureau of Justice Statistics showing nationwide conviction rates of blacks and Hispanics<sup>27</sup> disproportionately higher than their representation in the general population of the United States.<sup>28</sup> The EEOC cautions employers against drawing conclusions driven by racial or ethnic animosity, as well as decisions infected by stereotyped thinking which might lead an employer to reject a black or Hispanic applicant based on a higher than average likelihood of a criminal history.<sup>29</sup>

Based on its statistical information, the EEOC regards as likely disparate impact any exclusion of a black or Hispanic job applicant or employee with a criminal record. This would hold true regardless of the type of crime, the type of job, the location, or the nature of the employer's business, unless the employer uses what the EEOC considers a narrowly drawn or "targeted" screen that does not exclude all persons with criminal records, or enquires into the details of each applicant's history to determine suitability and establishes a rationale that is consistent with business necessity.<sup>30</sup> The EEOC defines "targeted exclusions" as "an employer policy or practice of excluding individuals from particular positions for specified criminal conduct with a defined time period, as guided by the *Green* factors."<sup>31</sup>

The "*Green*" factors were set out in 1977 in a three-judge panel decision of the Eighth Circuit Court of Appeals, *Green v. Missouri Pacific Railroad*.<sup>32</sup> The *Green* factors are 1) the nature and gravity of the offense; 2) the time passed since the offense and/or completion of the sentence; and 3) the nature of the job held or sought.<sup>33</sup>

The EEOC, as is true of many other federal agencies,<sup>34</sup> has broad investigative powers. The EEOC's 2012 Guidance states that the agency may investigate a charge in light of its national data on disparate impact and consider contrary data provided by employers.<sup>35</sup> In the context of litigation, however, existing disparate impact case law requires a plaintiff to bear the initial

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<sup>26</sup> 2012 Guidance at 10.

<sup>27</sup> The 2012 Guidance uses the phrase "race and national origin." *Id.*

<sup>28</sup> The elevated incarceration statistics are used by the EEOC "as a proxy for conviction data." 2012 Guidance at n.69.

<sup>29</sup> 2012 Guidance at 7. The EEOC would consider drawing such conclusions unlawful disparate treatment.

<sup>30</sup> The 2012 Guidance describes and gives examples of "targeted exclusions," or "screens." See 2012 Guidance at 17. Title VII shifts the burdens of production and persuasion to the employer to demonstrate that the challenged practice is job related for the position in question and consistent with a business necessity.

<sup>31</sup> 2012 Guidance at 17.

<sup>32</sup> *Green v. Missouri Pac. R.R.*, 549 F.2d 1158, 1160 (8th Cir. 1977).

<sup>33</sup> 2012 Guidance at 15-16.

<sup>34</sup> See *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508-509 (1943) and *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 214 (1946).

<sup>35</sup> 2012 Guidance at 9-10. "For example, an employer may present regional or local data showing that African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer's particular geographic area."

burden of proof.<sup>36</sup>

The EEOC held two public meetings prior to the publication of the 2012 Guidance. At the public meeting in November 2008 the EEOC invited eight speakers—six in favor of its views and two opposed. In July 2011, the EEOC held another public meeting to which ten speakers were invited, eight generally supporting the EEOC’s stated views,<sup>37</sup> and two possibly somewhat equivocal.<sup>38</sup> The law does not require, and the EEOC did not provide, a draft of the new guidance to meeting speakers or the public on either occasion, nor did it provide a draft at any time before the guidance was issued. The EEOC received approximately 300 written public comments for the 2011 meeting, many from ex-offenders<sup>39</sup> and advocacy organizations supporting limits on using criminal histories, many from individuals, groups and businesses opposing restrictions on use or the elimination of background checks.<sup>40</sup> The EEOC did not respond publicly to comments or speaker testimony but says it considered them in its deliberations, and in fact, the new guidance does not forbid or restrict employers from obtaining background checks.

The 2012 Guidance is couched largely in a series of factual examples followed by “best practices,” rather than commands. In the briefing, EEOC speaker Carol Miaskoff stated categorically that it does not require individualized consideration,<sup>41</sup> although the 2012 Guidance could reasonably be read as strongly recommending this approach. The text states that Title VII “does not necessarily require individualized assessment in all circumstances . . . the use of a screen that does not include individualized assessment is more likely to violate Title VII . . . [and] the use of individualized assessments can help employers avoid Title VII liability...”<sup>42</sup> Employer counsel at the briefing clearly viewed this warning to mean that any use of criminal history for a protected class member without individual assessment was presumptively illegal and in fact they would be highly vulnerable to suit,<sup>43</sup> an impression contrary to what the EEOC says it intended.<sup>44</sup>

Once a claim is brought against an employer, the 2012 Guidance provides that the employer may defend against the charge by showing that its policy does not cause a disparate impact,

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<sup>36</sup> *Lewis v. City of Chicago*, 130 S. Ct 2191, 2197 (2010) (Required that a plaintiff establish a prima facie disparate-impact claim by showing that the employer uses a particular employment practice that causes a disparate impact on one of the prohibited bases.) (internal quotations removed). The Court reversed in favor of the plaintiffs in that case: black firefighters who challenged a qualification test.

<sup>37</sup> One invited speaker did not attend.

<sup>38</sup> Attendee lists were graciously supplied by the EEOC.

<sup>39</sup> In this report the term “ex-offender” is used to include anyone who has a recorded brush with criminal laws, even if no charges were ever filed.

<sup>40</sup> These comments with personal information redacted are available from the EEOC or the Commission upon request.

<sup>41</sup> The individualized assessment includes “notice to the individual that he has been screened out because of a criminal conviction; an opportunity . . . to demonstrate that the [policy] should not be applied due to his particular circumstances; and . . . whether the additional information . . . warrants an exception . . . show[ing] that the policy as applied is not job related and consistent with business necessity.” 2012 Guidance at 15.

<sup>42</sup> 2012 Guidance at 2, 14, 18-20.

<sup>43</sup> See remarks of Don Livingston, *infra* at 18, see also remarks of Garen Dodge, *infra* at 58.

<sup>44</sup> See remarks of Carol Miaskoff, *infra* at 30.

using local conviction rates for blacks or Hispanics and/or its own job application data. The Guidance allows the EEOC to reject the showing, however, if it concludes that some applicants who might be in the applicant pool have been discouraged from applying because of the employer's reputation in the community.<sup>45</sup> The Guidance does not indicate the method of assessment, which potentially complicates the employer's efforts to comply.

The employer may also defend against the charge by demonstrating that its policy or practice is job-related for the position in question and consistent with business necessity. The EEOC believes there are two established legal or evidentiary criteria for successfully making such demonstration. One is the formal validation for each specific job under the rarely used 1978 Uniform Guidelines on Employee Selection Procedures mentioned above and the other is the creation and use of a specific analysis for each job description that considers the "Green" factors and an individualized assessment.<sup>46</sup> The 2012 Guidance does not address or acknowledge the practical difficulties of performing individualized assessments in large-scale hiring by an employer.<sup>47</sup>

The new guidance emphasizes individualized assessment in part because it asserts that former offenders pose risks that are overestimated by employers, particularly as the years pass with no further convictions. Speakers and advocacy groups at the briefing who work with former offenders supported this view, and gave examples of States in agreement that have passed laws restricting the use of criminal histories after a certain number of years without recidivism, and the groups' own successes placing ex-offenders they screen who become valued employees.

## **Views of Briefing Speakers**

Views on whether the 2012 Guidance has added new conditions and restrictions on employers' use of criminal background checks differed among speakers. Speaker Carol Miaskoff of the EEOC believes that it does not contain new restrictions, just a better explanation of the existing ones. From the EEOC's point of view, employers have long had a legal obligation to refrain from excluding any member of a protected class who has not been individually considered or screened and given a chance to pursue a legitimate occupation, the protected class in this instance including mainly black and Hispanic job applicants or employees with criminal records.<sup>48</sup>

Speakers associated with background screeners or employers viewed the risks of hiring someone with a past conviction for a violent or financial crime or other felony as indicating potential legal liability, financial and inventory losses, or untrustworthiness.<sup>49</sup> Speaker William Dombi, for example, discussed the heightened vulnerability and risk sensitivity of

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<sup>45</sup> See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977) (consistently enforced discriminatory policy deters job applications from those unwilling to subject themselves to the humiliation of explicit and certain rejection).

<sup>46</sup> *Green v. Missouri Pac. R.R.*, 549 F.2d 1158, 1160 (8th Cir. 1977); 2012 Guidance at 14.

<sup>47</sup> The *Green* factors, by contrast, would likely be suitable for scaling up for multiple applicants.

<sup>48</sup> See remarks of speaker Carol Miaskoff, *infra* at 15.

<sup>49</sup> See for example, remarks of Richard Mellor, *infra* at 86-88 and Don Livingston, *infra* at 17-19.

the home health care industry,<sup>50</sup> which along with many other home-based service businesses is concerned with physical or financial risks for clients, customers and co-workers.<sup>51</sup>

Speakers associated with employers viewed the power to exclude those with certain criminal histories as essential to ensuring a safe environment for customers and fellow employees, to reducing negligent hiring lawsuits, to reducing inventory theft, embezzlement or other crimes, to comply with state laws requiring background checks and exclusion of former offenders in particular industries, and to assess an applicant's trustworthiness. They asserted the need to retain the discretion to decide for themselves how best to protect their customers and employees based on policies reflecting their own needs and experience.<sup>52</sup>

Employers and trade group speakers expressed considerable concern also with the EEOC's reading of Title VII as rejecting state law mandates barring employment of certain ex-offenders in some industries pursuant to federal preemption power.<sup>53</sup>

As to compliance, speaker Don Livingston objected to what he viewed as the EEOC's reliance on ad hoc, fact-specific examples and the subjective nature of the Guidance rather than clear legal analysis.<sup>54</sup> He viewed the EEOC's new guidance as leaving the agency with few legal boundaries and wide discretion to accept or reject employer defenses in the face of an investigatory period that is often lengthy and expensive for employers.<sup>55</sup> Speaker Jeffrey Sedgwick considered the EEOC's social science research insufficient to support its 2012 Guidance.<sup>56</sup> Speaker Todd McCracken viewed the 2012 Guidance as opaque, confusing, and difficult for employers to follow or implement.<sup>57</sup> Speaker Jonathan Segal viewed as problematic the EEOC's use of national data to establish disparate impact and its view of State mandates as preempted.<sup>58</sup>

The EEOC's new guidance, on the other hand, appears to accord weight to certain data showing a rapid decline in risk for employers over time, and indicates that employers should consider allowing any ex-offender to show employability by refraining from subsequent

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<sup>50</sup> See remarks of speaker William Dombi, *infra* at 88-89; see also remarks of speaker Richard Mellor concerning the needs of retail businesses for customer safety and theft deterrence, *infra* at 86-88.

<sup>51</sup> See remarks of Lucia Bone, *infra* at 51.

<sup>52</sup> See remarks of speaker Richard Larson, *infra* at 56 (Mr. Larson believes many small employers are unaware of the 2012 Guidance).

<sup>53</sup> See 42 U.S.C. §2000e-7 ("Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.")

<sup>54</sup> See remarks of Don Livingston, *infra* at 17-18.

<sup>55</sup> Federal enforcement is also expensive for taxpayers. For example, over five fiscal years (FY 2008, 2009, 2010, 2011, 2012), EEOC's outside legal counsel expenditures alone were \$150,572,000. See Andrew Ramonas, "Under Contract: A Special Report on Government Legal Spending," *The National Law Journal*, Mar. 11, 2013, pp. 17-34, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202586644243>.

<sup>56</sup> See remarks of speaker Jeffrey Sedgwick, *infra* at 24-27.

<sup>57</sup> See remarks of speaker Todd McCracken, *infra*, at 81.

<sup>58</sup> See remarks of speaker Jonathan Segal, *infra* at 83-84.

criminal offenses, regardless of the nature of the offense.<sup>59</sup> The 2012 Guidance suggests that elapsed crime-free time subsequent to the offense offers an objective metric supporting the EEOC's view that automatically excluding former offenders from employment is unwarranted and illegal.<sup>60</sup>

Advocates for ex-offenders expressed the concern that former offenders are never given a chance to make their case to an employer because they are usually turned down immediately with no further explanation. Both speaker Roberta Meyers of the National H.I.R.E. Network and speaker Glenn E. Martin of the Fortune Society<sup>61</sup> reported considerable frustration on this issue, despite their record of success in screening and placing ex-offenders in jobs. Both cited research showing that minority ex-offenders are hired less often, compared to non-minorities with the same criminal record, although this would be prohibited as discriminatory treatment rather than disparate impact discrimination.<sup>62</sup>

Speakers associated with employers<sup>63</sup> did not take issue with data supplied by advocacy groups such as the Fortune Society, and agreed that discriminatory treatment was illegal. Rather, they stated that, although the new guidance does not flatly prohibit employer policies restricting the hiring of ex-offenders of certain descriptions, its factual examples allowing the restrictions are seemingly contradicted by "best practices" statements saying the opposite and amount to "strict in theory; fatal in fact" enforcement.<sup>64</sup>

Some of the employers' apprehensions concerning EEOC enforcement appeared in general to be based on the difficulty of determining how to comply, rather than on any disagreement by employers with the need for former offenders to be employed. Other apprehensions include bad-faith investigations or investigations stretched out over a long time period, questionable or sanctioned litigation tactics or practices as in *Peoplemark*,<sup>65</sup> refusal to accept employers' state law mandates, reliance on inadequate research and data, and possible encroachment on employers' discretion to decide on employee qualifications based on employer needs as, for example, in the EEOC's ongoing investigation of G4S Secure Solutions USA, Inc.<sup>66</sup>

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<sup>59</sup> 2012 Guidance at 15, n.118.

<sup>60</sup> 2012 Guidance at 19-20.

<sup>61</sup> As did a New York group, Get Out and Stay Out, expressed in a submitted comment. See <http://www.gosonyc.org/HomePage.php>.

<sup>62</sup> See remarks of briefing speakers Roberta Meyers and Glenn E. Martin, *infra* at 45, 48.

<sup>63</sup> Employer-related trade association speakers (Panel III) included Ms. Miller, Mr. Fishman, Mr. McCracken, Mr. Segal, Mr. Mellor, and Mr. Dombi. See Panel III speaker remarks, *infra* at 75.

<sup>64</sup> See, for example, the March 13, 2012 audio recording of oral remarks of EEOC Commissioner Victoria Lipnic to the U.S. Chamber of Commerce at <http://link.brightcove.com/services/player/bcpid1062994879001?bckey=AQ~~.AAAAEkkpZUK~.X1iY6-4YH0xD1Wm6D1VB4kWeHRwgu8hA&bctid=1505101556001>.

<sup>65</sup> See description *infra* at 10.

<sup>66</sup> See remarks of briefing Julie Payne, *infra*, at 54, Garen Dodge, *infra* at 58-60, and Montserrat Miller, *infra* at 104.

## Recent Cases

Several recent court cases involving the EEOC's criminal background policies predating the 2012 Guidance have not been deferential to the agency or its policies. The *SEPTA* case in particular formed part of the rationale for the EEOC's issuance of the new Guidance.<sup>67</sup>

- *El v. Southeastern Pennsylvania Transportation Authority (SEPTA)*, 479 F.3d 232 (3d Cir. 2007) affirmed the grant of summary judgment against a black plaintiff who was dismissed from his job as a paratransit driver when, a few weeks after his hiring, SEPTA belatedly realized that he had a 47-year old second-degree murder conviction that he had disclosed on his application. SEPTA's subcontractor had a policy that disallowed anyone with a violent criminal conviction, regardless of the time elapsed, and Mr. El did not present his own expert witness to rebut SEPTA's assertion of job-relatedness and business necessity. The court recognized the heightened vulnerability of a closed-car environment with disabled passengers. SEPTA's expert witness was Professor Blumstein, one of our briefing speakers, who testified that someone who had committed a violent crime--even after as in this case more than 40 years--never presents as low a risk as a non-offender.<sup>68</sup>
- In *EEOC v. Peoplemark*, the EEOC charged that the employer categorically refused to hire anyone with a criminal record, even though Peoplemark had provided evidence to the EEOC showing this charge was untrue. The employer filed a motion for summary judgment seeking dismissal of the complaint, and sanctions against the EEOC. A month later, the EEOC acceded, in a joint motion agreeing that Peoplemark was the prevailing party. Because of the conduct of the EEOC, the court awarded attorneys' fees to the employer.<sup>69</sup>
- In *EEOC v. Freeman*, a criminal history/bad credit history case, the court ruled against the EEOC and granted defendant's motion for summary judgment.<sup>70</sup> The judge ruled that the EEOC had failed to offer reliable expert testimony and statistical analysis that demonstrated disparate impact from a specific employment practice. The court rejected as insufficient the EEOC's national statistics showing disparate impact. During the case, the court had granted defendant Freeman's motion to compel disclosure of the EEOC's own background screening practices indicating that the EEOC uses criminal background history for all of its employees, and credit check information on about 90% of its workforce.<sup>71</sup>
- EEOC has recently filed disparate impact suits against car manufacturer BMW and

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<sup>67</sup> See written statement of Speaker Carol Miaskoff, EEOC, *infra* at 220.

<sup>68</sup> The court noted reservations about such policies in general, as the 2012 Guidance states.

<sup>69</sup> *EEOC v. Peoplemark, Inc.*, 2011 WL 1707281 (W.D. Mich. Mar. 31, 2011).

<sup>70</sup> *EEOC v. Freeman*, No.: RWT 09cv2573, slip op. (D.Md. Aug. 9, 2013).

<sup>71</sup> 2012 U.S. Dist. LEXIS 114408, 6-7 (D. Md. Aug. 14, 2012).

the Dollar General Stores for their use of criminal history in employment decisions.<sup>72</sup>

In conciliating criminal background cases outside of litigation the EEOC has been very successful. In a negotiated conciliation agreement with PepsiCo, for example, the EEOC obtained a settlement of over three million dollars on behalf of black applicants with either arrests or criminal convictions and Pepsi's agreement to change its race-neutral policy that resulted in disparate impact effects.<sup>73</sup> The EEOC has also concluded an agreement with transportation company J.B. Hunt regarding Hunt's denial of a truck driver position to a man with a criminal record that the EEOC contends was unrelated to the job.<sup>74</sup>

## **Constitutional Question**

The 1991 amendment to Title VII banning disparate impact discrimination has been an integral part of the Act and undisturbed by Congress ever since its adoption over 20 years ago. The constitutional issue of whether or to what extent the disparate impact provisions of Title VII of the Civil Rights Act of 1964 are consistent with the Constitution's guarantee of equal protection was raised by Commissioners Kirsanow and Gaziano.<sup>75</sup> The issue, however, has not been squarely presented to the Court.<sup>76</sup>

## **Surveys and Research Provided by Speakers<sup>77</sup>**

One of the briefing speakers, Nick Fishman, co-founder of a screening firm,<sup>78</sup> provided his firm's survey of 992 U.S.-based employers who use various screening companies, not only his. In general, the survey found that most responding employers obtained criminal background checks, most have reviewed and adjusted their policies in light of EEOC Guidance policies, most did not categorically exclude those with criminal records from being hired, and in fact, fewer than 5 percent reported excluding candidates based on a prior conviction. These survey results are supported in research by Professor Michael Stoll and Shawn Bushway, who found that where employers were not legally prohibited from hiring anyone with a criminal record, the performance of background checks had no effect on hiring ex-offenders.<sup>79</sup>

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<sup>72</sup> See <http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm>; see also <http://www.wvago.gov/press.cfm?ID=707&fx=more> (reaction of nine state attorneys general)

<sup>73</sup> See <http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>.

<sup>74</sup> See <http://www.eeoc.gov/eeoc/newsroom/release/6-28-13c.cfm>

<sup>75</sup> Br. Tr at 37, 42.

<sup>76</sup> See Justice Scalia's opinion concurring in *Ricci v. DeStefano*, 557 U.S. 557 at 594-596 (2009) ("Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection? The question is not an easy one . . . The Court's resolution of these cases makes it unnecessary to resolve these matters today. But the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.").

<sup>77</sup> The Commission has not independently verified any research discussed in this report.

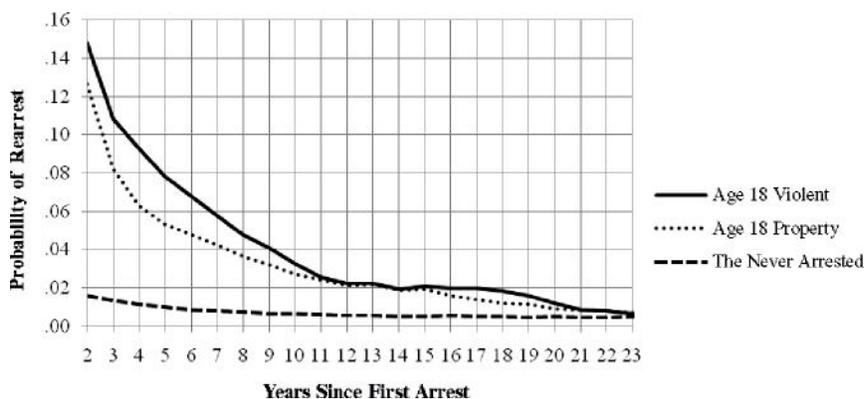
<sup>78</sup> Nick Fishman of EmployeeScreenIQ.

<sup>79</sup> Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 CRIMINOLOGY & PUB. POL'Y 371, No. 3 (2008). See also Michael A. Stoll, *Ex-Offenders, Criminal*

Ex-offender advocacy group speakers in the briefing disagreed that employers are willing to hire ex-offenders, stating that their experience strongly indicated the opposite. Glenn E. Martin of the Fortune Society provided statistics showing disparate treatment of applicants based both on race and on prior convictions.<sup>80</sup> Written public comments sent to the Commission from ex-offenders also recounted continuing rejections by employers, although a slight majority of the 300 comments submitted by the public supported the right of employers to decide for themselves who to hire and on what basis.

Speaker Alfred Blumstein's joint research with Professor Kiminori Nakamura is relied on and referenced by the EEOC in its new Guidance. Excerpted below is one of the graphs from their research, showing the rapidly decreasing divergence in risk of re-arrest in succeeding two-year periods between former arrestees and non-arrestees.<sup>81</sup> "Redemption," as they call it, is the theory, supported by their studies, that as a certain number of years pass with no further arrests, an ex-offender rapidly approaches the risk level of someone with no record.

#### Comparison with the Never Arrested (Age 18 Violent, Property)<sup>82</sup>



This graph shows, for each successive year after the first two, the reduction in the probability of re-arrest compared to persons who have never been arrested. The drop is steep until approximately the twelfth year after initial arrest, when it decreases more slowly until it comes close to matching the probability of re-arrest at year 23 compared to the probability of arrest for non-offenders. The authors also provide graphs that show actual conviction data, but do not compare ex-offenders with non-offenders. Instead, they compare ex-offenders to what they term the "general population," by which they mean a blended population of both

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*Background Checks, and Racial Consequences in the Labor Market*, 2009 U. CHI. LEGAL F. 381 (2009) (restricting background checks has unintended consequences for ex-offenders and black men).

<sup>80</sup> See Glenn E. Martin written submission, *infra* at 194.

<sup>81</sup> Note that arrests are highly correlated with convictions, although not identical.

<sup>82</sup> Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY & PUB. POL'Y 327, 343, No. 2 (2009), available at [http://www.search.org/files/pdf/Redemption\\_Blumstein\\_Nakamura\\_2009Criminology.pdf](http://www.search.org/files/pdf/Redemption_Blumstein_Nakamura_2009Criminology.pdf). Blumstein and Nakamura completed their recent work, "Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences," for the U.S. Department of Justice's National Institute of Justice in November of 2012. See <https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf>.

ex-offenders and non-offenders. By contrast, employers choose between known ex-offenders and known non-offenders, using the information available to them.

According to Professor Blumstein, in his testimony as an expert witness for SEPTA in the 2007 *El v. SEPTA* case mentioned above, no former offender will ever be “less or equally likely to commit a future violent act than comparable individuals who have no prior violent history.”<sup>83</sup> Another group of researchers (Kurlychek, Brame and Bushway) echoes this observation, stating “even individuals whose last offense record occurred years ago will, as a group, generally exhibit some nonzero risk of reoffending in the future.”<sup>84</sup> Both Professor Blumstein and his co-author Kiminori Nakamura concluded, however, that after a considerably shorter time period than 23 years the risk of re-offense was low enough so that the risk posed to employers and the public should be weighed against the societal burden of unemployment among former offenders, but stated that individual employers should make decisions based on their own circumstances.<sup>85</sup>

In his remarks to the Commission, Professor Blumstein did not allude to his views expressed as an expert witness in the *SEPTA* case, and also did not provide a specific number of years for convergence of risk where the comparison group was non-offenders. Professor Holzer’s research led him to agree that background checks result in increased employment among black and Hispanic individuals, but also agreed with the EEOC that the new guidance was a reasonable way to evaluate the employment risk of ex-offenders. He disagreed strongly that ex-offenders’ risk of re-offending never diminished to the same risk posed by non-offenders. Professor Holzer pointed to research by Pager, Western and others that showed a significant disadvantage in hiring encountered by black and Hispanic individuals with records, compared to white individuals with similar records.<sup>86</sup>

## **Public Comments**

The Civil Rights Commission received almost 300 public comments reflecting considerable interest in this issue. These public comments from both groups and individuals are available from the Commission.<sup>87</sup> Most of the individuals’ comments were solicited by advocacy

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<sup>83</sup> *El v. SEPTA*, 479 F.3d 232, 246 (3d Cir. 2007).

<sup>84</sup> Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL’Y 483, 490, No. 3 (2006).

<sup>85</sup> See also John Monahan, “A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients,” 92 Virginia L.R. 391-435 (April 2006) available at <http://www.virginialawreview.org/content/pdfs/92/391.pdf>; John Monahan, “The Inclusion of Biological Risk Factors in Violence Risk Assessments,” in Ilna Singh, Walter Sinnott-Armstrong and Julian Savulescu (Eds.) *Biopredictions, Biomarkers, and Bad Behavior: Scientific, Legal and Ethical Challenges*, (Oxford University Press, Forthcoming 2013).

<sup>86</sup> Devah Pager & Bruce Western, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men*, (2009), submitted to the U.S. Department of Justice, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf>. See also Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf> on page 64. Professor Pager found ex-offender stigma effects larger for blacks than whites—65 percent versus 50 percent.

<sup>87</sup> Comments from individuals have most personal information redacted.

groups such as the National Association of Background Screeners, the Sentencing Project, or Sue Weaver CAUSE, among others.

Of the total, about 83 comments were from individuals, mostly ex-offenders, supporting the 2012 Guidance, and approximately 28 from mostly non-offenders that were critical of the 2012 Guidance. Comments from individual former offenders recounted continuing rejections they believed were based on their criminal histories. There was little indication in their comments that any had sought the intervention of ex-offender support groups. In addition, there were about 42 comments from groups supporting the 2012 Guidance, who welcomed its focus on treating each individual on his or her own terms with no predetermined or automatic rejection.

About 121 comments came in on behalf of employer-related groups supporting the goals of the 2012 Guidance, but objecting to the additional burdens on employers stemming from individualized or “targeted” screens and the lack of direction as to how to comply, compared to the 1987 Guidance. Comments also objected to the perceived lack of transparency of the process by which the 2012 Guidance was produced. A major concern of those objecting to the Guidance was a fear that the true intent of the EEOC is to ban criminal record checks entirely and expressed mistrust of the Guidance’s vague language that increased the potential for unpredictable prosecutions.

Those sending comments included two commissioners of the EEOC (Victoria Lipnic and Chai Feldblum), the Federal Trade Commission, the National Employment Law Project, the Consumer Data Industry Association, the Brennan Center for Justice, the U.S. Department of Justice, the Safer Foundation, the Sentencing Project, the National Association of Professional Background Screeners, the U.S. Chamber of Commerce, Get Out and Stay Out (New York), the City of Seattle Office for Civil Rights, the Human Rights Defense Center, the Kings County District Attorney’s Office, and 39 co-signatories of a letter that included representatives of credit bureaus, victim advocacy, security companies, screeners, financial services, amusement parks, small business, merchants, anti-child abuse, and employment agencies.

### **Briefing Speakers’ Remarks to Commission**

The briefing’s first speaker was Ms. Carol Miaskoff, Acting Associate Legal Counsel, Office of Legal Counsel, EEOC. Her remarks are set out below, as are in turn, remarks of other speakers in the three panels.<sup>88</sup> All speakers were limited to seven minutes each, but in addition submitted written statements or slide presentations expanding on their views that are included in this report. Short biographies of each speaker are also included. Commissioners asked questions at the conclusion of each panel of speakers. Please note that some speakers used the phrase “criminal background check” to mean, “use of criminal background history.” Speaker Carol Miaskoff of the EEOC pointed out that the 2012 Guidance does not in any

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<sup>88</sup> Speakers’ and commissioners’ oral remarks are in some instances edited to increase readability without altering content. The complete transcript is available from the Commission’s website, [www.usccr.gov](http://www.usccr.gov).

way limit an employer's right to obtain background check information; it does strongly suggest limits on the use of the background check information.

## **Panel One Speakers**

CAROL MIASKOFF, ACTING ASSOCIATE LEGAL COUNSEL, EEOC:

The EEOC, as you know, is a bi-partisan commission of five presidentially appointed, and Senate confirmed Commissioners. The EEOC's mandate from Congress is to enforce Title VII of the Civil Rights Act of 1964.

Title VII prohibits employment discrimination on the basis of race, color, religion, sex or national origin. It has applied now for almost 50 years.

The EEOC enforces Title VII first by investigating charges of discrimination brought to us by job applicants, or employees, who assert that covered employers violated the law, either by treating them differently because of their race, for example, or by applying to them a seemingly neutral policy that nonetheless operates to disproportionately exclude people of their race, but is not job related and consistent with business necessity.

When the EEOC investigates a Title VII charge, it gathers the facts necessary to decide if there is reasonable cause to find a violation. My statement today will summarize the EEOC's recent enforcement guidance on the consideration of arrest and conviction records and employment decisions under Title VII. The substance of this guidance is not a major departure from existing precedent from the courts and from the EEOC.

In short, Title VII does not stop employers from meaningfully considering criminal history information when they make employment decisions. As a Federal Court said when interpreting Title VII for a hiring race discrimination case in the 1970s, and as the EEOC's policy statements reiterated in 1987 and 1990, criminal history may be used to screen applicants by considering the nature of the crime, the time elapsed and the nature of the job.

However, under Title VII, the mere fact of having a criminal record should not automatically, and without consideration, bar a person from all future employment.

The 2012 Guidance recognizes that reentry is a complicated issue. And that employment discrimination is one piece of the puzzle, albeit a real piece. The guidance looks at the different kinds of criminal history, that are now available online, and some of the problems with its accuracy and completeness.

The Guidance recognizes the other legal duties faced by employers at the federal, state and local levels and the concerns they have about workplace safety and reducing theft. In this context the guidance reviews recent statistics about arrests and incarceration in America and then breaks those numbers down by race and national origin.

The Guidance is obviously about the Title VII piece of this puzzle. It begins by discussing disparate treatment, which occurs when similarly qualified job applicants who disclose or are found to have equivalent criminal records are nonetheless given different employment opportunities because of their race.

The Guidance then turns to disparate impact, which was the focus of the EEOC's 1987 and 1990 policies. The new Guidance analyzes disparate impact in the same fundamental way, but in greater depth and in light of the 1991 Civil Rights Act, which formally added disparate impact to Title VII.

The 2012 Guidance gives a step-by-step analysis to [assessing] disparate impact. The first step is to identify the particular policy or practice at issue. In other words the policy of excluding people from employment if they have a criminal record or if they have a record of a particular conviction and are seeking a particular job.

The second step is to determine if there is evidence that the policy or practice caused a disparate impact. The EEOC's starting point, as the national enforcement agency, is national criminal justice data demonstrating that Blacks and Hispanics are arrested and incarcerated in numbers greatly disproportionate to their representation in the population.

This is not a legal conclusion in itself. The employer is welcome to provide evidence to demonstrate that its policy or practice does not have a disparate impact. The EEOC also may gather data itself that is unique to the particular case.

If disparate impact is found, the third step is the employer defense of job-related and consistent with business necessity. If that is satisfied the final step is determining if there is an effective less discriminatory alternative the employer refused to adopt.

Understanding business necessity is the heart of the Guidance. The Commission states that employers can reliably meet the standard in two ways. The first involves validating the policy under the Uniform Guidelines on Employee Selection Procedures.

The second way involves the basic test I discussed above using a targeted screen to consider at least the nature of the crime, the time elapsed and the nature of the job and providing an opportunity for individualized assessment.

Individualized assessment is not burdensome and it is not complicated. Simply put it means that the employer tells an applicant or employee that he may be excluded from employment because of past criminal conduct. And then it gives him an opportunity to explain or submit information to put his criminal record into context so that the employer can factually judge its relevance to the employment situation.

The individual could provide documentation of error in the record or information about work experience, personal references, training, bonding or other related factors. The goal of the guidance here is to alert employers about the kinds of information that may be relevant, not to mandate a checklist of factors.

I will conclude there. There is more in my written testimony that everyone is more than welcome to read. Thank you.

DON LIVINGSTON, PARTNER, AKIN, GUMP, STRAUSS, HAUER & FELD:

Good morning. I'll comment on what the Guidance says, what the Guidance is, the educational and transformational consequences of the Guidance, and some perplexing issues and the failure of the Guidance to recognize trust and reliability as important linkages between law-breaking and work.

The EEOC guidance on the consideration of arrest and conviction records in employment decisions is presented in a lengthy document; but the rule it establishes is simple: Employers commit race discrimination if they choose law-abiding applicants over applicants with criminal convictions unless the employer goes through a highly subjective decision making process that involves the collection of information and weighing of multiple factors, including the individual's particular circumstances, education and training post-conviction, length and consistency of employment history, and character references. If the applicant is rejected after consideration of these factors, presumptively no race discrimination occurs.

An analytical flaw in the guidance is that it does not explain whether or why it is race discrimination to reject the applicant without individualized assessment but it is not race discrimination to reject the same applicant with the individualized assessment.

The Guidance is not authoritative in the way a law is authoritative. The Guidance is not a regulation. Indeed, the EEOC has no authority under Title VII to issue substantive regulations under Title VII. The Guidance is not binding, even on the EEOC, which is free to take inconsistent positions during its own investigations or in litigation when it sues employers.

As a general matter the Supreme Court gives little deference to the EEOC's non-regulation interpretations of Title VII. This is thoroughly discussed in a study by Melissa Hart, called "Skepticism and Expertise." It was published in the Fordham Law Review in 2006. The EEOC's Title VII Guidance is followed by the courts to the extent the courts finds the guidance persuasive based on thoroughness, logic and fit with prior interpretations and any others sources of weight. That means simply that the court will consider the EEOC's guidance as it would any other argument.

The EEOC's Guidance already has played a significant educational role. As result of the Guidance there has been greater awareness by employers that their policies may be unnecessarily restrictive. The Guidance has also been transformational. From the heightened awareness from education has come liberalization, a loosening if you will, on the restrictions on the hiring of persons with criminal records.

And because the Guidance implies an expectation that the outcome of an EEOC charge investigation will hinge upon whether the employer has weighed the multiple factors stated in the EEOC Guidance, employers have changed practices to conform to the EEOC's Guidance solely to avoid entanglements with the EEOC, including litigation.

The Guidance, though, remains perplexing to employers. For example, employers do not understand the EEOC's position that they commit race discrimination if they reject an applicant with a criminal history of violence unless the rejection follows an individualized assessment.

Employers also do not understand why they are at risk for an EEOC sex discrimination lawsuit if they chose to hire a law abiding female applicant over a convicted felon, who is male.

In addition employers expect that the individual assessment that they are being asked to undertake will result in second-guessing of their decisions by the EEOC. Employers have been given no guidance on how the individual decisions should be made as, for example, how they should weigh the various factors. They are rightly concerned that if they follow the EEOC's approach and make subjective case-by-case assessments of applicants' suitability for work, as for example hiring some applicants who have felony violence convictions but rejecting others with similar convictions, they will face an increase in the number of discrimination lawsuits by rejected applicants.

Finally, by placing so much emphasis on the issue of recidivism, discussions about law breaking and work have de-emphasized two important traits, trust and reliability, or conscientiousness.

Prior to the EEOC's Guidance, these characteristics were considered important linkages between law-abiding behavior and employment. Both trust and reliability have been emphasized by the EEOC, the U.S. Office of Personnel Management and the United States Supreme Court as overriding interest shared by employers, employees and consumers.

For example, the EEOC's Suitability and Security Program Handbook, which the EEOC uses to make its own hiring decisions for its own employees, states that a history or pattern of practice of criminal activity creates doubt about a person's judgment, honesty, reliability and trustworthiness.

The U.S. Office of Personnel Management's Introduction to Credentialing, Suitability and Security Clearance Decision Making Guide, states that criminal activity creates doubts about an individual's judgment, reliability and trustworthiness and calls into question an individual's ability or willingness to comply with laws, rules and regulations.

The EEOC's new Guidance seeks to reject the common-sense notion that continues to hold sway when the EEOC itself is hiring, that the willingness to follow society's rules is relevant to whether the employer can depend on the individual to faithfully and honestly perform his or her job duties. When an employer decides that a lawbreaker cannot be trusted to faithfully perform on the job, the employer should not be branded by the EEOC with the allegation of race or sex discrimination.

**HARRY HOLZER, PROFESSOR OF PUBLIC POLICY, GEORGETOWN UNIVERSITY:**

Good morning and thank you for inviting me today. I'd like to very briefly make four points about the 2012 Guidance by the EEOC and the broader issues of criminal records for employment.

First point, the prevalence of arrests and convictions among less educated men substantially reduces employer willingness to hire them later in life and worsens their employment outcomes more generally, in a way that generates clear disparate impacts on minority, and especially black men.

Now it's true that many young men enter and then exit prison with very poor basic skills and low levels of education, and their time in prison further reduces their work experience and their marketable skills. But on top of that the great reluctance of most employers to hire men with criminal records, regardless of their individual characteristics, further worsens their employment outcomes.

The large negative effects of incarceration on post-release employment appears to be a major reason for the continuing deterioration of employment among young black men over the past few decades. And, by the way, this is

not because young black men have an innately greater proclivity towards crime, but instead because they have been the most disadvantaged by economic changes in the labor market that have reduced their legal opportunities.

Point number two. The use of criminal background checks by employers can have both positive effects on the employment of some minority men and negative effects on others. And I believe both the usefulness and the limitations of the information should be considered when policies are made about their use.

Now it is true that background checks almost certainly reduce employment for black men and others with criminal records. It is also true that employer background checks seem to raise employment for black men overall; presumably by reducing statistical discrimination against men whom employers suspect of such activity but who turn out to have clean records.

Background checks can therefore play a very useful role for some groups of workers and for employers. But there are important limitations to the positive effects of criminal background checks that should be also noted. For one thing, there appear to be many errors in these data. For instance, the private provision of these records often does not carefully distinguish arrests from convictions.

And there appear to be many false positives among apparent offenders, as well as false negatives among apparent non-offenders, suggesting that the observed differences of criminal activity between the two groups are really not as great as they seem to be.

Furthermore, and I know Dr. Blumstein will talk about this, the ability of criminal records to predict future contact with the police diminishes greatly after the first five to seven years in which a past offender does not commit another crime. And again, I'll defer to Dr. Blumstein more on that record.

But importantly, these studies mostly focus on the general probability of new arrests rather than the commission of specific new felony offenses. In most cases the studies do not tell us whether or not the arrest results in a conviction or what type of offense occurred.

Accordingly, it is hard to ascertain the risks of poor job performance, property damage, theft or injury to coworker or customers associated with any such re-arrest. Since so many offenders are in fact convicted of non-violent felony drug conviction or sales it is hard to know the extent to which the risks that employers fear from these applicants are really well founded.

Point number three. The very high costs of previous criminal histories on employment are borne not only by the offenders themselves, but also by their families and their children, their communities and the U.S. economy more broadly.

Accordingly, having some positive policy efforts to improve employment outcomes for this group are in the national interest. Now low employment after prison release appears to be quite highly correlated with recidivism, and a number of very prominent scholars believe that's a causal effect.

But the negative effects of low employment and recidivism extend far beyond the offender himself or herself. For instance, the children of offenders are much more likely to engage in negative behaviors and ultimately become incarcerated themselves than similar children of non-offenders. And it is likely that the low employment and repeat arrests and re-incarceration among parents help to generate these worse outcomes among the children.

A lack of employment among offenders almost certainly makes it harder for low-income, non-custodial fathers with a child support order to make their payments on time, thus denying their families and children an important source of household income.

Children and youth growing up in low-income neighborhoods where very few adult men work seem to have worse outcomes in life themselves, because of the absence of role models for work and labor market contacts and connections.

And, finally, the overall U.S. economy appears to suffer when so many adult men do not work. Their lost earnings represent lost output and lost productivity for economy overall. And the magnitudes of these effects are not trivial.

Finally, my last point: The EEOC Guidance should be viewed as one of several potentially effective legal and policy efforts to reduce the barriers for employment among men with criminal records and thus to improve their employment outcomes.

Now, since employer reluctance to hire men with criminal records appears to be a major reason for why employment rates of offenders are so low, attempts to limit the disparate impacts associated with criminal records should be welcome as long as they do not impose undue risks and burdens on employers.

Now, in my opinion, the EEOC Guidance does not seek to discourage employers, in any way, from doing background checks. It simply tries to encourage a more judicious use of the information so gained.

Furthermore, the EEOC Guidance does not seek to significantly raise the risks employers bear from hiring offenders, it simply tries to encourage a more accurate assessment of what those risks really are.

As the courts have argued for decades, the length of time since an offense is committed, the nature of the offense and the nature of the job should be taken into account when assessing the risk of recurrence of any offense and what it implies for job performance.

The mere existence of a prior record, conviction or incarceration in and of itself may tell us very little about such risks. Furthermore a range of individual factors, such as participation and completion of employment and training program has been shown to lower the risk of re-incarceration quite dramatically. And so this individual consideration should be taken into account.

Now there are a range of other policies and programs that should be used to address the employment barriers of former offenders. These include the efforts of states to review statutory limits on felony offender employment, limiting recidivism [data] due to technical parole violations, re-entry programs, fatherhood programs and the like.

But I consider all of those efforts to be complements to the EEOC Guidance and it should not be viewed as a substitute for them.

ALFRED BLUMSTEIN, PROFESSOR OF URBAN SYSTEMS, CARNEGIE MELLON UNIVERSITY:

Thank you very much for the opportunity to report to you on some of the research that I've been doing over the past number of years.

It's clear that most public policy issues involve some complex trade-offs, often between one set of private interests and another set of public interests. And there's an issue that's involved here in terms of the use of background check information in an environment where, number one, the prevalence of positive background events, criminal events, is not at all appreciated.

And second, because of the difficulty of understanding where the risks are at any particular point. The research I want to talk about is research that Professor Kiminori Nakamura and I started about five/six years ago in recognition of the fact that many people had some minor infraction, a crime, particularly when they were young and stupid. Then, twenty or thirty years later, they still can't get a job because of that record in their background.

And it's that situation that impelled the research, and that links to the issue of the timeliness in the EEOC Regulations, the timeliness that says if somebody

did something stupid when he was young, that should not hang over him for the rest of his life.

So it's clear that there is tension between those who feel that all information should be available to an employer so that the employer can make whatever wise decision he chooses to make, on one hand, and the opportunity to limit the collateral consequences of that event.

We started the research with 88,000 criminal-history records from of first-time arrestees in New York State. We then dove down to those who were convicted. We then looked at the risk of a new event as a function of the time clean since that first event in 1980. It turns out that very shortly after that first crime, there's a reasonably high risk of recidivism, of committing a new crime, shortly after that event.

But that risk declines. And so our challenge was finding the nature of that decline and when it got low enough to be considered negligible. One measure of low enough was when it became less than that of the general population [including ex-offenders] of the same age. The second measure was when it got close enough to the risk of non-offenders (people who had no prior records).

And so that was the basis for doing the analysis. We had full criminal records and so we could see the nature of the declining risk. It turns out that most recidivism occurs within the first three years after a previous event, so that the risk falls off rather sharply after that. It gets down below ten percent after that. It becomes less than the general population that includes both ex-offenders and non-offenders<sup>89</sup> within four to seven years, and somewhat longer if the comparison is exclusively to those with no prior records.<sup>90</sup>

One might challenge the contemporary usefulness of what happened in New York in 1980. So we got similar first-arrestees data from New York in 1985 and 1990. We also went to Florida and Illinois and that enabled us to test the robustness of our findings over time and state. And there was a reasonable amount of variation over those first five years.

But after that, the pattern becomes much closer, because we're now dealing with a population that avoided the high risk of recidivism in those first few years.

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<sup>89</sup> Dr. Blumstein uses the category "general population" to include both ex-offenders and non-offenders.

<sup>90</sup> By contrast, Dr. Blumstein's research indicates that the point at which ex-offenders and non-offenders' risk begins to converge is over 20 years. See Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY & PUB. POL'Y 327, No. 2 (2009). As noted previously in this report, Dr. Blumstein was an expert witness in *El v. SEPTA*, where the court cited as dispositive his testimony on behalf of the transit authority (SEPTA) that former offenders' risk of re-offending diminishes over time but never equals or falls below the risk for those who have no prior violent history. 479 F.3d 232, 246 (3d Cir. 2007).

Our first analyses were re-arrests for any crime type. We then wanted to look at re-arrests for crime types to which employers might be particularly sensitive. So we looked at violent crime type or property crime type. And those were quite different.

So that we now have the basis for sorting out what we call the redemption time, which is when they get below the general population or close enough within some small risk-tolerance of the people who have no records.

And we found that of these 88,000 people, 40 percent had no subsequent arrests in New York. It was their first and only arrest. Now about ten of those 40 percent had an arrest in another state, so that we were able to adjust our estimates of redemption times, times when the risk was low enough, to account for that variation.

We looked at individuals who were convicted, but I can tell you that the risk pattern of those who were convicted compared to those who were merely arrested was not very much different. You have a much smaller population, but conviction is usually attributable not to innocence but something associated with evidentiary possibility.

One particular target that I think we want to talk about is the wide variety of the forever rules that are present in statute and in corporate policies. If you have ever done X, you cannot be hired. And that totally precludes the possibility of redemption, the possibility of people surviving what they did wrong.

And arrest ubiquity is a particularly important issue. There have been recent estimates of arrest prevalence. We made an estimate about 40 years ago that the chance that a male would be arrested some time in his life was 50 percent. We were sure that there was an arithmetic error, missed the decimal point. That estimate is now higher because we hardly had arrests for drugs or domestic violence then. So the ubiquity of arrest is an important consideration in terms of what employers view to be meaningful.

JEFFREY SEDGWICK, CO-FOUNDER, KESWICK ADVISORS:

I want to start by asking you to think about three numbers: 11,521, 7,739 and 4,685. The significance in these numbers is there are 11,521 published articles on criminal careers, many of them done by my colleague here, Al Blumstein.

There are 7,739 published articles on predicting crime or criminality. And there are 4,685 published articles on recidivism. These are crucial topics in understanding the risks involved in hiring those with, or even without, criminal histories; because, indeed, people who have no criminal history still have a risk of committing an offense.

The question I would ask you is, does the updated EEOC Guidance reflect an awareness or a nuanced understanding of this available body of knowledge? Also, does the EEOC updated guidance reflect awareness or nuanced understanding of the multiple factors that contribute to problems encountered by ex-offenders in the job market?

I'm referring here to such factors as substance abuse or dependency, poor job skills and employment history, and difficulties with inter-personal relationships. Does the updated guidance address these issues in a constructive manner, or acknowledge their presence in order to enhance employment prospects for the ex-offender in aiding successful re-entry -- a goal that we all share?

Does the updated EEOC Guidance reflect awareness of or a nuanced understanding of the available body of social science research on statistical discrimination and the benefits of criminal history background checks Professor Holzer spoke to so eloquently and his research documents quite concisely?

Does the Guidance reflect an understanding that background checks do not inhibit positive employment outcomes across the board? And they in fact, as he noted, actually lead to an overall improvement in minority hiring.

Also, does the EEOC Guidance reflect an awareness or nuanced understanding of research by scholars such as Devah Pager, who's done some very good work identifying the actual sequencing of events that leads to the way in which the presence or absence of a criminal event in one's background affects one's employment prospects?

Does the updated EEOC Guidance reflect awareness or nuanced understanding of the available body of social science research on redemption that Professor Blumstein has been working on so diligently these years including the limitations of it, its preliminary status, its potential for informing employer assessment of job applicants, but also its unsuitability for guiding an administrative or regulatory bright line or uniform guidance?

Does the EEOC updated Guidance reflect awareness or nuanced understanding of the way in which employers use criminal history background checks? SHRM [Society for Human Resource Management] has provided a great deal of survey information on how and why employers use background check information.

Oddly, in many cases, employers demonstrate what seems to me to be a quite sophisticated understanding of how to use this information; and, in fact, they seem to be using it in ways that, quite frankly, the EEOC Guidance doesn't.

And finally, does the updated EEOC Guidance reflect awareness or nuanced understanding of the insubstantial foundation of disparate impact and social frameworks as justification for adverse action by EEOC? In my written statement, I noted a very long tradition and body of research on the disparate prevalence of criminal records in the United States, some of which was done by Professor Blumstein and by other scholars such as Hindelang, Langan, and Sampson and Lauritsen, concluding that the disparate impact of criminal records reflects differential involvement in imprisonable or arrestable crimes, not discriminatory treatment of protected classes.

It also seems to me interesting that the EEOC Guidance fails to recognize, engage and respond to some of the questions that Professor Amy Wax asks about disparate impact analysis, particularly looking at the Griggs Decision and the standard in the Griggs Decision, and the way in which continuing social science research has undermined the foundations of the court standard in the Griggs case.<sup>91</sup>

And, finally, again, I'd ask whether or not the EEOC Guidance takes account of the work of Professor John Monahan<sup>92</sup> at the University of Virginia Law School that was mentioned in the *Dukes v. Wal-Mart* case, questioning the use of social frameworks like disparate impact analysis in a litigation affecting racial discrimination.

As you can tell by the questions that I've asked, my primary interest is that I want to see social science research used. The scholars that we have here have done some excellent work. What concerns me is that I don't see that work, or an understanding of that work, reflected in a sophisticated and nuanced sort of way in the EEOC Guidance.

And I would hope we all share an agreement that we have 2.2 million incarcerated people in the United States; 95 percent of them are coming back to their communities. We have a vested interest in making sure they come back prepared to succeed in their re-entry into legitimate society. My concern is I don't see social science, and what it has to offer to that challenge, being used appropriately, or used in a sufficiently sophisticated sort of way, in the EEOC Guidance.

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<sup>91</sup> Amy Wax, *The Dead End of "Disparate Impact,"* 12 *National Affairs* 53-69 (2012) available at <http://www.nationalaffairs.com/publications/detail/the-dead-end-of-disparate-impact>.

<sup>92</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2554 n.8 (2011); John A. Monahan, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 *Virginia L. Rev.* 1715 (2008) available at <http://www.virginialawreview.org/content/pdfs/94/1715.pdf>.

QUESTIONS BY COMMISSIONERS OF PANEL ONE SPEAKERS

COMMISSIONER KIRSANOW:

I live in inner city Cleveland and see the profound effects of failure of re-entry into the workplace of ex-offenders. We have a lot of people who probably could contribute to society but can't because of the problem of failure of re-entry. The problem of criminality is exacerbated and with all the downstream effects talked about by Mr. Blumstein.

However, I also have profound concerns about this particular guidance from a number of perspectives. One is that I don't see any safe harbors in the Guidance whatsoever. If there's a negligent-hire lawsuit brought, what does an employer do?

Number two, I understand the EEOC has said that this supersedes state laws to the contrary. So if you've got state laws out there that say you've got to have criminal background checks for certain industries, you comply with it in good faith. And then you get slapped with a disparate impact lawsuit.

That brings me to number three. I don't see a judicious application of disparate impact theory in this particular case. That is a subject for a whole different hearing on its constitutionality.

But I guess most importantly here is I know the EEOC maintains that this is not burdensome or complicated, which would be a surprise to a lot of small employers that are represented here. It's not complicated to me, necessarily; I have practiced in this area for 35 years. But to a mom and pop corporation or company -- they don't know what to do with this thing. They do think it's ambiguous. They suspect it's [deliberately] ambiguous so that there can be a more expansive application of this particular policy.

One of the questions I have is addressed to Ms. Miaskoff: What evidence, if any, did the EEOC adduce during the hearing process to address whether or not this was going to be burdensome or complicated to smaller employers, or any employers whatsoever?

MS. MIASKOFF:

We heard during the hearing process and through written comments that the basic factors that we have enunciated here were familiar to employers, and indeed that a lot of employers already were following a process whereby they would look at the basics, which are the three factors, and often, would give an opportunity to an individual to explain the situation. And in fact I think there is something in a recent SHRM [Society for Human Resource Management] publication that also asserts that fact. So we got feedback that indeed a lot of

employers already, almost on a common sense level, were following some of these processes.

COMMISSIONER KLADNEY:

I know you've said it twice already but a number of our panelists, not necessarily on this panel, but panels to follow, have indicated that the EEOC Guidance prohibits employers in some fashion from doing criminal background checks. That's not the case, right? I mean I'm just asking you to absolutely state that again.

MS. MIASKOFF:

N-O. No. It does not prohibit criminal background checks.

COMMISSIONER KLADNEY:

Right. I mean they say that quite a bit. And so based on what you said about the guidance, if an employer is running a business in which employees spend a lot of time one-on-one with customers or other employees, and you receive an application from someone who has a criminal background that reveals the person was convicted of a violent crime, a crime against a person, and was only recently released from prison, using the Green factors an employer could safely tell that applicant, I'm sorry, you're not employable at my place of business, is that correct?

MS. MIASKOFF:

Yes, that's correct.

COMMISSIONER KLADNEY:

I mean you would balance the application and the Green factors with regard to risk. I mean, it's not rocket science?

MS. MIASKOFF:

No, I don't see it as rocket science. The Green factors I think were discussed in the later decision in *El v. SEPTA*, and there the court came out and said that really what we're talking about is assessing risk. And what the Green factors do is they give a common-sense way to do that: What's the crime? How long ago did it happen? What's the job?

COMMISSIONER KLADNEY:

Dr. Blumstein, that's exactly what you talked about in your article isn't it?

DR. BLUMSTEIN:

Very much so, specifically focusing on the duration issue. We didn't try in any way to assess the applicability of a prior crime to the employer's needs. That is clearly relevant. But ours was specifically recognizing that lots of people get held off from employment for a long time, without any empirical basis for knowing when long enough had occurred, that this individual should no longer be seen as a threat.

COMMISSIONER GAZIANO:

My day job is at the Heritage Foundation where I help direct a legal center. My colleague, Ed Meese, has helped me appreciate the importance of re-entry programs that help former prisoners. This has been a great interest to me for a number of years.

But the overuse of disparate impact analysis under Title VII is a very complicated and tricky way to get at this problem. The Federal Government, state governments, and private individuals can do a lot more I think to help prisoner reentry. But this is an area where being heavy handed with a disparate impact approach may backfire. There is some literature that suggests that employers are discouraged -- even if they go through some hoops when considering criminal background checks -- by the threat of a private or EEOC litigation that will subject them to liability. So instead of employing more of some minorities that the guideline is supposed to help, they'll employ fewer.

And my question I think is to Mr. Livingston. The EEOC could have gone two ways with the disparate impact guidance under the Title VII. First of all I certainly agree they have no authority to issue regulations. So the guidance in the guise of interpretive regulations is questionable to me.

But the other is to try to interpret the disparate impact approach in a way that lessens the constitutional risk of requiring disparate treatment that violates the Equal Protection Clause.

The first way expands their power to the almost maximum extent possible. And that's generally the bureaucratic temptation -- to aggrandize power, to increase leverage, to increase agency staff. Have you studied the constitutional implications of using non-regulatory guidance that allows the EEOC to eliminate any disparate impact and potentially crosses the threshold into unconstitutional territory?

MR. LIVINGSTON:

That's a big question. What we do know is, for example, in a lawsuit that EEOC has filed alleging disparate impact, that the EEOC is asserting that

men, white men, black men, Hispanic men, are entitled to a remedy when they're denied employment because of a criminal conviction, but that white women are not. And that does raise some questions about whether the statute is being applied in a way which is consistent with the requirements of the Equal Protection Clause.

I'll give you a different sort of answer. And it deals with the Green case, and the Green factors, and the discussion about, "well nothing has really changed; the Green factors are common sense factors that employers ought to take into account when they make hiring decisions."

A great deal has changed in the EEOC's new policy guidance with respect to application of the Green factors. The Green factors, according to the Third Circuit Court of Appeals in a recent case, *El v. SEPTA*, do not require individualized assessments: the employer can look at particular crimes and particular jobs and form bright line rules.

For example, a policy that states, "we won't hire someone who has been convicted of theft for a cashier position if the conviction occurred within the last five years" takes into account the nature of the job, the nature of the offense, and when the offense occurred. These are bright-line factors.

The EEOC has rejected that and is requiring employers to look at each person who committed a theft individually. And that requires subjective, individualized assessments of the type that employers have been trying to work out of their hiring systems for years, out of concerns that when hiring managers treat similarly situated persons differently, minorities may be disadvantaged and create disparate treatment litigation risk for employment resulting from the exclusion of women and minorities from positions.

So I'd say that the new policy Guidance, by requiring individualized assessments and preventing employers from establishing bright line rules that would treat similarly situated persons the same, has an unintended consequence which is opposite from what is intended by the EEOC's policy.

MS. MIASKOFF:

The Guidance does not require individualized assessment. Period. Indeed, Mr. Livingston has been telling you how we don't have rulemaking authority, so we can't require it. But we don't require it in the Guidance.

What we do is say is that it is at times an important supplement to the Green factors. And the Guidance does say that there will be situations in which a

bright line rule without the individualized assessment will be fine under Title VII.<sup>93</sup>

COMMISSIONER ACHTENBERG:

Dr. Holzer, you state in your testimony that the EEOC Guidance should be viewed as one of several potentially effective legal and policy efforts to reduce the barriers to employment among men, I would imagine as well as women, with criminal records. And it thereby improves their employment outcomes.

You also stated that in your view the EEOC Guidance does not seek to discourage employers in any way from doing background checks of applicants. That seems to be in stark distinction from the critique offered by Mr. Sedgwick and I'm wondering if he would comment on the acuity of my observation to that effect.

DR. HOLZER:

Well, Mr. Sedgwick and I agree that it's important to use social science research, and I appreciate the plug you made for that.

I very, very strongly disagree with Mr. Sedgwick's reading of that evidence. And I read over his testimony several times and I was, frankly, quite troubled by some of the logical leaps that Mr. Sedgwick makes, some of the inferences he draws.

Mr. Sedgwick, for instance, mentioned a paper by Devah Pager and Bruce Western. And then he infers exactly the opposite from that paper of what the paper really shows and what the authors clearly believe. And then he attacks the EEOC for not citing that paper and accuses them essentially of dishonesty in his written statement, which I found quite amazing.

In many, many other places Mr. Sedgwick reviews the evidence Al Blumstein has now generated in a body of work on how duration affects the probability of re-arrest. There are other papers in the body of research. There are several papers by the trio of Kurlychek, Brame, and Bushway.<sup>94</sup> Mr. Sedgwick cites just one paper, though there are several of them. All of the papers except that one Mr. Sedgwick cites in fact find after some number of years there is no remaining difference in the probability of re-arrest.

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<sup>93</sup> But see note 18 above (citing 2012 Guidance at 14).

<sup>94</sup> [http://reentrypolicy.org/publications/scarlet\\_letters\\_recidivism\\_does\\_old\\_criminal\\_record\\_predict\\_future\\_offending/ScarletLetters.pdf](http://reentrypolicy.org/publications/scarlet_letters_recidivism_does_old_criminal_record_predict_future_offending/ScarletLetters.pdf)

Separate from the whole issue of the re-arrest are the issues of for what crime and did a conviction occur. So I have a very strong disagreement with Mr. Sedgwick on how this research should be read.

I'm not a lawyer and I won't pretend to be. And one might have qualms about the EEOC from legal grounds. Commissioner Kirsanow mentioned some of those qualms and I'm not prepared to comment on that. When I read the document from my vantage point as an economist and social scientist, it seemed to me to be a relatively sensible application of the Green factors plus other individual factors, which this literature shows do matter -- like having completed an employment training program that dramatically reduces the likelihood of re-offense.

I don't think this imposes an enormous burden on small businesses to check into these kinds of personal backgrounds. I mean, they're readily available if people choose to look at them. And we know that there are many employers, small and medium size especially, that have blanket refusals to hire people with a felony conviction who don't look at the Green factors.

Now they may not state that publicly, but I found thousands of these employers early in my career. And many of them simply say that, they will not hire anyone with a felony conviction.

Given that, none of us are arguing about the Green factors, we all seem to agree on those. It just seems to me that trying to clarify the issues that should be taken into account is a potential positive, though again I'll leave legal qualms to other people.

And the other thing I'll say is the status quo does enormous social and economic damage, not only to these individuals but to their families and their communities and the American economy. The risks that we're now considering imposing on employers are hypothetical and do not seem to me to be very high.

So an honest assessment, an accurate assessment of all of the costs and all the benefits certainly leads me to believe that if we're erring in a certain direction right now we're erring too much in the direction of keeping these men and women from employment and that maybe we should at least reconsider some of these factors.

COMMISSIONER KLADNEY:

What I'd like to ask you is based on the thousands of people you surveyed early in your career. I think that's when you got most of the information for the article that you're here for. And one of your co-authors, Stolz, wrote a subsequent article using a lot of that same information. And I was struck by

when they said that people who don't do criminal background checks, employers who don't do criminal background checks, hire white ex-offenders at a higher rate than people of color. Do you recall that in Stolz's article?

DR. HOLZER:

I do recall that. I believe he is actually citing a result from Devah Pager's doctoral dissertation, which is distinct from the piece Mr. Sedgwick cited. And what that shows is that race per se plays a very important factor in these hiring decisions. Criminal records also play an important factor in these hiring decisions.

Mr. Sedgwick tries to argue that these papers show that's really race and not criminal records. I don't read the evidence at all that way, because both of them matter. It's certainly possible for multiple factors to be important in determining the outcomes we care about and this one of those cases.

So yes, race matters. White men who have criminal records seem to either have comparable, or slightly higher, or slightly lower -- depending on the study -- odds of being hired than a black man without a criminal record. But when you look at all of the data, all of the evidence, it's clear that both of them matter very importantly and interact in important ways.

COMMISSIONER KLADNEY:

Dr. Blumstein, Mr. Sedgwick said that you cited a statistic saying that 80 percent of people recidivate after their first conviction. Does that go down with time -- I mean that's basically what we're talking about.

DR. BLUMSTEIN:

In our study 40 percent did not recidivate at all. So that 60 percent did. So recidivism is widespread. But it's widespread for a wide variety of crimes, many of which are of minor concern to an employer or otherwise.

But from a research-strength viewpoint we chose to take this cohort of first-time arrestees in 1980 and follow them through. We then tracked how many of them had out of state arrests. Of those who had no further arrests in New York we tracked those who had out of state arrests, and so we were able to find those.

But recidivism is reasonably high. And recognize we took people who we thought had no prior record in New York. And even among them recidivism was high. And then, obviously, offending is going to be high among lots of people who never had a prior record, because we're all at risk in the criminal justice system for our own future misbehaviors as well.

So 80 percent recidivating sounds high and the studies of people released from prison, according to the Bureau of Justice Statistics, said that about two-thirds get re-arrested for something whereas half of them went back to prison. That means one-third didn't get re-arrested, at least in the five years they tracked them.

So that the recidivism studies are fairly consistent but people look at different measures of recidivism in different ways. The police will look at re-arrest whereas the corrections people look at re-incarceration. And those two may be totally consistent, but they will then argue about whether it's two-thirds or 50 percent.

COMMISSIONER KLADNEY:

Mr. Sedgwick, would you agree that the passage of time reduces the propensity to recidivate?

DR. SEDGWICK:

Oh absolutely. Oh, that's a well-known fact in social science that there is an age/crime curve. As people get older the likelihood of their committing a crime declines.

COMMISSIONER KLADNEY:

So it would be important for employers to look at that?

DR. SEDGWICK:

Absolutely. One other thing that I think is an important point is that the research that Al [Blumstein] has done on redemption so far is for first-time arrestees.

His next wave of research is going to look at redemption times for people who have multiple prior offenses. It will be interesting to see whether those redemption times are longer or shorter. So one of the things here that I appreciate in Al's research on redemption is that it fits nicely with a body of literature on criminal careers that I think is very interesting and ought to be taken account of by employers. This research looks at what the markers are at the beginning (meaning first offense) to indicate a criminal career that's going to be long and relatively intense -- what the markers are of a criminal career that's going to be serious as opposed to not very serious.

I remember back in 1984 when I was the deputy director of the Bureau of Justice Statistics (BJS), we were testing the FBI's system for keeping and making accessible records. So we asked the FBI to run us the longest rap sheet

they had, just to see what it was. It turned out it was a young man who was a turnstile jumper in New York City, right? So, okay, there would be an example of someone who has a very high-volume criminal history for a trivial offense.

So I guess the bottom line that I would stress with the redemption research is it strikes me as valuable. But it's much more valuable for an employer in terms of assessing the risk of a particular individual in the context of a variety of other personal and familial and social characteristics than it is to be cited by EEOC in order to form an enforceable standard for how long a window of elapsed time since the last offense an employer should have.

COMMISSIONER KLADNEY:

The EEOC doesn't do that in their guidance, obviously.

MS. MIASKOFF:

Correct.

DR. SEDGWICK:

Although they keep citing, "well, it could be four to seven years." And Al [Blumstein] in his New York Times opinion essay in January said, "well, it's ten to 13."

DR. BLUMSTEIN:

That's the harsher standard.

DR. SEDGWICK:

True. Although I wouldn't call it harsher, because in a sense you're saying there's two standards. One standard is: When does the risk of hiring this individual, given the time elapsed from his last offense, match the general population of the same age (including ex-offenders)?<sup>95</sup>

DR. BLUMSTEIN:

Drop below.

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<sup>95</sup> The other standard, presumably of more importance to employers, is when the risk of hiring an individual with a record matches the risk of hiring someone who has never been convicted of a felony.

COMMISSIONER KLADNEY:

That's not what he says.

DR. BLUMSTEIN:

Dropped below.

DR. SEDGWICK:

Okay. All right, so it equals or falls below?

DR. BLUMSTEIN:

Yes.

COMMISSIONER HERIOT:

Ms. Miaskoff: Mr. Livingston said something that I thought was interesting, which is that a rule that discourages reference to criminal backgrounds can have a disparate impact on females. And we could draw that out and say that it has a disparate impact on elderly Asian females if you like.

And that makes me wonder, given that lots of things have disparate impact, how does the EEOC prioritize the disparate impact issues that are out there? I guess maybe what I'm leading to here is the idea that Title VII requires you to take some special interest in the interest of African Americans or is what's really driving this an interest in ex-offenders generally? I mean, is race driving this or something else driving this? And if race is driving this policy then how do you prioritize which disparate issues are going to get the EEOC's attention?

MS. MIASKOFF:

Two points in response: Your question is about prioritizing, which does acknowledge that the disparate impact provision in Title VII now prohibits disparate impact on any of the protected bases listed in the statute. So that includes all of the different qualities you just spoke of.

That said, when the EEOC does policy we look at the research that these gentlemen have been talking about. We look at the data. And the data that would overlap in terms of race and criminal records is both, I guess, voluminous and stark and so that drove our focus.

COMMISSIONER HERIOT:

It runs both ways. [Protecting against disparate impact on elderly Asian

females may mean interfering with protecting black job applicants against disparate impact] if employers who wish to use criminal background aren't able to. So is this really a Title VII issue or is this an issue where you're concerned about criminal background as an issue by itself and the notion of integrating ex-offenders into the economy? Or is this a special concern that the EEOC thinks Title VII requires for African Americans or Hispanics [but not other protected groups]. What's going on here?

MS. MIASKOFF:

Title VII is not an affirmative action statute. So let's get that off the table.

COMMISSIONER HERIOT:

What do you mean it's not an affirmative action statute?

MS. MIASKOFF:

It doesn't require special consideration of race, I think with some of the terminology we're using. So I wanted to step back from that. I think as some people on the panel were saying, because we all have gender, we all have race, we all have national origin, et cetera. Religion, some of us have.

Everyone, as you said, can be protected by Title VII. In making the decisions about what to do policy on, we are not denying anyone their rights. We are, as a national agency, we are trying to focus on issues which have a big impact on American society, recognizing, yes, that it's very complicated and that technically everyone is protected by this law. I am, you are, we all are.

So we recognize that, but we look at the national issues, based on the research.

COMMISSIONER HERIOT:

What do you mean by the national issues? I mean, again, if it's true that elderly Asian females are worse off under guidance, why does it work in one direction and not the other?

MS. MIASKOFF:

I'm not saying it doesn't work. An elderly Asian woman could go forward and bring a case to court if she so decided to do so under Title VII. What I am saying is that the EEOC has to choose where to invest its resources to do a policy statement. We obviously watch the research and therefore issues such as the overlap of race and criminal exclusions that we're discussing here today have been documented to be a major issue in the American society.

COMMISSIONER HERIOT:

In the sense that it has a disparate impact on particular groups. But there are always mirror images --

MS. MIASKOFF:

I understand that.

COMMISSIONER HERIOT:

Because then you're not answering the question.

MS. MIASKOFF:

I guess I'm not sure. I'd ask you a question. How does one enforce Title VII then? If there's always a mirror image, which would stop one --

COMMISSIONER HERIOT:

For intentional discrimination. That's an easy question.

MS. MIASKOFF:

I'm sorry?

COMMISSIONER HERIOT:

By looking for intentional discrimination.

MS. MIASKOFF:

But Title VII itself includes disparate impact now as well as intentional discrimination. That is the law of the land now.

COMMISSIONER HERIOT:

Can you name something for me now that doesn't have disparate impact? Any job qualification that doesn't have disparate impact?

MS. MIASKOFF:

Job qualification? Now a job qualification, by saying that you're implying that it is a rule or a policy that the employer is going to apply across the board. That is the kind of situation that raises disparate impact concerns.

COMMISSIONER HERIOT:

Is there any job qualification that you can think of that wouldn't have a disparate impact?

MS. MIASKOFF:

Well I'm thinking out loud. And if you had an individualized job qualification, for example, I decided that I simply was not going to hire anyone who's shorter than five feet because I don't want to hurt my neck looking down. You know, a very individualized factor. That would not be impact. That would be treatment.

DR. HOLZER:

I want to make two quick comments in response to Commissioner Heriot's question. I don't see anything in the EEOC guidance that requires the employer to hire the black man with the criminal record over the elderly Asian woman that doesn't. The guidance simply says be careful how you use the information about that applicant's history.

It does not require anyone to discriminate against the elderly Asian applicant. It simply says do not put undue emphasis on that one factor. So I don't see that it creates a disparate impact on anybody else.

COMMISSIONER HERIOT:

In the end either you get the job or you don't get the job.

DR. HOLZER:

It says do not use that one characteristic of the black male applicant without considering other factors. It does not require that he be hired or that there be any discrimination against the other applicant.

But I want to make a second point, again going back to the evidence. Every study that I'm aware of that's ever looked at this, finds that black men are at the end of the hiring queue of employers; that, that of all the demographic groups black men face very substantial discrimination. Every audit study, rigorous studies where they send out matched pairs of applicants, find that employers are reluctant to hire black men.

This is for many different reasons. Perhaps some legitimate, perhaps not. And we know that the fear of criminal records almost certainly is part of that. And again, the work done by Bruce Western and Devah Pager, our work and others, suggests that's an important part of that fear. I know of no body of

evidence that says elderly women from Asia face substantial discrimination in this market.

So the evidence clearly suggests there is a large problem in this one area and not these other hypothetical examples. And the EEOC I believe has made an attempt correctly or incorrectly, to address these issues. But the notion that it requires discrimination against these other applicants -- I didn't see that anywhere in the document.

COMMISSIONER HERIOT:

Ms. Miaskoff was nodding, I just want to establish, you were agreeing with him, right?

MS. MIASKOFF:

Correct.

COMMISSIONER YAKI:

Thank you very much. It strikes me there are sort of two things that I'm listening to here. One is, as referenced by the last interchange, there's this confusion about what this guidance really does. To me what the guidance does is it opens up the pool for everyone to jump in a little bit better than what's currently out there right now.

It lowers the bar for exclusions of people who formerly were sort of never allowed in to the hiring pool to begin with, I mean part of the problem that we have in this country for people who have a criminal background. And who predominately, in this case, are African American or Latino, so that they can't even get in the door to begin with to even get the interview.

I mean that to me is part of the big problem. As someone who worked on this in local government and understands how working with employers who came to me about this regulation or that regulation, part of the biggest hurdle was trying to educate them about the fact that there's something about giving someone the chance. But if you never even give them the chance to explain themselves in the first place by enacting a hard and fast rule about a criminal conviction, you never get that opportunity.

I mean am I right, Ms. Miaskoff, that in many ways this is about -- this isn't a hiring mandate as it is broadening the pool of prospects that employers should be able to choose from in many ways.

MS. MIASKOFF:

Well it's not a hiring mandate. And I think Dr. Holzer made that point clearly also. It is cautioning against discrimination.

COMMISSIONER YAKI:

This to me, the irony of this discussion, being in Washington, D.C. is I think not lost on me. Because the underlying tone of what you've talked about Mr. Sedgwick, Mr. Blumstein and others has been redemption, about the idea that someone can experience the conversion on the road to Damascus, give up their life of whatever it was that they had before and become a productive citizen.

We have that model in San Francisco. It's called Delancey Street, where we have diversion of drug other hardcore offenders within mainstream back into normal life. And they create sort of their own record through this program to graduate into real work.

But nothing to me, what I don't understand from an employer's perspective and perhaps you can illuminate me on this, is why you would object to what is really, by its own nature, guidance. By its own nature it's not mandatory. It is a requirement, it is imposed by law by Congress for them to look into this. This is not something that they just invented on their own. This stems from a law enacted by Congress, signed into law by the first President Bush in 1991.

But we sit here and we talk about, I mean, there's something ironic about employers sitting here talking about how we have to have these requirements and this flexibility to do what we want to do. To screen out who we don't want to do, when we live in a city where you can break the laws of God and still be re-elected to national office.

I mean, where people who stray, do things all the time that are foolish, silly, arguably outside the law, even get convicted of it and still return to public life. It means all the time you, and others, are making judgments all the time about whether or not what someone did relates to what it is you want them to do.

And why you can't extend that in very possibility and every case, and in the interest of African Americans and Hispanics especially, that you give that person the same kind of benefit of the doubt in some ways to enter your work ranks is quite frankly puzzling to me. And when we get to the second panel what I'm going to ask is going to be even tougher on this particular question. But to me, explain to me why. It goes back to the Bible, you know, those who are in glass houses should not throw stones. And for all of us, in all of our ranks, in all of our employment have someone who may have done stupid, something that they aren't proud of. Maybe they got caught, maybe they

didn't. Maybe they had a friend who was a DA who got them off so they didn't have to do it. So it never appears.

A lot of these kids don't. They have a bad public defender who just wants to churn and burn a case. You know, plead it out, get it out, it's on their record. They don't have those kinds of benefits. So why isn't it logical and why doesn't it make sense for EEOC to say to you just can't say no. You've got to give everyone a second chance to prove themselves. And to do that you can't automatically bar them from entering your doors.

MR. LIVINGSTON:

I'm happy to prove the adage that fools rush in where wise men fear to tread, by volunteering to answer your question.

The issue of employment for persons who come out of prison is a very significant issue that needs to be addressed in a very thoughtful way. And we can't have a society where if you commit a crime and go to jail you can never work. That's unacceptable to everybody in the room and should not happen in this country.

The question though is who decides what the rules will be? Will it be the people, through their elected representatives in Congress? Or will it be an agency, using discrimination laws, that is not answerable to the electorate?

And so it's not a question of whether the rules are good.

COMMISSIONER YAKI:

But you set up an immediate bifurcation which I don't understand. These laws were enacted by people elected to a body, delegated those authorities to that body. That body is responsible and there is oversight done by both Executive and Legislative Branches on it.

MR. LIVINGSTON:

Well there you go. You just answered my question. This body was delegated authority for that body. We have a Congress and they should deal with this issue in a very thoughtful way, with input and opportunities for people to express their opinions.

The EEOC Guidance was issued without the opportunity to comment. And then the rest of us are told that these will be the rules the EEOC will follow and it flows right back to the conversation that you just heard. Is EEOC using this as an opportunity to step into a space where Congress won't act and

generally try to formulate rules that will apply to everybody? Or is it enforcing discrimination laws?

And to tell you the truth I don't know which it is. So EEOC policy guidance says that the use of criminal records by employers will result in disparate impact on Hispanics and blacks. But, the EEOC has a lawsuit pending where EEOC is alleging that it discriminates against men, including white men, and that's the claim the EEOC is pursuing.

So I'm not arguing with you about whether there should be rules or whether we ought to be more thoughtful in the way we address this issue of jobs for persons with criminal convictions. We should, I agree. It's whether EEOC is the agency that should be doing that.

COMMISSIONER KIRSANOW:

One quick observation: I keep hearing that this is only guidance, but when you're on the receiving end of an EEOC Guidance, that is the functional equivalence of a statute, if not a regulation.

And I keep hearing it's not a hiring mandate but in *Ricci v. DiStefano*, we saw how it transforms into a hiring mandate. When you're concerned that you may have liability on a disparate impact claim you may have to put a thumb on the scale in terms of disparate treatment. And that is not theoretical. That happens in practice all the time.

So again, that is another lack of a safe harbor, meaning there are now three safe harbors that aren't being provided. But this goes to the job relating and business necessity, I'm going to go back to the law. Under a disparate impact claim the employer must establish that the particular device, test, rule, or policy that is facially neutral is job related and consistent with business necessity.

I think it was Don Livingston who said that criminal convictions are a device test that are perhaps different from other devices or tests, as you have in *Griggs v. Duke Power* where you had this facially neutral requirement that you have a high school diploma or pass a certain test. That's not job related, or even consistent with business necessity.

Here you've got a criminal conviction that says that somebody was convicted of embezzlement so he should be barred from being a bank teller. Somebody was convicted of rape so he shouldn't be working in an assisted living center. But it goes beyond that in terms of reliability, trustworthiness, it's an indication of a number of things that have been shown pursuant to possibly the highest standard we have in jurisprudence, and that is guilt beyond a reasonable doubt.

So to what extent is this actually consistent with disparate impact in terms of job necessity? And do we have any data that show whether or not those individuals who have criminal convictions perform worse or better than those who've been hired without criminal convictions? Because it seems to me that's what goes directly to the job necessity.

Are they qualified, do they perform the job without any kinds of problems? Are they there every single day? Do they perform as well as those without criminal convictions? That's the true inquiry here when it comes to the law.

MS. MIASKOFF:

Well thank you for that question. And I actually couldn't agree with you more, that is the data that we need. And we would love it.

COMMISSIONER KIRSANOW:

Hold it, hold it -- data that we need? We don't have this and yet we're issuing guidances? I'm astonished by this. We don't have data that goes to the exact issue here. We don't have any data on this? Is that what people are telling me?

MS. MIASKOFF:

What I'm saying to you is, that is why in the Commission's Guidance you see two factors. The first factor, for job relatedness, is the uniform guidelines on employee selection procedures. Ideally the kind of data that would be meaningful for that pool would be studies that used a criminal record and correlated that with subsequent workplace behaviors.

We did a lot of research. We found one study to that effect. Therefore, that is why the courts have turned to working with the basic framework that Green court set out in the 70s. Now I think it's also a very important question that you raise.

That yes, the original disparate impact, the Supreme Court cases, they deal with job qualifications, like high school diploma, like scores on a skills test, et cetera. And clearly having a criminal record or not is a different beast.

I think the Third Circuit in Philadelphia gave a very thoughtful opinion in *El [El v. SEPTA]* where it really dove in and tackled the issues presented by that, which we're looking at for assessing risk in this situation, not necessarily determining someone's level of arithmetic or reading.

And, indeed, I think that that tension has been recognized throughout the development of the law in this area, and was very fully addressed by the Third Circuit. And indeed, that is the task that is pursued, I guess, by the second way

we talk about establishing job related consistent with business necessity:  
Assessing the risk of the crime to the job. Looking at the time that has elapsed  
and looking at any other facts that can be enlightening.

COMMISSIONER YAKI:

This is very important. I'd respectfully submit that risk is only one aspect to look at. You have to look at not just the risk, that's maybe what the EEOC is looking at because it's focused on the criminality of this. But it's also for the employer, is this guy going to be a good employee.

## **Panel Two Speakers**

ROBERTA MEYERS, DIRECTOR OF LEGAL ACTION CENTER'S NATIONAL HELPING INDIVIDUALS WITH CRIMINAL RECORDS REENTER THROUGH EMPLOYMENT NETWORK, ALSO KNOWN AS H.I.R.E.

The Legal Action Center is the only non-profit law and policy organization whose sole mission is to fight discrimination against people with criminal records, histories of addiction or HIV and AIDS, and to advocate for sound public policies in these areas.

H.I.R.E., which is a project of the Legal Action Center, aims to increase the number and quality of job opportunities available to people with criminal records by changing public policies, employment practices and public opinion.

Since 2001 my project has provided leadership on public policy advocacy and technical assistance and training all across the country to private and public agencies on strategies to eliminate or reduce the number of criminal record barriers faced by job seekers in the labor market.

And just for the record, we've also been working with a number of states to create safe harbor protections for employers, which we know is a big issue.

As a proponent of the EEOC Guidance and Policy, and I think for other proponents that support it, I am not arguing for the elimination of background checks in hiring decisions. I'm a consumer, I'm a mother, I'm a granddaughter. I am arguing for logical and responsible policies and procedures that allow all qualified job seekers a fair opportunity to compete for jobs.

And I am arguing against the allowance of indiscriminate uses of criminal background checks and screening policies that overtly and covertly limit opportunities for people of color.

For the past decade we have used the EEOC Guidance as a policy model that states could adopt as a fair employment standard to give more qualified individuals with criminal histories a fair opportunity for employment and qualify for occupational licensing.

We have also used it to educate employers on the use of criminal records in hiring decisions. While conducting these educational activities over the years we have also worked with other legal and policy groups to encourage the EEOC to strengthen its position on employer's use of records, criminal record screenings, as well as urged them to become more rigorous in its investigation of criminal record-based claims of discrimination.

Therefore, we considered it a tremendous victory when the EEOC released this update of the Guidance it had released nearly 30 years ago that discouraged employers from establishing blanket bans against hiring people with arrest and conviction records.

The update of the EEOC Guidance includes provisions that we were really excited about that put employers on notice that categorical exclusions for people with certain arrest and conviction records may violate Title VII.

It emphasized the earlier recommendation that job applications not ask about criminal records. And if they do ask that they limit inquiries to conviction records for which exclusion would be job related with business necessity, offered a series of examples of common policies and practices that may violate Title VII and informed local and state governments that barring people with certain criminal records from jobs or occupational licenses could violate Title VII.

This issue has become of greatest importance because as the National Employment Law Project reported there are over 65 million individuals with criminal records in this country. Two, a criminal record is usually the number one automatic disqualifier for employment. And we know that many employers, public and private, will go as far as noting on job postings such a thing.

And we cannot ignore that criminal records serve as a double stigma for people of color. In 2006 H.I.R.E. partnered with the Center for Community Alternatives in New York to conduct a project that we called Unchaining Civil Rights, which identified, documented and described the institutional and structural exclusions in what we called the Four E's. Employment, education, enfranchisement and equality, and the ways that these exclusions result in de facto discrimination of racial minorities.

We concluded that structural and institutional barriers to employment, education and enfranchisement for people with criminal records are more than collateral consequences. They are an abrogation of fundamental civil rights.

The release of Michelle Alexander's book in 2011, the New Jim Crow, catapulted this issue into mainstream media and has really forced the country to take note and acknowledge that people of color are significantly and disproportionately represented in the criminal justice system, and that a criminal record has become a surrogate for race-based discrimination. Throughout the U.S., employment statistics for blacks and Latinos, particularly males, continue to be worse than for any other demographic.

The experimental audit studies of Devah Pager out of Princeton University encapsulate the real challenges faced by black and Latino males with or without criminal histories in the labor market.

In the last study she and Bruce Western conducted in 2004 in New York City they concluded that a black male without a criminal record was less likely to get a job than a white male with a criminal record. And my colleague Glenn here will talk a little bit more about that study.

Needless to say a black man with a criminal record barely stood a chance of getting a callback for a job. Race discrimination and race bias is pervasive in the job market and we have to attack it from every angle to which it exists.

We respectfully ask that the members of the Commission on Civil Rights consider supporting the EEOC's position on limiting the use of criminal background checks in employment decisions, as well as work with H.I.R.E. to promote criminal record barriers as civil and human rights issues as they are.

Here are a few additional thoughts. Few states, only 14, have laws prohibiting discrimination against individuals with criminal records in public and/or private employment and/or for occupational licensing. And as you know there is no federal law.

Therefore, we need federal enforcement agencies to commit to ensuring that qualified individuals with criminal histories are given a fair chance and opportunity to work and not face discrimination.

Most states give unfettered access to criminal record information indefinitely, which perpetuates the lifelong stigma suffered by millions of individuals with criminal records who are disproportionately people of color.

Until now, the employer community was not very concerned about being challenged on their discriminatory hiring practices because the threat of a

criminal record-based, or even a race-based discrimination lawsuit, seemed more unlikely and remote than the negligent hiring liability suit.

Employers must continue to be encouraged to not consider arrests that did not result in a conviction as well as old or minor convictions that really cannot justifiably be considered relevant to the ability or the potential behavior of an applicant.

I have a series of other recommendations that's in my written testimony and I hope that you will consider them.

GLENN E. MARTIN, VICE PRESIDENT OF DEVELOPMENT AND PUBLIC AFFAIRS  
AND DIRECTOR OF THE DAVID ROTHENBERG CENTER FOR PUBLIC POLICY AT  
THE FORTUNE SOCIETY

Thank you for holding this important briefing on the EEOC Reissuance of Arrest and Criminal Record Guidance, which was originally issued under the leadership of Clarence Thomas. I think personally, and my colleagues do, that the guidance is reasonable, fair and flexible. I'm pleased to see that it enjoyed bi-partisan support for its passage.

I represent an organization called the Fortune Society. We've been around for over 46 years serving people who have been involved in the criminal justice system, either helping them to reintegrate on the back-end, about 2,500 people, or running alternatives to incarceration programs, keeping people out of jail and prison on the front end, meeting their needs in the community where it doesn't jeopardize public safety.

Some of the services we offer include an array of programs: education, employment (We place 600 people with criminal records in jobs each year), housing, drug and alcohol treatment, mental health services, and fatherhood initiatives. And we're an advocacy organization.

And I'd also like to mention that of our 185-person staff, half of them are people who have done time in prison. Half of them are people who have some sort of involvement in the criminal justice system, as is true for a third of our board, by way of our by-laws. It's very deliberate. We put value in the cultural competency that our staff, our professional staff, brings to the table.

It's also made us a bit of an expert on the hiring of people with criminal records. So much so that we worked with the Department of Justice to create a tool kit just two years ago, which was launched by the Attorney General Eric Holder, on how to successfully hire people who were formerly incarcerated and who also have the professional credentials to do the job.

Today my written testimony focuses on the Devah Pager, Western Study because I served as the project manager on that study when I was the co-director of the National H.I.R.E. Network at the Legal Action Center.

As you might know, it was the largest audit study ever conducted in the United States. It was a replication of an original study that was done in Milwaukee, where the main criticism was that Milwaukee is not a very diverse labor market, hence the replication in New York, a much more diverse labor market.

And the major finding, which has been stated a number of times this morning, is that a white person with a criminal record just out of prison has a better chance of getting a job from an employer than their equally qualified black counterpart who has never been arrested.

And then when it looked at a black job seeker with a criminal record, his call backs were reduced another 50 percent. Very stark findings. The study was housed at the New York City Commission on Human Rights, one of the agencies in New York State which is charged with enforcing our anti-discrimination law, which I should say is over 40 years old. It applies to employers with ten or more employees, so that includes small Mom and Pop shops.

The New York law is much more prescriptive than the EEOC regulations. There are many more mechanisms for relief under our anti-discrimination law. And the bill was originally sponsored by a very conservative Republican in Long Island, New York.

Just before I came here I checked in with colleagues at the New York City Commission on Human Rights. Last year there were only 14 meritorious complaints filed by people with criminal records that they moved forward on.

So contrary to the rumor the sky is not falling as a result of having these sorts of anti-discrimination laws on the books.

So I'd like for you to indulge me for a minute because I took the opportunity to read the testimony of some my colleagues on the way here on the train yesterday evening and I was somewhat disturbed by some of the things that I read, which is what encouraged me to deviate a bit from the presentation that was specifically about the study.

Maybe it's because I was involved as an advocate in helping the EEOC Guidance move forward. Maybe it's because I did six years in prison myself before I started doing this work 11 years ago. Maybe it's because I'm a black man. But definitely because I'm an American.

With all due respect to my fellow presenters, first, curtailing the legitimate use of background check is not my intention or the intention of the agency I work for. I think Pandora's box is wide open on background checks in the United States, we're not going to close it. I wouldn't ask employers to stop using background checks where appropriate any more than I would say that credit card companies should stop using credit checks to make decisions about who should get a credit card.

I do have issues with the accuracy, how the information is used and if the subject has an opportunity to respond to what's contained in the background check. But when I was at the National H.I.R.E. Network we worked with the National Association for Professional Background Screeners eight years ago.

And we agreed that there was need for additional rigor, we agreed, we both acknowledged that the field needed to respond or that somewhere down the line there may be a strengthening of the Fair Credit Reporting Act.

At the Fortune Society, where we hire a number of people with criminal records, we do background checks on all qualified applicants to make decisions because we have legitimate liability concerns ourselves.

So the background check company response to the new EEOC Guidance was a bit surprising to me. These agencies are conduits of information, as they should be, not necessarily experts in the interpretation of civil law and surely not suggesting that Title VII applies to them.

Secondly, the argument that Black and Latinos have a predisposition for being criminals is just categorically false, not supported by evidence and irresponsible. I look no further than the Bureau of Justice Statistics, crime statistics.

Thirdly, some of the research findings suggest that the expansion of the utilization of background checks can have a positive effect for black men without criminal records. That obviously is in response to employer liability and legitimate, and sometimes not so legitimate liability concerns, but we all know at this point criminal record-based discrimination easily serves as a surrogate for race-based discrimination. Whether it's intentional, deliberate or unintentional.

So the idea of winnowing out black applicants, which some of the other presenters are going to suggest, to find the good black applicants from the bad black applicants feels very un-American to me, especially when I think back to the 2004 State of the Union Address where it was President Bush who suggested that when the gates of the prison open we need to give people a second chance and that it should be a road to a better life. And how do you get a better life if you don't have access to the labor market?

Finally, I have one other thing to say. In response to this concept that we need to be doing more background checks to winnow people out, surely allowing more disparate impact discrimination to reduce disparate treatment discrimination, where Title VII makes both illegal, is not something we should be doing.

We should be moving forward full throttle in the enforcement of the prohibitions on both. Anything less than that would be an assault on the rule of law.

And finally, if we listen to some of the testimony that will be presented here today, I myself would probably not be sitting here in front of you. I myself would probably have been categorically excluded from the \$16,000 job I first took 11 years ago. Yet today I run a \$20 million agency, I'm in charge of fund-raising, communications and advocacy.

I hire a number of people who have been involved in the criminal justice system. I hire a number of people who have not been involved in the criminal justice system. But anything that categorically denies people a job opportunity based solely on their criminal record would have had a huge impact on me.

And again, I would hate to think of where I would be sitting as opposed to sitting here today.

**LUCIA BONE, FOUNDER OF SUE WEAVER C.A.U.S.E.:**

It's a great privilege to appear before the United States Commission on Civil Rights in honor and in memory of my sister, Sue Weaver and for other innocent victims whose tragic deaths could have been prevented had an employer done a proper criminal background check before hiring that individual.

My name is Lucia Bone, and I'm the Founder of Sue Weaver CAUSE. CAUSE is Consumer Awareness of Unsafe Service Employment. It's a non-profit organization proactively keeping you and your families safe, one service worker at a time.

We promote the important of proper annual criminal background checks on anyone working in our home or with a vulnerable population. We educate you, the consumer, on the importance of knowing who you hire to work in or near your home or your family.

At one time or another we all need to invite a stranger into our home for maintenance or delivery. We trust the companies we hire to send safe workers into our homes. But how do we know that that trust is well placed? My sister, Sue Weaver, thought it was. She was wrong.

Sue hired a very reputable Florida department store, Burdine's, to have her home air ducts cleaned. No background checks were done on the workers they sent into clients' homes. The work was subcontracted out and two convicted felons were sent into Sue's home to do the service work.

A single woman, home alone, two convicted felons. Six months later one of the workers, Jeffrey Hefling, a twice-convicted sex offender on parole, returned. He raped Sue, he murdered her, and he set her body and her home on fire in an attempt to destroy the DNA evidence.

Had Burdine's done a criminal background check they would have found both men were not suitable to be working in their clients' homes. And my sister might still be alive today. A criminal background check would have saved Sue's life.

Since Sue's death I have campaigned tirelessly to educate and bring awareness to the importance of proper background investigations and the importance of knowing who you hire. We need federal legislation requiring national background checks on individuals entering consumer's homes or working with vulnerable populations.

This type of consumer safety legislation would better protect unsuspecting individuals like my sister. Not only do background checks make good business sense, they save lives. It is absurd that a person with multiple convictions for violent sexual assaults would be engaged as a home repairman. Yet it happens over and over again.

Everyone has the right to work, but not every job is right for everyone. Criminal background investigations provide employers an invaluable tool to help them place employees in job appropriate positions, better protecting co-workers and clients. Background checks prevent tragedies.

I believe the EEOC focused its recently updated policy on helping minority ex-offenders seek employment without paying any regard to victims. Everyone deserves a second chance, but not at the expense of innocents such as my sister. Sue did not commit the heinous crimes that Hefling committed. Burdine's should have known about his criminal past and not sent him into consumers' homes.

Is it too much to ask that employers take appropriate steps to ensure the safety of their clients from their employees? Unfortunately my sister paid the ultimate price because a background check was not conducted that would have alerted Burdine's to who Hefling was.

That doesn't mean that Hefling couldn't have been hired, just that armed with the knowledge of his criminal history, Burdine's shouldn't have sent him into

my sister's, or anyone's, home. I'm gravely disappointed that no victims were represented at the July 2011 meeting of EEOC. The Commission did not consider the victim's side but solely focused their attention on the plight of ex-offenders.

Unfortunately, it appears they singled out background checks as the leading cause of why ex-offenders fail to find a job, ignoring other difficulties such as drug and alcohol addictions, lack of education or vocational training, lack of family structure, and ignored the beneficial side of screening.

Rather than take steps to engage employers to rely on criminal background checks, their actions will cause employers to conduct less, not more screening. No attention was paid to such critical issues as why employers rely on background checks to ensure safer workforce and how its new policy would discourage the use of background checks. And how victims' advocacy groups felt about any change in policy.

I personally attended the 2011 hearing and was insulted that the EEOC showed no interest in hearing from any victims. It was apparent that the hearing was only a formality. Their focus was on protecting ex-offenders.

In addition, they made a serious error by failing to allow the public to view and comment on the Guidance before it was issued. They need to suspend the Guidance and listen to victims and their families' and victims' rights organizations and others representing vulnerable populations. And not ignore their comments and letters as has been done in the past. All views need to be heard and considered before a new policy goes into effect.

The Guidance must balance the safety of public and innocent consumers against the employment concerns of ex-offenders. While sadly it is too late for my sister, it is not too late for others. Without background checks used to qualify individuals that work or care for our families, or do service work in our home, we are knowingly risking the safety of our loved ones.

Under the guidelines the EEOC is actually forcing employers to make decisions on job applicants without the proper use of the resources that would allow an applicant to be placed in an appropriate position for their skill and their character.

When the EEOC weighed the risk and benefits of the proposed policy guidance, it should have balanced the safety of innocent consumers and the rights of ex-offenders. It did not. Its guidance is unacceptable and it should be revoked.

JULIE PAYNE, SR. VICE PRES. AND GENERAL COUNSEL OF G4S SECURE SOLUTIONS USA:

G4S is a leading security company in the United States. We employ over 33,000 security officers, nearly 8,000 of whom are armed. G4S provides security services to nearly every sector of our country's critical infrastructure, including nuclear power plants, government buildings and facilities, chemical plants and refineries, ports, airports, railways, public transit facilities, detention facilities and financial institutions.

G4S has clients and responds to the public - who expect us to deploy security officers who are professional, well trained and trustworthy. In order to meet this expectation, to comply with our contracts and to comply with law, our screening process is one of the most thorough in the industry.

Our clients expect, and most require, that G4S supplies security officers that have passed an extensive criminal background check. I am here today to cast light on the EEOC's targeting of companies, including my own, over legitimate and necessary business practices.

In April of 2010, David Coleman, an individual with two prior convictions for theft, applied for a position with G4S in Pennsylvania. G4S did not hire Mr. Coleman, as a result of his convictions. He filed a charge of discrimination, claiming that our refusal to hire him was based on his race and that use of criminal background checks adversely impacts African Americans.

The EEOC Philadelphia Office expanded the Agency investigation beyond the charging party, to include G4S applicants and employees across the United States. The EEOC sent a series of requests for information that were incredibly extensive and burdensome and sought vast amount of information related to our hiring policies.

They requested information about every employee and applicant of G4S, its parent companies, its subsidiaries, its affiliates, its successors, its predecessors, agents and assigns. It sought the information for a period of time dating back to the date when G4S first implemented its policy regarding criminal convictions to the present.

G4S, formerly known as Wackenhut in the United States, was founded in 1958 and has relied on criminal background screening from the beginning. As a result of this inquiry, we have hired multiple lawyers, statisticians, experts, to assist us with complying with the onerous requests. We have spent hundreds of thousands of dollars, to an uncertain result.

The EEOC Guidance and its application in the Coleman case demonstrate that the EEOC is focused on using individual cases for expanding claims to

national prominence. This not only dilutes the claims filed by individuals who have turned to the EEOC for specific redress, but it also puts employers on the defensive as class claims are extremely costly and highly unpredictable.

In our case, because we would not hire an individual who has two previous convictions for theft, we are now being asked to defend the use of criminal background checks in every hiring decision we have made over a period of decades.

The EEOC ignores the significant risk to G4S and other employers if they fail to do background checks. We have a duty to perform a reasonable investigation on potential employees. And this standard of care can be higher in industries, such as my own, where we serve, transport and protect the public.

Litigation against employers for negligent hiring and negligent retention makes the EEOC Guidelines and enforcement plan a very difficult no-win situation for employers.

Another no-win situation for security companies is that most states, with very few exceptions, require that a background check be done before security officers can be licensed to work. Those with felony convictions, or certain misdemeanor convictions, are not authorized to work as security officers in most states.

The EEOC is aware of the statutory scheme but counters that state and local laws are preempted by Title VII. Therefore, by simply complying with state and local licensing laws, private security companies are put in an untenable position.

Congress has also expanded access to FBI criminal background checks for private security companies. G4S is a member of and worked with the National Association of Security Companies in support of the Private Security Officer Employment Authorization Act, which was passed in 2004. The enactment of this legislation was a clear public policy decision by Congress in support of more expansive and stringent criminal background checks for security officers. In the law it states that “the American public deserves the employment of qualified well trained private security personnel as an adjunct to sworn law enforcement officers; and private security officers and applicants for private security officer positions should be thoroughly screened and trained.”

Criminal background checks draw upon the most rigorous standard of our U.S. Criminal Justice system-- that is: proof beyond a reasonable doubt. Regardless, the EEOC has determined that in certain circumstances there are

reasons for the employer not to rely on a conviction record when making an employment decision.

The EEOC is requiring that employers substitute its judgment for that of our criminal justice system. This is illogical. Given the burden that must be met for a conviction to occur, employer reliance upon a criminal background check is far less likely to lead to individual discrimination.

G4S should not have to bear the legal, financial and reputational risk of hiring persons who have been convicted of theft for positions where the opportunity for theft is great and where our customers have entrusted us to protect their assets.

We cannot give guns and badges, keys and combinations, pass codes and access to servers containing personal and sensitive information, and our trust to those who are at high risk of abusing it or offending again.

RICHARD LARSON, PRESIDENT, WINNING WORK TEAMS, INC.:

I have managed the hiring of thousands of men and women, using large scale job fairs to senior level executive searches. In each instance the goal has been simply to identify the most suitable candidates for the organization.

Some of the best people I have hired did not make a strong first impression, or attend a ranked U.S. News and World Report Top 50 university. Beyond the immediate assessment as to whether the candidate can perform the tasks identified in a job description, there are other crucial variables such as interpersonal skills, critical thinking skills, leadership potential, brand awareness, work ethic, problem solving capabilities, positive attitude, teamwork and demonstrated judgment to make good, solid decisions.

Reasonable people often disagree as to who the best candidate for a job may be. I have seen hiring managers strongly at odds with the HR manager as to which candidate is the right fit for the particular job.

I believe obtaining an accurate criminal history is an important component in any disciplined hiring process. Indeed a thorough background check with a detailed criminal history is the single most effective tool that employers can use to mitigate their risk, which leads me to the April 25th, EEOC Guidance Document. I make two key points.

First, my impression is the rationale behind the guidance does not yet resonate with small business whose HR managers do not have ready access to the educational training awareness offerings of major industry groups and to outside legal counsel.

I draw this observation in presenting classes on employment law and practices to HR [human resource] managers. I would venture to say that if we were to conduct focus groups with HR managers from smaller companies nationwide we would often find a lack of understanding as to the issues raised in the guidance document.

HR managers view themselves in a gatekeeping role to prevent negligent hiring claims. That their company could be sued by an ex-offender for not being hired is counter-intuitive to them.

When I announced to my Rotary club this week that I would be participating in today's discussion I was immediately approached by many small business owners who knew nothing of this issue and were concerned.

Accordingly I believe governmental agencies as well as private sector industry groups have an obligation to provide educational awareness on the guidance so that all employers have an equal opportunity to understand the EEOC's current focus on this issue.

My second observation is that companies that do understand the rules, have often moved forward to create an interactive process to thoroughly vet concerns raised by the disclosure of the criminal history and to determine whether the conviction relates to the open position under consideration. I have worked with companies that have been engaged in this process long before the April guidance document was issued. The interactive process allows the ex-offender to provide court records, often required by the company. Some companies also want to see the affidavit supporting the arrest to get a better understanding as to what actually took place at the time.

The ex-offender is given the opportunity to make a statement and to address concerns. A helpful tool in this process can be a comprehensive set of questions that need to be addressed. Another tool may be a matrix of data points weighting the various factors for a review.

Such tools provide data as to the nature of the event, when it took place, age of the offender at the time, intervening work history and recommendations of previous employers and other key factors.

When all of the relevant factors have been gathered, the stakeholders such as the hiring manager, the HR manager and the risk manager, make a business decision as to whether or not the behaviors underlying the criminal conviction correlate to the job.

A person convicted of possession of stolen property may not be deemed suitable for a warehouse position but may be deemed suitable for a landscape gardening position. And sometimes the decision not to offer any position is

necessary to serve the best interest of the company and to prevent downside risks.

Whatever the outcome of this step-by-step, case-by-case individualized interactive process, documentation of the thorough measures the company took to vet and debate these issues will provide the basis for a defense against both a negligent hiring charge and a failure to hire charge.

In conclusion, even when a criminal history is not a factor there will be many close calls as to who gets hired. And when criminal histories are a factor there will also be many close calls as to who gets hired. But who better to make these decisions than the employer who knows its own business operations far better than any third party?

GAREN DODGE, PARTNER, JACKSON LEWIS LLP:

I appear today on behalf of my law firm, Jackson Lewis, as well as the Council for Employment Law Equity.

Both Jackson Lewis and the Council for Employment Law Equity strongly support the appropriate use of criminal background checks in employment. Such record checks before the commencement of employment are highly effective and vital tools to prevent criminal recidivism in the most harmful contexts, protect at-risk populations and assist employers in making fully informed hiring decisions as well as protecting employees, their clients and customers, their assets and the public at large.

As background, the Council for Employment Law Equity is a non-profit coalition of major employers committed to the highest standards of fair, effective and appropriate employment policies. Jackson Lewis is a national law firm of more than 730 lawyers in 49 offices, all of whom are dedicated to the representation of management in labor and employment issues. I'm a partner at Jackson Lewis and serve as co-chair of the government relations practice group.

Larry Bossidy, the former chairman for Honeywell, once said, "nothing we do is more important than hiring and developing people. At the end of the day you bet on people, not on strategies." Mr. Bossidy was right. Nothing is more important to a company than who it hires. However, betting on people means more than simply accepting the first candidate and blindly hoping for the best.

Instead, the employer's recruitment and hiring process is its biggest and best opportunity to shape not only its workforce but its future. But as employers, we face a dilemma, as you've heard from some of the other panelists, which is only exacerbated by the EEOC's new rule. As those of you who are lawyers understand, we live in a litigation-happy environment. Civil lawsuits alleging

an employer's vicarious liability for torts committed by employees or claims such as negligent hiring or retention give little quarter for missed steps in hiring.

In addition, the EEOC, as you've heard before, is now with this guidance taking aim squarely at employers, second-guessing their decisions and undertaking high profile, class action type litigation.

So stuck between this “rock” of tort liability and the “hard place” of statistical second guessing for those not hired, employers are faced with near impossible choices in how and whether to screen perspective workers.

But as a matter of policy, employers should not be forced to bet in the dark. Society should actually encourage employers to utilize criminal background check information when appropriate in their estimation and judgment as part of the hiring process.

Risk is inherent in many aspects of the world we live in but we should not force employers to risk employee hiring decisions when the tools exist right now to aid them.

So why should employers use criminal background checks? Let me just give you a few examples, and others are cited in my testimony.

Back in 2010, Amy Bishop, a biology professor, walked into a meeting and shot and killed three of her colleagues, wounding three others. A background check at the time of her hiring would have revealed that eight years earlier she had pled guilty to and had a misdemeanor conviction for assault and disorderly conduct for punching a woman in the head at a restaurant.

Another example: Lisa Keebler, a mother of three young children, arrived home to find a meter reader waiting for her. When she left her vehicle and went into the house, the man approached. He asked about reading the meter. Keebler demanded that the guy leave but then he began to attack her. He beat her; he raped her. A background check came back the day after his arrest for this assault, revealing several convictions for arson, criminal mischief, burglary, theft and other crimes.

Another example: Edwin Harber, an over-the-road truck driver, picked up a 17-year-old hitchhiker at an Indiana toll plaza. In the sleeping compartment of the truck, he repeatedly assaulted, beat and raped her, even threatening to kill her. Had his employer done a complete criminal background check in addition to the one performed for the vehicle infractions, the company would have learned that in the year before they hired him he had been arrested for doing similar bad things. In fact, he had a long history of violent sexual crimes.

Another example involves George Augustine's employer who failed to do a criminal background check before they hired him as an elevator operator. Had the company done so it would have learned that he had a lengthy criminal history. Indeed, he was a registered sex offender. But in 2003, he assaulted and attempted to rape a woman while at work.

At the time of his hiring in 1994 as a custodian for a community center, Anthony Moore was not subject to a criminal background check. He began working in the community center, and in 1997 he took one of the young girls in his charge into a weight room and committed various heinous acts. Had the center done a criminal background check, it would have discovered an expansive criminal record including crimes of violence.

There are many, many, many other examples cited in my written testimony. So contrary to an earlier panelist, these concerns are not theoretical. They are real. And they're of grave concern to employers and others you've heard on this panel.

So these examples are things that all employers want to avoid. And in fact, as Ms. Payne noted, it's our obligation as employers to safeguard our workers and customers as well as the general public.

These risks are not only physical. For example, the U.S. Department of Commerce noted that 30 percent of business failures are due to poor hiring practices. Annual losses generated by poor hires, absenteeism, drug abuse and employee theft, amount to \$75 billion a year. There are other statistics cited in my testimony.

But all of this real risk is lost in much of the EEOC's guidance. Rather than focusing on job relatedness, business necessity, the kinds of things that employers typically take into consideration when they factor all this in, the EEOC's guidance largely is based on statistical analysis, the front-end if you will, of the disparate impact theory.

Employers must be given the opportunity and the discretion to make their own informed decisions as to whether a perspective prospective employee is an acceptable risk. They need to have available, relevant and appropriate information.

COMMISSIONER QUESTIONS:

CHAIRMAN CASTRO:

Let me open by asking you a question and then I'll open it up to my colleagues. In each of the cases that you outlined there, there was not a criminal background check that was conducted. And I think what we've

gathered from this morning's panel and from other panelists here today is that the EEOC is not saying don't do criminal background checks. They're setting forth guidelines to ensure that those background checks are not done in a way that violates Title VII.

So had those folks that you just outlined in your presentations done a criminal background check, as the EEOC says they should have, these instances would not have occurred. So I don't understand why those are relevant to the EEOC guidance?

MR. DODGE:

I understand your question, thank you. The point is criminal background checks are important and critical. And what is lost in the discussion of the EEOC Guidance is the effect that this guidance is actually having out there in the real world.

For example, the EEOC indicated in the middle of its guidance document that one of its "best practices" was for employers to take this question off the application form: "have you ever been convicted of felony say in the last, let's say seven years." They want to ban the box [question], if you will, through an administrative process generated at the EEOC.

The message that sends to employers is okay, we better take this question off our application form and if we don't do it at least some regions of the EEOC have indicated that they are going to take an especially hard look at those employers who leave that in.

So you're right, the EEOC Guidance doesn't flat-out prohibit the use of criminal background checks. But what I'm saying is out in the real world it's sending the message to companies, like Ms. Payne's and others, that you do so at your own risk. At great risk. Think of the expense and the aggravation in compliance simply with the request for information related to the one individual in the example cited by Ms. Payne.

What we're hearing from medium and small sized employers in particular is because of the complexity of the Guidance, because of the risk that it poses to them, that in fact it is chilling employer behavior. And some employers are reporting back to us- - and we operate nationally so we hear stories anecdotally--that in fact its consequence is that employers are really second-guessing whether they should even do criminal background checks at all.

CHAIRMAN CASTRO:

And is that the case in the examples you gave us? Did the "ban the box [question]" chill those particular employers from doing background checks?

MR. DODGE:

Those were cases were several years ago, prior to this Guidance, so no.

CHAIRMAN CASTRO:

They don't relate to this [new] Guidance at all, in this particular instance?

MR. DODGE:

I'm not familiar with reported decisions after the issuance of the April 2012 EEOC Guidance. I haven't heard of any cases since then.

MR. MARTIN:

I would just like to add for the record that the "ban the box" [effort] doesn't tell employers to never consider the criminal record. What it suggests is that if job seekers with criminal records had an opportunity to get their foot through the door and make the case that they're the most qualified candidate that, if I can use a sports analogy, that if you get everyone up to the start line it's a better chance for them to compete for the job. And the criminal records should be taken into account. And you should do a background check, just not on the initial applications. I just want to clarify that. And 30 jurisdictions have done it and about –

MS. MEYERS:

Forty-three.

MR. MARTIN:

Forty-three jurisdictions have already done it around the country, including states. Entire states.

COMMISSIONER KIRSANOW:

I'm going to go back to the law again, sorry for burdening everybody. This is to Mr. Dodge, and goes to the issue of job necessity again and job relatedness.

I was listening to some of the scenarios that you described. And when you talk about job-relatedness typically what we talked about is when somebody has been convicted of embezzlement that bars him from being a bank teller, that shouldn't bar him from being say a laborer.

But in a couple of the examples you cited, for example I think it was the meter reader example, I didn't hear anything about breaking and entering, for

example, which would seem to me for a meter reader probably to be the most specific job related criterion under the EEOC Guidance.

To what extent do you find from what you hear from clients that the guidance might bar them from considering criminal convictions as an indicator of a broader host of issues related to job relatedness?

MR. DODGE:

That's a good question. So if you're literally looking at the EEOC Guidance you might come away from that thinking that the only way I can exclude somebody from a job currently is if they've committed a similar type of crime related to this job. So bank teller, embezzlement.

But sometimes there may be related crimes that also affect whether or not that person is a trustworthy person who can be trusted with money. So it shouldn't necessarily be for the exact same crime, it could be for a related band of crimes, if you will.

COMMISSIONER KIRSANOW:

Just a follow-up, with the exception of Ms. Bone, I haven't heard anybody ask for the wholesale rescission of the Guidance. I would ask for anybody who would like to contribute, perhaps Ms. Payne. If you were going to suggest just one way of improving the Guidance, presuming that it's not going to go away -- and by the way have you heard of the Peplemark case by any chance?

MS. PAYNE:

I'm not familiar with it.

COMMISSIONER KIRSANOW:

But to what extent would you suggest just one improvement, among many perhaps, to the EEOC Guidance?

MS. PAYNE:

Well you're boxing me in a little bit asking for just one improvement. Certainly from my perspective, because of the industry in which I operate, the issue with state law where Title VII preempts state law and the fact that state law requires us to do background checks and requires us to not employ people who have been convicted of felonies or certain misdemeanors. That's just an untenable position for us.

COMMISSIONER KIRSANOW:

Does in fact, given that this is a Guidance, and I understand Ms. Miaskoff supposedly said it that it preempts or supersedes state law, does anyone have an opinion as to whether or not that is, frankly, an accurate opinion? Does it in fact preempt state law? Does the EEOC Guidance preempt state law, does it supersede state law? Is there some kind of federal supremacy issue here with respect with EEOC Guidance? I keep hearing it's merely a Guidance but then there is a suggestion that it preempts state law.

MS. PAYNE:

Well what I can tell you from my real experience is that when we received the EEOC charge and when the discovery in that case began to take place, in our position statement we were very clear that we are required to do these background checks by state law. Actually in Pennsylvania it happens to be more locally controlled in the jurisdictions within Pennsylvania. And the EEOC proceeded with its investigation to the tune of our having to spend hundreds of thousands of dollars. So they are not appreciating the fact that in Pennsylvania we were actually required to do this background check.

MS. MEYERS:

Pennsylvania also has its own state anti-discrimination law that probably was part of that action that's also being considered as well, right?

MS. PAYNE:

Correct.

COMMISSIONER KLADNEY:

Mr. Larson, as I noticed in your statement, how difficult is it to implement this type of program into a hiring process as compared to any other kind of requirement you're required to by government, say ADA or something like that?

MR. LARSON:

It's another component to consider in the employment matrix. But once there's clear understanding as to what the requirements are, then companies can, I think, quite readily put together a list of questions or some other vetting process to make a reasonable determination. For example, an applicant or an employee comes forward and says, my back's hurting and I think I might need some sort of reasonable accommodation, given my chronic back problems. Companies today are well versed in this. They have a vetting process to

understand the nature of the request. Very often we'll send the person's current job duties off to the doctor for his or her opinion and then a determination can be made.

So in my experience once the groundwork is laid there's foundational education and training components to this. Then determinations will be made on a case-by-case basis and not be too burdensome.

I think the point where we are now is there's a lack of awareness as to the guidance and how to set up the framework to deal with this issue, you know, make wise decisions but avoid the risk that the EEOC is concerned about. As a practical matter I think once the framework is understood employers could do this. But I think we're in a time right now where there's a lot of uncertainty as to how to do this.

COMMISSIONER KLADNEY:

Mr. Dodge, in that regard, your company or law firm puts on seminars, is that right?

MR. DODGE:

That's right.

COMMISSIONER KLADNEY:

Have you put seminars on about this?

MR. DODGE:

Yes, we have. I've done probably ten webinars myself -- some for different groups and clients. Also, our firm has put an analysis up on our website on what we think employers should be doing based on this guidance.

COMMISSIONER KLADNEY:

So these types of things like when Mr. Larson talks about a matrix of jobs versus crimes, you would agree with that?

MR. DODGE:

Well I know some employers have done that. I know some CRAs [consumer reporting agencies] have put that together as well. I think it's probably an individualized determination based on the company if that matrix scenario makes sense in your situation. I know certainly things in the guidance we've taken away as a law firm and have made recommendations to our clients. I

think overall it's sort of encouraged employers to dust off their criminal policies and to take a look and to more closely monitor whether what they're looking for accurately is what they need to do.

COMMISSIONER KLADNEY:

I mean I did notice in your statement, I mean I was sitting there going left, right, left, right. I mean I just kept getting hit in the jaw, you know. I mean it was pretty strong about the criminal background.

And you were very strong about drugs and alcohol, at least that was my impression. And I was just wondering, okay people get convicted of using drugs. They get convicted of using alcohol and it's bad. People who get convicted of DUI usually have driven [under the influence] DUI quite a few times before they wind up with a felony prison sentence.

What about the people in AAA [Alcoholics Anonymous], or NA [Narcotics Anonymous]? Say in your firm you have over 1,000 employees with lawyers and others. I'm not casting any aspersions, but I bet you that there's somebody in there going to AA or NA or something like that. Is that something you should consider as an employer? Because a lot of those people have issues along the way.

MR. DODGE:

Sure. So obviously it interplays with the Americans with Disability Act, if somebody is a recovering alcoholic or recovering addict, obviously there are ADA considerations. But if somebody is driving a company vehicle and they've got DWIs [driving while intoxicated], clearly that is a relevant consideration. So in simply practicing law, if somebody is a recovering alcoholic, I would say probably not. But in some industries it is going to be a relevant consideration.

COMMISSIONER KLADNEY:

So what you're saying is that you bring a focus to this Guidance and you use it to help you put people in positions where they can help you as opposed to cause you liability? Is that fair?

MR. DODGE:

That's fair.

COMMISSIONER KLADNEY:

Thank you.

COMMISSIONER GAZIANO:

I want to thank this panel as well, but especially I'd like to convey my thanks to Ms. Payne, I hope all of our thanks to all of your colleagues. There are some federal agencies that are vindictive when people publicly challenge what they perceive as an abuse. I've seen that before and I've seen it possibly with the EEOC. So it's doing great service to this Commission that you give such concrete testimony. And it would be very harmful to this Commission were we not to try to follow up and watch what happens to your company's case.

But the last two panels have helped crystallize where there's agreement and disagreement. I'd like to state where there are differences. I think we, at least all in this room and almost everyone, agree that criminal background checks shouldn't be used as automatic, definitive rejections. That it's important for people to consider employing those with criminal records when possible.

I think we also will concede that the EEOC Guidance doesn't automatically say that someone will have liability in an enforceable way, since they can't issue regulations at all. The state of the world, as I understand it, is that prior to these guidelines some companies were probably using criminal background information too automatically, reflexively using them too heavy handedly.

But some weren't using them enough in situations like Ms. Bone's, and an unfortunate loss occurred. And as I understand it from the last panel in the exchange with Commissioner Kirsanow, the EEOC had a hunch and it decided that overall too many companies were using it too loosely, but decided it without data. And that's what bothers me.

Without data, they acted on their hunch and designed a guidance that (I'd like to hear any disagreement with this) increased the costs of using criminal background information, in order to discourage it. And it also increased liability for employers who rejected an applicant for a prior felony, as a result of the EEOC's wisdom or hunch that it would improve America. But without data. And by the way, it has certainly had the effect of increasing the cost to companies of using criminal background information -- that was its intent. It was meant to chill and meant to increase costs, because they wanted to affect employer behavior.

Does anyone disagree with that summary? Some of you may think that's great and that's good, other people may be concerned. But does anyone disagree with that characterization of where we are?

MS. MEYERS:

I will say I don't completely agree. I can see that yes there is definitely a lot more data that is needed. However, organizations like mine who help people

every day, we get the calls every day from individuals who are struggling in the labor market, who are struggling to deal with their criminal history. Whether it's one case or a slew of cases where they're attempting to enter or re-enter the labor market and are blatantly being told no we're not hiring you because you have a criminal history.

We do agree that more data needs to be collected. The EEOC has accepted letters from organizations like ours talking about and sharing the stories of the many thousands of clients who have come through our doors. Many of which we have helped get jobs without having to litigate, where we've advocated on their behalf.

So there are a lot of cases that didn't need to be filed because these individuals found non-profit organizations like ours that are able to meet with employers and advocate on behalf of that individual, [meaning] discuss what's on their history, make sure that that person has had the opportunity to present the evidence of rehabilitation that they had obtained up to that point and then [ask] for the employer to then consider actually hiring that person.

And so they've taken some of that information and also used it, we believe, in their Guidance. But I do agree that part of the work and what organizations like ours have been pushing for them to do is to bring some light to this issue and to get more businesses to think about the way that they're conducting their hiring practices so that we can make sure there's a fair opportunity.

COMMISSIONER GAZIANO:

Use the levers they have to put pressure on them?

MS. MEYERS:

I think all enforcement agencies do that. I think all employment agencies have that ability to do that.

MR. MARTIN:

I'd like to respond to your question. First I have a hard time with the fact that we're talking about the Guidance as if it hasn't existed for many, many years. This is a re-issuance of the Guidance, it's not that much of a departure from the original Guidance.

COMMISSIONER GAZIANO:

Yes, but the EEOC is very proud of it. And why go to the trouble if it wouldn't have some effect?

MR. MARTIN:

Maybe I'll pinch my answer down to respond to that as a second question. So I wanted to respond to the question you asked about additional costs. I mean every time I've talked to employers, I've done focus groups with employers. A big part of my job is engaging employers, hearing what they have to say.

It always starts with liability. Everything is liability, I'm going to face liability. I'm going to be sued. I'm going to have to spend a lot of money to respond to that. Clearly that happens in real life. So idea of the EEOC giving guidance to employers to avoid that liability down the line, and by virtue of a small investment up front, I mean the background check companies, with the proliferation of them, the cost has gone down considerably.

So to me there's a financial savings. And is there not a financial savings in finding the most qualified candidate up front, whether that job seeker is someone who'd been involved in the criminal justice system or not? If I'm an employer to me it's all about the bottom line. And if the bottom line means I'm better able to sort through candidates to find the most qualified candidate, that sounds like a win/win in my opinion.

COMMISSIONER YAKI:

Ms. Payne, your quote was we cannot give guns and badges, keys and combinations, pass words -- your statement was we cannot give guns and badges, keys and combinations, passwords et cetera to convicted felons or something like that, right?

MS. PAYNE:

Something like that, yes.

COMMISSIONER YAKI:

Okay. And the reason why is because you're concerned about their ability to perform their jobs in a way for the security operations that you have, private, public, whatever, around the country and the world that G4S has, correct?

MS. PAYNE:

Correct.

COMMISSIONER YAKI:

Do you give your employees psychological tests?

MS. PAYNE:

Not in all cases. We do where they're located at certain facilities where clients require it and where they're armed.

COMMISSIONER YAKI:

Do you know if the employees in the Jimmy Mubenga case were given psychological tests?

MS. PAYNE:

That case does not emanate from my particular area of responsibilities.

COMMISSIONER YAKI:

Have you heard of Jimmy Mubenga?

MS. PAYNE:

I've heard the name, but I'm not familiar with the case.

COMMISSIONER YAKI:

It involved a G4S employee at a detention center at Gatwick where an asylum seeker was asphyxiated during deportation. There's a concept called "carpet karaoke" that's on the YouTube video.

MS. PAYNE:

Sir, I'm sorry you're talking about a case that emanated from an affiliate company in Europe and the UK and I'm just--

COMMISSIONER YAKI:

Well is it owned by G4S?

MS. PAYNE:

It is owned by G4S, but that is not my area of responsibility. So I'm not --

COMMISSIONER YAKI:

So let's talk about the U.S., are you familiar with the Coke County Juvenile Detention Center in Texas? I mean it's just cases of sexual assault by guards on juveniles were alleged in that instance by one of the other companies that

you acquired, Wackenhut GEO, for example. I mean do you know if all, have you done retroactive background checks on all the employees where the companies have been acquired like GEO, that Wackenhut, Cornell --

MS. PAYNE:

Sir, we did not acquire the GEO Company, we divested ourselves of the GEO Company in 2002.

COMMISSIONER YAKI:

Was Wackenhut not part of your --

MS. PAYNE:

Wackenhut is the predecessor, well excuse me. Wackenhut was the name of the company trading in the U.S. before it was purchased by a predecessor of G4S. But at the time Wackenhut was purchased it divested itself of its correction business, which became GEO. So we have not owned GEO or it's --

COMMISSIONER YAKI:

You're not involved anymore in the lawsuits, so let me just ask you this. Do you know how long your prohibition on hiring people with felonies goes back in terms in refusal to give anyone -- I mean how far does it go back?

MS. PAYNE:

We have not been able to establish the exact date that our policy went into place. We do know that as far as the Wackenhut Corporation is concerned it came into existence over 50 years ago. And some form of background screening has been used since the beginning.

COMMISSIONER YAKI:

Then let's go back to things that are G4S. Do you know about Cell 36?

MS. PAYNE:

No, sir.

COMMISSIONER YAKI:

Cell 36 is a detention cell in Gaza that the Children Defense International has claimed that the children are being tortured in there. And whether they're true

or not it just asks me the question, the allegations against G4S employees are, I assume, that you, subsidiaries, affiliates, whatever you want to call them.

To me it begs the question of you sit here and you talk about how we're not going to give anyone with this kind of record a chance in our organization, but your organization has a number of different lawsuits, complaints, allegations, whatever by its own employees dealing with violent acts. Deliberate acts, cruelty acts.

And I'm just trying to figure out how is it that in your rigorous screening process these kinds of individuals somehow get through? I mean is there something else going on there? Are you not administering the kind of tests, I guess it goes to my point of how do you really know who it is that you're getting unless you conduct, I assume you conduct a reasonable inquiry into the background into each of these people to determine whether or not they're qualified to serve the security needs of your customers around the world.

MS. PAYNE:

Sir, I cannot speak to the screening practices or policies of some affiliated companies that exist in other parts of the world, that's not my area of responsibility.

COMMISSIONER YAKI:

Maybe I'm mistaken, it says G4S, the British Defense Minister calls it the G4S Company. Other company is called the G4S. How can you sit here and, well I mean are you saying that you're like McDonald's, you franchise it out to people and you only have some of the standards?

MS. PAYNE:

My responsibility lies here in the United States for a very specific affiliate of G4S. And I'm not aware of many of the things of which you're bringing up today.

COMMISSIONER YAKI:

It's too bad. You should, because it is your company and you're here talking about how you need this for your hiring and yet you have allegations of how your employees may be performing acts that may or may not be legal in other places as well. Many of the same acts that you're condemning out a whole group of people for without doing a real inquiry about it.

COMMISSIONER ACHTENBERG:

Thank you, Mr. Chairman. Thank you, Mr. Martin, for pointing out something that I had wanted to comment on, namely that the EEOC Guidance is built upon EEOC Guidance that was promulgated in the past. I would also point out that providing Guidance is a tried and true function of various enforcement and regulatory agencies.

There's nothing that is a departure from standard practice by issuing guidance, far from it. The EEOC Guidance, at least in my view, is an important update responding to both new practices, new public, new policy research that has been promulgated. New court decisions that mean that employers benefit, aren't harmed by, the EEOC giving further elucidation of ways in which they might view particular actions being taken by particular employees.

So I was very glad that you point that out, Mr. Martin. I'm wondering whether or not, given your specific expertise in the development of hiring practices that relate to this area, if there's anything about the EEOC Guidance that you think can be improved upon, or anything that you find particularly problematic? And after that I'd like to ask Ms. Meyers if she would comment similarly.

MR. MARTIN:

That's a good question. Thank you. I would respond very similarly to what someone said earlier, which is if I had my druthers I would like to see some sort of safe harbor built into it, because in every engagement I've had with employees, again starts out with liability concerns.

And in New York State for, instance although we've had an anti-discrimination law on the books for years, it was only a couple of years ago that we passed legislation to create a safe harbor which gives a rebuttable presumption to employers who exercise due diligence by doing background checks and following the factors in the anti-discrimination law.

MS. MEYERS:

I would agree. That's the same. Another particular area that would be helpful I think in our work is offering more protections or seeking more protection for employers in states. As I mentioned earlier that, as an advocacy organization, we've been working with legislators and with policy advocates in states around the country to figure out a way to address that and to possibly legislate around that particular issue.

And it would be helpful to have more discussion about that and how it could relate and serve as a complementary factor as part of the whole hiring process and consideration that employers will undertake.

COMMISSIONER KIRSANOW:

And again, thanks to the panelists. And to Ms. Payne I want to thank you for coming to testify in a matter of important public concern, despite that your company is smeared by relationships you don't even have. And companies that exist in foreign countries that are not even subject to the EEOC Guidance about a matter that actually shows that imperfect policies are imperfect and establishes the need for criminal background checks.

But my question goes to Ms. Bone and that is you indicated there is no testimony at the EEOC hearing from victims, but do you know if anyone requested to testify?

MS. BONE:

To my knowledge the EEOC did not ask. And on more than one occasion I wrote to the EEOC asking them to look at victims and victim advocacy groups.

COMMISSIONER KIRSANOW:

They did not ask for people to testify?

MS. BONE:

To my knowledge they did not.

COMMISSIONER KIRSANOW:

My question is did anyone ask to testify, and you just said you wrote?

MS. BONE:

I did.

MR. DODGE:

I'm somewhat familiar with that. The way the witnesses went at that EEOC hearing, there were a number of us that were seeking to have other witnesses testify. But the EEOC Chair chose the panelists at the EEOC, so it wasn't like these Commission panels, which are, I would say representative of all

different points of view on the issue. The EEOC hearing was very much focused on one side of the inquiry.

COMMISSIONER KIRSANOW:

Mr. Martin: What is your opinion of a guidance that would permit employers to use criminal background check information with sufficient safe harbors out there and allow them to go fully and robustly in questioning about somebody's background, but only after, similar to requirements under the Americans With Disabilities Act, a job offer has been tendered already?

MR. MARTIN:

Good question. Because even as an advocate I've been on the fence about that, mostly around the impact on small employers and whether it would be overly burdensome on small employers. I think in concept it would lend itself to the issues I care about, which is opening up doors for people and then being able to isolate when the criminal record is taken into account, similarly under the Americans With Disabilities Act.

But if I were to support something like that, an advocate for it, I may be open to, for instance, maybe suggesting that certain small size employers be exempted from it. Although the biggest abusers to be quite frank, are the large employers, not the small to medium size employers. Small to medium size employers actually are the ones who typically hire people who are formerly incarcerated because they tend to work with agencies like our, because they don't have their own HR departments and they rely on us for their initial screening. And for them, in their mind, whether it's real or not, it helps to reduce liability concerns because they have a sense of who they're getting through the door.

### **Panel Three Speakers**

MONTERRAT MILLER, PARTNER, ARNALL GOLDEN GREGORY; COUNSEL, NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENER'S (NAPBS):

NAPBS is a trade association representing screening professionals involved in employment and tenant background screening. Founded in 2003, NAPBS represents 681 members, many of whom are engaged in employment and tenant background screening across the country.

The majority of these member companies are small businesses with 25 or fewer employees, although our membership includes a range of companies from Fortune 500 companies to small local businesses. Collectively, NAPBS member companies conduct millions of background checks each year.

NAPBS member companies provide background checks for private employers, volunteer organizations, nonprofits, government, public utilities, health care, higher education and publicly held corporations. The Association exists to promote ethical business practices in compliance with the Fair Credit Reporting Act, equal employment opportunity and state consumer protection laws relating to the background screening profession.

NAPBS provides educational programs aimed at empowering members to better serve clients and to maintain standards of excellence in the background screening profession including a company accreditation program, individual Fair Credit Reporting Act certification program as well as a provider exam.

Over the past ten years there has been an increase in the number of background screenings and there are several contributing factors such as increased security concerns after 9/11 and greater emphasis by employers to focus on safe hiring to protect their business, employees and customers.

Employers value a good hire over a bad hire and seek to ensure that the right person is hired for the right job to avoid injury to customers, injury to other workers, regulatory noncompliance, potential litigation, shareholder suits or employee theft and fraud.

In addition, there has been an increase in the number of federal, state and local lawmakers enacting laws mandating checks especially for the most vulnerable populations such as the disabled, children and the elderly. In many states, background checks are required for a variety of private sector positions and state licenses.

One important factor to bear in mind with this increase in the number of background screens is an associated increase in employers and the public's desire to know more about individuals. With the desire for greater knowledge comes an increase in the number of individuals conducting their own online Google searches as well as an increase in the number of instant online searches available to the general public.

However, there is a distinction between a Google search or an instant online search and a background report created by a professional background screening company under the requirements of the Fair Credit Reporting Act. A professional screening firm providing background reports for employment purposes is required to follow strict procedures pursuant to the Fair Credit Reporting Act and other state and local laws that limit how information is reported. Use of an instant online website or search engines offers none of the consumer protections afforded under the Fair Credit Reporting Act and other applicable laws.

We believe that background screening is an effective tool used by employers to protect employees, customers and assets from risks such as theft in the workplace, employee-on-employee violence as well as ensuring that only appropriately screened individuals deliver goods or provide services in our homes.

To be clear, background screening is not conducted to keep individuals out of the workplace or, for instance, to impair reintegration of ex-offenders into the workplace. Rather, background screens are conducted to facilitate the right person for the right job.

Background screens provide employers with information to make informed hiring decisions. The federal government, including the EEOC, fully appreciates and values background screening, conducting millions of checks each year.

The Supreme Court, in a recent decision regarding the use of background checks, *NASA versus Nelson*, confirmed the value of such checks and said this in its opinion, and I quote, "The government has an interest in conducting basic background checks in order to ensure the security of its facilities and to employ a competent reliable workforce to carry out the peoples' business," end quote.

Further the Court said, and again I quote, "Like any employer, the government is entitled to have its projects staffed by reliable, law-abiding persons who will efficiently and effectively discharge their duties," end quote.

The private sector is no different. NAPBS member companies are not insensitive to the frustrations some have in finding employment especially in time of national economic stress, and we also appreciate the strong desire to reintegrate ex-offenders into American society.

However, attempts to ease unemployment frustration or reentry desires should not come at the expense of keeping people and businesses safe from physical or financial harm. Also our experience is that ex-offenders are being hired and their criminal history does not serve as a permanent bar to employment. In the interest of time I will not restate what our previously provided written comments cover regarding the use of background screens and compliance under the Fair Credit Reporting Act as well as NAPBS's concerns with the EEOC guidance. Those are already stated in the written testimony we provided.

In conclusion, we would ask that the Commission consider the following. First, we can all agree that reintegration of ex-offenders into society is important. The use of background screening is not the dominant cause of the troubles ex-offenders face. The problems facing ex-offenders go well beyond

an employer's use of background screening in the hiring process. Substance abuse, lack of education and established work habits, the absence of a stable family relationship can and should be looked at as problems facing ex-offenders. These are issues we must continue to address.

Second, we need to change the discussion from focusing too much on placing constraints on or discouraging the use of criminal history information in the employment context and focus more on greater public discussion about current and potential programs geared to helping ex-offenders such as the Federal Work Opportunity Tax Credit, WOTC, which provides a tax credit for employers who hire ex-offenders. There are also similar state programs.

And another is certificates of rehabilitation or certificates of good standing which could provide safe harbors for employers who hire ex-offenders depending on how they are drafted.

NICK FISHMAN, CO-FOUNDER, CHIEF MARKETING OFFICER AND EXECUTIVE VICE PRESIDENT, EMPLOYEESCREENIQ:

Our company conducts employment background checks for over 3,000 organizations across the United States and abroad. We work with those who serve vulnerable populations such as schools, overnight camps and home health care agencies, hotels, airlines and banks, to name a few.

We provide these clients with a wide range of services, all of which allow them to make better informed hiring decisions. Today I'd like to share with the Commission my experience and perspective as a professional background screener.

I'll focus my remarks on how our company conducts criminal background checks. I'll also highlight the findings from our annual background screening marketplace survey completed by a random sampling of over 2,000 human resource professionals since 2010.

Our business is based on the core belief that background checks are necessary for employers to have the information they need to make informed hiring decisions. Employers agree. Our 2010 survey revealed that 90 percent of all U.S. businesses perform criminal background checks on perspective employees. At the time, 70 percent said that these checks were growing in importance.

Our clients tell us that their most valuable assets are their employees, but if they're not screened properly they can become their biggest liability. Every new hire is a potential risk. Employers simply want to know that they're bringing in the right people and putting them in the right positions.

As for perspective job candidates, 96 percent of the employers that we surveyed indicate that applicants understand and accept the needs for these checks. Furthermore, these candidates must provide written consent before a search can commence.

The FCRA (Fair Credit Reporting Act) requires that we, as a consumer reporting agency, ensure maximum possible accuracy in all of our reports. This is a responsibility that our company takes very seriously. That means that with every background check we take steps to verify the information before it's reported to the employer.

We go to the most current, accurate source each and every time. We confirm the identifiers on a record belong to the subject of a report such as the name and date of birth and/or Social Security number, and follow standards for acceptable and legal reporting.

As a result of our meticulous process, we stand by the accuracy of the information we report. Our dispute rate is just 0.15 percent, and when disputes do occur we handle them quickly so that in the unlikely event the information needs to be modified it can be done without penalizing the candidate or unnecessarily delaying the hire.

We've heard the argument that the use of criminal background checks is creating an underclass of unemployable Americans. Based on the feedback and statistics that we pull from our survey, that simply is not the case.

In fact, our 2012 survey revealed the majority of employers do not eliminate a candidate solely on the basis of a criminal record. Seventy percent of our responders said that when they find a criminal record on a job applicant that person is denied employment less than ten percent of the time.

When asked which is more important, qualifications or lack of a criminal record, 73 percent indicated that qualifications were, in fact, more important. And that's up from 70 percent in 2011.

These results demonstrate the willingness on the part of employers to look at qualifications and consider the needs of the business before eliminating candidates based on criminal history. In fact, 92 percent of those surveyed in 2011 indicated that they reach out to candidates or consider job relevance when a check contains adverse information. Many that did not go back to the candidate indicated that they were in regulated industries that barred them from hiring those with criminal records.

Lastly, it's important to note that when a criminal record is revealed, the report does not include protected-class information. Employers review the report and

contemplate if the type of record found would reasonably suggest a pattern of behavior. Our clients are looking for reasons to include, not exclude.

The EEOC guidance on criminal records has caused tremendous confusion among our clients. There are three main areas that are causing the most confusion. First, the EEOC recommends as a best practice that employers defer the job application question that asks if a person has been convicted of a crime.

The recommendation is not feasible for many clients who have bonafide job qualifications that require exclusions based on certain types of crimes. Clients are understandably confused about when they can and should ask about criminal history, and also when they should conduct a background check.

Delaying the question can cause both the employer and the candidate to invest heavily in an opportunity or even quit their job only to be disqualified later in the process.

Secondly, there's no relief or consideration for employers that have state law conflicts. Employers who have traditionally conducted background checks and excluded certain applicants based on criminal standards defined by state law are now between a rock and a hard place. In some instances, there's simply no way to abide by the law without setting aside the guidance.

Finally, the EEOC adds a new requirement for employers to conduct an individualized assessment when a criminal record is found. The guidance does not recommend any particular means of conducting an assessment, and we're hearing a wide and variable range of practices that employers are considering to meet this requirement. Until tested in the courts, no one really knows what's sufficient.

To add to the confusion, public statements by EEOC field office attorneys have warned employers that they'd better think twice before conducting a criminal background check. This type of statement can certainly have a chilling effect on employers.

We suggest focusing on programs that offer training to those with criminal records. Identify programs that help those with convictions get on their feet, whether offering assistance with drug rehabilitation, finding a safe place to live, or helping them find gainful employment.

We also suggest looking at some of the laws that have been enacted across the country to help those with criminal records succeed in the workplace. Illinois has established a certificate of rehabilitation and offers employers legal protection if they were to hire someone with one of these certificates. The State of Ohio just passed a law that offers a certificate of employability.

Both our experience with our clients and our survey findings suggest that employers are using background checks in a reasonable manner. Enacting laws that inhibit their ability to perform proper due diligence is not the answer. In fact, they can lead to devastating consequences for the company, their employees, their customers and the public.

Our research, while limited, does not support a finding of widespread discriminatory practices based on the use of criminal background checks, and such research if it exists was notably absent in the recent EEOC guidance. It just isn't fair to ask employers to ignore information that could make them liable or keep them in the dark. Thank you.

TODD MCCRACKEN, PRESIDENT, NATIONAL SMALL BUSINESS ASSOCIATION:

The NSBA was founded in 1937 to advocate for the interests of small businesses in the U.S. It is the oldest small business organization in the United States. We're representing more than 65,000 small businesses throughout the country in virtually all industries and in widely varying sizes.

The topic that we're here to talk about today, it is an unfortunate fact of life that not everyone is law-abiding. It is also a fact of life that not everyone should be employed in certain types of jobs. We do not want some people entering other folks' homes. We do not want child molesters working in daycare centers, and we do not want embezzlers handling large sums of cash.

Employers want to provide a safe place for their employees to work and do their best to prevent workplace crime. They want to do their best to ensure that the employees that they send to customers' homes as technicians, repair people or sales folks do not inflict harm on their customers.

They need to take steps to prevent theft, fraud and embezzlement. Criminal background screening is an important tool, sometimes is very nearly the only tool that employers have to protect their customers, their employees and themselves from criminal behavior.

Given that fact, small businesses are willing to comply with reasonable rules designed to ensure that criminal background screening is not having a disproportionate impact on minorities. But they also want to know that those rules do not endanger their employees or customers, do not substantially increase their risk of being victims of property crimes, or do not increase their risk of being held liable for the tort of negligent hiring.

Government, however, has an obligation to articulate rules that are comprehensible and can actually be implemented. It is fundamentally unfair, and in practice, counterproductive for the rules to be so opaque that nobody

can understand them. It leads to a situation where the rules that cannot be understood are effectively ignored.

As I will discuss in detail later, the EEOC guidance is not guidance at all. It provides no meaningful rules about how to proceed. It is really just a threat that the EEOC may proceed against employers if in hindsight it decides it wants to.

Small businesses are often caught between competing government priorities and perspectives among different federal agencies, the courts, and state and federal governments. The recent EEOC guidance, for example, explicitly stated that the fact that a small business was complying with a state legal requirement to conduct a criminal background check or to bar a felon from a particular position would not prevent an EEOC enforcement action.

With respect, it is ridiculous that small business is forced to choose between two conflicting government requirements. If the EEOC has a problem with a state statute it should challenge the statute, not launch an enforcement action against a small business who is complying with state law.

Unlike the federal government, small businesses have limited resources and defending such a lawsuit will damage the financial health of the business. Similarly, state and federal courts will allow potentially devastating tort lawsuits against small businesses that hire felons who commit crimes at the workplace or in the customers' homes. Yet the EEOC has threatened to launch lawsuits if they do not hire those same felons.

Small businesses really want to know what the rules are so they can comply with those rules and get on with running their businesses. They want the state and federal governments including the courts, the legislative and executive branches to set forth consistent and comprehensible rules. This does not seem like it is asking for too much. The rules applying to small businesses should not be that they are at substantial legal risk no matter what they do.

Workplace violence, protecting customers and preventing property crime is continuing as a serious problem. Moreover, in the absence of criminal background screening, our members are subject to substantial risk of being successfully sued for the tort of negligent hiring.

Workplace theft and embezzlement are, as I mentioned before, very large problems. Both can be reduced through a proper background screening. According to the Bureau of Justice Statistics, approximately 500 to 7,200 non-fatal violent crimes occurred to individuals aged 15 or older or while they were at work in 2009.

Workplace violence accounted for 15 percent of non-fatal, violent crimes against persons age 16 or older. In short, workplace violence remains a very serious problem even though it has declined over the last 15 years.

A Westlaw search of the law reviews regarding negligent hiring indicate that the trial bar is quite busy filing negligent hiring lawsuits. Businesses have to take that risk into account when making hiring decisions.

The vast majority of small businesses want to comply with the law and with EEOC guidance, but in the current situation they are unable to do so. I can assure you that virtually no small business owner is going to be able read, absorb and apply the 55-page, 167 footnote enforcement guidance on the consideration of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act 1964 issued by the EEOC on April 25th, 2012.

More importantly, we have had many discussions with sophisticated attorneys who grapple with these issues for a living, including those that work for large law firms advising large corporations. They do not know how to advise their clients either. If they are at a loss, then small firms and their generalist attorneys will fare no better.

In the real world, small firms and their advisors are not going to be able to understand what the EEOC regards as permissible with respect to the use of criminal background checks.

The rules that small business owners have to grapple with now are so opaque and complex that they will in practice have to be ignored. The clear and quite understandable concerns about tort liability and worker, customer and family safety will take precedence over amorphous and ill-defined EEOC guidance. In short, EEOC guidance will not achieve its objective.

In conclusion, we urge the Commission to not prioritize enforcement against firms with educational attainment requirements or criminal background checks unless there is a substantial, factual basis to believe that they have an unlawful purpose.

We also strongly urge the Commission to clarify its guidance with respect to criminal background checks so that the Commission's expectations are made clear and so businesses can effectively meet those expectations.

**JONATHAN SEGAL, PARTNER, DUANE MORRIS LLP, LEGISLATIVE DIRECTOR,  
SOCIETY FOR HUMAN RESOURCE MANAGEMENT:**

SHRM is the world's largest association devoted to human resource management, HR, with more than 260,000 members in over 140 countries.

SHRM has participated in ongoing discussions at both the national and the state levels regarding appropriate use of background information in the employment process.

These discussions are heightened by the competitive employment environment created by today's economy. SHRM and its members are supportive of and are involved with various public policy initiatives focusing on finding jobs for the unemployed. SHRM, for example, is currently working with the U.S. Departments of Labor and Defense to help increase employment opportunities among returning military veterans as well as disabled individuals.

At organizations, whether large or small, HR professionals are charged with ensuring that each individual hired possesses the talents, skills and work ethic needed for the organization's success. The consequences of making a poor hiring choice can be great, possibly leading to financial losses, an unsafe work environment, and, if the employee engages in severe misconduct, legal liability to customers, shareholders or others in the form of negligent hiring lawsuits or other legal claims.

As a result, HR professionals strive to make the most informed choices possible under the law when selecting candidates for their organizations. In today's market it is not uncommon for employers to receive hundreds of applications in response to just one advertisement for a vacant position.

To cull through these job candidates, employers must use many factors to narrow the applicant pool. Factors may include work experience, education, certifications and so on. Once a group of candidates or a finalist has been selected, most often after an initial round of interviews, the HR department typically conducts a background check on the candidates or candidate.

It is important to remember that certain federal and state laws, as we've heard before, statutorily require employers to conduct specific background checks for certain positions. Many state laws require the use of criminal background checks for certain industries to maintain their licenses.

Health care and child care are but two examples. Some convictions under such state laws are automatic disqualifiers for employment.

Independent of any state law, failure to conduct a criminal background check can result in unreasonable risk. You've heard many examples this morning. I'd like to provide but one more example of the difficult decision faced by employers.

In response to the Gulf oil spill just a few years ago, BP worked with state unemployment offices in three states to fill thousands of positions to clean up

affected beaches. In this case, no criminal background checks were performed. A BP contractor ended up hiring a supervisor who had a criminal history and who, during his employment on the cleanup, allegedly raped one of the workers whom he supervised.

As you can imagine, the media stories about the cleanup efforts quickly changed from kudos for job opportunities provided to thousands of unemployed individuals to stories about the obviously tragic alleged rape and to condemning the company for failing to provide for the safety of others and the public by not performing criminal background checks.

When the EEOC published updated guidance on the use of criminal history information in April of this year, SHRM members were pleased to see that the guidance did not impose any new bright-line rules explicitly designed to prohibit employer access to and use of certain information. Instead, the Commission in this guidance continues to embrace the use of long-standing three factor test identified in the Green case when evaluating criminal history, and we discussed those factors earlier today.

These factors are familiar to HR professionals. Indeed, SHRM has not received significant negative feedback from its members about the guidance as a whole. Two specific aspects of the guidance, however, have been mentioned as areas of concern by SHRM and its members.

First, our members have expressed concern about the statement in the guidance that compliance with state and local laws will not shield them as employers from liability under Title VII. We appreciate preemption. However, this places employers between the proverbial rock and a hard place, between losing their state license or opening themselves up to liability if they don't comply with the state law mandating criminal background checks, and risking a class action if they go forward with the criminal background checks and base hiring decisions on the results.

We believe the state law requirements can fit within the EEOC's concept of targeted exclusion based on the Green factors and specifically allowed for by the guidance. We are hopeful that the EEOC will clarify the validity of state law requirements as lawful targeted exclusions or at least consider these concerns in exercising their prosecutorial discretion. We appreciate Commissioner Lipnic's<sup>96</sup> recent written statement on this issue, which I understand has been submitted for the record.

Second, SHRM is concerned about the guidance interpretation of disparate impact. The guidance states, and I quote, "National data supports a finding

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<sup>96</sup> EEOC Commissioner Lipnic's submitted public comment is available from the U.S. Commission on Civil Rights.

that criminal record exclusions have a disparate impact on race and national origin. The national data provides the Commission a basis to investigate Title VII disparate impact charges challenging criminal record exclusions," end quote.

It is not clear how imputing disparate impact based on national data can be reconciled with the recommended individualized assessment. Further, as written, it appears that employers may be vulnerable to EEOC investigation any time they take an adverse employment action against an individual of certain races or national origins based on criminal records checks, regardless of whether the employer has conducted a valid individualized assessment, seemingly making convictions a new protected status. SHRM believes this section should be clarified to help employers comply.

In conclusion, we believe the EEOC's guidance serves a very important societal interest, but that clarification in the areas mentioned would greatly benefit employers, employees and third parties who do business with employers. If the legal risks of conducting background checks are too great, then some employers may be reluctant to use them.

We believe hiring decisions are enhanced when employers are able to combine the information obtained by the candidate's resume and interview with additional verifiable information available through background checks.

**RICHARD MELLOR, VP, LOSS PREVENTION, NATIONAL RETAIL FEDERATION:**

As the world's largest retail trade association and the voice of retail worldwide, NRF membership includes retailers of all sizes, formats and distribution channels as well as chain restaurants in the United States. We represent more than 3.6 million business establishments, 42 million workers, 1 in 4 U.S. jobs, and \$2.5 Trillion annually to the GDP.

My responsibilities at the NRF include communication of pertinent information for retail loss prevention, surveying members on important issues and to include background checks as one of them, facilitating educational conferences -- recently we've held two conferences to discuss these topics on the background checks and inform our members -- engaging law enforcement to help prevent retail crime, advocating for appropriate legislation to protect retailers better.

Prior to my position at the NRF I served as a senior loss prevention executive for more than 25 years in retailing, most recently at a national jewelry chain. As part of my responsibilities I directed the company's employment screening process to include applicant processing, testing and background investigations.

Conducting this business in a professional and law-abiding manner is paramount in protecting the company brand and reputation. Over the past decade the use of background checks has increased steadily as retailers shoulder the enormous responsibility of securing the private data of customers, their safety and that of the employees, and protecting the company assets.

More important than ever before is the prevention of litigation and legal expense. Unnecessary expenses that stem from carelessness in employment related matters can have a huge impact on the company's financial stability. Employers are extremely careful to manage their employment process preventing even the slightest appearances of discrimination.

Social consciousness is a part of every retailer's business strategy. Employment practices and policies play an important role in creating a brand identity that encourages customers to want to shop and work for the company. Retailers, therefore, place a high priority on openly demonstrating fairness, credibility and serving the communities in which they do business.

As a result, hiring within the community is an important facet in perpetuating a healthy business environment. There is a fine line that retailers must walk between social responsibility and the obligation to protect customers, especially children, and to ensure the safety of employees.

A retailer who makes a decision to hire a former criminal who compromises customer private information has no protection under the EEOC guidelines to fall back upon. They will suffer the consequences, not the criminal that they hired.

The retailer who hires a delivery driver or a home repairman who has a criminal record for violence and theft and that person harms a customer or even an employee will again suffer the consequences and the liability for the crime. If a child is abused or hurt by a known sex offender in the company, the damage to the child and the retailer can be so severe that it can put the company out of business.

Statistics show that these types of criminal behaviors are often repeated and it's a high risk to employ such individuals. We are obligated to know these things about our employees. When these crimes do occur, the investigators, the prosecutors and judges always ask these questions. How did the person get access to that information, the restricted area, the merchandise or even access to the child?

Sometimes this happens when the original job changes or a specific task is assigned without knowing the criminal history of the individual. A matter of discussing criminal history cannot be left to a chance opportunity hopefully

addressed at a later date after an offer of employment and by someone not specialized in handling these conversations.

For those seeking to turn over a new leaf these conversations are better addressed by an HR professional before the offer of employment is conducted and when honesty and sincerity can be assessed appropriately. Oftentimes in retailing, that is a concerted effort to involve other parties in that decision making. That would not be the case if it's offered at the end of the employment process.

With a workforce of more than 42 million employees, retailers handle millions of applications each year and have worked diligently to provide opportunities and second chances for individuals committed to rehabilitation. Survey results show that approximately 95 percent of retailers conduct criminal background checks.

The question is, why do retailers spend an extraordinary amount of money, sometimes hundreds of thousands of dollars per year, in a tough economy, when it would be easy to say, save the expense? The answer, they've all learned by costly mistakes made in their own company and those in other companies as well. They seek to protect themselves against negligent hiring and the checks do provide a good opportunity for minority applicants.

We have heard stories of mistakes in identity but we can fix those things if we stay committed to improving the background check process. What we can't fix is the harm that is done by criminals and therefore we must, above all, protect those who put their trust in us. Background checks are an essential part of taking our responsibilities seriously. Retailers cannot fulfill their responsibility to us without doing the very best they can to vet potential employees who have access to our data, our homes and our children.

NRF believes the criminal background check question needs to remain on the employment application. This vital information is every bit as relevant as an applicant's education, previous employment, experience and formal training. That said, retailers have embraced individual assessment, I can say that.

In closing, I want to sincerely thank the commissioners for allowing us all, employers, employees, consumers and family members to express our views on this very important matter.

**WILLIAM DOMBI, VP, LAW, NATIONAL ASSOCIATION FOR HOME CARE AND HOSPICE:**

NAHC, as we call it, is a trade association representing tens of thousands of home care providers and hospices across the country. The issues involved in screening prospective employees' criminal record backgrounds have been

longstanding in health care presenting a myriad of challenges in complying with state and federal laws regulating the home health care community as a health service provider in addition to addressing their needs regarding best practices in employment and service to their customers along with fully respecting the civil rights of applicants for employment as well as the existing employees who may be on staff.

At the outset, let me state with total seriousness that my constituency and the Association fully supports efforts to ensure the civil rights guaranteed to employees and applicants for employment, but likewise, we support all the appropriate efforts to protect the highly vulnerable patient population served in home care along with the integrity of the numerous federal and state programs that finance this essential care.

In that regard, NAHC has a longstanding support for the use of criminal background checks as an employment screen for individuals who have direct patient care contact, access to health information on patients, responsibilities that relate to health care financing including payments to federal and state health care programs. Comprehensive criminal background checks are an essential tool for the home care provider in meeting their responsibilities to protect patients, payors, as well as their own organization.

It is fairly well known today what home care is. Some years ago people just couldn't distinguish us between Home Depot and health care in the home, but my assumption is that pretty much everyone in this room has been touched by home care in the last two decades, whether it's personal care services for their loved ones who are in their last years of life, hospice services for true end-of-life care, or as in my own personal experience, my father, my mother, my sister and my son, and most recently my mother-in-law as home care patients.

It is also very clear that that is an extremely vulnerable population of individuals. Home care is just what it says, care to individuals in their home. The vulnerable nature of that population is such that very often many of these individuals are just individuals in the home who open the door or have somebody give them a key to let them in the door, because these people are confined to a hospital bed or otherwise, to provide intimate and very important health care services.

It is a combination of high tech and high touch. Some of the most remarkable technology advances in health care have found their way into home care, but they haven't replaced the high touch aspect of personal care services to people who need assistance with activities of daily living. At the same time it's a very vulnerable payor population as well.

When we look at the issues of Medicare and Medicaid, today in particular, fraud, waste and abuse is way more than anyone would find acceptable. Even

if you start with just one dollar as being acceptable we are dealing with billions and billions of dollars. So individuals who are entrusted not only with the care of elderly, disabled, pediatric, as well as populations of all ages need special selection when sent into individuals' homes.

Beyond that, home care is a small business. Yes, we do have some companies that are billion-dollar operations, but we have many, many, many more who are small operations, meeting the SBA's definition of a small business but meeting everyone's common sense definition of that as well. And with due respect to the testimonies that I've heard prior to this, counsel that I see sitting at this table, counsel who preceded the people at this table, the social scientists as well, are not readily accessible to these small businesses to help in making these individualized determinations.

Asking the question, is this long enough after the conviction for the individual to then be employed to send to the home for your mother, is a very serious kind of matter but the resources are not there for these small businesses to do this. So instead, what happens is the businesses in home care look first to state and federal regulation.

We've talked a lot about preemption of state regulations today. In home care there is federal law requiring criminal background checks. All hospices must have a criminal background check of all employees who have contact with patients or sensitive health information as well as anyone they have as a subcontractor.

The Medicare conditions of participation require every home health agency to comply with all state and local laws, which then takes a state law requirement on criminal background checks and makes it a federal law requirement. In addition, over the last few years, the Congress has shown great attention to the issue of protecting the elderly in their homes who are receiving home care services, most recently through the Affordable Care Act extending the Elder Justice Act to require an expansion of a program that focuses in on criminal background checks.

Now I am in a slightly different world than I normally live, frankly, being here today. I'm a health care practitioner. My civil rights work ended with a school desegregation lawsuit back in the early '80s when the Supreme Court in *Milliken v. Bradley* stopped the opportunities to desegregate schools on an interdistrict basis. Disparate impact was never a viable standard in school segregation cases as well, but I'm back, you know, here talking a bit on civil rights.

And I had the opportunity to review the guidance which, I think, is an extraordinarily well written document for lawyers. I would publish it in any law review in any part of this country. But for my constituency, no chance of

understanding it, frankly. I think they would misunderstand it before they do understand it.

It was described as common sense guidance, but I don't see how it takes 50 pages to describe something in common sense when, instead, my constituency reads such things as this month's Consumer Report, which I didn't read until this morning. Happened to take a few minutes before I came out here, and it's an article, it's all about protecting Mom and Dad's money, just the money part of it. And it talks about how health care, home care in particular, is a high-risk area.

And so Consumer Reports, which is relied upon for common sense by people all across the country, writes as follows. "Make sure any caregiver you're considering undergoes a background check. Don't assume that the placement agency will do a thorough one. Insist on a national rather than a state criminal check. To monitor home help, consider installing a surveillance camera if the state law permits it." That's a common sense instruction.

And in line with that I'm concerned, as another member, of the chilling effect. I submitted testimony, which I offer as a series of recommendations, which suggest a collaborative effort between the health care regulators and the EEOC. I think there is a ground that can be found common among all them. So thank you for the opportunity today.

## **QUESTIONS BY COMMISSIONERS**

**CHAIRMAN CASTRO:**

Mr. McCracken, you were talking about -- I think everyone mentioned it, but I think you were the first to go into depth about the alleged conflict between the guidance and adherence to state requirements that there be background checks. Now again, as I asked earlier, I don't think anyone here is saying, the EEOC is not saying that you can't do background checks. It's saying, this is how you do them and not violate Title VII.

So I don't know if you were here earlier for Ms. Miaskoff's presentation, and I believe when she presented orally she stated this, but in her written presentation to us she said that Title VII prohibits disparate impact discrimination. And it also includes language that preempts state or local laws when those laws, quote, "purport to require or permit the doing of any act which would be an unlawful employment practice under the statute. Therefore, if an employer's exclusionary policy or practice has a disparate impact and is not job related and consistent with business necessity, the fact that it was adopted to comply with state or local law does not shield the employer from Title VII liability."

Presumably these state laws that require background checks in certain instances are doing it because they feel in those instances there is a business necessity, is that not right? And that it is consistent with the job so it's job related, right? So that would seem to me that in those instances the issue of Title VII liability would not be there because they're allowing you to do the background check. They're not saying you can't at the federal level. As long as it's consistent with business necessity and job related it's not violating Title VII.

So I don't understand where that conflict resides, because presumably if you do the background check you're going to do it for those reasons. You're not going to do a background check that's not going to be job related, right, and that has nothing to do with business necessity, right?

MR. MCCRACKEN:

I'm not an attorney so I'm not going to give you a legal opinion about that. But I do know a lot about small businesses, and I will tell you that you can walk them through something like that and get them to a correct conclusion. But when they're making a decision in the field they have to feel confident [making a decision on their own], for instance, if they feel that there's a conflict between both laws.

The EEOC rules, as I understand them, require a level of judgment. You have to make some decisions about whether or not the background checks are directly related to the job, and a whole series of judgment calls that you have to feel confident about as a business owner, and to understand the law.

And that's our most significant issue is confusion. Small businesses need clarity and simplicity in terms of how they need to comply with these requirements, and then make sure they understand where the conflicts are or are not between state laws.

CHAIRMAN CASTRO:

Mr. Segal, you mention in your presentation an example of a [British Petroleum cleanup] contractor for whom a background check was not done and then they committed a rape. Are you suggesting that that background check was not done as a result of some confusion about the EEOC's guidance?

MR. SEGAL:

No, I'm not suggesting that [happened in that case], sir. I am suggesting that, because of some confusion with regard to the guidance, it's possible that a contractor would not perform a background check that they otherwise would

and that clarification with regard to the issues that we have raised would be helpful.

CHAIRMAN CASTRO:

Hypothetical on your part. You're conjecturing that that might happen in another case.

MR. SEGAL:

No. I would suggest, respectfully, it's not hypothetical but that there is the potential for employers to refrain from conducting appropriate background checks if there is confusion over the guidance, and what we're hoping for is that the EEOC will provide clarification so that the respective rights of employers and applicants can be balanced.

CHAIRMAN CASTRO:

That was not the case in the BP example.

MR. SEGAL:

I'm not familiar with all of the background of the BP hiring process.

COMMISSIONER KIRSANOW:

Were any of you witnesses at the EEOC hearing?

(No response.)

COMMISSIONER KIRSANOW:

Nobody? Were any of you invited to testify at the EEOC hearing? Were any of you asked to submit written comments at the EEOC hearing? No?

MR. SEGAL:

Yes.

COMMISSIONER KIRSANOW:

Okay, SHRM was invited to submit comments but none of the rest of you were. Written comments, okay, and you supplied written comments. I've got a number of questions but I'll defer to others. Really, I've got a number and I hope I have the chance to follow up.

Mr. Segal, you talked a little bit about the tension between disparate impact and individualized assessment.

MR. SEGAL:

Yes, sir.

COMMISSIONER KIRSANOW:

I'd like you to kind of elaborate upon that because the way I look at it, if you look at the case -- I don't know if you're familiar with Ricci versus DiStefano where you had an employer that engaged in disparate treatment in order to avoid potential liability on disparate impact because its numbers weren't right -- can you tell me a little bit about the potential for that kind of problem where this might, if not encourage disparate treatment, shade toward that in order to avoid a disparate impact liability lawsuit?

MR. SEGAL:

Perhaps it would be helpful to start with the guidance. The language from the guidance provides that national data such as that cited above supports a finding that a criminal record exclusion has a disparate impact based on race and national origin. The national data provides a basis for the Commission to further investigate such Title VII disparate impact charges. During the investigation the employer would have the opportunity to show that its employment policy or practice does not cause disparate impact on the protected group.

So as I understand the language, there would be the possibility for one adverse action to result in an investigation based on a disparate impact analysis. We have concerns about this language as previously noted. We believe the reasonableness of the guidance ultimately will turn on the reasonableness of the prosecutorial discretion in enforcing it.

COMMISSIONER KIRSANOW:

Mr. Fishman, you said something that really interested me. You said that when you issue reports to your clients of criminal background check, protected-class information [race, sex, age, etc.] is not contained therein, and suggests to me that what's happening is clients are sometimes blind to the actual applicants' [race, sex, disability, etc.].

They simply do an initial screen to determine whether or not someone has a criminal background, correct? If that's the case, if clients don't know the protected class information how could there be a disparate impact issue?

MR. FISHMAN:

I can't answer that question. It would seem that there wouldn't be.

COMMISSIONER KLADNEY:

As Commissioner Kirsanow [said], my cup runneth over with questions, and I don't know if I'll have enough time to ask, but I appreciate this panel and its input. And I would like everyone to know I support criminal background checks. I think they're good and I think they're worthy, worthwhile.

I wonder though, Mr. McCracken, you said that your group, and I assume it's a big association, didn't quite grasp the analysis of the guidance, is that correct, of how you go through the analysis of a criminal background check?

MR. MCCRACKEN:

I was saying it's not clear for small businesses.

COMMISSIONER KLADNEY:

And as an association do you find it to be incumbent upon you to communicate that information?

MR. MCCRACKEN:

Well, sure. We try to communicate all kinds of information to our members. But the reality is, all kinds of businesses in different states are all in different situations, and so ultimately it's up to a business owner to make a whole series of judgment calls on these issues and there's only so much that a group sitting in Washington can help them with.

COMMISSIONER KLADNEY:

Have you done any of that work?

MR. MCCRACKEN:

That's why we consistently advocate that federal agencies at all levels be clear and consistent and as simple as possible on communicating what businesses have to do. Because you have to remember, this isn't the only thing that they're having to worry about and it's typically the business owner, him or herself, that is having to think through these issues and make these decisions.

COMMISSIONER KLADNEY:

My question really is based upon Mr. Segal's analysis saying that the Green factors are not that difficult to apply. Is that correct, Mr. Segal? That's what you said, I think, in your statement.

MR. SEGAL:

Based on the testimony we have heard today, we can see that there are competing considerations that employers must consider in making these difficult decisions. We believe employers can apply the Green factors but there will be times that, based on them, targeted exclusions will be appropriate. But the Green three-factor analysis in and of itself is not new.

COMMISSIONER KLADNEY:

It's been for 20, 30 years.

MR. SEGAL:

Overall the guidance is largely a restatement of existing law and SHRM has not received substantial concerns raised by its members. In our experience, the result has been that most members are taking a closer look at the Green factors in making individualized assessments and in determining where targeted exclusions may be appropriate.

COMMISSIONER KLADNEY:

Thank you. And then the background checkers, I'm wondering, you know, obviously you're professional background checkers and you do a very professional job. My concern is, what are your thoughts regarding regulating internet scrubbers [criminal background checkers] where businesses get online and do their criminal background checks with these organizations, well, dot-coms on the internet? What's been your experience with that?

MR. FISHMAN:

I don't have a lot of experience with that. They operate under an entirely separate set of circumstances than we do as employment background screeners, and it's an entirely different animal altogether.

COMMISSIONER KLADNEY:

Is it reliable?

MR. FISHMAN:

I don't know the answer to that question because I'm not familiar with all of them. I would say it's less reliable than that which we engage in as employment background screeners.

COMMISSIONER KLADNEY:

Ms. Miller?

MS. MILLER:

When you say internet scrubbers I think the devil's in the details, probably, as to what exactly you mean, because I'm not quite familiar with that.

COMMISSIONER KLADNEY:

Well, I prefer not to use any company names. But if I put "Montserrat Miller" in [a search engine], up pops as the very first thing, come here and find out about Montserrat Miller's background.

MS. MILLER:

You would fall outside of the Fair Credit Reporting Act [if you did that]. So, if you were to find information out about me [that way], you would not be protected because I wouldn't have all the rights that [are due me] under the Fair Credit Reporting Act.

COMMISSIONER KLADNEY:

So do you believe that small business should be made aware of that and business should understand not to use these internet scrubbers in terms of providing criminal background checks? Would that be your recommendation?

MS. MILLER:

That's a good recommendation. As an association we do quite a bit of outreach and education. We've done outreach and education on the EEOC guidance and we do it on other issues as well such as doing the perils of doing your own Google searches, because of the fact that the individuals upon who you are doing them may not know. And not only do you fall outside of the Fair Credit Reporting Act, but there are EEO [Equal Employment Opportunity] considerations as well when you look at that type of information. So we do certainly try to educate as to the perils of doing searches outside of a professional background screening company.

COMMISSIONER KLADNEY:

One more question to Mr. Fishman. When you said an EEOC lawyer gave some guidance for people not to do criminal background checks, do you know what context that was given in?

MR. FISHMAN:

It was reported in the Chicago Tribune, and then has been reported in several other areas. I don't know the context. I just know that the direction was that employers better think twice before conducting a background check.

COMMISSIONER KLADNEY:

Was it a direction or was it, if you don't know the context how do you know it was a direction?

MR. FISHMAN:

I guess I can't answer that question [right now].<sup>97</sup>

COMMISSIONER GAZIANO:

Thank you all for your wonderful testimony. And before she walks away, I also want to publicly thank Lenore Ostrowsky for her work on this panel and putting together such outstanding panels that, I think, represented the various views much more than seems to have been before the EEOC. And I think the record also reflects that the Commission reached out to commissioners of the EEOC. Some of them have submitted written testimony. I would have appreciated hearing from them [today] as well.

I think the last panel was unanimous that the purpose of the EEOC rule was to act on its hunch, since they didn't have the relevant data, and to increase the costs on businesses that wanted to use criminal background checks.

And there're many costs. One of them as it's been remarked on is the individualized attention cost of screening, but what I'm really worried about is the cost of acting on the results of screening. Of course everyone said, well, they can still do it, they can still do it.

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<sup>97</sup> Mr. Fishman supplied the referenced news article reporting the statement: "If companies ask job applicants about their criminal histories they could face discrimination lawsuits." John Hendrickson, the regional attorney for the EEOC's Chicago district said, "I would suggest to (businesses) that they think long and hard about why they think they need to do a criminal background check," insinuating that if they felt it was not required, they'd be safer not doing it." <http://www.humanresourcesjournal.com/2012/10/eec-asks-employers-not-to-hold-the-criminal-past-of-job-applicants-against-them-give-them-a-second-shot-at-life-it-says/>

But the problem with the guidance is an increase in litigation risks, an increase in legal risks, to try to -- through the guidance -- create a standard that a court might apply, so that if someone actually acted on the criminal background check there's increased liability.

And one of the factors I want to concentrate on with this panel is the EEOC's reversal of the precautionary principle [requiring avoidance of any possible harm to the public] that we normally have in government regulation, the various types of precautionary principles. Let's take an EPA regulation. Congress generally writes it. The agency then [interprets it by insisting on risk avoidance to an extreme degree].

But there are some conditions where if there's a risk of cancer no matter how infinitesimal, by so-called "Delaney Clauses," EPA requires the companies to eliminate any risk. In the Clean Air Act there are some other extreme precautionary principles where the government says if there's even a very small risk that public health will be affected that the company must expend enormous amounts of money [to abate it].

But it seems to me that this EEOC guidance has the strangely opposite effect. It tells companies who may have a precautionary principle [risk avoidance principle] of their own -- and I'm particularly directing this to you, Mr. Mellor, because it seemed to dovetail with some of your testimony-- that you better abandon your precautionary actions.

And one little factor in the guidance seems to suggest that the offense that you consider disqualifying has to be really kind of close [relevant to the job's duties]. One of the reasons that worries me is because I think most of us know a lot of [criminal] convictions are also pled down [i.e., the initial offense was reduced to a lesser offense to obtain a guilty plea].

In the remarks of one of the witnesses in the prior panel, we learned that they're facing a multi-million dollar lawsuit because they hired someone as a security guard with a [prior] misdemeanor [offense] who after being hired as the security guard for a gated community was caught taking pictures of an underage woman undressing. Well, it turns out that his prior misdemeanor was pled down from a "peeping tom" charge.

So Mr. Mellor, could you comment on how the guidelines skew the normal risk [avoidance] precautionary principle decision-making of a firm and whether you think that's a good idea or a bad idea?

MR. MELLOR:

Commissioner, I'm not sure I understand the question.

COMMISSIONER GAZIANO:

If a company would have, before the guidelines, applied a framework of relatedness to the type of crime, how would the guidelines tend to affect a company's decision when they have to factor in the possible liability for disparate impact litigation?

MR. MELLOR:

I'm assuming that you're speaking about prior to the guidelines where companies -- and there's been lots of conversation about this -- have put out a blanket sort of matrix that we do not employ people with this type of criminal history and apply that across the landscape, perhaps, of the whole company.

And I can comfortably say this after doing it for good number of years myself and involved with other people in retailing that actually conduct the background checks, comfortably say that even before the guidelines came out, and I happen to feel that the logic involved with the guidelines is well founded and that maybe it's a little bit behind the curve from the standpoint that retailers in particular have evolved out of those blanket policies and how they apply them across the landscape and do spend considerable time now analyzing what the Green factors are before even being asked or guided to do that.

In my comments with regard to how that gets done and when it gets done, I focused on the fact that this is better done by corporate type people who have their head on straight, can analyze this information properly and interact, often with me on the telephone with the applicant, because some of these interviews take place far away from them.

But there are other people that become involved in that decision making and collaborating on whether this is a sensible risk and could we take it and would this job be a disqualifier for this particular individual. I don't know that I've answered your question.

COMMISSIONER GAZIANO:

Let me rephrase it and open it up to anyone. Does anyone want to comment on whether they think these guidelines tend to require companies, as an economic matter, to increase their risk in hiring to decrease their risk of a disparate impact lawsuit?

MR. SEGAL:

In my experience, as an attorney who advises clients and in SHRM's experience, this has not resulted generally in employers discontinuing use of

the background checks. What we have seen as employers looking to the guidance as just that and in reviewing more carefully the Green factors.

But, ultimately, I believe that the reasonableness of the guidance will turn on the reasonableness of the prosecutorial discretion in terms of enforcement, and that may have an impact on whether employers continue to use background checks. I'd rather see employers use professional background checks than simply search the internet and come up with what may be invalid information.

COMMISSIONER ACHTENBERG:

Before asking Mr. Dombi a follow-up question to his testimony I just want to say that we don't have any information in our record or otherwise that would suggest that the EEOC in its various capacities, including whatever fact-finding it undertook before promulgating the various guidelines that it was certainly entitled to promulgate, failed to, merely because it didn't invite everyone on this terrific panel -- and by the way thank you all very much for all the observations that you have proffered before our little committee here -- merely because it didn't ask everyone on this panel to participate specifically in its fact-finding does not support the assertion that somehow its fact-finding was skewed. And I just wanted to make that observation for the record.

Mr. Dombi, having recently lost many family members in my own family and had to supervise home health care that needed to be provided during their last illness, I'm very knowledgeable about and sympathetic to the plight of the lawyer who advises home health care providers and hospice providers, and I understand what a difficult situation that might put you in.

Could you talk a little bit about how a collaboration between a group like your industry group and the EEOC might be furthered so that home health care providers might do just the right kind of background screenings so as to enhance safety while not inadvertently or otherwise doing harm to ex-offenders who have a right to have their criminal backgrounds assessed properly by a prospective employer?

MR. DOMBI:

The state regulation as brought into federal play varies from state to state. Some states have automatic exclusion, and I think we would support a safe harbor where a state's made that kind of a judgment there, and I think it would be an easy call for everybody on that. But beyond that a number of states take certain criminal offenses and then allow them to be taken into consideration.

I learned more here today about what [one] you should be considering than I knew coming in, by far, and I think the collaboration that I would suspect would be very helpful would be, you know, the parties to get together to try to

outline in more detail, with better clarity, how you take into consideration whether an offense has a connection to the risk that you have in an individual going into a home setting, the issue of the time frame, you know, and obviously you should let the individuals, perhaps, receiving the services make the ultimate judgment, but it appears there is some science that says that after a certain period of time someone with a record is no longer a greater risk than someone without a record. And so that, you know, would be certainly one way to go about it.

But beyond the collaboration in terms of what is told to individual companies is the health care system itself [that] has a huge communications network. Medicare, for example, routinely puts out something they call the MedLearn articles, which are guidance instructions and they have contractors there who engage in training and the like.

And so the EEOC combined with HHS [U.S. Department of Health and Human Services] in doing some training around this, I think, would go a long way to alleviate what I know would happen, that chilling effect. If my constituency read this they would be wondering, what's changed and what have I done wrong and I better do something different, so teach me what I'm supposed to do, because that's all they're really looking to accomplish is to meet the standard.

One of the things they'd have to work out between themselves is one that I don't have an answer to and that is that yes, criminal background checks are used in home care. They are mandated, by and large. Decisions are made when it's discretionary to select from one offense or another, but the majority of the workforce, ultimately, that's in home care are actually in protected race categories. They are African American. They are Hispanic.

This is job not a lot of people want, and home care companies are searching high and low to get people to do the job. You know, for \$10 an hour to clean up after an incontinent dementia patient you're either a saint or you're desperate. Fortunately we have a lot of saints providing home care.

So trying to figure out how is that disparate treatment in that situation would be, yes, deny a criminal record background candidate employment and accept another one who happens to be actually of the same race or may actually be of a protected class of the one that you've denied. My constituency doesn't understand disparate impact, doesn't understand that tough decision, and maybe together the EEOC and the Department of Health and Human Services can help guide them because they do want to comply.

CHAIRMAN CASTRO:

I'll direct this to Mr. Mellor, but anyone else, feel free to chime in as well. In

the materials that we've received and in some of the testimony we've heard earlier, although we haven't spent a lot of time on this, there have been issues raised about the inaccuracies of some criminal records and arrest records or the lack of clarity of some of those and, you know, wrong people being considered as the criminal compared to the actual person who's applying for the job.

And I believe, Mr. Mellor, in your remarks you said well, you know, we can fix those inaccuracies. It seems to me that the reason for the individualized assessment is to kind of address that to fix these inaccuracies, which exist probably in various layers of government data and criminal records, has got to be an overwhelming task, maybe even more overwhelming than an individualized assessment.

How would you propose that we fix these inaccuracies? I believe if they could have been fixed easily that would have happened. Do you have some ideas and recommendations on how to do that?

MR. MELLOR:

Well, I certainly agree with you, Mr. Chairman. It's not an easy task to do it and I wasn't trying to imply that it was an easy task. If we put our minds to it, we work together, the professional organization for background screeners is certainly tasked and working on that to collaborate with the retailers and the other organizations represented here, I think that that's a task that we can tackle, work on, collaborate with this Commission as well as the EEOC to kind of push forward and see if we can't do something about this.

My personal experience with doing the background checks over a pretty long period of time, the folks that work for me doing that were tasked to go to every degree they possibly could to validate the information to include personal visits to courthouses and so forth. But it always, always included conversations with the individual that was applying for the job and whatever information they had placed on the application. In some cases it was understated on the application; in other cases it was very clear.

But to the point of trying to be precise in the identification of who the individual was, in my experience and in my management of that process, we absolutely wouldn't go forward with a decision if we couldn't validate it 100 percent. Now I'm not suggesting that that doesn't happen out there. I think it does. I'm pretty comfortable saying that. But as I made reference to in my remarks, there isn't a company that's willing to take a risk at doing something that's going to result in litigation such as being confronted with the EEOC or other attorneys saying your information was inaccurate and this is what resulted.

So I don't suggest that this is easy to do, but I think the collective minds could put their heads to this. And it took a long time for the guidelines to be reissued and I think it'll take time for us to get where we need to be on validating this kind of information in background checks.

MS. MILLER:

Accuracy of the reports is paramount. It's what is required by the Fair Credit Reporting Act, maximum possible accuracy.

Contrary to popular belief, and as reported in the media, our member companies report to me 99 percent accuracy rates. So that means that when a consumer disputes a consumer report, and that might include criminal history information, only one percent of consumer reports are disputed, and of that one percent an even smaller percentage actually require a correction. So as far as the individualized assessment, that doesn't replace the Fair Credit Reporting Act procedures.

And under the Fair Credit Reporting Act an individual has not one but two opportunities to correct the information in the report if there is an inaccuracy or incomplete information. It's rare that the reports are inaccurate. Not one [opportunity to correct] but two.

So the first bite of the apple is, if a report is done, and mind you, under the Fair Credit Reporting Act that requires your consent. [Your consent is also required to do] the criminal history check.

There are multiple steps that then begin to kick in and those steps are requirements [that apply to] background screening companies and consumer reporting agencies, are actually defined under the Fair Credit Reporting Act, and place responsibility [for complying] on the employers. And those responsibilities of the employers would be that they provide individuals with a pre-adverse action notice if during the process any information, in whole or in part, is going to be used from that report that might adversely affect the individual and that might include criminal history information.

So the first opportunity is what's called the pre-adverse action notice. [Applicants are] provided a copy of their report, a copy of the summary of their rights under the Fair Credit Reporting Act, and they can contest the information if it is inaccurate or incomplete. And then the next step would be [an] adverse action process if they will be denied employment based on the report.

What is causing some confusion with the guidance is that the guidance has the individualized assessment. So what is very new, at least in my opinion, is that there is this concept under the EEOC's guidance that in order to avoid Title

VII liability you could do either a validation study, which the guidance itself says, but there's not enough social science in order to do a validation study, or you can do a matrix and an individualized assessment. This is a new concept provided by the guidance.

That causes confusion for employers because then they say well, wait a minute, what happens to the [requirements of the] Fair Credit Reporting Act? So I don't think that was intended, but the unintended consequence is employers now are faced with, well, do I follow the Fair Credit Reporting Act or do I follow this guidance, I'm not quite sure. And what I hope doesn't happen is that consumers aren't afforded the rights because of confusion with the guidance.

But there are two separate processes, and the Fair Credit Reporting Act, which has been around since the '70s, has provided many protections for consumers when background checks are done and it already has what you could say would be similar to an individualized assessment, although under the Fair Credit Reporting Act what you're looking at are inaccuracies or incomplete information in the consumer report which the consumer can then challenge and background screeners have a duty to reinvestigate that information and provide correct information. But again the inaccuracy rates are very low.

MR. FISHMAN:

I would just echo those same sentiments. They do have an opportunity, if there is an error in the report, to be able to dispute that information.

In addition to that as far as the misidentification, if you will, I can only speak for a company like my own where until we're able to confirm identifiers meaning name and date of birth, name and Social Security or any combination thereof, we're not going to report a record.

So that's how you eliminate that kind of thing is that you pay attention to those identifiers and ensure that they actually belong to the applicant before it's been reported.

COMMISSIONER KIRSANOW:

So far on all the panels I haven't heard anybody say that, you know, there shouldn't be background checks done, and I haven't heard anybody say that they oppose reintegration of criminals into society. The real question is -- let me repeat myself -- I haven't heard anybody say that they don't feel criminal backgrounds should be done nor that we don't support reintegration of those with criminal records into society. And the question, I think, is whether or not the EEOC guidance is a smart way or the best way or even a decent way of doing this.

I want to pick up on something that I think Commissioner Kladney had asked of Mr. Fishman. I think it was interesting. Mr. Fishman talked about the EEOC lawyer who was quoted in the paper, Chicago Tribune, as saying if you're thinking about doing a criminal background check you better think again.

We've heard about certain instances related to concerns about ambiguity of the guidance. I think it was Mr. Dombi who said it's a 55-page guidance that was beautifully written for lawyers. I would like to ask Mr. McCracken, Mr. Mellor and Mr. Dombi, with respect to small businesses, when a small businessman -- I appreciate he doesn't know the context in which an EEOC lawyer may say something -- when a small businessman hears or reads that an EEOC lawyer, as the character in Lincoln says, "clothed in immense power," says you better think twice about using a criminal background check, how does that person construe that statement and what actions does he take as a result?

COMMISSIONER KLADNEY:

This is the quote out of context, and we don't know what context it was given in. "I would suggest to," open parens, "businesses," close parens, "that they think long and hard about why they think they need to do a criminal background check." If you look at the guidance I guess that would tell you why.

COMMISSIONER KIRSANOW:

Yes, long and hard. If an EEOC lawyer says they better think long and hard, long and hard before they think about doing a criminal background check, Mom and Pops there, doesn't have an HR department, doesn't have access to big-time lawyer, how does he construe it normally?

MR. MCCRACKEN:

You have to realize these are very small-business people, which no one would be surprised to hear, do operate largely on conventional wisdom, on what they hear, what people tell them, because as you say they don't have the time and the resources. I do think it has the potential at least to have a chilling effect on some companies that should and might be able to conduct criminal background checks legitimately that will choose not to.

And that will have, you know, potential consequences for whether [the business is] staffed down the road. And that will be hard to quantify because it's hard to know what didn't happen.

But I do think that's a real [problem] because very much in the small business sector, there is sort of an accepted wisdom that comes from somewhere, like newspaper articles like this, that really does shape how people behave.

MR. DOMBI:

I think my constituency is unique compared to some of the others that were referenced here. The enlightened ones would call me and say, what did that mean? And then I might be able to explain it to them. Others would say, what is that EEOC person talking about? It's pretty clear why we have criminal background checks in health care. And then the vast majority probably would be unfazed and they would recognize in a common sense way [the necessity] to do a criminal background check and to make the right judgment to keep their patients safe.

It's a priority for them. Patients first, payors second, business third, so a prospective employee would probably be denied employment still even after seeing that [news article].

MR. MELLOR:

With regard to small businesses the National Retail Federation represents a lot of one-store business owners, and with regard to that I would say we suspect they would opt out and not do a background check. That's our fear, because they're fearful of not being able to do this process appropriately and not to rely on their instincts for their employment decisions.

COMMISSIONER KIRSANOW:

Do many of your constituents have employment practices, liability insurance or anything similar in case your friendly neighborhood EEOC investigator comes knocking on the door?

MR. MELLOR:

I'm not able to say that for sure, but I would think not.

MR. DOMBI:

In health care, it's in the marketplace, I mean and a lot of the brokers and longer-standing home care providers would likely have purchased it along with directors' and officers' liability, general liability, and it's in a package that many of them acquire today.

COMMISSIONER KLADNEY:

I personally think the quotation means to go ahead and do one because you're supposed to do one. Think long and hard why you should do one, and you need to do one. But I guess beauty is in the eye of the beholder, Commissioner.

COMMISSIONER KLADNEY:

In your submitted statement, you said there's no relief or consideration for employers that have state law conflicts. Since 1987, when the initial guidance came out, do you have any cases to back that up?

MR. FISHMAN:

Well, that was referring to the new guidance.

COMMISSIONER KLADNEY:

Okay, the new 2012 guidance. Any cases?

MR. FISHMAN:

Not that I'm aware of. I think that one of the earlier panelists mentioned the fact though that she was caught between a rock and a hard place. I believe it was Pennsylvania law and the EEOC guidance.

COMMISSIONER KLADNEY:

That actually had to do with the Pennsylvania law that merely provided a background check but not exclusions.

THE COMMISSION THEN ADJOURNED.

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## SPEAKERS' WRITTEN STATEMENTS

### Alfred Blumstein

**Statement of Alfred Blumstein (Carnegie Mellon University) and  
Kiminori Nakamura (University of Maryland)  
Before the United States Commission on Civil Rights – December 7, 2012**

Most important public policy issues involve complex trade-offs, often reflecting the tension between private interests and public interests. That is certainly the case involving the use of criminal-history records. Employers would like to be able to use whatever information they can obtain in order to assess the quality of individuals applying for an open position. On the other hand, the EEOC, acting in accord with Title VII of the Civil Rights Act, has established limits on the use of criminal-history-record information in order to diminish the disparate impact of such record information on racial minorities, by requiring that the use of such information be relevant to the business necessity of the employer.

One important facet of those limits is the timeliness of that record information. It is widely recognized that the longer an individual with a prior record has avoided contact with the criminal justice system, the less is the risk that he will commit a crime in the future. This has resulted in tension between groups representing employers and groups representing individuals whose latest record information is quite stale and no longer relevant to the position for which they are applying. Resolving that tension requires empirical evidence on how much their risk has declined over their time clean.

The research that I have been pursuing<sup>1</sup> along with Kiminori Nakamura of the University of Maryland provides a basis for making such estimates. Starting with criminal-history-record information or “rap sheets” of 88,000 people arrested for the first time in New York in 1980, we have estimated their “hazard function”, or the probability that they will be rearrested for the first time as a function of how long they have stayed clean. This has enabled us to compare that hazard function or their risk of rearrest with the risk associated with two benchmarks: 1) the risk associated with general population of the same age and 2) the risk of people with no prior record. This analysis has enabled us to estimate what we call a “redemption time” when their risk of a new arrest drops below or “close enough” to our benchmarks. That redemption time typically runs about four to seven years for the first benchmark, depending on the age at and the crime type of that first arrest, and somewhat higher for the second, more stringent benchmark.

One might question the contemporary relevance of recidivism estimates based on a first arrest in 1980 in New York, so we have tested the robustness of our findings by examining first arrests in 1985 and 1990, and in Florida and Illinois. In that robustness testing<sup>2</sup>, we find reasonable differences in the first five years, but much greater similarity after those five

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<sup>1</sup> See items 1), 2), and 4) in the list of references below. All are attached to this submission.

<sup>2</sup> See slides 15-16 in the PowerPoint presentation (Reference # 1 below).

years, reflecting a recognition that most recidivism occurs within five years, and usually within three years.

Our initial analyses were based on a second arrest for any crime type. Our later research provided a basis for estimating redemption times based on an employer's concerns about particular crime types<sup>3</sup>, specifically property crimes or violent crimes, again depending on the age and crime type at the first arrest. In that analysis, we find that the redemption time for those whose first crime was violent will be longer for an employer concerned about violence, whereas, if the employer's primary concern is about property crime, the redemption time is appreciably shorter and the variation associated with the earlier crime type is far less salient. Also, we find that the risk associated with older first-time offenders is less than that of younger offenders.

These observations are based on the results of our analyses, some of which are displayed in the PowerPoint slides that we have distributed to the Commission. Obviously, we can generate estimates of redemption times as a function of the various parameters characterizing the information in the criminal history record. These parameters would include the age at the first arrest, the crime type of the first arrest, or the employer's risk tolerance. We also have estimates for the two comparison benchmarks we have identified, the general population or the population with no prior arrests.

We should also point out that, since most jurisdictions limit the use of criminal history records based on a prior conviction, our analyses are based on individuals convicted – not merely arrested – following their first arrest. Since the concern about a future crime is based on a probability rather than on a particular individual's future crime, we focus on the probability of arrest rather than conviction. We should also note that the hazard function or future risk profile for the individuals convicted is very similar to that of the individuals arrested, although, of course, they represent a smaller population. Of our total sample, about 40% never had a second arrest.

We were also concerned about the possibility that individuals who stayed clean in New York might have been arrested elsewhere, and so we sent the FBI a sample of those with no further arrests in New York and found that about 23% of them had experienced arrests in another state, and that required us to correspondingly increase our estimate of the hazard function. One of the important considerations in estimating redemption times is the possibility that individuals might have been incarcerated and therefore not vulnerable to a second arrest during that incarceration time. In our sample of first-time arrestees, only about 16% were ever incarcerated and 74% of those were sent to a local jail for a fairly short time, and so our estimates have not been distorted by that incarceration. Our current research is focused on first-time releasees from prison, and so we are dealing with people with more elaborate prior history records and with a risk of future incarceration that could well change our estimates of their rearrest.

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<sup>3</sup> See slides 17-20 in the PowerPoint presentation (Reference # 1 below).

The question then arises how one might make use of these analyses in shaping public policy. Obviously, it is important that employers using criminal record information be made aware of these findings and the low risk associated with individuals who have stayed clean long enough. This is particularly important because of the widespread use of criminal-history checking, and especially so in light of the surprising prevalence of arrest. Some 40 years ago, it was estimated that a male had about a 50% chance of being arrested some time in his life, well above what anyone could have imagined, and that was well before we had any sizable number of arrests for drug offenses and for domestic violence.

Also, state repositories might want to limit access to criminal history record information to employers who might treat them as more salient than is warranted. The repositories might choose to restrict their dissemination after reasonable redemption times have passed. Alternatively, they might include with the record information some documentation about the associated redemption times. One might hope that commercial organizations would follow similar policies.

It would also be most desirable for states to enact statutes that protect employers who adhere to reasonable redemption times from lawsuits claiming negligent hiring.

One particular target of our analyses is the "forever rules" enacted in statutes or in corporate policies. These rules state that anyone who has ever been convicted of a particular subset of crimes can never be employed. All of our analyses come out with redemption times well under 20 years, and so there should be a heavy burden of proof imposed on any "forever rule", many of which are enacted by legislatures in response to a particularly heinous later crime.

**References:**

- 1) Blumstein, Alfred and Kiminori Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks" (2009). *Criminology* **47**(2): 327-359
- 2) Blumstein, Alfred and Kiminori Nakamura, "Potential for 'Redemption' in the Presence of Widespread Background Checks" (2009). *NIJ Journal* June 2009 issue, pp. 10-16
- 3) Blumstein, Alfred and Kiminori Nakamura, "Paying a Price, Long After the Crime" (January 10, 2012) OpEd in the *New York Times*
- 4) Nakamura, Kiminori, and Alfred Blumstein, "Redemption in an Era of Widespread Use of Criminal Background Checks" (2012) PowerPoint presentation.

## Redemption in an Era of Widespread Use of Criminal Background Checks

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Kiminori Nakamura  
University of Maryland

Alfred Blumstein  
Carnegie Mellon University

December 7, 2012

Partially supported by NIJ Grant No. 2007-IJ-CX-0041 and No. 2009-IJ-CX-0008.  
Opinions or points of view expressed are those of the authors and do not necessarily  
reflect the official position or policies of the U.S. Department of Justice.

1

## Glossary

- **T1:** Redemption Time in relation to general pop'n
- **T2:** Redemption Time in relation to the Never-Arrested plus a risk tolerance ( $\delta$ )
  
- **A1:** Age at first arrest
- **C1:** Crime type at first arrest
  
- **C2:** Crime type of particular concern for a 2<sup>nd</sup> arrest

2

## Motivation for the Project

- Technology has made background checking easy – and so very ubiquitous
  - Most large companies (80-90%) now do background checks
  - Statutes require background checks for many jobs and job licenses
- Criminal records are also ubiquitous
  - Nearly 14 million arrests a year
  - 92 million criminal records in state repositories
  - Recent estimate: 30% of people report a non-traffic arrest by age 23
    - More for males
- As a result, many people can't get a job or otherwise – all because of a crime that happened long ago
- Need to explore when relief from that prior mark of crime – “redemption” – should be granted

3

## The Problem of “Redemption”

- It is well established that recidivism probability declines with time clean after an arrest or conviction
- If a person with a criminal record remains crime-free sufficiently long, his risk becomes less than some appropriate comparison group
- We now have some strong empirical estimates of when redemption is appropriate
  - “redemption time”

4

## Research Approach

- **Data:** Arrest history records (“rap sheets”) from NY state criminal-history repository (DCJS)
  - All individuals who were arrested for the first time in **NY** as adults in **1980** ( $\approx 88,000$ )
  - Follow-up time > 25 years
  - Focus on a subset of arrestees who were **convicted**
  - Age at first arrest: **A<sub>1</sub>** = 19-20 vs. 25-30
  - Crime type of the first arrest: **C<sub>1</sub>** = Violent vs. Property vs. Drug
- **Recidivism Risk**
  - Probability that a new **arrest** occurs at any particular time **t** for those who have stayed clean until **t**
  - New arrest here could be for *any* crime type (**C<sub>2</sub>** = any crime)
    - Will later consider concern about specific subsequent crime types

5

## Two Benchmark Comparison Criteria

- We compare recidivism risk of those with a prior criminal record to:
  - 1) Risk of arrest for the **general population** of the same age
  - 2) Risk of arrest for **those with no prior record**

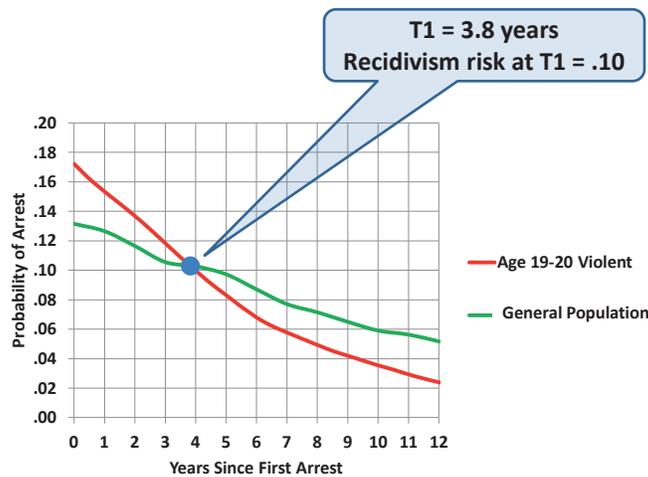
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## Comparison to General Population of the Same Age

- Comparison 1: Rate of arrest among the general population of a given age
  - (Number of arrests/Population) for a given age
- Time to redemption, **T1**, occurs when recidivism risk drops below the general population's risk of arrest

7

### Calculation of T1



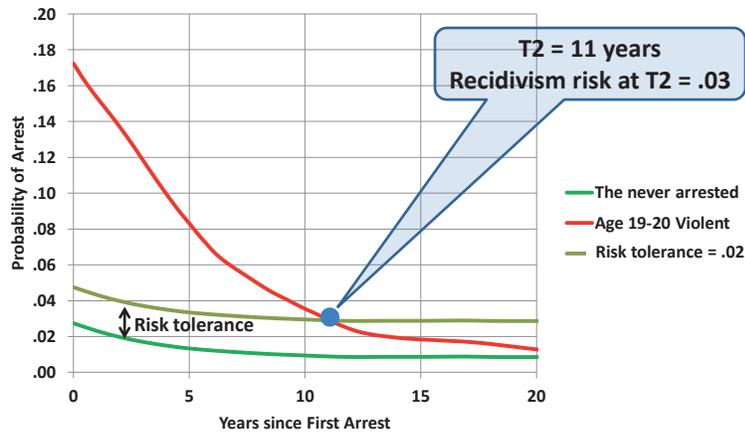
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## Comparison to the Never Arrested

- Comparison 2: Risk of arrest for those without a prior criminal record (*the never arrested*)
  - Simple intersection method used for T1 won't work if *the never arrested* is consistently below recidivism risk
  - Estimate time to redemption, **T2**, when recidivism risk and *the never arrested* are "close enough"
  - Introduce a **risk tolerance** ("close enough")
    - How much extra risk an employer is willing to tolerate – perhaps to get a better employee

9

## Calculation of T2



10

## Choice of Benchmark: T1 or T2?

- Factors to be considered:
  - Applicant pool
    - Many with priors (T1) vs.
    - Primarily never-arrested (T2)
  - Nature of the job and its risk sensitivity
    - < 10% risk (T1) for minor theft from cash register or bar-room fight
    - < 3% risk (T2) for embezzlement risk or assault of vulnerable populations

11

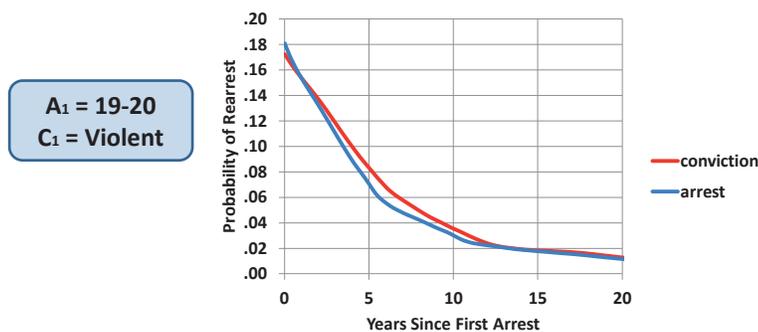
## Concern for Arrests Outside NY

- Those who appear clean in NY might have been arrested elsewhere
- Obtained from the FBI national criminal records for a sample of 1980 NY arrestees **with no re-arrest in NY**
  - About 23% of them were found to have arrests elsewhere
- Adjustment of recidivism risk for out-of-state arrests appropriate

12

## Conviction vs. Arrest

- In many hiring situations, employers are prohibited from asking about an arrest record without a following conviction
  - Those convicted are a subset of those merely arrested
  - The curves for arrest and for conviction are very similar



13

## Consideration of Incarceration

- Those who appear clean in NY might have been incarcerated, and that would prevent their rearrest
  - Only a small fraction of the 1980 cohort was incarcerated – it was their first arrest
  - No need for adjustment on their recidivism risk
- For those who are incarcerated, time to redemption should be measured after their release
  - That is when they first begin to be at risk of recidivism
  - Need information about release time
    - Generally not available from rap sheets, but known to applicant

14

## Concerns about Robustness

- Estimates of redemption times are based on 1980 first-time arrestees in NY
- How reliable are our estimates for use at different times or in different places?
- We test the robustness of estimates to:
  - Different Sampling years ('85, '90 from NY)
  - Different States (Florida, Illinois in 1980)
- Results are different in about the first 5-10 years
  - But very close after 5-10 years

15

## Robustness of Redemption Times

- Our estimates of redemption times are reasonably robust
  - Less so for the first 5-10 years, but that period is less relevant for consideration of redemption
  - We find them to be much more similar in later years
  - We have rough estimates of redemption times:
    - High  $\geq 10$  years,  $4 < \text{Medium} < 10$ , Low  $\leq 4$  years

	Benchmarks (probability of re-arrest)	
<b>Crime at 1<sup>st</sup> Arrest: C<sub>1</sub></b>	<b>.1</b>	<b>.03</b>
<b>Violent</b>	<b>Medium</b>	<b>High</b>
<b>Drugs</b>	<b>Low</b>	<b>High</b>
<b>Property</b>	<b>Low</b>	<b>Medium</b>

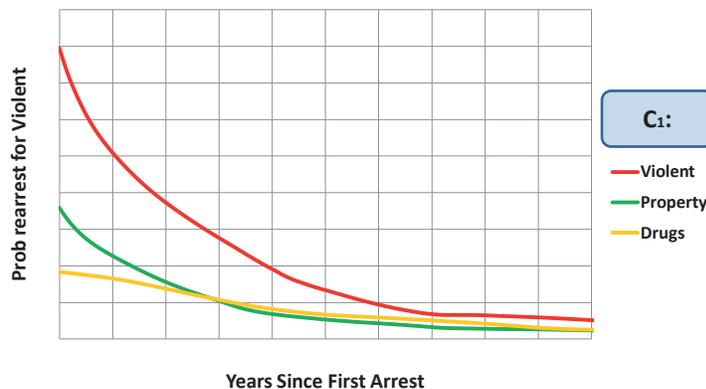
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## Concern over $C_2$ – The “Next Crime”

- Employers differ in the crime types they care about
  - Shop owners or banks care more about property crimes
  - Those dealing with vulnerable populations care more about future incidence of violence
- EEOC requires employers to demonstrate “*business necessity*” to justify the use of criminal records
  - The future concern based on the prior record should be job related

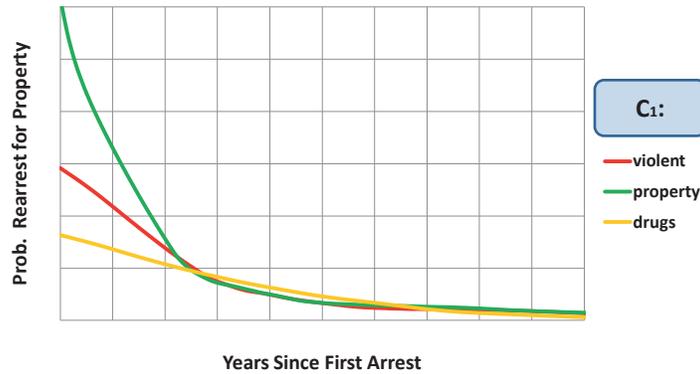
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## $C_2$ -Specific Recidivism Risk ( $A_1 = 19-20$ , $C_2 = \text{Violent}$ )



18

## C<sub>2</sub>-Specific Recidivism Risk (A<sub>1</sub> = 19-20, C<sub>2</sub> = Property)



19

## C<sub>2</sub>-Crime-Type-Specific Redemption Times

- Prior record crime type is indicative of recidivism crime type:
  - This is especially true for violence (i.e. prior violence indicates higher risk of violence)
- Redemption times vary:
  - High >= 10 years, 4 < Medium < 10, Low < 4 years

Next Crime C <sub>2</sub>	Crime at A <sub>1</sub> C <sub>1</sub>	Age At First Arrest (A <sub>1</sub> )	
		19-20 (young)	25-30 (older)
Violent	Violent	High	High
	Property	Medium	Low
	Drugs	Medium	Low
Property	Violent	Medium	Low
	Property	Medium	Medium
	Drugs	Medium	Low

20

## Conclusions

- Recidivism risk declines with time clean
  - Important consideration to employers and government regulators
- Redemption times (T1 and T2) identify key time points when the criminal record loses its value in predicting risk
  - We have strong empirical estimates of redemption times
    - Based on a large set of official data
    - Tested for robustness over time and across states
    - Other researchers have produced similar estimates
- Prior crime type provides an indication of future crime type, especially for violence
- Our analyses provide a basis for responding to user needs
  - Redemption times T1 and T2 can be estimated based on user specs for  $A_1$ ,  $C_1$ ,  $C_2$ , risk tolerance, etc.
  - Avoids inappropriately denying jobs to people with low risk
- Reconsider the “forever rules”

21

Thank you!

Questions & Suggestions?

Kiminori Nakamura  
University of Maryland

Alfred Blumstein  
Carnegie Mellon University

22

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## **Lucia Bone**

### **The Sue Weaver C.A.U.S.E. Before the U.S. Commission on Civil Rights December 12, 2013**

It is a great privilege for me to appear before the United States Commission on Civil Rights in honor and in memory of my sister, Sue Weaver, and, for other innocent victims whose tragic deaths could well have been prevented had an employer done a criminal background check before hiring an individual.

My name is Lucia Bone, and I am the Founder of The Sue Weaver C.A.U.S.E., Consumer Awareness of Unsafe Service Employment. C.A.U.S.E. is a nonprofit organization proactively keeping you and your family safe by preventing tragedy one service worker at a time.

The Sue Weaver C.A.U.S.E. promotes the importance of proper annual criminal background checks on anyone working in our homes or with vulnerable populations. We educate you, the consumer, on the importance of knowing whom you hire to work in or near your home and your family.

At one time or another, we all need to invite a stranger into our home for maintenance or delivery. Did you know that your safety or the safety of your family might be endangered the next time you need service work done? Many people believe hiring a company that is “bonded and insured” protects them. In truth, it is only an insurance policy and it does not mean the employer has done criminal background checks on the workers. Regardless, most of us trust the company we hire to send safe workers into our homes. But how do we know if that trust is well-placed? My sister, Sue Weaver, thought it was. She was wrong.

My sister hired a reputable Florida department store, Burdine's, to have her air ducts cleaned. No criminal background checks were done on the workers they sent into their clients' homes. The work was subcontracted out and two convicted felons were sent into Sue's home to do the service work. A single woman, home alone, two convicted felons. ... Six months later one of the workers, Jeffrey Hefling, a twice-convicted sex offender on parole, returned to rape and murder Sue. He then set her body and her home on fire in an attempt to destroy the DNA evidence. Had Burdine's done a criminal background check they would have found both men were not suitable to be working in their clients' homes and my sister might still be alive today! A criminal background check would have saved Sue's life.

Since Sue's death, I have campaigned tirelessly to educate and bring awareness to the importance of proper background investigations and the importance of knowing whom you hire. We need federal legislation requiring nationwide background checks on individuals entering consumers' homes or working with vulnerable populations. This type of consumer safety legislation would better protect unsuspecting individuals like Sue. Not only do background checks make good business sense, they save lives. It is absurd that a person with

multiple convictions for violent sexual assaults would be engaged as a home repairman, yet it happens over and over again.

Everyone has the right to work—but not every job is right for everyone. Criminal background investigations provide employers an invaluable tool to help them place employees in job appropriate positions, better protecting coworkers and clients. Background checks prevent tragedies.

Although we still have a long way to go, legislators do understand the importance of criminal background checks and the need to mandate appropriate guidelines for certain positions. In the last decade, we have witnessed a dramatic upsurge in federal, state and local laws mandating background checks in many areas, often to better screen those working with children or other vulnerable populations. Unfortunately, we must ask ourselves if the EEOC gets it at all!

I believe the EEOC focused its recently updated policy on helping minority ex-offenders seek employment, without paying regard to any victims. Everyone deserves a second chance, but not at the expense of innocents such as my sister.

On more than one occasion I have written to the EEOC. The following is quoted from a letter on July 11, 2011 to Chairwoman Jacqueline Berrien:

As you conduct your upcoming Commission Meeting on Arrest and Conviction Records as a Barrier to Employment, I ask that you consider the other side of the coin and remember my sister's case. As the Commission considers revising its guidance on the use of arrest and conviction records, consider that background checks are beneficial for employers and they should be conducted more often, not less! Sue didn't commit the heinous crimes that Hefling committed. Burdine's should have known about his criminal past and not send him into consumers' homes. Is this too much to ask, that employers take appropriate steps to ensure the safety of their consumers from their employees? Unfortunately, my sister paid the ultimate price because a background check wasn't conducted that would have alerted Burdine's as to who Hefling was. That doesn't mean Hefling couldn't have been hired, just that armed with the knowledge of this criminal history, Burdine's shouldn't have sent him to my sister's or anyone's home.

I am gravely disappointed that no victims were represented at the July 2011 meeting of the EEOC. The Commission did not consider the victim's side, but solely focused their attention on the plight of the ex-offenders. Unfortunately, it appears to have erroneously (1) singled out background checks as the leading cause of why ex-offenders fail to find a job, ignoring other difficulties such as drug or alcohol addictions, lack of education or vocational training and lack of family structure and (2) ignored the beneficial side of screening. Rather, than take

steps to encourage employers to rely on criminal background checks, their actions will cause employers to conduct less, not more, screening.

It is my opinion that the EEOC has paid little or no attention to such critical issues as:

- a) Why employers rely on background checks to ensure a safer workforce.
- b) How its new policy would discourage use of background checks.
- c) How victims' advocacy groups felt about any change in policy. I personally attended the 2011 hearing and was insulted that the EEOC showed no interest in hearing from any victims. It was apparent that the hearing was only a formality; their focus was on protecting ex-offenders.

In addition, they made a serious error by failing to allow the public to view and comment on the Guidance before it was issued. The EEOC needs to suspend implementation of its Guidance and hold the type of transparent, inclusive proceeding that it should have conducted in the first place. This time they need to listen to victims and their families and victims' rights organizations and those representing the vulnerable populations and not ignore their comments and letters, as was done in the past. All views need to be heard and considered *before* a new policy goes into effect. When weighing the risk and benefits of the proposed policy guidance, the Guidance must balance the safety of the public and innocent consumers against the employment concerns of ex-offenders!

While sadly it is too late for my sister, it's not too late for all the others who might become victims because of the EEOC's misguided Guidance. Without background checks used to qualify individuals that work or care for our families or do service work in our home, we are knowingly risking the safety of our loved ones and ourselves.

Sue was no different than your sister, your aunt, your daughter, your neighbor or your best friend. She was my best friend, my inspiration, my ideal and my big sister.

Stranger danger isn't just for little kids. At one time or another we all have to invite a stranger into our home for a delivery or service work. We trust the companies we hire to not send convicted felons into our homes.

Common sense says you wouldn't hire a drug dealer to work in a pharmacy, a thief to work in a bank or a sex-offender to work in our home or with the vulnerable populations. Not only is common sense not law, but under these guidelines the EEOC is actually forcing employers to make decisions on job applicants without the proper use of the resources that would allow an applicant to be placed in an appropriate positions for their skill and character.

When the EEOC weighed the risks and benefits of the proposed policy Guidance, it should have balanced the safety of innocent consumers and ex-offenders. It did not; its Guidance is unacceptable and it should be revoked.

Thank you.

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**Garen E. Dodge**

**STATEMENT AND TESTIMONY**

**in support of**

**THE USE OF CRIMINAL-BACKGROUND  
CHECKS IN EMPLOYMENT**

**to the**

**U. S. COMMISSION ON CIVIL RIGHTS**

**on behalf of**

**THE COUNCIL FOR EMPLOYMENT LAW EQUITY**

**And**

**JACKSON LEWIS LLP**

**by**

**Garen E. Dodge, Jackson Lewis Partner and CELE General Counsel**

**December 7, 2012**

**I. Statement of Interest**

On behalf of the Council for Employment Law Equity (“CELE”) and Jackson Lewis LLP, I appreciate this opportunity to comment to the U.S. Commission on Civil Rights (the “Commission”) regarding its Concept Paper: Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission’s Conviction Records Policy on the Employment of Black and Hispanic Workers. Besides my position with the CELE, I am also a Partner at the national employment law firm of Jackson Lewis.

The Council for Employment Law Equity, on behalf of the employer community as end users of criminal-background checks, is *in strong support of* the appropriate use of criminal-background checks in employment. Such record-checks *before* the commencement of employment are highly effective and vital tools to help prevent criminal recidivism in the most harmful contexts, protect at-risk populations, and assist employers in making fully informed hiring decisions and in protecting their employees, their clients and customers, their assets, and the public at-large.

It is my firm and unequivocal belief that the use of criminal-background checks in employment is in the *decisive* interests of employers, employees, and the American public overall, helps protect vulnerable populations within our society, and is an effective crime deterrent.

Moreover, empirical evidence strongly supports the conclusion that record-checks ultimately are in the strong interests of ex-offenders themselves in terms of positively influencing their opportunities for re-employment and re-integration into society. The plain truth is that employers who do criminal-background checks are *more* likely to hire ex-offenders than employers who do not (and who, therefore, often resort to assumptions which may lead to statistical discrimination).

Convicted felons are not a protected class in America. “Discrimination” against convicted felons – if race-neutral, “color-blind,” and void of any consideration based on any individual’s status as a member of a protected class – is *not* discrimination. Employers have a right – indeed, an *obligation* – to protect their companies, their workers, their customers, the public at-large, and their assets. They have a legitimate interest – if not a responsibility – to protect the safety, health, and well-being of their workers and those who use their goods and services, and to refrain from any hiring practice which would jeopardize these interests.

Some studies challenge the basic assumption that discrimination against African-Americans (and other minorities) explains the overrepresentation of minority groups in prison. Contrary to this assumption, these studies conclude that, for example, proportionately more African-Americans are in prison *because* proportionately more African-Americans commit crimes.<sup>1</sup>

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<sup>1</sup> See, e.g., Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J Crim.& Criminology, 666 (1985).

Also in refutation of this “basic assumption” (of discrimination) is the argument that only some minorities are “overrepresented” in prison – African-Americans and *some* Hispanic subgroups. By contrast, Asian-Americans and minorities from such national origins as El Salvador and the Dominican Republic are “*underrepresented*” in prison vis-à-vis whites. If the criminal-justice system were tilted against Hispanics, why only *some* Hispanics? If it is tilted against minorities, why only *some* minorities? If it is tilted against African-American males, why not against African-American females? The conclusion of Langan<sup>2</sup> – and others – is that those in prison, by-and-large, *deserve* to be in prison – not because they are (or are not) members of a minority group – but because they are convicted felons. Criminals are criminals – regardless of race. Moreover, if employers have a compelling business justification for screening out convicted felons, no further inquiry into motive or intent is necessary and no justifiable cause of action exists.

Besides *supporting* employers’ rights to perform criminal-background checks as a necessary and appropriate component of their hiring process, the CELE also *opposes* any initiative (by the EEOC or other government entity) which would: (1) unduly restrict the employer option of conducting criminal-backgrounds checks; (2) make broad assumptions to facilitate disparate-impact claims against employers that neglect individualized applicant-pool qualification and interest factors for a specific employer; and/or (3) retreat from the current “job-related” and “business necessity” standards and widely endorsed by employers and the courts.

The Council for Employment Law Equity is a non-profit coalition of major employers committed to the highest standards of fair, effective, and appropriate employment practices. The CELE advocates such employment practices: (1) to the employer community; (2) before the judicial, legislative, and executive branches of government; and (3) to the public at-large.<sup>3</sup>

The CELE regularly attempts to positively and constructively influence the consideration of national policy issues of importance to the employer community. The use of criminal-background checks in employment is one such issue.

Jackson Lewis is a national law firm of more than 730 lawyers in 49 offices, *all* of whom are dedicated exclusively to the representation of management on labor and

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<sup>2</sup> *See id.*

<sup>3</sup> Among other activities, the Council for Employment Law Equity has filed *amicus curiae* briefs on numerous occasions to the U.S. Supreme Court, and to other federal and state courts and the National Labor Relations Board; has filed comments during rule-making to the U.S. Department of Labor, the U.S. Department of Health and Human Services, the Office of Management and Budget, and the Government Services Administration; and has been active on policy-making issues before the American Bar Association’s House of Delegates – *including* on issues regarding criminal-background checks.

employment issues.<sup>4</sup>

Clearly, the CELE in particular, and the employer community in general, has a *very* strong interest in any initiative which would embrace or discourage the use of criminal-background-check policies and programs in employment.

I respectfully urge, on behalf of the CELE and the employer community at-large, the endorsement of: (1) the use of criminal-background checks in employment for a *much* broader range of employment situations; (2) greater private-sector employer access to such criminal-conviction records; and (3) ultimately, the protection and promotion of the right of *all* employers to have access to *all* criminal-conviction records without a date limitation, provided the conviction records have not been expunged so that employers can make qualified hiring and assumption-of-risk decisions.

The protection and promotion of the use of criminal-background checks in employment endorses and underscores the principle that employers should have *more* – not less – information upon which to make fully informed hiring decisions.

## **II. Negligent-Hiring Lawsuits Are Rising and Forcing Employers to Defend Their Hiring Practices**

There has been an *explosive* growth in negligent-hiring lawsuits – and employer liabilities – in the United States, and the upward trend is continuing.

Employers are being forced to defend their hiring practices and decisions whenever a workplace violence or other work-related crime with victims takes place. The plaintiffs' law is aggressive in this regard, and understandably so given their success rate in negligent-hiring and negligent-retention lawsuits, as detailed below.

The standard applied to employers is: Did you do everything a reasonable and responsible employer would do to prevent *this* (the crime) from happening?

“Everything” a reasonable and responsible employer would do *includes* criminal-background checks – according to a growing number of courts, juries, and arbitrators... and the EEOC itself (in the *EEOC v. ABM Industries* case, see discussion below).

Thus, there is a *very* compelling public policy in favor of the increased use of criminal-background checks, a policy increasingly articulated by court-after-court in jurisdiction-after-jurisdiction and with sizeable jury award or settlement amount after sizeable jury award or settlement amount.

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<sup>4</sup> No law firm has had as extensive or prominent a labor practice as has Jackson Lewis over the past 50 years. In addition, Jackson Lewis has the highest concentration of employment lawyers in such major markets as the New York, Washington, and Los Angeles metropolitan areas.

Unfortunately, virtually all of us know what the term “going postal” means. Workplace violence is a reality in America today – a sad, disturbing, *increasing* workplace reality.

In fact, 16 percent of the “criminal-justice population” has “serious mental-health problems,” as cited by Amy Solomon, U.S. Department of Justice Senior Advisor in her testimony to the EEOC on July 26, 2011.<sup>5</sup>

Moreover, this growing – and tragic – phenomena of workplace violence is exacerbated by the much greater influx of released convicted felons into the workplace. (More than 650,000 convicted felons were released from prison in the United States last year alone.)

Given the high<sup>6</sup> – and unacceptable – criminal-recidivism rates, coupled with the explosion in negligent-hiring and negligent-retention lawsuits: (1) Do *employers* have any choice but to do criminal-background checks on job applicants?; (2) Does *American society* have any choice but to endorse and encourage this practice?; and (3) How unreasonable, inappropriate, and contrary to national public policy and legal precedent would it be to impede, restrict, or disallow criminal-background checks in employment, or – in effect – *penalize* employers for adopting such necessary and appropriate policies and practices?

The U.S. Supreme Court ruled last year in NASA v. Nelson<sup>7</sup> that it is reasonable and appropriate for the federal government to perform background checks on federal contractor employees. The Court stated that: “Like any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will ‘efficiently and effectively’ discharge their duties.”<sup>8</sup> It likewise has an interest in “separating strong candidates from weak ones.”<sup>9</sup> Clearly, the Court considers criminal-background checks necessary and appropriate.

To the extent that it would inhibit or impede employers’ use of criminal-background checks as a necessary and appropriate employment practice, the EEOC’s changes in its Guidance and enforcement focus likely *increase* an employer’s exposure in negligent-hiring cases, and contradict the principles embraced by the NASA v. Nelson decision.

In addition, courts and juries have consistently found employers liable for injuries or damages caused by an employee where the employee had a criminal history that should have

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<sup>5</sup> Paula Ditton, *Mental Health and Treatment of Inmates and Probationers*, Special Report NCJ 174463 (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 1999).

<sup>6</sup> As much as 80 percent, see below.

<sup>7</sup> 131 S. Ct 746 (2011).

<sup>8</sup> Id. at 759-760

<sup>9</sup> Id. at 761.

alerted the employer of a potential issue. For example in *Heller v. Patwil Homes*, 713 A.2d 105, 108 (Pa. Super. Ct. 1998), a court found negligent hiring where, had the employer performed a background check, it would have learned that Strouse had engaged in investment fraud resulting in his being “disciplined” by the Pennsylvania Securities Commission. In *Doe v. Liberatore*, 478 F. Supp. 2d 742, 760 (M.D.Pa 2007), the court found that “the Diocese, Sacred Heart and Bishop Timlin may be liable if they knew or should have known that [the employee] had a propensity for committing sexual abuse and his employment as Pastor at Sacred Heart might create a situation where his propensity would harm a third person, such as Plaintiff.” In *Sabo v. Lifequest, Inc.*, 1996 U.S. Dist. LEXIS 14971 (E.D.Pa 1996), the court stated that, “Among the essential elements of a negligent-retention claim is proof that a more thorough investigation by the employer would have revealed that the employee had a history of harassing conduct.”

States wisely recognize a claim against an employer for negligent hiring. Pennsylvania, for example, recognizes a claim where: (1) the employer knew or should have known of the employee’s incompetence or propensity for harm; and (2) the harm to third persons was foreseeable. See *Smith v. Bethany*, 48 Pa. D. & C.3d 359 (Pa. Comm. Pl. 1988); *Dempsey v. Walso Bureau, Inc.*, 246 A.2d 418 (Pa. 1968); *Coath v. Jones*, 277 Pa. Super. 479, 483 (Pa. Super. Ct. 1980) (holding that the employer “could be found negligent if [the employee] was known to have the inclination to assault women or if the defendant should have known that.” “It has long been the law in this Commonwealth that an employer may be liable in negligence if it knew or should have know that an employee was dangerous, careless or incompetent and such employment might create a situation where the employee’s conduct would harm a third person.” *Brezenski v. World Truck Transfer, Inc.* 2000 Pa. Super. 175, \*P11 (Pa. Super. Ct. 2000).

This is consistent with examples around the country. Today, nationwide, the plaintiffs’ bar is increasingly pressing claims against employers, and the courts are increasingly holding employers legally and financially responsible for illegal or violent actions by employees who were not subjected to preemployment screening – such as criminal-background checks. This is most often, and most aggressively, litigated in regard to employers’ hiring of convicted felons whom – claim the plaintiffs’ attorneys – the employers knew, should have known, or should have reasonably anticipated would commit crimes again.<sup>10</sup>

Employers’ liability in such legal actions has been substantial – *often* resulting in multi-million-dollar verdicts or settlements. Negligent-hiring and negligent-retention cases are on the rise.<sup>11</sup> Courts in almost every jurisdiction now recognize the doctrines of negligent hiring and retention.<sup>12</sup> If an employee causes harm to another employee or to a customer, or

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<sup>10</sup> Or cause industrial or vehicular accidents – e.g., caused by their drug abuse or reckless/impaired driving for which they had a prior record which easily could have been discovered by a criminal-background check.

<sup>11</sup> *Infra*, see note 12.

<sup>12</sup> *Daily Labor Report*. No. 179, Page A-7, see *id.*

to a member of the public at-large, and the employer knew or should have known that the individual causing the harm was high-risk, the courts have found the companies liable. Employers in negligent-hiring cases lose more than 70 percent of such lawsuits, and the average jury plaintiff award is more than \$1.6 million.<sup>13</sup>

The appropriateness and necessity of criminal-background checks comes further into focus given that, according to the U.S. Department of Commerce, 30 percent of business failures are due to poor hiring practices.<sup>14</sup> Annual losses generated by poor hires, absenteeism, drug abuse, and employee theft amount to \$75 billion per year.<sup>15</sup>

According to the Association of Certified Fraud Examiners, \$652 billion per year is lost to internal fraud. Small businesses are the most vulnerable, accounting for a whopping 80 percent of all internal fraud cases. Employee-committed acts are the most common and most expensive type of fraud, accounting for more than half of all reported cases<sup>16</sup>

Simply trusting job applicants to be truthful on their job applications is neither rational nor responsible. According to a recent study by the American Psychological Association, 67 percent of job applicants' résumés in the United States contain material misrepresentations.<sup>17</sup>

Approximately 66 percent of negligent-hiring trials overall result in awards averaging \$600,000 in damages.<sup>18</sup> The Workplace Violence Research Institute reports that the average jury award for civil suits on behalf of the injured is \$3 million.<sup>19</sup>

The following are examples of lawsuits with adverse outcomes against employers for negligent-hiring claims:

- (1) In California, a store customer was injured in an altercation with a Kmart security guard after trying to return an item. The customer, while being restrained,

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<sup>13</sup> Public Personnel Management, *USA Today*, Nov. 21, 2003.

<sup>14</sup> U.S. Department of Commerce: <http://jobcircle.com/career/articles/x/njtc/3026.xml>.

<sup>15</sup> Corporate Combat Inc., at <http://www.corporatecombat.com/statistics.html>.

<sup>16</sup> [Source sbnonline.com](http://Source.sbsonline.com) (last viewed Aug. 8, 2011)

<sup>17</sup> Sixty-seven percent of job applicants' résumés contain misrepresentations: Info Cubic, Employment Screening FAQ, at <http://www.infocubic.net/faq.htm>.

<sup>18</sup> Alliance Network, Chicago & Illinois Background Checking, at [http://www.alliancehrnetwork.com/employers/background\\_checking.asp](http://www.alliancehrnetwork.com/employers/background_checking.asp).

<sup>19</sup> Workplace Violence: An Employer's Guide, Steve Kaufer, CPP and Jurg W. Mattmann, CPB, at [http://www.workviolence.com/articles/employers\\_guide.htm](http://www.workviolence.com/articles/employers_guide.htm).

was injured by the security guard. The customer was awarded \$3.8 million in damages in a lawsuit claiming negligent hiring against the store;<sup>20</sup>

- (2) A furniture company in Florida was found liable for \$2.5 million for negligent hiring and retention of a deliveryman who savagely attacked a female customer in her home;<sup>21</sup>
- (3) A Pennsylvania jury awarded \$1.5 million for the negligent hiring of a babysitter who abused a child;<sup>22</sup>
- (4) A jury awarded \$2.76 million in West Virginia to the parents of a deceased child when a doctor negligently failed to diagnose and treat the mother, which resulted in the death of the newborn son. The hospital negligently hired the doctor without investigating an agreed order between the doctor and the medical licensing board that put his medical license on probationary status for writing a large volume of prescriptions for illegitimate non-medical purposes not in the course of professional practice;<sup>23</sup>
- (5) In *McLean v. Kirby Co.*,<sup>24</sup> Urie, a Kirby distributor, hired Molachek as a dealer. Molachek had a history of violent crimes and was charged with sexual assault at the time he was hired. Within a month of hire, Molachek raped Linda McLean. Relying on the "peculiar risk" doctrine of Section 413 of the Restatement (2d) of Torts, the Supreme Court of North Dakota upheld the judgment against Kirby. As a result, Kirby has put warnings in its training manuals of the need to do a "thorough criminal-background check" on potential dealer candidates, had discourse with some distributors about the need to do reference checks, and instructed that if "red flags" come up in the process, the distributors should do further background checks;

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<sup>20</sup> Heiner v. Kmart Corp., 84 Cal. App. 4th 335 (Cal. Ct. App. 2000).

<sup>21</sup> Tallahassee Furniture Co., Inc. v. Harrison, 583 So.2d 744 (Fla. Dist. Ct. App. 1991).

<sup>22</sup> Glomb v. Glomb, 366 Pa. Super. 206, 530 A.2d 1362 (1987).

<sup>23</sup> Andrews v. Reynolds Memorial Hosp., 201 W. Va. 624 (W. Va. 1997).

<sup>24</sup> McLean v. Kirby, 490 N.W.2d 229 (N.D. 1992).

- (6) On December 31, 1998, the Texas Supreme Court held a company was liable for negligent hiring associated with the actions of an independent contractor.<sup>25</sup> In this case Kirby Vacuum's independent contractor door-to-door salesman raped a woman;
- (7) In February 2009, in a negligent hiring case, a Texas jury ordered a cab company to pay \$300,000 to a woman taken on a terrifying ride by one of its drivers.<sup>26</sup> The jury found the cab company, Greater Houston Transportation, should have done a criminal-background check before hiring Ricardo Steel as an independent contractor. The verdict against Greater Houston was delivered even though the driver, Steel, had a permit from the City of Houston, which requires background checks;
- (8) In a verdict called "a loud wake-up call" to service firms sending employees into people's homes, a California jury in 2000 determined that a company must pay \$9.38 million in damages to the surviving spouse of a woman killed by a carpet cleaner.<sup>27</sup> The Alameda County Superior Court jury found America's Best Carpet Care negligent in not obtaining a background check on Jerrol Glenn Woods, 52, of Vallejo, who is serving life in prison without parole following the May 5, 1998, stabbing death of Kerry Spooner-Dean, 30. The case shows that employers can be held responsible for the actions of their employees, and the importance of conducting criminal-background checks. Surviving spouse Daniel Dean says one of two goals in filing the wrongful death suit was to send a message to the industry that it must screen employees. Coupon advertising brought the victim to America's Best which – court documents show – serves as a dispatching agent to cleaners, who operate their own companies. The *Oakland Tribune* reported on a similar case: The survivors of Terenea Fermenick won a \$1-million-plus

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<sup>25</sup> Read v. Scott Fetzer Co., 990 S.W.2d 732 (Tex.1998).

<sup>26</sup> Jonathan M. LeBlanc, *Jury Awards 300K in Negligent Hiring Case*, <http://www.businessblogdallas.com/negligent-hiring/>, Feb. 27, 2009. (last visited Aug. 2, 2011)

<sup>27</sup> Daniel Dean vs. Oppenheim Davidson Enter., Inc., No. 809231, Superior Court of State of California, Judicial District, County of Alameda, Nov. 16, 2000.

settlement from the company that employed Giles Albert Nadey Jr. Sent to clean carpets in a rectory in 1996, Nadey, a full-time employee of a carpet cleaning company, raped and killed a minister's wife;

- (9) In 2010, Amy Bishop, a biology professor, walked into a meeting and shot and killed three of her colleagues, as well as wounding three others. A background check at the time of her hiring would have revealed that in 2002, eight years earlier, she pled guilty to and had a misdemeanor conviction for assault and disorderly conduct for punching a woman in the head at an IHOP. Ms. Bishop did so because the woman took the last booster seat;
- (10) Byran Uyesugi began working as a technician for Xerox in Honolulu, Hawaii in 1984. After being transferred to another team he began complaining of harassment and alleging that his co-workers were tampering with equipment. He also began making death threats against co-workers. In 1993, he was arrested for criminal damage after he kicked in an elevator door. At that time, he was made to undergo a psychiatric evaluation and to attend anger management courses. A doctor cleared him to return to work. On November 2, 1999, fearing he was about to be fired, he murdered seven of his co-workers and attempted to murder another. The murders occurred six years after he first displayed violent tendencies;<sup>28</sup>
- (11) Lisa Keibler, a mother of three young children, arrived home to find a meter reader, John Cramer, from Bermex, Inc. nearby. When she left her vehicle, Cramer approached Keibler and asked her to identify the location of her gas meter. Keibler did so and progressed into her home to take care of chores and rest. She was awakened by a noise and turned to find Cramer in her bedroom. Keibler demanded that Cramer leave, at which point Cramer began to attack her. Cramer grabbed her by the hands, arms, and neck, cutting off her breath and blocking her mouth and nose. He proceeded to beat and rape Keibler several times, forcing her to perform involuntary deviate sexual

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<sup>28</sup> State of Hawaii v. Byran K. Uyesugi, Case No. 1PC99-0-002203.

intercourse, among other vile acts. Cramer finally ran off when Keibler's five-year-old son came to the door of the bedroom frightened. A background check performed by Bermex on Cramer the day *after* his arrest revealed several convictions for arson, risking a catastrophe, criminal mischief, burglary, theft, and receiving stolen property. Remarkably, Cramer also had convictions for involuntary deviate sexual intercourse, indecent assault, and various other crimes. In fact, on his hire date, Cramer was on parole and had within the preceding 30 days been arrested again for felony charges, including possession of marijuana and maintaining of paraphernalia related thereto;<sup>29</sup>

- (12) Paul and June Heller approached Patwil Homes, a construction company, to discuss specifics of a new home to be built. After working through the details, Patwil agreed to build a base model home for the Hellers. Shortly before the Hellers signed the contract, Patwil hired a sales manager, Bill Strouse. Strouse developed a relationship with the Hellers and eventually proposed to them that they take part in an investment opportunity to upgrade their home from a base model. The Hellers succumbed to Strouse's proposal and invested nearly \$50,000. Strouse later delayed the closing on the home and eventually disappeared with most of the Hellers' money. Strouse was hired by Patwil Homes without a background check. He had previously engaged in investment fraud resulting in his being disciplined by the Pennsylvania Securities Commission. The court found Patwil Homes liable for the damages suffered by the Hellers;<sup>30</sup> and
- (13) Paul Dennis Reid served seven years of a 20-year conviction relating to aggravated armed robbery of a steakhouse in Houston, Texas. When he was paroled he moved to Nashville, Tennessee. In early 1997, he was fired from his job at a Shoney's Restaurant where he worked as a dishwasher for throwing a dish at a co-worker after losing his temper. On June 25, 1997, Reid went to the home of his former boss, brandishing a weapon and threatening to kill the manager if he did not

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<sup>29</sup> Keibler v. Cramer, 36 Pa. D.&C.4<sup>th</sup> 193 (Pa. D.&C. May 26, 1998).

<sup>30</sup> Heller v. Patwil Homes, 713 A.2d 105, 108 (Pa. Super. Ct. 1998).

hire him back. However, before that occurred and the day after he was fired from Shoney's, February 16, 1997, he robbed and murdered two employees of a Captain D's Restaurant, a company owned by Shoney's. Subsequently, in March and April of that same year he robbed and murdered three McDonald's employees and injured a fourth and he robbed, kidnapped, and murdered two Baskin Robbins employees. He is on death Row in Tennessee for the seven murders.<sup>31</sup>

There are many other examples:

- (14) A security company was found liable for negligently hiring guards who beat a spectator;<sup>32</sup>
- (15) Corporate liability for negligently hiring a security guard with a prior criminal record;<sup>33</sup>
- (16) A hotel settled a lawsuit over a guest's rape by a housekeeper when negligence in the employee background check was alleged;<sup>34</sup>
- (17) A failure to investigate a housing inspector's past criminal record resulted in a \$200,000 settlement for rape;<sup>35</sup>
- (18) A lawsuit was settled for \$1.4 million in the killing of a store customer by a security guard after the lawsuit alleged that guard was negligently hired and entrusted with weapons;<sup>36</sup>

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<sup>31</sup> State of Tennessee v. Paul D. Reid, Case Nos. 97-1834 & 97-1836, Circuit Court for Davidson Cnty, Tenn.

<sup>32</sup> Gonzales v. Sw. Sec. & Prot., 665 P.2d 810 (N.M. App. 1983).

<sup>33</sup> Kanne v. Burns Int'l Sec. Servs., Inc., Los Angeles County Superior Court, No. SWC 61883, 5/18/84; 28 ATLA L. Rep. 78.

<sup>34</sup> Wahlers v. Hotel Nevada, Nev., Clark County Superior Court, No. A 241758 (Oct. 24, 1986).

<sup>35</sup> Cramer v. Hous. Opportunities Comm'n of Montgomery Cnty., Md., Montgomery County Circuit Court, No. 46581, Mar. 30, 1987, 30 ATLA L. Rep. 318 (Sept. 1987).

<sup>36</sup> Montauban v. Haitian Transfer Express Co., N.Y., Kings County Supreme Court, No. 29/84, April 15, 1988, reported in 31 ATLA L. Rep. 319 (Sept. 1988).

- (19) An employee with a criminal record forced a child to perform oral sex and \$1.75 million was awarded for negligent hiring and retention;<sup>37</sup>
- (20) A 20-year-old tenant was raped in a co-op apartment by a building management employee and the subsequent negligent-hiring claim was settled for \$500,000;<sup>38</sup>
- (21) A nursing home was found liable for \$235,000 for negligent hiring of an unlicensed nurse with 56 prior criminal convictions who assaulted an 80-year-old visitor;<sup>39</sup>
- (22) A hospital settled a lawsuit for negligent hiring, retention, and supervision of an employee who raped a mentally retarded patient.<sup>40</sup> The employer was not relieved of the duty to exercise care in the selection of employees when they hired a juvenile criminal offender as part of a rehabilitation program;<sup>41</sup>
- (23) A car-rental company in Pennsylvania settled for \$2.5 million a lawsuit seeking to hold it liable for negligent hiring and entrustment of an intoxicated security guard. The guard had an on-duty traffic accident in a company car in which he and another motorist were killed;<sup>42</sup>
- (24) A bar was liable for an off-duty doorman's alleged assault on a patron in a parking lot. The doorman had been involved in prior fights on the premises as a

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<sup>37</sup> Doe v. MCLLO Enters., Ohio, Cuyahoga County Court of Common Pleas, No. 74028, Sept. 28, 1989, reported in 33 ATLA L. Rep. 27 (Feb, 1990).

<sup>38</sup> Welch v. Niles Mgmt., Mass., Suffolk County Superior Court, No. 77747, Oct. 2, 1989, reported in 33 ATLA L. Rep. 115 (April 1990).

<sup>39</sup> Deerings West Nursing Ctr. v. Scott, 787 S.W.2d 494 (Tex. App. 1990).

<sup>40</sup> Corker v. Appalachian Reg'l Healthcare, Inc., U.S. Dist. Ct., S.D. W. Va., No. 5:88- 1097, Dec. 12, 1989, reported in 33 ATLA L. Rep. 264 (Aug. 1990).

<sup>41</sup> Nigg v. Patterson, 276 Cal. Rptr. 587 (Cal. App. 1990).

<sup>42</sup> Butler v. Hertz Corp., Pa., Philadelphia County Court of Common Pleas, Apr. Term, 1990, No. 1691, Feb. 11, 1991, reported in 34 ATLA L. Rep. 247 (Sept. 1991).

patron, so the bar should have known that hiring him as a doorman made further altercations foreseeable;<sup>43</sup>

- (25) A grocery store was held liable for negligent retention of a store manager who allegedly attacked a four-year-old boy in a store parking lot after another boy who came in the same car urinated on an outside store wall. The manager had previously been promoted after he engaged in an unprovoked attack on another employee. The knowledge of other employees of the manager's attack on his own son could be imputed to the company;<sup>44</sup>
- (26) A company which provided ushers for rock concerts was sued for negligent hiring for failing to investigate the background of a job applicant who attempted a rape of minor girl at a concert;<sup>45</sup>
- (27) A carpet-cleaning business was held liable for \$1 million for the negligent hiring of an employee who allegedly murdered two students while cleaning a carpet in their home. The employee had prior arrests for drugs, carrying a concealed weapon, and resisting arrest with violence;<sup>46</sup>
- (28) A store was held liable for negligent and wanton training and supervision of an employee who allegedly forced a customer he detained to perform oral sex on him or face criminal prosecution as a suspected shoplifter;<sup>47</sup>
- (29) An armored-car company settled a negligent hiring, training, and supervision lawsuit for \$12 million when it was alleged that it did not adequately investigate an

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<sup>43</sup> Medina v. Graham's Cowboys, Inc., 827 P.2d 859 (N.M. App. 1992).

<sup>44</sup> Bryant v. Livigni, 619 N.E.2d 550 (Ill. App. 1993).

<sup>45</sup> Carlsen v. Wackenhut Corp., 868 P.2d 882 (Wash. App. 1994).

<sup>46</sup> McKishnie v. Rainbow Int'l Carpet Dyeing & Cleaning Co., Fla. Cir. Ct., No. 91-3617 CA Div. "J", March 11, 1994, reported in Vol. 9 Individual Employment Rights News No. 7, p. 1 (April 12, 1994).

<sup>47</sup> Big B, Inc. v. Cottingham, 634 So. 2d 999 (Ala. 1993).

employee's past work record or provide adequate driving training;<sup>48</sup>

- (30) A lawsuit was settled for \$5 million when the family of a deceased female tenant sued an apartment complex owner and management. The lawsuit claimed that the tenant was killed by the brother of the complex's assistant manager and that it was negligent hiring to hire an assistant manager without a criminal-background check;<sup>49</sup>
- (31) A store was sued for negligent supervising and retention of a security guard who allegedly had sexual intercourse with a 15-year-old female shoplifting suspect in exchange for letting her go;<sup>50</sup>
- (32) A jury awarded \$680,000 against a nursing home for a sexual assault on a 92-year-old female resident by an employee hired without any screening. An Illinois statute provided for tripling of the award to \$2,040,000;<sup>51</sup>
- (33) A store customer detained by a security guard at a department store as a suspected shoplifter and injured while being restrained was awarded \$10 million in damages in a lawsuit against the store claiming negligent hiring;<sup>52</sup>
- (34) Evidence concerning whether a bouncer had been discharged from the military for striking an officer, and evidence of other fights that he had been in were relevant to claim of negligent hiring, retention,

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<sup>48</sup> Quinones v. Roe, Cal., Los Angeles County Super. Ct., No. BC 076751, Mar. 23, 1994, 37 ATLA L. Rep. No. 10, p. 376 (Dec. 1994).

<sup>49</sup> Liebman v. Hall Fin. Group, Inc., Tex., Dallas County 116th Jud. Dist. Ct., No. 93-07042-F, July 27, 1994, reported in 38 ATLA L. Rep. 149 (May 1995).

<sup>50</sup> Hoke v. May Dep't Stores Co., 133 Or. App. 410, 891 P.2d 686 (1995).

<sup>51</sup> Brown v. Springwood & Assocs., No. LKA 94-657 (Circuit Court, Kane Co. Ill.), reported in Chicago Daily Law Bulletin p. 3 (Jan. 26, 1996).

<sup>52</sup> Porter v. Proffitt's, Inc., Tenn., Bradley County Cir. Ct., No. V-94-676, Sept. 19, 1996, reported in 40 ATLA L. Rptr. No. 2, p. 72 (March 1997).

supervision, and training against a nightclub at which he hit a patron;<sup>53</sup>

- (35) Numerous other examples are detailed in various articles.<sup>54, 55, 56</sup>

The increased threat of a disparate-impact lawsuit would undoubtedly lead employers to hire *more* individuals with red-flag criminal histories which would lead to *more* negligent-hiring claims against employers. To the extent employers are “punished” for doing criminal-record checks, they would be less likely to do so. The net result: *less* safe workplaces and *more* victims of violence, particularly at-risk populations such as children, the elderly, and the infirm.

Conversely, as the number of negligent-hiring claims, verdicts, and settlements grow – as does the *size* of the verdicts and settlements – employers recognize the necessity of minimizing their potential legal liability – *but more importantly* – of protecting their employees and their assets, and the public at-large.

One additional point about settlements is extremely noteworthy and must not be overlooked. For every case that results in a verdict of negligent hiring, there are many, *many* more where settlements occur. In these cases, defense attorneys for the employers commonly realize the risk of liability and frequently advise their clients to quietly settle the cases rather than being exposed to the potential of the adverse public-relations nightmares, huge costs, and tenuous outcomes of jury verdicts.

First and foremost, this is a people issue. The examples above are incidents that *never* should have happened. Employers have an obligation – and recognize that obligation – *not* to aid and abet criminal behavior. The explosive growth in negligent-hiring and negligent-retention lawsuits simply underscores employers’ commitment in this regard and the necessity of criminal-background checks in employment.

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<sup>53</sup> Hall v. SSF, Inc., 930 P.2d 94 (Nev. 1996).

<sup>54</sup> Peter Page, *Boss liable for rape by driver*, Nat’l L.J., A10, Oct. 1, 2001

<sup>55</sup> Margaret Cronin Fisk, *Estate wins \$46 million for killing*, Nat’l L.J., Mar. 1, 2002

<sup>56</sup> *Check, Please*, Wall Street Journal, Mar. 11, 2002, available at [www.firstcontacthr.com/pdf/checkplease.pdf](http://www.firstcontacthr.com/pdf/checkplease.pdf) (last visited 8/3/2011)

### III. Summary of the CELE's Position on Criminal-Background Checks in Employment

**The seminal question is:** Should employers have access to federal and state criminal-conviction records and be able to use those records as a factor in their consideration of job applicants?

**The seminal answer is:** Absolutely. Such access and consideration is not only appropriate, in many contexts it is absolutely necessary given the high rates of criminal recidivism and the legitimate employer, employee, and public expectations regarding safety and security.

Some advocates of ex-offenders' rights want to restrict the use of criminal-background checks of job applicants by employers, no matter how dire the possible consequences.<sup>57</sup>

One state – Connecticut<sup>58</sup> – already has enacted and repealed a restrictive law in this regard. Proposals are pending in several other states.<sup>59</sup>

In Connecticut, an amendment was added to a non-germane bill during a July 2007 late-night session that, due to the administrative burdens it would impose, would effectively deny criminal-background checks as an option to employers. The amendment's effective date was delayed and ultimately repealed after it was widely reported that a Connecticut school district hired a convicted pedophile as a teacher/coach. The people of Connecticut did not want what their government was preparing to give them. The uproar scuttled the proposed limits on the background checks.

Some criminal-rights' advocates are pushing for policy guidance, rules, and/or legislation that would only allow for criminal-background checks only under very limited exceptions – such as for job applicants for law enforcement positions, *or* for convictions for particularly egregious crimes, *or* for a limited period after the conviction (provided the individual has not subsequently been convicted of the same or a related crime during that period).

These exceptions are *not* particularly meaningful. For example, an individual may have been arrested for an egregious crime (e.g., terrorism-related activities), but pleaded out to a lesser crime (e.g., conspiracy to commit a crime or a firearms-possession charge)... *or* the individual may have been acquitted because of a technicality or a tainted confession... *or*

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<sup>57</sup> For example, there was some effort by the leaders of the American Bar Association's ("ABA") Commission on Effective Criminal Sanctions, to promote sealing of criminal-conviction records as a proposed resolution before the ABA's House of Delegates in 2007. This effort was rejected.

<sup>58</sup> 2007 Conn. Acts 07-243 (originally Connecticut SB 1700).

<sup>59</sup> Principally in Massachusetts, although bills also have been introduced in Ohio, Minnesota, and New Jersey.

the individual may have been “clean” for a period before the conviction record is sealed *because* he or she was in prison during that entire period... *or* because he or she was arrested but the criminal-justice process was winding its way laboriously through our court system<sup>60</sup> with its significant procedural delays and backlogs.<sup>61</sup>

Should employers be able to conduct criminal-background investigations of job applicants? Should employers be able to take every reasonable and appropriate step to screen out convicted felons with an established history of criminal behavior, especially in such circumstances as:

- Day-care centers, juvenile sports leagues, and summer camps screening out convicted pedophiles;
- Pharmaceutical companies and drug stores screening out convicted drug dealers;
- Defense contractors manufacturing guided missiles or employing civilians on military bases screening out those convicted of espionage;
- Banks and credit-card companies screening out convicted embezzlers;
- Hospitals and medical clinics screening out convicted drug abusers;
- Retirement and assisted-living homes screening out convicted arsonists;
- Taxicab and messenger/delivery-service companies screening out those convicted of reckless endangerment or driving under-the-influence;

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<sup>60</sup> Significant delays in our court system are well-documented. One study found that lawsuits took between two-and-a-half and eight years to resolve depending on the nature of the case and the jurisdiction involved. *Evaluating and Using Employer Instituted Arbitration Rules and Agreements in Employment Discrimination and Civil Rights Actions in Federal and State Courts* (ADLI-ABA Course of Study, April 28-30) 875, 894 (1994). While criminal cases are docketed and tried more expeditiously than civil cases, the delays in prosecution, discovery, motions, trials, and appeals can and do routinely take multiple years, especially in major metropolitan areas with greater backlogs.

<sup>61</sup> The backlog in the federal courts is significant – 23,000 cases had been pending in U.S. District Courts for two-to-three years in 2006, and another 50,000 had been pending between one-to-two years, and this does not, of course, include appeals and remands. *U.S. District Courts: Civil Cases Pending by Length of Time Pending* tbl.4.11, available at <http://www.uscourts.gov/judicialfactsfigures/2006/Table411.pdf>.

- School districts and youth recreational centers screening out those convicted of statutory rape;
- Power plants and petroleum refineries screening out convicted terrorists;
- Rehabilitation centers and counseling programs screening out those convicted of spouse or child abuse;
- Retailers and wholesalers screening out those convicted of theft; and
- Employers with diverse workforce populations or diverse clients or patients screening out those convicted of hate crimes?

Really, shouldn't *every* employer have every legitimate option – as appropriate and necessary – for ensuring the protection of its employees, customers, and assets, and the public at-large?

There *are* legitimate privacy interests at stake, and rehabilitation and re-entry into the workforce – under appropriate circumstances – of ex-offenders *is* a highly appropriate societal goal.

However, a blanket prohibition on all or most criminal-background checks – as some criminal-rights' advocates support – would promote the indiscriminate concealment of arrest and conviction information on even the most dangerous of convicted felons, and represents: (1) *bad* public policy; (2) a compromise of employee and public safety; (3) a major impediment to employers' ability to minimize their exposure to legal liability; and (4) a prescription for dramatically more crime and more *severe* crime.

While the re-integration into society of former convicts is a compelling and worthwhile goal, in American society we frequently lose sight of the need to protect the rights of *victims* (and potential victims) by focusing too intently on protecting the rights of *criminals*.

#### IV. ***Ironically, the EEOC Litigates Against Employers That Do Not Conduct Criminal-Background Checks***

The EEOC itself understands the relevance and value of criminal-background checks, even in positions that are not clearly safety-sensitive. Indeed, the EEOC recently obtained a \$5.8 million settlement in a pattern-and-practice sexual harassment case in the

Eastern District of California in which the EEOC criticized the employer for *not* doing a criminal-background check.<sup>62</sup>

The basis of the EEOC's lawsuit was the allegation that ABM Industries, a janitorial-service company, was negligent in not reviewing the criminal history of a supervisor, Jose Vasquez. In response to the employer's Motion for Summary Judgment, the EEOC filed a brief that repeatedly – in fact, five times – referred to Mr. Vasquez as a “convicted” sex offender.

Indeed, on page six of its Memorandum of Points and Authorities, the EEOC directly attacked ABM because “[D]efendants failed to initiate an investigation into Vasquez’ criminal background.” In fact, the EEOC felt Vasquez’ prior conviction outside ABM’s workplace was so important that during the investigation, the EEOC informed ABM of Vasquez’ conviction.<sup>63</sup>

The EEOC states that it “filed this lawsuit to vindicate the public interests and the interests of the Charging Party and class members throughout the Central Valley of California.”<sup>64</sup>

## V. Criminal Recidivism

While re-integration into society for ex-convicts is a worthwhile goal, and while acquiring gainful employment for ex-convicts is an important step in *preventing* criminal recidivism (without an income, what choice is left for an ex-offender but to return to crime?), the reality is that former criminals *are* highly likely to become current criminals.

In fact, at a conference conducted by the American Bar Association’s Commission on Effective Criminal Sanctions, Professor Alfred Blumstein of the Heinz School at Carnegie-Mellon University reported that, based on the preliminary findings of his research, as many as 80 percent of those released from prison after criminal convictions will be convicted of crimes again, with the percentages especially high for those convicted of burglary and robbery.<sup>65</sup>

In 2002, the U.S. Department of Justice’s Bureau of Justice Statistics (“BJS”) released a study of criminal recidivism covering released inmates from 15 states (hereinafter

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<sup>62</sup> *EEOC v. ABM Indus., et al.*, 1:07-cv-1428, *see also*, ABM Industries Settles EEOC Sexual Harassment Suit For \$5.8 Million, available at <http://www.eeoc.gov/eeoc/newsroom/release/9-2-10.cfm> (last viewed 8/3/2011)

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2.

<sup>65</sup> Blumstein, Alfred, Redemption in the Presence of Background Checking – Some Preliminary Results, Conference on Fair Use of Criminal Records in Employment, ABA Commission on Effective Criminal Sanctions, Washington, DC, January 12, 2008.

“the study”). The study tracked 272,111 former inmates for three years after their respective releases from prison in 1994. In defining the term “recidivism,” the study used four separate measures: rearrest, reconviction, resentence to prison, and return to prison with or without a new sentence.<sup>66</sup>

The study found that of the 272,111 prisoners released in 1994, 67.5 percent of the prisoners were rearrested for a new offense (almost exclusively a felony or a serious misdemeanor), 46.9 percent were reconvicted for a new crime, 25.4 percent were resented to prison for a new crime, and 51.8 percent were back in prison serving time for a new sentence or a technical violation of their release.<sup>67</sup>

Thus, more than half were back in prison within three years. By contrast, the general population has a 6.6 percent chance that they will serve time in prison during their *lifetime*.<sup>68</sup> This means that criminal recidivists are nearly *eight times* more likely to be incarcerated again within three years than an average American is to be incarcerated for the first time.

#### (A) **First-Time Offenders and Recidivism**

While criminal recidivism is a major problem in the United States criminal-justice system, first-time offenders have accounted for a large increase in overall crime in the country. Between 1974 and 2001, the number of adults incarcerated increased by 3.8 million. Nearly two-thirds of the 3.8-million-person increase occurred as a result of an increase in first-time incarceration rates.<sup>69</sup>

However, once an individual has entered the criminal-justice system, the person is more likely to be arrested again within three years of release. Within three years of a convict's release, even 40.6 percent of prisoners with just one prior arrest were rearrested.<sup>70</sup>

Moreover, the *more* arrests an ex-convict has, the *more* likely he or she will be rearrested. Within three years, 47.5

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<sup>66</sup> Bureau of Justice Statistics Special Report: Recidivism of Prisoners Released in 1994, U.S. Department of Justice, NCJ 193427, Patrick A. Langan, Ph.D., David J. Levin, Ph.D., June 2002, at pg. 1.

<sup>67</sup> *See id.* This, of course, does *not* include the substantial number of crimes committed for which the offenders are not apprehended. No one is charged in more than 80 percent of the crimes committed in America today.

<sup>68</sup> Bureau of Justice Statistics, U.S. Department of Justice, Criminal Offender Statistics, at <http://www.ojp.usdoj.gov/bjs/crimoff.htm>.

<sup>69</sup> *See id.*

<sup>70</sup> *See, supra, note 61, at pg. 10.*

percent of people with two prior arrests were rearrested, 55.2 percent of those with three prior arrests were rearrested, and 59.6 percent of those with four arrests were rearrested. Across the board, the number of prior arrests *directly* correlates to the chances that an individual will be rearrested within any given time period – the more prior arrests, the higher the percentage of rearrests. At the high end, individuals with 16 or more prior arrests had an 82.1 percent chance of being rearrested.<sup>71</sup>

The annual proportion of federal offenders with “zero criminal history points” is substantial. However, it is substantially lower than the percentage of federal offenders who are recidivists.<sup>72</sup>

In fact, overall, significantly more crime is being committed by recidivists than by first-time offenders – almost *50 percent* more. The U.S. Sentencing Commission report found that in 2004, 57.8 percent of federal offenses were committed by individuals with at least one prior conviction.<sup>73</sup> When compared to the adult population in the United States as a whole, first-time offenders are only a very small subset of the general population.

Therefore, the odds that a released prisoner will commit another crime are *much* higher than the odds that someone who has never committed a crime will start committing crime.

**(B) Total Crime Compared to Recidivist Crime**

BJS also attempted to measure the percentage of all crimes that were committed by released prisoners. While the study did not precisely measure what fraction of all crimes the released prisoners accounted for, it calculated the number of arrests for seven serious crimes – murder, rape, robbery,

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<sup>71</sup> *See id.*

<sup>72</sup> Research Series on the Recidivism of Federal Guideline Offenders, Recidivism and the ‘First Offender,’ A Component of the Fifteen Year Report on the U.S. Sentencing Commission’s Legislative Mandate, May 2004, (defining “zero criminal history points” as individuals with no prior contact in the criminal-justice system, those with prior arrests but no convictions, and those with minor convictions but only for limited offenses such as hitchhiking, juvenile status offenses, loitering, and minor traffic offenses). available at [http://www.uscc.gov/Research/Research\\_Publications/Recidivism/200405\\_Recidivism\\_First\\_Offender.pdf](http://www.uscc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_First_Offender.pdf) (last viewed 8/3/2011)

<sup>73</sup> *See id.*

aggravated assault, burglary, larceny, and motor vehicle theft.<sup>74</sup> Released prisoners were arrested within three years of their release from prison for homicide at a rate 53 times higher than the homicide arrest rate for the adult population.<sup>75</sup> Between 1994 and 1997, 8.4 percent of homicides overall were committed by prisoners released in 1994 – a figure which does *not* include released prisoners who had crossed state lines.<sup>76</sup> The percentage of homicides attributable to released prisoners would be substantially greater if it included these additional individuals. Regarding the threat – and the *reality* – of workplace violence, surely the EEOC cannot ignore *these* numbers.

(C) **Specific Offense Recidivism – “Specialists”**

“Specialists” are prisoners who, after being released, commit the same crime that resulted in their imprisonment. Different offenses show varying degrees of specialization. The types of convictions that showed high degrees of specialization were robbery (13.4 percent), assault (22 percent), burglary (23.4 percent), and motor vehicle theft (11.5 percent).<sup>77</sup>

Further analysis of released prisoners shows a striking pattern among categories of offenses previously thought to be non-specialists. The study analyzed the ratio of ex-convicts being rearrested for the same or similar offense compared to rearrest for a different offense. Someone who committed a rape was 4.2 times more likely to be rearrested for rape than if the initial conviction was for a crime other than rape. The ratios of other offenses were also high. Released prisoners with other sexual-assault records were 5.9 times more likely to be rearrested for sexual assault. Released prisoners with prior fraud convictions were 5.3 times more likely to be rearrested for fraud. Released prisoners with prior drug offenses were 2.1 times more likely to be rearrested for another drug offense.

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<sup>74</sup> See, *supra*, at note 61, at pg. 5.

<sup>75</sup> See *id.*, at pg. 6.

<sup>76</sup> See *id.*

<sup>77</sup> See *id.*, at pg. 9. These percentages, again, refer to crimes committed in the three-year period between 1994 and 1997 by prisoners released from prison in 1994 alone.

Thus, recidivism is not only prevalent, a pattern of *same-offense* recidivism is highly prevalent.<sup>78</sup>

**(D) Recidivism and Violence**

The U.S. Sentencing Commission report found an especially troubling statistic regarding the linking of violent crimes to recidivism. The report found that recidivists were much more likely to have a weapon, use actual or threatened violence, and injure or threaten to injure a victim during the commission of a crime.<sup>79</sup> The report also suggests that regardless of the number of convictions, the more arrests an individual has, the more likely the arrests involve weapons, injury, or violence.<sup>80</sup> The BJS study found that of the recidivists released from prison in 1994, 61.7 percent of the recidivists were rearrested for a violent offense regardless of what their original offense was.<sup>81</sup> Again, these statistics are highly relevant to the issue of workplace violence, and highly relevant to employers' legitimate commitment to criminal-records checks.

**(E) Recidivism and Employment**

Some evidence suggests that access to employment reduces recidivism. Indeed, numerous articles have been written maintaining the close relationship between post-incarceration employment and reduced recidivism. This theory purports that employment provides for basic needs that criminal activity previously funded. Indeed, work-release reentry programs have made an impact on recidivism. Although many of the programs were not specifically intended to reduce recidivism, studies of some work programs report reduced recidivism rates, but qualify these findings by admitting biased data. These work-release programs are generally subject to the inmate's election. The self-selection process of program participants' results in a group that is less likely to revert to criminal behavior with or without the

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<sup>78</sup> *See id.*

<sup>79</sup> *See, supra, note 67, at pg. 9.*

<sup>80</sup> *See id., at pg. 16.*

<sup>81</sup> *See, supra, note 61, at pg. 9, table 10.*

program.<sup>82</sup> Simply put, ex-convicts clearly are unlikely to participate in such surveys if they are continuing to engage in criminal behavior, or to be honest about their resumption of criminal behavior if they do choose to participate in such surveys.

Some studies have argued that without income from employment, released prisoners are more likely to turn to crime for economic support. Employment, however, is important for many reasons beyond the basic need for income. Employment also provides a stabilizing routine, occupies time that might otherwise be used for illegal activity, keeps individuals responsive to employer's behavioral demands, and provides a non-stigmatized social role. Although work is important, not all types of employment have the same effect on recidivism. Higher wages are an important factor in reducing recidivism. Generally speaking, only jobs that are high quality in terms of pay or viable careers have been shown to reduce recidivism.<sup>83</sup>

While high-paying employment may reduce recidivism rates, studies of federal programs meant to provide employment assistance have demonstrated very limited reductions in recidivism. These programs generally focus only on the need for employment, not other serious issues that many released inmates face, such as substance abuse, mental illness, the stigma associated with their criminal past, and the lack of education, skills, and/or work experience.<sup>84</sup> In addition, the post-incarceration positions that former inmates generally hold are not high-paying or career-oriented. Former inmates will not have the ability to obtain a satisfactory job or stay gainfully employed without programs that address these other issues.

Access to employment is therefore not the single answer in addressing criminal recidivism. Legislation and government programs must focus on the entire set of problems that former inmates face, rather than limiting employers' access to information in an attempt to artificially and inappropriately bolster employment rates regardless of the human and financial costs. To truly re-integrate former inmates

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<sup>82</sup> Bushway, Shawn, Reentry and Prison Work Programs, Urban Institute, May 2003, available at [www.urban.org/url.cfm?ID=410853](http://www.urban.org/url.cfm?ID=410853). (last viewed 8/3/2011)

<sup>83</sup> Lise McKean, Current Strategies for Reducing Recidivism, Center for Impact Research, August 2004, at pg. 19. available at: <http://www.impactresearch.org/documents/recidivismfullreport.pdf> (last viewed Aug. 4, 2011)

<sup>84</sup> *See id.*

into society, employment represents only one part of the equation.

Recidivism statistics are particularly troubling when viewed in light of the threat in a small number of states to prevent or restrict criminal-background checks in employment. Entrance into the U.S. criminal-justice system dramatically increases the likelihood that individuals will continue their criminal behavior.

To deny criminal-records access would leave employers in the dark – a frightening “dark.” Employers could have no knowledge of whether they would be hiring an individual with a criminal background, how extensive that criminal background is, and whether the criminal background is relevant (from a time and/or substance standpoint) to the job for which the applicant is being considered.

As research has clearly demonstrated, individuals with criminal backgrounds are much more likely to commit another crime than the general U.S. population (as much as 80 percent become criminal recidivists; only six percent of Americans are ever convicted of a crime).<sup>85</sup>

That means employers would be putting themselves, their employees, and the public at-large at substantially higher risk by hiring an individual who has a high statistical probability of engaging in criminal activity. In addition, employment alone has not been proven to reduce recidivism. Ultimately, only effective programs to increase skills and education (and therefore increase eligibility for higher-paying jobs) and to reduce substance abuse and treat mental illness will have a positive effect on reducing recidivism.

## **VI. The Links Between Crime and Substance Abuse, and Between Substance Abuse and Recidivism**

In considering crime in America, it is impossible to ignore the highly detrimental and incestuous impacts of drug dealing, drug-related crime, and substance abuse.

Two questions need to be answered: (1) What are the relationships between crime and substance abuse, *and* between crime and substance-abuse recidivism?; and (2) Are substance abusers more likely to be criminal recidivists than individuals who do not abuse – or have not abused – drugs or alcohol?

A direct correlation exists between substance abuse and crime. Nearly one-quarter of federal prison inmates, and one-third of state prison inmates, reported being under the influence of drugs or alcohol when they committed their respective offenses. While there is debate as to whether the correlation between substance abuse and crime consistently equates to causation, certain types of crime, such as violent crime and property crime, clearly demonstrate a direct causal link.

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<sup>85</sup> See, *supra*, notes 10 and 63.

Drugs and alcohol are prevalent in crime. One U.S. Government study showed that more than 36 percent of the 5.3 million convicted adult offenders under the jurisdiction of probation authorities, jails, prisons, or parole agencies had been drinking at the time of the offenses for which they had been convicted.<sup>86</sup> Nearly half of those convicted of assault and sentenced to probation had been drinking when the offense occurred.<sup>87</sup>

In fact, 68 percent of the criminal-justice population (prison inmates) “meet the criteria for substance abuse or dependence,” according to the DOJ’s Amy Solomon in her recent testimony to the EEOC.<sup>88</sup>

This is brought into sharper focus by the fact that at least 90 percent of substance abusers with legal and/or illegal drug problems relapse in the short term according to the National Institutes of Health – a strikingly high recidivism rate.<sup>89</sup> If more than two-thirds of convicted felons are drug abusers or addicts, and more than 90 percent of those are subject to *short-term* recidivism, isn’t this more of a drug treatment and rehabilitation problem (and, therefore, not within the mandate of the EEOC) than an employment-related race problem?

Moreover, does *anyone* cogently question an employer’s right or interest in screening out drug abusers?

Thus, more than two-thirds of convicted felons have illegal drug problems. Employers routinely do preemployment drug testing to screen out drug abusers from their workforce – and rightfully so – and the case law is overwhelmingly in favor of employers’ rights to do so. So why might it be inappropriate to screen out a job applicant for a convicted rape or embezzlement, and *not* be inappropriate to screen out an applicant for smoking marijuana?

Moreover, based on the DOJ’s own statistics, arguably a high proportion of those denied employment because of a criminal-records check would have been denied employment (or subsequently dismissed from employment) based on a positive drug-test result.

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<sup>86</sup> Lawrence A. Greenfeld, Alcohol and Crime: An Analysis of National Data on the Prevalence of Alcohol Involvement in Crime, Bureau of Justice Statistics, U.S. Department of Justice, prepared for the Assistant Attorney General’s National Symposium on Alcohol Abuse and Crime, April 5-7, 1998, at pg. 20.

<sup>87</sup> *See id.*, at pg. 21.

<sup>88</sup> See testimony of Amy Solomon, at 5. Jennifer Karberg and Doris James, “Substance Dependence, Abuse, and Treatment of Jail Inmates, 2002,” Special Report NCJ 209588 (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 2005). <http://www.ojp.usdoj.gov/bjs/abstract/sdatji02.htm>.

<sup>89</sup> Health A to Z: Substance Abuse and Dependence, at [http://www.healthatoz.com/healthatoz/Atoz/common/standard/transform.jsp?requestURI=/healthatoz/Atoz/ency/substance\\_abuse\\_and\\_dependence.jsp](http://www.healthatoz.com/healthatoz/Atoz/common/standard/transform.jsp?requestURI=/healthatoz/Atoz/ency/substance_abuse_and_dependence.jsp). (last viewed Aug. 8, 2011)

At any rate, victims of violent crimes perceived drug use by the assailant 37 percent of the time.<sup>90</sup> Among victims of violence who were able to describe the offender's use of drugs, about two-thirds of those in an intimate relationship with the offender reported the offender's drinking at the time of the crime. These individuals were current or former spouses, boyfriends, or girlfriends. Based on victim reports, on average, each year approximately 183,000 rapes and sexual assaults involve alcohol use by the offender, as do more than 197,000 robberies and 661,000 aggravated assaults, and nearly 1.7 million simple assaults. Combined abuse of drugs and alcohol accounted for 18 percent of the alcohol-involved rapes and sexual assaults, 36 percent of the alcohol-involved robberies, 24 percent of the aggravated assaults in which the offender was drinking, and 15 percent of the simple assaults involving a drinking offender.<sup>91</sup>

**(A) Substance Abusers and Recidivists**

Substance abuse is a chronic relapsing illness.<sup>92</sup> In 2009, an estimated 21.8 million Americans aged 12 or older were current illicit drug users and had used an illicit drug during the previous month. This estimate represents 8.7 percent of the population age 12 and older.<sup>93</sup> In 2009, an estimated 22.5 million persons age 12 and older were classified with substance dependence or abuse in the past year (8.9 percent of the population age 12 and older). Of these, 3.2 million were classified with dependence on, or abuse of, both alcohol and illicit drugs, 3.9 million were dependent on or abused illicit drugs but not alcohol, and 15.4 million were dependent on or abused alcohol but not illicit drugs.<sup>94</sup>

In 2009, the number of persons age 12 and older needing treatment for an alcohol-use problem was 19.3 million (7.7 percent of the population age 12 and older). Of these, 1.7 million (0.7 percent of the total population and 8.8 percent of the people who needed treatment for an alcohol-use problem) received alcohol-use treatment at a specialty facility. Thus,

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<sup>90</sup> See *id.*, at pg. 3.

<sup>91</sup> See *id.*

<sup>92</sup> Haiyi Xie, Ph.D. et. al., Substance Abuse Relapse in a Ten-Year Prospective Follow-up of Clients With Mental and Substance Use Disorders, *Psychiatric Services*, Vol. 56, No. 10, October 2005, at pg. 1282.

<sup>93</sup> Department of Health and Human Services, Substance Abuse and Mental Health Service Administration: 2009 National Survey on Drug Use & Health, at pg. 16. (These statistics reflect use of marijuana, cocaine, heroin, hallucinogens, and inhalants; and the non-medical use of prescription-type pain relievers, tranquilizers, stimulants, and sedatives.)

<sup>94</sup> See *id.*, at pg. 73.

there were 17.6 million people who needed treatment but did not receive treatment at a specialty facility for an alcohol-use problem.<sup>95</sup>

Addiction to a drug is a very powerful – and destructive – force. Recovery from substance abuse is notoriously difficult, even with exceptional treatment resources. The National Institute on Alcohol Abuse and Alcoholism at the National Institutes of Health cited evidence that 90 percent of alcohol-dependent users experience at least one relapse within the four years after treatment. Relapse rates for heroin and nicotine users are believed to be similar.<sup>96</sup>

Thus, those who have formerly had a substance-abuse problem (addiction and/or alcoholism) have at least a 90-percent probability of a relapse in the short term, while non-substance-abusers have only about a ten-percent chance of *ever* developing a substance-abuse problem.

**(B) Drug Users in the General Population Are More Likely Than Non-Users to Commit Crimes**

Of inmates in local jails in 2002, 68.7 percent reported using drugs at least once a week for at least a month. In addition, 28.8 percent of inmates in local jails in 2002 reported using drugs at the time of the offense.<sup>97</sup> In 2006, adults aged 18 or older who were on parole or supervised release from jail during the past year had higher rates of dependence on, or abuse of, a substance (36.9 percent) than their counterparts who were not on parole or supervised release during the past year (9.1 percent).<sup>98</sup> The rate of substance dependence or abuse was 39.7 percent among adults who were on probation during 2006, which was four-and-a-half times higher than the rate of adults who were not on probation during the past year (8.7 percent).<sup>99</sup>

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<sup>95</sup> See *id.*, at pg. 87.

<sup>96</sup> See, *supra*, note 84.

<sup>97</sup> Bureau of Justice Statistics, U.S. Department of Justice, Substance Dependence, Abuse, and Treatment of Jail Inmates, NCJ 209588, July 2005.

<sup>98</sup> See, *supra*, note 86, at pg. 74.

<sup>99</sup> See *id.*

A U.S. Department of Health and Human Services (“HHS”) survey asked individuals about their drug and alcohol use and involvement in acts that could get them in trouble with the police. Data for 2005 showed that among adults, those who use cannabis (marijuana) or cocaine were much more likely to commit crimes of all types than those who did not use these substances. Of those arrested for a violent crime, 63.1 percent also reported using illicit drugs in the year prior to their arrest.<sup>100</sup> Individuals who had been arrested two or more times for the most serious “Part I” crimes were more likely to have used an illicit drug in the past year than those who were only arrested once (69.8 percent versus 55.2 percent).<sup>101</sup>

**(C) Factors Related to Drug Use and Crime – the Goldstein Framework**

In 1985, Paul Goldstein, the then-Deputy Director of Narcotics and Drug Research Inc., was commissioned by the National Institute on Drug Abuse to write a series of studies that described the connection between drugs and violence. Goldstein looked at drug-related violence and created three distinct categories of drug crime. Goldstein classified drug crimes as psychopharmacological, economic-compulsive, and systemic. The psychopharmacological category was for violence due to the direct acute effects of a psychoactive drug on the user. The economic-compulsive category encompassed the violence committed instrumentally to generate money to purchase expensive drugs. Finally, the systemic category covered violence associated with the marketing of illicit drugs, such as turf battles, contract disputes, etc.<sup>102</sup>

When the Goldstein framework was applied to homicides in New York State in 1984 and New York City in 1988, it was found that drugs and alcohol were important causes for a large number of homicides in both samples. For the 1988 sample in New York City, near the height of the crack

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<sup>100</sup> National Survey on Drug Use and Health. Office of Applied Studies, Substance Abuse and Mental Health Services Administration, NSDUH Report: Illicit Drug Use Among Persons Arrested for Serious Crimes, December 16, 2005.

<sup>101</sup> *See id.*, at pg. 3. Part I offenses include criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson.

<sup>102</sup> Goldstein, Paul, The Drug/Violence Nexus: A Tripartite Conceptual Framework, *Journal of Drug Issues*, 14, 1985, at pgs. 493-506.

epidemic, Goldstein classified 53 percent of 414 homicides as drug- or alcohol-related.<sup>103</sup>

### 1. Psychopharmacological

When other researchers applied the Goldstein framework, they found that purely psychopharmacological violence (as opposed to economic-compulsive or systemic) is rare and attributable mostly to alcohol rather than illicit drugs. If the psychopharmacological claim is that drugs directly promote violent behavior absent any situational provocation or stressors, then that claim is probably wrong. However, when taking into account the individual's psychological health and the situation leading to the violent crime, drugs – and, even more so, alcohol – can amplify the psychological and situational facilitators of aggression.<sup>104</sup>

### 2. Economic-compulsive

Clear evidence exists to form a relationship between crime and drugs under Goldstein's economic-compulsive category. In 2004, 17 percent of state prisoners and 18 percent of federal inmates said they committed their current offense to obtain money for drugs.<sup>105</sup> About a quarter of convicted property and drug offenders in local jails in 2002 had committed their crimes to get money for drugs, compared to five percent of violent and public-order offenders. State prisoners in 2004 for property (30 percent) and drug offenses (26 percent) were more likely to commit their crimes for drug money than violent (10 percent)

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<sup>103</sup> National Institute of Justice: The Research, Development, and Evaluation Agency of the U.S. Department of Justice. Robert MacCoun, Beau Kilmer, and Peter Reuter, Research on Drugs-Crime Linkages: The Next Generation, July 2003, at pg. 66.

<sup>104</sup> *See id.*

<sup>105</sup> Bureau of Justice Statistics, U.S. Department of Justice, Drug Use and Dependence, State and Federal Prisoners 2004, NCJ 213530, October 2006.

and public-order (7 percent) offenders.<sup>106</sup> Inmates in local jails convicted of burglary had the highest rate of substance dependence or abuse (85 percent).<sup>107</sup> Money-generating crimes quite clearly account for the majority of economic-compulsive drug crimes.

### **3. Systemic Violence**

Some drug markets are more prone to market-related violence than others. While the market for marijuana is generally not violent, the crack market is particularly prone to market-related violence.<sup>108</sup>

The National Institute of Justice (“NIJ”) suggested four factors account for the increase in violence in the crack market: (1) the youth of the participants increase the likelihood for violent crime. NIJ believes that the young are particularly likely to lack foresight, judgment, and restraint, and thus engage in violence to settle disputes; (2) the high value of the drugs themselves lead to increased violence; (3) the intensity of law enforcement increases the likelihood that drug transactions are conducted under considerable uncertainty, and as a consequence, situational violence can be high; and (4) the indirect consequences of drug use render some drug users more violent and aggressive, causing dealers to be more likely to carry and use weapons and, similarly, to make this more likely among their customers. This in turn promotes unreliable behavior among both users and dealers as well as subsequent retaliation by their suppliers.<sup>109</sup>

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<sup>106</sup> Bureau of Justice Statistics, U.S. Department of Justice, Drug and Crime Facts, NCJ 165148, April 12, 2007. (26.9 percent of local jail inmates who committed property crimes did so for money for drugs. 24.8 percent of local jail inmates who committed drug crimes did so for money for drugs.)

<sup>107</sup> Bureau of Justice Statistics, U.S. Department of Justice, Drug and Crime Facts, May 20, 2007, at <http://www.ojp.usdoj.gov/bjs/def/duc.htm>

<sup>108</sup> Research on Drugs-Crime Linkages: The Next Generation, July 2003, at pg. 74.

<sup>109</sup> *See id.*

Under the Goldstein framework, drugs have a distinct impact on overall crime. Drug use increases the need for money, thus increasing property crime. Use of drugs may increase an individual's general aggression when a predisposition for violence already exists. Finally, some drugs are accompanied by varying degrees of market-related crime.

**(D) Drugs and Driving**

DUI offenses are a major source of drug- and alcohol-related crime, injuries, and fatalities. In 2005, nearly 1.4 million drivers were arrested for driving under-the-influence of alcohol or narcotics.<sup>110</sup> In 2006, an estimated 17,602 people died in alcohol-related traffic crashes – an average of one person every 30 minutes. These deaths constitute 41 percent of the 42,642 total traffic fatalities. Of these, an estimated 13,470 involved a driver with an illegal blood-alcohol content (.08 or greater).<sup>111</sup> In 2000, 1,400 fatalities occurred in crashes involving alcohol-impaired or -intoxicated drivers who had at least one prior driving-while-intoxicated (“DWI”) conviction. This represents 8.5 percent of all alcohol-related fatalities.<sup>112</sup> In addition, 34 percent of the offenders in jail and eight percent of the offenders on probation reported having been convicted of three or more DWI offenses in their lifetime.<sup>113</sup>

**(E) Drug Use and Criminal Recidivism**

As discussed earlier, the U.S. Department of Justice's Bureau of Justice Statistics issued a special report regarding recidivism of prisoners released in 1994. The report followed 272,111 former inmates for three years after their release from prison in 15 different states. Of the prisoners released whose

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<sup>110</sup> U.S. Department of Justice, Federal Bureau of Investigation, Crime in the United States 2005: Uniform Crime Reports, Washington, D.C., FBI, 2005 [cited 2006 Nov 3].

<sup>111</sup> National Highway Traffic Safety Administration, 2006 Traffic Safety Annual Assessment – A Preview, DOT 810 791, Washington, D.C., National Highway Traffic Safety Administration, July 2007, at <http://www-nrd.nhtsa.dot.gov/Pubs/810791.PDF>. (last viewed Aug. 8, 2011)

<sup>112</sup> Angel Outside My Window – Don't Drink and Drive, at <http://aomw.org/>.

<sup>113</sup> National Highway Traffic Safety Administration, A Guide to Sentencing DWI Offenders, 2005 HS 810 555, Washington, D.C., National Highway Traffic Safety Administration, 2005, at <http://www.nhtsa.dot.gov/people/injury/alcohol/DWIOffenders/pages/intro.htm>. (last viewed Aug. 8, 2011)

most serious offense was a drug offense, 66.7 percent were rearrested within three years. Of all drug-crime recidivists, 49.2 percent returned to prison within three years of their release. Of those previous drug offenders rearrested, 41.2 percent were rearrested for a new drug offense.<sup>114</sup>

As discussed above, DWI recidivism is a major problem. The National Highway Traffic Safety Administration found that the majority of DWI offenders:

- Are age 25-to-45, male, white, and unmarried; have blue-collar jobs; prefer beer and drink it frequently; tend to drink at bars; and tend to be “problem drinkers” (i.e., repeat DWI offenders, drink excessively [5 or more drinks in a session], and have problems associated with alcohol use); and
- Tend to have experienced alcohol-related problems in the past and tend to be extroverted, impulsive, aggressive, hostile, and anti-social.<sup>115</sup>

DWI arrestees also are much more likely to have more arrests for non-traffic offenses including, but not limited to, assault and public drunkenness.<sup>116</sup>

The statistics regarding overall rearrest rates for drug-related crimes are difficult to quantify. Due to different definitions of the phrase “drug-related,” studies differ on how to classify crimes. For example, the FBI conducted a study entitled “Crime in the United States: Uniform Crime Reports.” In the study, the FBI did *not* include as drug-related a burglary committed by someone under the influence of drugs *or* a murder that occurs during a robbery committed to obtain money to buy drugs.<sup>117</sup> The Department of Justice’s Bureau of Justice Statistics classifies crimes in the same manner.

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<sup>114</sup> See, *supra*, note 61. Drug offenses include drug trafficking, drug possession, and other drug-related offenses.

<sup>115</sup> See, *supra*, note 105.

<sup>116</sup> See *id.*

<sup>117</sup> Executive Office of the President, Office of National Drug Control Policy, Drug Policy Information Clearinghouse: Fact Sheet, March 2000, at pg. 5.

Regardless of the problems in defining drug-related crime, drugs clearly have a major impact on crime. In addition, under the Goldstein framework, drug users are likely to continue their criminal habits due to the psychopharmacological, economic-compulsive, and systemic pressures.

Drugs and alcohol clearly and substantially are directly related to the incidents and severity of crime in America today.

Whether the effects of drugs cause violent behavior and/or criminal activity (psychopharmacological effects), the need for money by chronic substance abusers or addicts to support their habits leads to crime (economic-compulsive), or the drug market creates criminal activity, such as stealing and dealing, and the violence associated with them (systemic), one plain fact stands out: drugs and crime are inextricably linked.

Many convicted criminals were under the influence of drugs and/or alcohol at the time they committed their crimes. Drugs are also prevalent in recidivist crimes. Many released prisoners are reconvicted for drug-related offenses, and many more abuse drugs and alcohol.

Moreover, a very high percentage of crime is caused by those who are chronic substance abusers who are drug- and/or alcohol-dependent. Recidivism rates by chronic substance abusers, addicts, and alcoholics are extremely high, and multiple relapses are the rule, not the exception. The recidivism of the substance abuser *after* “successful” rehabilitation often equates to *criminal* recidivism by the substance abuser.

“Former” substance abusers will *always* constitute a *much* higher at-risk population for future substance abuse than the public at-large, and – correspondingly – ex-criminal-offenders will *always* be a *much* higher at-risk population than the public at-large for future criminal offenses. You cannot separate one from the other. The former is a significant subset of the latter. The extensive and well-documented incidence of substance abuse addiction/alcoholism recidivism translates *directly* into criminal recidivism.

## VII. Conclusion

***“Nothing we do is more important than hiring and developing people. At the end of the day you bet on people, not on strategies.”***<sup>118</sup>

So said Larry Bossidy, former Chairman of the Board of Honeywell. Mr. Bossidy was right – nothing is more important to a company than who it hires, and we do “bet” on the people we hire.

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<sup>118</sup> Lawrence A. Bossidy, *Execution: The Discipline of Getting Things Done*, at <http://www.brainyquote.com/quotes/quotes/l/larrybossi307853.html> (last viewed Aug. 3, 2011)

But we don't want to bet too much, we don't want to risk too much, we don't want to "bet the farm" on any one wager – or one person, especially if that person is a convicted felon with a documented history of crime and/or violence.

Let's *not* bet. Let's play it safe.

We cannot give guns and badges, keys and combinations, passcodes, checkbooks, our children, and our trust to those who are at a high risk of abusing it, to those who may have as high as an 80-percent chance of criminal recidivism, to those who *may* be wedded to terrorism and anarchy. We cannot gamble with people's lives – the lives of *our* people who expect more and deserve our protection.

As the comments above demonstrate, to restrict background checks is *not* in the interest of *any* American.

The existing law on arrest and conviction records appropriately addresses the rights and responsibilities of *both* employees and employers, *both* those with a criminal history and those without one, and *both* those who need employment reentry and those who need to be protected, especially those who are in a high at-risk population such as children, the elderly, and the infirm.

Therefore, we should refrain from undermining this current legal balance of interests, and/or would create a more litigious environment, a more legally suspect cause of action, a more dangerous American workplace, and a larger pool of employer, employee, and public victims by unduly restricting the rights and incentives of employers to conduct lawful and appropriate criminal-background checks.

On behalf of the Counsel for Employment Law Equity and Jackson Lewis LLP, I thank you for your consideration of my views and offer my willingness to provide future information and input which would be helpful to your deliberations.

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**William A. Dombi**

**STATEMENT OF WILLIAM A. DOMBI  
VICE PRESIDENT FOR LAW  
NATIONAL ASSOCIATION FOR HOME CARE & HOSPICE**

**Before the  
UNITED STATES ON CIVIL RIGHTS**

**December 7, 2012**

Thank you for the opportunity to present testimony today. The issues involved in screening prospective employees for criminal record backgrounds have been longstanding in home care, presenting a myriad of challenges in complying with state and federal laws regulating the home care community as health service providers, engaging in best practices in employment and service, and fully respecting the civil rights of applicants for employment as well as existing employees. My testimony focuses on the recent Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964 issued by the Equal Employment Opportunity Commission.

At the outset, it must be stated that the National Association for Home Care & Hospice (NAHC) and its members fully support efforts to ensure all civil rights guaranteed to employees and applicants for employment. Likewise, NAHC supports all appropriate efforts to protect the highly vulnerable patient population served in home care along with the integrity of the numerous federal and state programs that finance this essential care.

In that regard, NAHC strongly supports the use of criminal background checks as an employment screen for individuals who have direct patient contact, access to health information on patients, or responsibilities related to health care financing, including payments by federal and state health care programs. Comprehensive criminal background checks are an essential tool for home care providers in meeting their responsibilities to protect patients, payers, and their organization.

**Background on Home Care**

Home care is a very diverse set of services provided to every age group throughout the nation. It is estimated that over 12 million people receive home care from non-family members each year. The patients and clients range from newborns to those in their end of life. Pediatric home care includes high tech services such as ventilator care to newborns and

much more. Developmentally disabled youths and adults receive extensive skilled and personal care services. Persons with physical disabilities also rely on extensive home care to remain in the community. The elderly population is the predominant recipient of home care, much of it funded by Medicare, Medicaid, the Administration on Aging, state programs, and through private payment. Medicare alone covers 3.5 million beneficiaries each year under its home health benefit. Medicaid covers many more with nearly \$60 billion in spending for skilled and personal care services.

Typically, home care patients/clients are confined to their home due to the severity of their illness, injury, mental limitations or functional incapacity. Many of the elderly patients/clients live alone or with their aged spouse. Home care patients/clients are among the most vulnerable citizens in the country, subject to acute and chronic infirmities, dependent upon others for their recovery or maintenance of activities of daily living. As such, they are at high risk of abuse—physically, emotionally, and financially. In addition, many patients/clients use multiple prescription medications thereby creating an opportunity for others to acquire drugs otherwise not available to them. Finally, many home care patients/clients receive funding for their care from government programs, creating a risk of fraud by the provider.

The risks referenced above are heightened by the fact that in many instances the home care caregiver is alone with the patient/client. While supervision does occur, it is periodic rather than continuous and may not even occur with the caregiver present.

It is estimated that the total professional and nonprofessional caregivers in home care is approximately 2 million persons. The US Department of Labor estimates the nonprofessional workers at nearly 1.7 million and growing rapidly. While the actual number of paid individual caregivers is unknown, California, for example, uses several hundred thousand in a Medicaid program known as “In-Home Supportive Services.”

The nonprofessional caregivers are personal care assistants, homemaker-home care aides, and home health aides. Under Medicare home health and hospice benefits, home health aides are credentialed through training, competency testing, and ongoing in-service training. These aides are employed by Medicare participating home health agencies and hospices that adhere to comprehensive Conditions of Participation. Outside of the Medicare services, the nonprofessional staff may be comparably credentialed through state licensure requirements, payer standards, or on a voluntary basis. However, not all aides are credentialed.

Professional staff includes nurses, physical therapists, speech-language pathologists, occupational therapists, respiratory therapists, dieticians, medical social workers and others. The vast majority of these professional workers are subject to state licensing requirements.

Home care providers range from individuals to small “mom and pop” sized companies to large public companies to international franchise operations. Some home care companies are affiliated with a health care institution or health system. Others are freestanding. There are over 12,000 Medicare participating home health agencies, over 3,000 Medicare hospices, and estimated 15-20,000 private pay enterprises across the country.

While the situational and environmental risks may be high, home care providers have taken their responsibilities to protect the patient/client and the payers of the services very seriously. Among the valuable tools available to mitigate the risks are criminal background checks on existing and prospective staff.

## **USE OF BACKGROUND CHECKS**

### **State Requirements**

According to the National Conference of State Legislatures, all states except Louisiana, Montana, Nevada, and North Dakota have laws governing criminal background checks for some level of in-home direct care workers. "State Policies on Criminal Background Checks for In-Home Direct Care Workers," National Conference of State Legislatures, prepared for AARP Public Policy Institute, December 18, 2008. In California, Kansas, South Dakota, Tennessee, and Vermont the background checks are discretionary for some or all of the employees listed in the state statute. However, the voluntary nature may be illusory as some states, such as California, preclude Medicaid payment those convicted of certain crimes. The state requirements vary widely, with many states limiting the background checks to "home health agencies," while others requiring checks for all licensed home care providers and services financed through programs such as Medicaid.

Most states prohibit employment automatically if designated criminal offenses are revealed by a criminal history. Only a few states allow employers to decide whether a background warrants disqualification or do not mention disqualifying crimes in the statute. For example, North Carolina lists a number of crimes such as homicides, sex-related offenses, offenses against vulnerable individuals, drug-related offenses, and fraud, but gives the home health agency complete discretion on whether to disqualify the individual based on these offenses. Where disqualification is automatic, the offenses vary from state to state, but generally include homicide and other violent crimes, fraud, and drug-related crimes.

The time period for automatic disqualifications varies as well. Some offenses such as homicide or criminal sexual assault can lead to a lifetime employment ban. Others have time limitations, such as a 15 year ban following completion of sentence or probation in Minnesota for fraud against federal health programs.

Many states offer waiver or appeal rights that can give an opportunity to reconsider an employee applicant despite the criminal record. NCSL reports that 25 states outline some type of waiver or appeal process. In some of these states, a disqualification can be overturned upon evidence of successful rehabilitation. Accuracy appeals are also available.

Finally, some states allow for conditional employment pending the outcome of the criminal background check. Conditional employment may be time-limited or subject to direct supervision.

NCSL concludes that "[t]he widespread use of mandatory criminal background checks for in-home direct care workers suggests states view the process as an important screening tool for

hiring qualified workers for older people and people with disabilities.” NAHC agrees with this view.

### **Federal Requirements and Activity**

While most laws requiring criminal background checks in home care originate at the state level, these state laws are given federal effect through Medicare laws that require providers of services to comply with all applicable State laws and regulations including any state and local licensing requirements. See, e.g. 42 USC 1395x(o)(4); 42 CFR 484.12 (Medicare Conditions of Participation for Home Health Agencies).

Specific federal activity involving criminal background checks in home care is growing and evidences a strong Congressional and Administration interest in using the checks as a tool to protect patients and federal payment programs. Section 307 of the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003 (PL 108-173) created a pilot program within the Department of Health and Human Services “to establish a program to identify efficient, effective, and economical procedures” for conducting state and federal checks on prospective home care employees. Seven states originally participated in the pilot program. The program’s success led to a congressionally-authorized nationwide expansion under Section 6201 of the recent Patient Protection and Affordable Care Act (ACA). Section 6201 establishes federal minimum standards on the use of background checks while allowing states to establish certain parameters including the addition of disqualifying crimes. Overall, the program is a strong indication that national policy favors the use of criminal background checks in home care. The program established under MMA and expanded under the ACA creates a framework for federal home care programs while allowing states to tailor the background check requirements to meet their unique goals and standards.

The original pilot program indicated effectiveness while not triggering wholesale disqualifications. The report on the pilot revealed that of the 204,339 background checks, 158,476 employees were cleared for employment with 269 of those cleared based on rehabilitation review and appeals processes. “Evaluation of the Background Check Pilot Program—Final Report,” Abt Associates, Inc., August 2008. The pilot disqualified 7,463 applicants with an additional 38,400 records withdrawn prior to a final fitness determination decision. Abt suggests that the withdrawn may include those deterred based on an expectation of disqualification or unrelated reasons.

Any concern about the disparate racial or ethnic impact of using disqualifying criminal background checks in home care is likely misplaced. Home care is the fastest growing occupation in the US according to the Bureau of Labor Statistics (BLS). Among the areas employment projected to grow the most is personal care attendants, home care aides and nurses. In many parts of the country there already is a staff shortage. That is not an environment for improper or illegal discrimination. Also, the facts currently demonstrate that employed home caregivers are 48% white non-Hispanic, 31% African American, 15% Hispanic and Latino, and 7% other race/ethnicity.

It is notable that in six of the seven pilot states, the fitness determination was made not by the employer but by analysts that worked either for the State health care provider regulatory

agency or the State central repository. In such a process, the risk of discriminatory rejection of employment by the employer is no concern.

Further federal support for the use of criminal backgrounds checks in home care is found in the Medicare hospice program. Since 2008, Medicare has required all participating hospices to obtain a criminal background check on all hospice employees who have direct patient contact or access to patient records, 42 CFR 418.114(d). Subcontractor staff are also subject to the same requirement. Under the rule, hospices must obtain the background in accordance with state law. In the absence of state law requirements, the hospice must obtain criminal background information within 3 months of the date of employment for all states that the individual has lived or worked in the past 3 years.

### **EEOC GUIDANCE**

As stated, NAHC strongly supports full compliance with all civil rights law related to employment. At the same time, NAHC supports appropriate use of criminal background checks in the screening of workers who provide direct patient care in the home and those who have access to sensitive health care or identity-related information.

The recent EEOC guidance is a thoughtful effort to provide direction to employers that must comply with civil rights laws along with laws requiring or encouraging prospective employee criminal background checks to protect vulnerable consumers and others. However, the guidance presents complexities and confusion for most home care businesses and could benefit from simplification.

It is always difficult for businesses to comply with state and federal laws that may actually require conduct that is inconsistent or in conflict. With home care services, that difficulty is readily apparent as most states require criminal background checks that either mandate the exclusion of a prospective employee from employment or strongly encourage such while the EEOC guidance appears to establish a position that such exclusion is presumptively a violation of civil rights laws.

The guidance is useful in distinguishing between acceptable and unacceptable uses of criminal background checks in hiring processes and decisions. However, it presents itself in a nature and form that renders it useful only for a small segment of the population capable of digesting its complex, 52-page legal analysis.

Most home care businesses are small operations without in-house legal staff or access to the resources necessary to consult expert legal counsel on hiring policies and decisions. Certainly, it is not feasible for most home care companies to render compliant "individualized" hiring determinations involving applicants with criminal backgrounds supported by expert legal representation and guidance. The volume of hiring decisions alone make such impractical and uneconomical.

The NAHC membership consists of the wide range of home care companies presented by the industry at large. In recent weeks, we consulted with various members to determine how they have reacted to the new EEOC guidance. While admittedly anecdotal, the information

gathered indicates that the vast majority of smaller companies are unaware of the guidance and do not routinely employ legal counsel on hiring policies, practices, or decisions. Those companies aware of the guidance expressed confusion triggered by the complexities of the guidance, particularly with respect to discretionary employment disqualifications.

Most home care companies consulted expressed that the hiring decisions are primarily guided by state law when employment disqualification is required. They cite the vulnerable population that they service and the program integrity responsibilities they have to the various third-party payers. This operational approach may be summarized as one where doubts about whether to hire someone with a criminal background are resolved by favoring disqualification in order to protect patients and payers.

At the same time, the home care companies consulted indicate that they do hire individuals with criminal records when not otherwise specifically prohibited from doing so under state law. With these, the companies take a variety of factors into account including the nature of the offense subject to conviction, post-conviction activities of the person, and the length of time since the conviction.

The approaches taken to criminal records may be fully compliant with the guidance. However, its denseness and complexity can leave one with too many uncertainties for comfort.

## **RECOMMENDATIONS**

NAHC recommends that the Commission take the following steps to help alleviate confusion and concern with the EEOC guidance:

1. Encourage the EEOC to collaborate with the Centers for Medicare and Medicaid Services and the US Department of Health and Human Services to develop coordinated, simple compliance guidance in laypersons' terms along with a communications plan to educate health care providers on their responsibilities relative to criminal background checks.
2. Encourage the EEOC to collaborate with federal and state health care regulators to develop model standards that achieve joint compliance with laws that are designed to protect health care consumers and payers and the laws designed to protect the civil rights of employees and job applicants.
3. Issue guidance that specifies that compliance with state or federal laws requiring automatic employment disqualification results in a "safe harbor" compliance with civil rights laws.
4. Develop and overall guidance regarding the use of criminal background checks in hiring that is in plain English.

NAHC believes that the best solution to concerns raised regarding the EEOC guidance on the use of criminal background checks, in health care employee hiring, is to collaborate

with the regulators of health care entities on the state and federal level. The current approach results in silo-based standards by both the EEOC and health regulators. Instead, those regulators should jointly seek to achieve a clarity and consistency in their policies that will benefit all stakeholders.

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## **Nick Fishman**

**Nick Fishman  
Co-Founder, Chief Marketing Officer and Executive Vice President of  
EmployeeScreenIQ**

### **EmployeeScreenIQ Written Testimony for the United States Civil Rights Commission**

#### **Hearing on Employers' Use of Criminal Background Check**

##### **Introduction**

Thank you for having me here today. My name is Nick Fishman and I am the co-founder, Chief Marketing Officer and Executive Vice President at EmployeeScreenIQ, a company that provides employment background checks to employers throughout the country. Today, I'd like to share with the Commission my experience and perspective as a professional background screener. I will focus my remarks on how we handle criminal background checks, and how our clients use them in a responsible manner.

Our business is based on our core belief that background checks are necessary for employers to have the information they need to make informed hiring decisions. The cost of a bad hire due to a lack of organizational fit or qualifications is substantial enough. But if you add up the cost of negligent hiring lawsuits, employee theft, negative employee morale and the potential human cost and loss that can occur in the workplace, we believe that employers would be negligent in *not* performing employment background checks.

Employers agree. A recent Society for Human Resource Management survey indicates that 87%<sup>219</sup> of all U.S. businesses perform criminal background checks on prospective employees. This number makes sense, considering the high cost of the investment in people who are entrusted to take care of customers, manage businesses, oversee financial affairs, and ensure the safety of employees. Our clients tell us that their most valuable assets are their employees, but if they are not screened properly, they can be their biggest liability. Every new hire is a potential risk. Employers simply want to know that they are bringing in the right people and putting them into the right positions.

##### **Background Check Reporting and Accuracy**

Our company conducts employment background checks for over 3,000 organizations in the US and abroad. We work with those who serve vulnerable populations such as schools, overnight camps and home-health care agencies, hotels, airlines, and banks, to name a few. We provide these clients with a wide range of services—all of which allow them to make better informed hiring decisions. Our services include criminal background checks, resume verifications services, verification of education and past employment, and professional

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<sup>219</sup> SHRM Survey Findings: "Background Check—The Use of Criminal Background Checks in Hiring Decisions" The Society for Human Resource Management (SHRM) July 19, 2012.

license verification. We check references, conduct motor vehicle record checks, perform drug testing and other services.

The Fair Credit Reporting Act (FCRA), the federal statute that regulates employment background checks, requires that we (as a consumer reporting agency) ensure “maximum possible accuracy” in all of our reports—a responsibility that we take very seriously.

Employers spend a lot of time and money finding, recruiting and interviewing candidates. Once the background screening process begins, (typically after a finalist has been selected), the last thing an employer wants is to find a reason not to hire someone. It’s a dollars and cents issue—they have immediate hiring needs; they don’t want any delays, and they have invested time and money in the candidates. Therefore, they demand that we get it right. They need accurate information, and they need us to get it right the first time.

That means that with every criminal background check, we take steps to verify the information that we find before it is reported to the employer. We go to the most current, accurate source each and every time. It means that we confirm the identifiers on a record belong to the subject of the report, and follow standards for acceptable reporting. It also means verifying that a record is legally reportable.

As a result of our meticulous process, we stand by the accuracy of the information we report. In keeping with the FCRA, in the event that accuracy is questioned by a job candidate, we have a very well defined dispute process. Our dispute rate is just 0.15%. And when disputes do occur, we handle them quickly; so that in the unlikely event the information needs to be modified it can be done without penalizing the candidate or unnecessarily delaying the hire. The FCRA allows 30 days to resolve consumer disputes, but EmployeeScreenIQ resolves 25% of all disputes within 24 hours, 50% within a week and 85% within 14 days.

### **Our Clients and the Responsible Use of Criminal Background Checks**

We have heard the argument that the use of criminal background checks is creating an underclass of unemployable Americans. Based on the feedback and statistics that we pull from our marketplace surveys, that is simply not the case. In fact, our EmployeeScreenIQ 2013 survey of background screening trends<sup>220</sup> revealed the majority of employers do not eliminate a candidate solely on the basis of a criminal record. 70% of our responders said that when they find a criminal record on a job applicant, that person is denied employment less than 5% of the time. When asked which is more important, qualifications or lack of a criminal record, 73% indicated that qualifications were more important; up from 70% in 2011.

These results demonstrate the willingness on the part of most employers to look at qualifications and consider the needs of the business, weighing the job relatedness before eliminating candidates based on criminal history. In our 2011 survey, employers ranked qualifications and the job interview far ahead of a criminal background check in terms of

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<sup>220</sup> EmployeeScreenIQ 2013 Survey Report, “Employment Screening Practices and Trends: The Era of Heightened Care and Diligence” January 2013.

importance in the hiring decision<sup>221</sup> (85% ranked qualifications and job interview as most important).

We have clients who seek out ex-offenders to include in their workforce. One client, a national, publicly traded energy company in the southwest, participates in a re-entry program with the state of Texas to hire ex-cons. Those applicants are screened for job-based qualifications, and hiring criteria are applied accordingly.

Lastly, it is important to note that when a criminal record is revealed, the report does not include race information, religion, sexual orientation, or other protected class information. Arrests and infractions are generally not included or considered by employers. Employers review the report, and contemplate if the type of record found would reasonably suggest a pattern of behavior or predict future performance. Our clients are looking for reasons to include, not exclude.

### **EEOC Guidance**

The EEOC guidelines on criminal records that were introduced in April have caused tremendous confusion among our clients. There are three main areas that are causing the most confusion in the background screening process. First, the EEOC recommends as a best practice that employers abolish the job application question that asks if the person has been convicted of a crime. This recommendation is not feasible for many clients who have bona fide job qualifications that require exclusions based on certain types of crimes. Clients are understandably confused about when they can and should ask about criminal history and request a background check. Delaying the question can cause both the employer and the candidate to invest heavily in an opportunity or even quit their job only to be disqualified later in the process. The best practice really depends on the type of job, and the attempt to brush one broad “best practice” is simply not fair or manageable.

Secondly, there is no relief or consideration for employers that have state law conflicts. Employers who have traditionally conducted background checks and excluded certain applicants based on criminal standards defined by state law are now between a rock and a hard place. In some instances, there is no way to abide by the law without setting aside the EEOC guidance, and they are asking their background screeners for help in evaluating what they can or should not do.

Finally, the EEOC adds a new requirement for employers to conduct an “individualized assessment” when a criminal record is found in a criminal background report. The guidance does not recommend any particular means of conducting an assessment, and we’re hearing a wide and variable range of practices that employers are considering to meet this requirement. Some suggest a phone call, others want to request written statements, questionnaires and, or in person interviews. Some want us, the background screening company, to perform those functions. Until tested in the courts, no one really knows what is sufficient.

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<sup>221</sup> EmployeeScreenIQ 2011 Survey of Employers “Trends in Employment Background Screening: Survey 2011” June, 2011.

To add to the confusion, public statements by EEOC field office attorneys have warned employers that they had better think twice before conducting a background check. John Hendrickson, the regional attorney for the EEOC's Chicago district said, "I would suggest to (businesses) that they think long and hard about why they think they need to do a criminal background check."<sup>222</sup> This type of statement can certainly have a chilling effect.

### **Recommendations**

We suggest focusing on programs that offer training to those with criminal records. Identify programs that help those with convictions get on their feet, whether offering assistance with drug rehabilitation, finding a safe place to live and, or helping them find gainful employment. We also suggest looking at some of the laws that have been enacted across the country to help those with records succeed in the workplace. Illinois has established a certificate of rehabilitation and offers employers legal protection if they were to hire someone with one of these certificates. The state of Ohio just passed a law that offers a certificate of employability that affords the same protection to employers as the Illinois law.

Enacting laws that inhibit an employer's ability to perform proper due diligence is not the answer—in fact they can lead to devastating consequences for the company, their employees, their customers and the public. Our research, while limited, does not support a finding of widespread discriminatory practices based on the use of criminal background reports. We have not seen any current evidence or research that supports such a finding, and such research was notably absent in the recent EEOC guidance. You can't ask employers to ignore information that could make them liable or keep them in the dark.

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<sup>222</sup> "EEOC Asks Employers Not to Hold the Criminal Past of Job Applicants Against Them: Give Them a Second Chance" Human Resources Journal <http://www.humanresourcesjournal.com/2012/10/eec-asks-employers-not-to-hold-the-criminal-past-of-job-applicants-against-them-give-them-a-second-shot-at-life-it-says/>

**Harry J. Holzer**

**Statement of Harry J. Holzer  
Before United States Commission on Civil Rights  
December 7, 2012**

Good morning. I would like to make four points today with regards to the Enforcement Guidance issued by the Equal Employment Opportunity Commission (EEOC) last April and on the issue of criminal records and employment opportunities.

- 1. The prevalence of arrests and convictions among less-educated American men substantially reduces employer willingness to hire them later in life and worsens their employment outcomes more generally, in ways that generate clear “disparate impacts” on minority (especially black) men.*

High rates of incarceration clearly worsen employment outcomes for those with criminal records after their release from prison (Western, 2007; Raphael, 2006). Many young men enter and then exit prison with very poor basic skills and low levels of education (Travis, 2003), but their time in prison further reduces their work experience and marketable skills (Raphael, op. cit.) and worsens their social networks and psychological outlooks (Lerman, 2009).

Even among those with stronger employability, the great reluctance of most employers to hire men with criminal records further worsens their employment outcomes (Holzer et al., 2003; Pager, 2003), particularly in jobs that involve higher levels of skill, customer contact, and/or the handling of money.

Overall, more than 30% of a recent nationally representative sample of youth have been arrested at least once by age 23, with presumably much worse numbers among young blacks and the less-educated (Brame et al., 2012). And, by age 35, one-third of all young black men have become incarcerated at some point, while two-thirds of black male high school dropouts have been jailed.

So very large percentages of less-educated men, especially black men, have now become ex-offenders. Indeed, the very high prevalence of ex-offender status plus the large negative effects of incarceration on post-release employment appear to be major reasons for the continuing deterioration of employment rates among black young men in the noninstitutional population in the past few decades (Holzer et al., 2005; Edelman et al., 2006). This is not because young black men have an innately greater proclivity towards criminal activity, but instead because they have been the most disadvantaged by economic changes that weakened their opportunities in the regular labor market (Holzer, 2009), resulting in larger changes in their behavior and norms.

2. *The use of criminal background checks by employers can have positive effects on the employment of some young minority men and negative effects on others; both the value and the limitations of the information so obtained should be considered when making policy about their use.*

The use of background checks has risen dramatically in the past decade or so, as their availability from private vendors on the internet has risen while the costs of using them have declined. While they almost certainly reduce employment for black men with criminal records, employer background checks seem to raise employment for black males overall – presumably, by reducing statistical discrimination against men whom employers suspect of such activity but who turn out to have clean records. Background checks can thus play a very useful role for some groups of workers as well as for employers.

But there are important limitations to the positive effects of background checks that should also be noted. For one thing, there appear to be many errors in these data (Bushway et al., 2007). Frequently, the records do not carefully distinguish arrests from convictions, even though arrests often do not result in convictions and imprisonment, and thus data on arrests should be viewed with greater skepticism. And there are both false positives (among apparent offenders) and false negatives (among apparent non-offenders) in the data, suggesting that the observed differences in criminal activity between these two groups are really not as great as they seem to be.

Furthermore, a number of research studies have shown that the ability of criminal records to predict future contacts with police or arrests diminishes greatly during the first five years in which a past offender does not commit another crime (Blumstein and Nakamura, 2009; Kurlychek et al., 2006, 2007). Indeed, arrest rates are very low for young offenders who are “clean” for at least 5-7 years and become very close in magnitude to those of non-offenders.<sup>223</sup>

Importantly, these studies all focus on the probability of new contacts with police or arrests for previous offenders, rather than the commission of specific new felony offenses; in most cases, the studies do not tell us whether or not the new contact/arrest results in a conviction and another spell of incarceration, and if so for what type of offense. Accordingly, it is hard to ascertain the risks of poor job performance, property damage or theft, injury to coworkers or customers, or job turnover associated with any such new offense. Indeed, since so many offenders are convicted of non-violent felony drug possession or sales in the first place, it is hard to know the extent to which the risks

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<sup>223</sup> In the papers by Kurlychek et al., the arrest probabilities of previous offenders at age 18 who have not reoffended by age 25 are only 1-3 percentage points per year by ages 25-26 and even less after that, effectively converging with those of nonoffenders (which are close to zero). While the estimated probabilities of rearrest for previous offenders in Blumstein and Nakamura never quite converge with those estimated for nonoffenders, those convicted only of property crimes at age 18 or 20 and not afterwards have annual probabilities of rearrest of .05 or less within 5 years and even less 10-15 years later.

of theft or violence against customers or coworkers that employers fear are really well-founded.<sup>224</sup>

- 3. The very high costs of previous criminal histories on employment are borne not only by the offenders themselves, but also by their families and children, their communities, and the US economy more broadly; accordingly, having some successful policy efforts to improve employment outcomes for this population are in the nation's interest.*

Low employment after prison release is correlated quite highly with recidivism, and many researchers believe the former has a causal effect on the latter, though it is certainly not the only cause of reoffending (Sampson and Laub, 1993; Fagan and Freeman, 1999; Bushway and Reuter, 2004.).

But the negative effects of low employment post-release and recidivism extend far beyond the offender himself. For instance, Berkeley economist Rucker Johnson (2007, 2009) shows that the children of offenders are much more likely to engage in negative behaviors and to ultimately become incarcerated themselves than similar children of non-offenders, and it is likely that lower employment and/or repeat spells of incarceration among parents generate worse outcomes among the children of those incarcerated.

A lack of employment almost certainly makes it harder for low-income non-custodial fathers with a child support order to make their payments on time, thus denying their families and children an important source of household income (Mincy and Sorensen, 1998; Mead, 2011). When they fail to make such payments, the non-custodial fathers go into "arrears," or debts to the child support system, that likely even further reduce their future employment activity (because of the very high withholding rates of 50% on earnings for those in arrears – Sorensen et al., 2007; Cancian et al, 2011).<sup>225</sup>

Children and youth growing up in very low-income neighborhoods, where large fractions of adult men do not work, are likely to have even worse outcomes in life than those from similar families but better neighborhoods (Wilson, 1996; Sampson, 2012). The absence of role models for work and labor market contacts and connections for young men in these neighborhoods likely further worsens their employment opportunities in the future, perhaps becoming another reason why they also turn to crime (Wilson, op. cit; Holzer, 1987).

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<sup>224</sup> Employers tend to fear legal liability for theft or bodily harm done to coworkers or customers by previous offenders in a small number of well-known cases. But, aside from the very small numbers of such cases, relative to the millions who are incarcerated each year, it is not clear why those convicted of some felonies (such as nonviolent felony drug possession or sales) would pose any such risk.

<sup>225</sup> Since the money withheld by the state does not even get distributed to families who have been on any kind of public assistance in many states, it is essentially a very high tax rate on workers with low earnings, which tends to discourage their formal work effort.

Finally, the overall US economy suffers as well when such large fractions of adult men fail to find work. The lost earnings of these men represent lost output and productivity for the overall economy, and especially for the cities and states in which these young men live (Holzer et al., 2007).

4. *The EEOC Guidance should be viewed as one of several potentially effective legal and policy efforts to reduce the many barriers to employment among men with criminal records and thus to improve their employment outcomes.*

Since employer reluctance to hire men with criminal records appears to be a major reason for why employment rates of ex-offenders are so low, attempts to limit the “disparate impacts” associated with criminal records on those who would otherwise be employable should be welcome, *as long as they do not impose undue burdens and risks on employers.*

In my opinion, the EEOC guidance does not seek to discourage employers in any way from doing background checks on applicants; it simply tries to encourage a more judicious use of the information gained through these checks. Furthermore, it does not seek to significantly raise the risks employers bear from hiring offenders; it simply tries to encourage a more accurate assessment of these risks.

As US courts have argued for decades, the length of time since an offense was committed, the nature of the original offense, and the nature of the job and the tasks it requires should clearly be taken into account in assessing the risk of recurrence of any offense, and what it implies for job performance; the mere existence of a prior arrest, conviction or incarceration spell at some time in the past can sometimes indicate very little about the level of such risks.

Furthermore, a range of individual factors – such as any participation in employment or training programs after release, or an ex-offender’s performance on any jobs held in that time period, or other indicators of conscientious and responsible behavior – should also be taken into account when such information is available (Bushway and Apel, 2012).<sup>226</sup>

But a range of other policies and programs should also be used to address the employment barriers faced by former offenders and thus to enhance their employability. These can include efforts by states to review their statutory limits on felony offender employment (Rodriguez and Emsellem, 2011), limiting recidivism due to technical parole violations (Western, 2007), a range of reentry and/or fatherhood programs, paid transitional jobs, and other efforts to improve employment and child support payments by offenders and non-custodial fathers (Mead, 2011).

While the evidence on the cost-effectiveness of these efforts remains limited to date (Bushway and Reuter, 2004; Tyler and Berk, 2009; Mead, op. cit), the enormous social

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<sup>226</sup> For instance, Bushway and Abel demonstrate that participation in and completion of a job training program after release can be viewed as a very reliable signal of desistance from further criminal activity.

costs associated with the status quo should motivate us to explore many approaches to this problem. And I believe these other approaches should be viewed as *complements* to EEOC efforts to reduce discrimination, rather than *substitutes* for them.

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**Richard S. Larson**



**WINNING WORK TEAMS®**  
*Strategic Human Resources Consulting*

November 26, 2012

Statement of Richard S. Larson  
President, Winning Work Teams, Inc.

This Statement is provided to the U.S. Civil Rights Commission pursuant to the Open Briefing with respect to the use of criminal histories during the employment process.

My perspective on this important employment issue comes from nearly 30 years in the Human Resources field first, as a senior level Human Resources executive working with large companies having more than 750 employees to my more recent experience working as a Human Resources consultant with smaller companies of between 15 to 300 employees. As such, my hands on recruitment experience has ranged from large scale job fairs hiring hundreds of employees during a single day to recruiting senior level executives over the course of several weeks.

During the course of the past 30 years, employers have encountered a succession of challenges from the Immigration and Control Act of 1986 (“IRCA”) to The Family and Medical Leave Act (“FMLA”) to The Americans with Disabilities Act (“ADA”) to The Americans with Disabilities Amendments Act (“ADAAA”) to the Lilly Ledbetter Fair Pay Act and other federal and state laws impacting the workplace.

Along with these statutes, we have seen heightened scrutiny of workplace practices under Title VII and analogous state civil rights statutes. We have also seen the emergence of negligent hiring and negligent retention concepts. And we have seen the impact of unlawful workplace retaliation claims across the workplace. In today’s environment many employers are concerned about becoming a target for an employment claim.

We are now having a conversation regarding the proper use of criminal histories by companies when making hiring decisions and the various perspectives regarding this critical employment issue.

Perhaps we can agree that the United States has historically been a land of “second chances.” From our earliest days when an immigrant could earn passage to the new world through a

Page 2 - Richard S. Larson Statement

period of indentured servitude, to the promise of Emancipation, to the concept of a “fresh start” through filing for personal bankruptcy, we have long rooted for the underdog who was willing to keep moving forward to improve his or her station in life.

Indeed, employers are often willing to provide second chances to their employees who make mistakes. And they are often open to providing employment opportunity to those who may have failed elsewhere.

As a practical matter, a great many felony ex-offenders have a non-violent history such as a narcotic violation, felony-related DUI or a property crime conviction. Often an employer will hire an ex-offender when the employer is comfortable that the ex-offender poses no immediate risk to the company, to co-workers or to third parties and the company has established that the candidate is well suited to fill the open position. Criminal histories reflecting violence to the person, harm to children and criminal enterprise are more problematic.

In the reality of today's workplace, we must recognize that there are large employers having access to a highly qualified legal staff and to HR executives well versed on current employment issues and to the resources provided by high quality outside legal counsel. Due to such resources, shifts in the employment winds are relatively easy for large companies to track and understand. However, for the smaller companies, keeping up with new expectations (and risks) may be a very real challenge.

Whatever the size of the company, the HR function will see itself as the “gatekeeper” to ensure high performing human capital is identified to move the business forward. Make safe “right fit” hires. Avoid the risks of negligent hire and negligent retention. Manage performance and terminate employment when necessary.

It should be noted that obtaining a credible criminal history can be a challenge. Accuracy is paramount and often records are incomplete. Full case disposition is critical to the understanding as to whether a candidate is suited for the job at hand to meet ongoing business needs. Unfortunately, some employers seek out background information on job applicants through a variety of sources, some of which may be unreliable or incomplete. An Internet search may not provide the best information. A reputable third party credit reporting agency specializing in providing background information to employers is much more likely to provide better information as reflected in state and national law enforcement (FBI) data bases and is recommended.

Generally speaking, the smaller employer today understands that good HR practices include providing equal opportunity during the hiring process. Seeking to avoid a negligent hiring situation by use of criminal histories will often be an established practice. However, the concept of unlawful adverse impact by utilization of criminal histories may not be understood at the smaller company. In fact, for those schooled on the principle to avoid

Page 3 - Richard S. Larson Statement

negligent hiring, the concept of adverse impact may seem counter-intuitive, particularly when faced with a failure to hire claim.

Thus, a component of learning awareness on this issue since the EEOC issued its Enforcement Guidance on April 25, 2012 would be helpful so that all companies have a shared understanding with respect to this issue.

Governmental agencies as well as employer associations, business groups and the legal community all have a role to provide educational awareness regarding this important employment issue. Industry specific guidelines will be helpful.

For example, the hospitality industry may recommend close scrutiny of candidates having a criminal history involving children due to the high numbers of children who visit attractions and resorts with their parents. On the other hand, a candidate who has incurred a felony violation as the result of a traffic incident may be suitable in a retail position as posing no ongoing threat to guest safety when not having a requirement to drive a company vehicle as a component of the job description.

Just as it took a length of time to sort out the issues and develop appropriate best practices with respect to FMLA and the ADA/ADAAA issues, so must employers be afforded a learning curve on this issue as well as it has a direct impact upon the business and the employees who are selected to join the team.

Once the concept of unlawful adverse impact is understood, companies can create a process to identify the operative facts to make a reasonable determination as to whether the position should be offered to the candidate having a criminal history. Such a process is similar to making a determination following a request for reasonable accommodation under the ADAAA or whether a request for FMLA should be granted. A disciplined approach must be designed to ensure the input of all stakeholders, including the applicant.

The HR team and other key stake holders must be appropriately trained with respect to the components of the decision-making process. Then, the facts must be weighed and the necessary business decision reached. Many companies engage in such a process at this time. Again, such a process is not unlike the decision-making process when an applicant or employee seeks a reasonable accommodation due to disability.

The actual time to make an individualized case-by-case evaluation should not be overly burdensome upon the employer. Often this issue presents itself at 5% or less of contingent job offers and once the data is gathered, decisions can be made rather quickly.

Companies already trained to make decisions regarding requests for reasonable accommodation under the ADAAA will quickly grasp the steps in the recommended analysis

Page 4 - Richard S. Larson Statement

process. Those familiar with processing FLMA leave requests will have a similar analytical framework.

Compare this issue which occurs on a low percentage basis with the requirements of the Immigration and Control Act of 1986 which requires the employer to act upon 100% of new hires to ensure valid work authorization in the United States. This mandate requires document production, document review, proper filling out of the appropriate government form, tracking of certain documents having expiration dates and proper document retention. Non-compliance can result in enforcement sanctions. Many companies believed it necessary to hire additional staff to administer the new record keeping function required by IRCA. It is highly doubtful that a company will find that it needs to hire additional staff on an ongoing basis to review criminal histories for disparate impact issues. Once the issue is clearly understood and a well designed policy is in place, this process can be added to the scope of responsibilities of the HR manager who currently reviews background reports.

We must recognize that even the best good faith hiring efforts may result in close calls. We must also recognize that for every applicant hired, there may be many others who are disappointed.

A disciplined good faith approach to gathering all the relevant factors and then engaging in an individualized case-by-case analysis regarding the job at hand, the nature of the criminal offense and how it may relate to the open position under consideration, the amount of time that has passed since the time of conviction, intervening activities along with other relevant factors including the necessary needs of the business, will afford employers with a reasonable defense if challenged as to a particular hiring decision.

Thank you.

Most sincerely,

Richard S. Larson,  
President

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## Donald R. Livingston

### Statement of Donald R. Livingston<sup>1</sup> Before the Meeting of U.S. Commission on Civil Rights on December 7, 2012:

#### **“Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission’s Conviction Records Policy on the Employment of Black and Hispanic Workers”**

Thank you for inviting me to express my views on the U.S. Equal Employment Opportunity Commission’s policies on the use of criminal conviction records in the hiring process.

Since at least 1972, the EEOC has published its positions on the Title VII implications of using criminal history information as a factor in employee selection decisions. The EEOC has required that policies be applied consistently to prevent disparate treatment, but take into account particularized circumstances to be job-related.

On February 28, 2007, the EEOC announced E-RACE, an initiative to attack race discrimination. Among other things, E-RACE targeted employers’ use of arrest and conviction records because the practice significantly disadvantages certain minority applicants and employees. Two weeks later, in *El v. Southeastern Pennsylvania Transportation Authority* (“SEPTA”), the Third Circuit Court of Appeals rejected the EEOC’s guidance on convictions, finding it not based on thorough research or persuasive reasoning.

*SEPTA* reinvigorated debate over the meaning of business necessity, engaged the EEOC in deliberation over the appropriate means to assess the job-relatedness of criminal conviction policies, and cast uncertainty over how these policies are to be evaluated under Title VII. The EEOC answered in April 2012 with its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*.<sup>2</sup> My statement discusses the legal force of the EEOC’s enforcement guidance, the history of the EEOC’s interpretation of applicable legal standards, and significant aspects of the EEOC’s guidance.

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<sup>1</sup> Partner, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C.; general counsel of U.S. Equal Employment Opportunity Commission, 1990-93. This statement discusses the EEOC’s policies on an employer’s use of criminal convictions when making hiring decisions. It does not address the broader topic of criminal history records, such as records of arrests.

<sup>2</sup> Although the policy discusses the disparate impact of arrest and conviction records on Blacks and Hispanics, the EEOC has sued to attack the application of criminal conviction policies to males, including white males, on the basis that males engage in more criminality than females. Under the EEOC’s approach to Title VII, men with criminal convictions are entitled to a Title VII remedy when women with the same criminal history are not. See *EEOC v. Freeman*, Case No. 8:09-CV-02573-RWT, S.D. Md (pending).

## I. The Legal Effect of the EEOC's 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records

The most frequent way the EEOC makes and publicizes its interpretation of statutes is by issuing interpretative guidance and policy statements, without using notice-and-comment or other formal rulemaking procedures under the Administrative Procedures Act. The EEOC's right to issue statements that advise the public of the agency's construction of the statutes it administers is considered to be within the EEOC's inherent power.<sup>3</sup> This includes issuing enforcement guidance documents, such as the 2012 *Enforcement Guidance on the Consideration of Arrest and Conviction Records*, which was approved by the EEOC's commissioners.

The EEOC's 2012 policy guidance is not an EEOC regulation. In fact, the EEOC has no authority to issue a substantive regulation under Title VII.<sup>4</sup> The guidance is not binding, even on the EEOC which is free to taken an inconsistent position during investigations or in litigation.

As a general matter, the amount of deference to be given the EEOC's interpretations of EEOC-enforced statutes is controlled by the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>5</sup> Under *Chevron*, a court should give effect to a federal agency's regulation that reasonably interprets an ambiguous statute ("Chevron deference").<sup>6</sup> But, whether the Supreme Court will give *Chevron* deference to any particular EEOC interpretation is difficult to predict. The Court has exercised an undefined discretion to accept or reject agency analysis.<sup>7</sup> The Court's opinions on EEOC interpretations are inconsistent, often unexplained, and the Court has avoided any attempt to reconcile them.

The Court simply defers to EEOC when it determines the EEOC's interpretation is clearly right,<sup>8</sup> or, it declines to defer when it determines the EEOC is clearly wrong.<sup>9</sup> In the "between cases," the Court has signaled that it does not need the EEOC's help to interpret

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<sup>3</sup>See BENJAMIN W. MINTZ & NANCY G. MILLER, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: A GUIDE TO FEDERAL AGENCY RULEMAKING 63 (2d ed. 1991) ("Agencies may issue interpretative rules without a delegation of rulemaking authority"); *Associated Dry Goods Corp. v. EEOC*, 720 F.2d 804, 810, 33 FEP Cases 181 (4th Cir. 1983) (recognizing EEOC's inherent power to issue interpretative rules). Notably, the EEOC does not state that it intends its 2012 enforcement guidance to be used by the courts. The guidance states that the Commission intends that it be used by "employers considering the use of criminal records in their selection and retention processes; by individuals who suspect that they have been denied jobs or promotions, or have been discharged because of their criminal records; and by EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions."

<sup>4</sup>See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141, 13 FEP Cases 1657 (1976) ("Congress . . . did not confer upon the EEOC authority to promulgate rules or regulations pursuant to [Title VII]").

<sup>5</sup>467 U.S. 837 (1984).

<sup>6</sup>*Id.* at 842.

<sup>7</sup>Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *Fordham L. Rev.* 1937, 1938 (2006).

<sup>8</sup>As in *Edelman v. Lynchburg College*, 535 U.S. 106, 114 (2002), where an EEOC regulation permitted an otherwise timely charge to be signed after the time for filing has expired.

<sup>9</sup>As in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004), which refused to accept an EEOC interpretation that the ADEA protects younger workers against discrimination in favor of older workers.

anti-discrimination laws. In most EEOC cases, the Court follows the standard discussed in *United States v. Mead*, without expressly saying so:<sup>10</sup> the EEOC's Title VII guidance and policy statements are followed only to the extent the Court finds them persuasive, based on "thoroughness, logic, and expertness, fit with prior interpretations, and any other sources of weight."<sup>11</sup>

As a general matter, the influence of the 2012 policy guidance on judicial interpretations would seem to be minimal because of the indefiniteness of the EEOC's legal conclusions. In guidance in 1985, the EEOC expressed what an employer "must show" to prove its disparate impact defense under Title VII. "Must show" is an expression of a definitive interpretation. It is an exclusive command that would preclude any other interpretation. A contrary judicial opinion of what an employer "must show" would disturb it.<sup>12</sup> Consequently, there would seem to be some justification for a court to take the EEOC's opinion into account. The EEOC had made a decision about the requirements of a statutory defense based on its interpretation of an imprecise provision of Title VII, a statute that Congress empowered the EEOC to enforce.

However, the 2012 guidance does not express this same degree of confidence about what Title VII requires. Instead, of using language of command, the 2012 guidance merely lists "circumstances in which the Commission believes employers will consistently meet the 'job related and consistent with business necessity' defense." In other words, the 2012 guidance makes a prediction. It "believes" (i.e. predicts) that the EEOC, and possibly the courts, will "consistently" affirm employer conviction policies in certain circumstances, which are identified in the enforcement guidance. A decision by a court that is contrary to this prediction, or that approves different "circumstances" that meet the employer's defense, would not "disturb" the EEOC's guidance. So, it is hard to envision a role for the guidance in a courts' interpretation of Title VII's requirements for an employer's defense to a disparate impact claim. We shall see what the courts do.

## **II. History of EEOC's Position on the Nexus between Criminal Convictions and Title VII**

The EEOC's 2012 policy on criminal records states that it is a violation of Title VII to subject similarly situated persons of different protected groups to different standards when investigating or evaluating criminal backgrounds. This position is not controversial. Employers must maintain consistency in the application of their policies to guard against any suggestion of arbitrariness and, more importantly, to avoid disparate treatment.

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<sup>10</sup>533 U.S. 218 (2001); *see, e.g., National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111, 88 FEP Cases 1601 (2002) (EEOC interpretations of the substantive provisions of Title VII are only entitled to consideration, and thus should be followed only to the extent that they are persuasive).

<sup>11</sup>*Mead*, 533 U.S. at 228, 235.

<sup>12</sup>*See United States v. Shimer*, 376 U.S. 374, 382-3 (1961) ("... If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.")

What is controversial is the EEOC's interpretation of Title VII that would require employers to replace objective hiring standards, adopted to avoid this disparate treatment, with subjective assessments. Under the EEOC's reading of Title VII, in most cases employers must make fine distinctions about persons with criminal convictions based on subjective judgments about trustworthiness and improvements in character based on an evaluation of the individual's character references, rehabilitation efforts, employment history, and age.

In 1971, in *Griggs v. Duke Power Co.*,<sup>13</sup> the Supreme Court recognized the theory of disparate impact discrimination under Title VII. Under what seems to be the most relevant *Griggs* formulation for subsequent EEOC policies on criminal conviction records, once the plaintiff has shown that a selection procedure has an adverse impact on the hiring of members of a particular race, or other characteristic protected by Title VII, the burden is on the employer to show that the given requirement has "a manifest relationship to the employment in question."<sup>14</sup> The Court explained that "[u]nder [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze the status quo of prior discriminatory employment practices."<sup>15</sup>

In 1972, EEOC policy permitted a Respondent to appeal a field office's finding of discrimination to the Commission. The Commission then issued written opinions that it published. One of these opinions concerned a charging party who was fired under a policy of automatic discharge for conviction of a serious crime. The employer stated, and the EEOC accepted, that the policy was adopted solely to protect the company's image and maintain a safe working environment for other employees. Upon finding that disparate impact existed "since ... a substantially disproportionate percentage of persons convicted of 'serious crimes' are minority group persons," the Commission found that the policy was not justified by business necessity because it was "clearly arbitrary." It was "unnecessary to treat all 'serious' convictions as being equally predictive of future employability, without reference to the

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<sup>13</sup> 401 U.S. 424, 433 (1971)

<sup>14</sup> The Court's varied and imprecise express of the job-related test has sparked considerable disagreement over the meaning of *Griggs*. In addition to stating that job-relatedness looks to whether there is a manifest relationship between the selection procedure and the job, the court spoke in terms of a demonstration that the selection procedure bears a relationship to successful job performance. This has resulted in some inexact line drawing between scored procedures, which courts typically require be justified by a formal study of their relationship to job performance, and unscored procedures, such as licensing requirements, that are sometimes upheld without formal validation.

<sup>15</sup> 401 U.S. at 430. In 1973, the Supreme Court explained the justification for *Griggs* in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973): "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." It explained that criminal conduct does not fall within this justification. And, the Court recognized that an employer has a job-related interest in having trustworthy employees ("The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions"). However, the Court questioned the job-relatedness of a "sweeping disqualification of all those with *any* past record of unlawful behavior." (Emphasis added).

specific facts of the case, such as [the] job-relatedness of the conviction and the employee's immediate past employment history.”<sup>16</sup>

In 1975, the Eighth Circuit Court of Appeals decided *Green v. Missouri Pacific Railroad*<sup>17</sup> (EEOC participating as *amicus curiae*), which considered the legality of a blanket employment bar for anyone with a prior criminal offense. The court rejected the company's business necessity defense with the statement that it could not “conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed.” In a post-remand appeal, the court affirmed an injunction that allowed the use of criminal convictions as a factor in a selection decision, as long as the employer took into account (1) the nature and gravity of the offense or offenses, (2) the time passed since the conviction or completion of sentence, and (3) the nature of the job for which the applicant applied. These factors were soon adopted by the EEOC, and remain the core of the EEOC's guidance on the use of conviction records.

For years immediately following *Green*, the EEOC took the unexplained position that a Title VII violation would exist *even if the criminal conviction were job related* unless the employer examined several factors to determine whether the conviction affected the individual's ability to perform the job in a manner consistent with the safe and efficient operation of the employer's business. These include two of the *Green* factors (the number and circumstances of each conviction, and the length of time between the conviction and the employment decision), but added two factors -- consideration of the individual's employment history, and the individual's efforts at rehabilitation.<sup>18</sup>

In 1978, the federal agencies, including EEOC, adopted the Uniform Guidelines on Employee Selection Procedures (UGESP) to provide the government's position on the proper use of selection procedures that have a disparate impact under Title VII.<sup>19</sup> UGESP contains detailed procedures for the formal validation of selection rules and practices, particularly tests. The EEOC has never applied UGESP's validation procedures to criminal conviction policies. Indeed, the authors of UGESP have recognized that there may be unscored procedures for which validation is not required.<sup>20</sup> The EEOC consistently has taken the position that the use of criminal conviction records in the hiring process is one of these procedures.

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<sup>16</sup> Commission Decision No. 72-1497, CCH EEOC Decisions (1973) ¶ 6352.

<sup>17</sup> 523 F.2d 1290 (8<sup>th</sup> Cir. 1975).

<sup>18</sup> *See, e.g.* Commission Decision No. 77-23, CCH EEOC Decisions (1983) ¶ 6710.

<sup>19</sup> 29 C.F.R. §1607.

<sup>20</sup> UGESP's § 1607.6 recognizes that there may be circumstances involving unscored procedures “in which a user cannot or need not utilize the validation techniques contemplated by [the] guidelines.” The guideline states:

When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is formal, scored or quantified measure or combination of measures and then validate the procedure in accordance with these guidelines, or otherwise justify continued use of the procedure in accordance with Federal law. (Emphasis added).

In November 1985, the EEOC published its *EEOC Policy Statement on the Issue of Conviction Records under Title VI* which set forth the EEOC's position on the method for establishing business necessity for criminal conviction rules. The policy statement was based on *Green v. Missouri Pacific Railroad's* common sense approach to business necessity. No formal validation was required.

The 1985 policy statement expressed the EEOC's "underlying position that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics" because general population statistics show that members of these groups are convicted of crimes at a rate higher than their representation in the population. According, the EEOC held that a policy of limiting employment opportunities because of criminal convictions is unlawful discrimination against Blacks and Hispanics unless the policy justified by business necessity.

The EEOC stated that an employer establishes business necessity for refusing to hire (or for firing) an individual based on a criminal conviction by showing that it considered the three factors from *Green* when it made its decision: "(1) the nature and gravity of the offense or offenses, (2) the time that has passed since the conviction and/or completion of the sentence, and (3) the nature of the job held or sought." Significantly, the EEOC repudiated its previous Commission decisions that required consideration of the individual's employment history and efforts at rehabilitation. According to EEOC, these Commission decisions were "no longer precedent for establishing business necessity," and "are overruled."

In 1987, the EEOC issued a policy statement on how to use statistics to evaluate the disparate impact of a criminal conviction policy. The statement, *EEOC Policy on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*, reiterated that the EEOC believed that population statistics demonstrate the adverse impact of criminal conviction policies. However, the EEOC stated that an investigative finding of no cause should be made when the employer shows that there is no disparate impact from more narrowly drawn conviction statistics or from the consideration by the employer of criminal convictions in its own hiring process.

The EEOC's guidance was divided into two situations: one where the employer's policy is not crime-specific, and the second where the policy is crime specific. Where the policy is not crime specific, the EEOC stated "it is open to the respondent/employer to present more narrow local, regional, or applicant flow data (where not limited artificially by discouragement of applicants who are former criminal offenders), showing that the policy probably will not have an adverse impact on its applicant pool and/or in fact does not have an adverse impact on the pool. Where the employer's policy is crime specific, such as dealing with a subcategory of crimes like "theft," "robbery," or "drug-related crimes," the EEOC believed that national or regional conviction statistics for crimes as a whole will "only show a probability of adverse impact" for Blacks or Hispanics, while a more narrow data may show no adverse impact. The employer could avoid adverse impact liability if it showed no adverse impact for a specific crime targeted in its crime-specific policy ("the employer may present national, regional, or local data on conviction rates for the particular crime which is targeted in its crime-specific convictions policy"). In addition, the employer could use its

applicant flow data to demonstrate that its conviction policy had not resulted in the exclusion from employment of a disproportionately high number of Blacks or Hispanics.

In 1990, the EEOC issued its *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII*. This guidance states several positions relevant to criminal conviction policies that are left out or implicitly contradicted in the EEOC's current 2012 guidance document. These are: “[c]onviction records constitute reliable evidence that a person engaged in the conduct alleged since the criminal justice system requires the highest degree of proof for a conviction;” “trust” is the relevant relationship between a previous crime and the job; and business necessity need not be established if the applicant “engaged in conduct which is particularly egregious.”

In 2006, the EEOC added a section on race and color discrimination to its *Compliance Manual*.<sup>21</sup> The section reaffirmed both the 1985 policy on criminal convictions and the EEOC's position that a demonstration of job-relatedness is not required if the person committed a “particularly egregious” crime.<sup>22</sup>

The 2007, the federal Third Circuit Court of Appeals in *El v. Southeastern Pennsylvania Transportation Authority* explicitly rejected the EEOC's reliance on the *Green* factors.<sup>23</sup>

In 2010, the Supreme Court decided *National Aero. and Space Admin. v. Nelson*, 562 U.S. \_\_\_, 131 S.Ct. 746 (2011), which held that background investigations on contract workers at NASA did not violation any constitutional right to informational privacy. In the course of its opinion, the Court noted that “the government has an interest in conducting basic employment background checks,” and found it manifest that “[r]easonable investigations of applicants and employees aid the Government in ensuring the security of its facilities and in employing a competent, reliable workforce.”

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<sup>21</sup> Section 15, Race and Color Discrimination, *EEOC Compliance Manual*, 4/19/06; <http://www.eeoc.gov/policy/docs/race-color.html>

<sup>22</sup> The Section states in part:

In addition to avoiding disparate treatment in rejecting persons based on conviction or arrest records, upon a showing of disparate impact, employers also must be able to justify such criteria as job related and consistent with business necessity. This means that, with respect to conviction records, the employer must show that it considered the following three factors: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought. A blanket exclusion of persons convicted of any crime thus would not be job-related and consistent with business necessity. Instead, the above factors must be applied to each circumstance. Generally, employers will be able to justify their decision when the conduct that was the basis of the conviction is related to the position, or if the conduct was particularly egregious.

<sup>23</sup> 479 F.3d 232 (3d Cir. 2007). The facts of the case were as follows. Under a contract between SEPTA and King Limousine Services, King provided specialized bus service for persons with disabilities. King agrees in its contract with SEPTA that it would not employ drivers for these paratransit buses who had a felony or misdemeanor conviction for any crime of moral turpitude or violence against any person, or any conviction within the last seven years for any other felony or misdemeanor among specific offenses. El was denied a position because he had been convicted of second degree homicide for his role in a gang-related incident that occurred about 40 years earlier when El was fifteen years old. He served 3 ½ -years in prison.

### III. The EEOC's 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records

In April 2012, the EEOC issued its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*. The following is summary of some of the important aspects of the guidance.

#### 1. The Essence of the 2012 Guidance

The EEOC's 2012 guidance deals with this statement:

With respect to criminal records, there is Title VII disparate impact liability where the evidence shows that a covered employer's criminal record screening policy or practice disproportionately screens out a Title VII-protected group and the employer does not demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity.<sup>24</sup>

#### 2. The Use of Statistics

Under the 2012 guidance "an employer may present regional or local data showing that African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer's particular geographic area. An employer also may use its own applicant data to demonstrate that its policy or practice did not cause a disparate impact. An employer's evidence of a racially balanced workforce will not be enough to disprove disparate impact." The guidance does not deal with the difference between a policy that is crime specific and one that is not crime specific, which was an important aspect of the 1987 *EEOC Policy on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*.

Another important omission from the 2012 guidance is that it does not discuss the relevance of the Civil Rights Act of 1991 amendments to Title VII to proof of a statistical disparate impact from criminal conviction rules. As previously stated, EEOC's 1987 policy acknowledged that employer policies that target specific crimes can be evaluated for disparate impact on a crime by crime basis. Under the Civil Rights Act of 1991 and pre-enactment case law, the plaintiff must isolate and identify the specific employment practice that is allegedly responsible for any observed statistical disparity.<sup>25</sup> The 2012 guidance neither considers whether different crimes should be evaluated separately for disparate

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<sup>24</sup> This paper uses the terms "job related" and "business necessary" interchangeably. In *Griggs*, the Supreme Court referred to both terms without explaining a difference. After *Griggs*, the Court seemed to use the terms interchangeably. In *Contreras v. City of Los Angeles*, 656 F.2d 1267 (1981), the Ninth Circuit Court of Appeals stated that they are interchangeable ("We treated 'job related' and 'business necessity' as interchangeable terms, neither of which required proof that the challenged policy was absolutely necessary for operation of the business").

<sup>25</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i) and (B); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988) (plurality opinion); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657 (1989) ("a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack").

impact, nor whether the employer's use of the *Green* factors, as interpreted by the employer, should be evaluated separately for disparate impact. As for example, whether theft crimes should be examined separately from sex crimes, and whether a durational cut off, such as limiting consideration of convictions only to convictions within the past seven years, should be separately evaluated for disparate impact.

### **3. Articulation of the job-related and consistent with business necessity test**

The guidance states that the job-related and consistent with business necessity test should be constituted in accordance with *Griggs* and other Supreme Court decisions that predate *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).<sup>26</sup> The EEOC summarizes its understanding of the standard from these decisions:

The *Griggs* Court stated that the employer's burden was to show that the policy or practice is one that "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used" and "measures the person for the job and not the person in the abstract." In both *Albemarle* and *Dothard*, the Court emphasized the factual nature of the business necessity inquiry. The Court further stated in *Dothard* that the terms of the exclusionary policy must "be shown to be necessary to safe and efficient job performance."

The guidance then substantially adopts the formation of business necessity in *Green v. Missouri Pacific Railroad*, but without explaining how the rationale of *Green* fits the EEOC's interpretation of the *Griggs*' formulation.

According to the EEOC, it believes that there are two circumstances where employers will consistently meet the "job related and consistent with business necessity" defense:

- The employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible); or
- The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three *Green* factors), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

The individualized assessment would consist of notice to the individual that he has been screened out because of a criminal conviction; an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances; and consideration by the employer as to whether the additional information provided by the

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<sup>26</sup> See note 24.

individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity.

According to the EEOC, the individualized assessment would not always be necessary, but EEOC does not state the considerations that would be applicable to an evaluation of the necessity of the individualized assessment. The EEOC does state that to rely solely on the *Green* factors, “a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question.” “Demonstrably tight nexus” is not defined. However, when the screen does meet this test, the assessment would include consideration of the following:

- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

A significant weakness of the EEOC’s guidance is that it does not explain the linkage between the *Green* standards and the *Griggs*’ tests. Moreover, the EEOC’s guidance has two other striking omissions. First, it does not address the relevance of the statement in *Griggs* that the employer’s burden is to show that the given requirement has “a manifest relationship to the employment in question.”<sup>27</sup> And, second, it does not address the plurality opinion in *Watson v. Fort Worth Bank*<sup>28</sup> that the manifest relationship test would be satisfied when it is obvious that significant goals are significantly satisfied by a selection rule. These explications by the Supreme Court would seem to provide a reasoned and reliable justification for the *Green* test. After all, a recent, serious criminal offense that is plainly relevant to the nature of a specific job, such as a felony stealing conviction and a bank clerk job, is manifestly related to the employment in question *as shown by the Green* test.

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<sup>27</sup> The Court’s varied and imprecise express of the job-related test has sparked considerable disagreement over the meaning of *Griggs*. In addition to stating that job-relatedness looks to whether there is a manifest relationship between the selection procedure and the job, the court spoke in terms of a demonstration that the selection procedure bears a relationship to successful job performance. This has resulted in some imprecise line drawing between scored procedures, which courts typically require be justified by a formal study of their relationship to job performance, and un-scored procedures, such as licensing requirements, that are sometimes upheld without formal validation. Here is what the Court said in *Griggs*:

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

401 U.S. 431 (1971).

<sup>28</sup> 487 U.S. 977 (1988).

Applying *Watson*, no further proof would seem required. But, should uncertainty about “manifest” job relatedness remains, evaluation of other factors, such as employment history and rehabilitation might, in combination with the *Green* factors, show the manifest relationship. However, this line of reasoning to link *Green* to *Griggs* is not open to the EEOC because EEOC defines *Griggs* as requiring a showing that a criminal conviction “bear[s] a demonstrable relationship to successful” job performance. The EEOC fails to explain how the *Green* or any other factors accomplish this.

#### **4. Validation**

The EEOC’s guidance accepts that formal validation of conviction policies is not required, and questions whether validation is even possibly.

#### **5. Less Discriminatory Alternatives**

The guidance states that “[i]f an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory ‘alternative employment practice’ that serves the employer’s legitimate goals as effectively as the challenged practice but that the employer refused to adopt” The EEOC provides no example of a less discriminatory alternative.

### **IV. Federal Government’s Policies**

Private employers consider criminal convictions during the hiring process for the same reason the federal government considers them. With respect to its own applicants, for example, the EEOC believes that a history or pattern of criminal activity creates doubt about a person’s judgment, honesty, reliability and trustworthiness, and that a willingness to abide by rules is an essential qualification for a position of public trust. *See* EEOC Personnel Suitability and Security Program Handbook, p. 9. The EEOC cites to no authority for these conclusions, likely because the EEOC considers them obvious, or “manifest” to employment with the EEOC.

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**Glenn E. Martin**

**PRESENTATION OF GLENN E. MARTIN  
THE FORTUNE SOCIETY**

U.S. Commission on Civil Rights

December 7, 2012

Presented by

Glenn E. Martin  
Vice President for Public Affairs  
**The Fortune Society**  
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Good Morning. My name is Glenn E. Martin, and I serve as the Vice President of Public Affairs and the Director of the David Rothenberg Center for Public Policy (DRCPP) at The Fortune Society (Fortune). For over four decades, Fortune has been a powerful criminal justice advocate, as well as an alternative-to-incarceration and reentry service provider. Fortune's mission is to support successful re-entry from prison and promote alternatives to incarceration, thus strengthening the fabric of our communities. We do this by believing in the power of individuals to change, building lives through service programs shaped by the needs and experience of our clients, and changing minds to promote the creation of a fair, humane and truly rehabilitative correctional system. Thank you, distinguished Commissioners of the U.S. Commission on Civil Rights for the opportunity to present at today's Briefing.

As you know, there is an increasingly clear relationship between incarceration, collateral consequences, and the abrogation of civil rights in the United States. While professing high civil standards, the United States exhibits one of the most dilapidating criminal justice systems in the world. Topping the world charts for incarceration statistics while maintaining a clearly dysfunctional rehabilitation system, our nation races toward a civil rights catastrophe. Over the years, race- and class-biased policy making has successfully been hidden in the midst of a culture of low tolerance and fear of crime. The policies and biases that fuel the Prison Industrial Complex have had a disproportionate impact on colored and impoverished Americans, including the criminal record-based discrimination that affects

millions of U.S. citizens each year. Before America holds itself out to the rest of the world as a pillar of democracy and freedom, we must first deal with the racism proxy we have created with our burgeoning criminal justice system and the invisible punishment that follows conviction and confinement.

Each year, millions of Americans with criminal records face discrimination, stigma and a maze of policies and regulations that keep them from accessing the necessities for rebuilding their lives and becoming functioning members of society. Legal restrictions, licensing requirements, occupational bars, inadvertent and deliberate discrimination practices, and the cultural stigma associated with having a criminal record prevent many people—especially those from economically distressed communities of color—from accessing jobs in the low-wage labor market. When these individuals inevitably fail to reintegrate and are reincarcerated, they are not the only ones who suffer. So do their families, communities and indeed the entire country; valuable lives are wasted, the public is less safe, and civil rights are diminished.

Fortune has evolved in response to the overwhelming needs of formerly incarcerated men and women to include a broad array of programs addressing the myriad needs of the population of people with criminal records. Today, Fortune offers to 3000 clients annually a holistic and integrated "one-stop" model of service provision that, depending upon individual need, includes: workforce development, education, housing, outpatient substance abuse treatment, outpatient mental health treatment, family services, HIV/AIDS services, follow-up, and lifetime aftercare services. In addition, while Fortune has always engaged in advocacy and community education, in order to increase our impact and capacity, in 2007 we launched DRCPP, a department which focuses primarily on community education and federal and state-level public policy advocacy. Part of DRCPP's mission is to increase employment opportunities for qualified jobseekers with criminal records by improving employment policies and practices and changing public opinion.

Reflective of the self-help foundation of Fortune, over 70% of the agency's staff have graduated from our programs or have experienced issues similar to those of our clients, including incarceration, homelessness, and substance abuse. The cultural competency that such staff brings to Fortune's work informs our advocacy agenda, as well as program design and helps retain clients in our comprehensive array of services. Similar to over half of our staff, I am formerly incarcerated myself, having served 6 years in a NYS prison from 1994 to 2000. I am also the son of a retired police officer and the brother of a US federal correction officer. After earning a college degree inside and exiting prison in 2000, I spent months searching for employment in the NYC entry level labor market. Interviewing with over 40 employers within a two month period, I faced a tremendous amount of discrimination, before I began working at the Legal Action Center in New York City. I eventually was hired as the Co-Director of the National H.I.R.E. Network (HIRE), a national project dedicated to eliminating barriers to employment for jobseekers with criminal records. I invite questions from the Commissioners about my personal journey after exiting prison.

Since being released from prison, I have authored and advanced legislation in a number of jurisdictions to remove barriers to employment, housing, education and voting for formerly

incarcerated people. Knowing both sides of the justice system, I am extremely well versed in the issues. I have appeared as a criminal justice policy expert on several national news outlets, including CNN, MSNBC and CSPAN. I've also served as an expert on local television and radio, contributing on the controversial issue of Stop and Frisk, as well as a number of other topics, including policing, alternatives to incarceration and reentry. In addition to television appearances, I host a NYC- based cable television show, *Both Sides of the Bars*, where I engage criminal justice stakeholders and the local community in conversations about criminal justice reform.

Germaine to today's discussion, I recently collaborated with my colleagues to advocate for the recently adopted US Equal Employment Opportunity Commission Title 7 Guidance on Jobseekers with Arrests and Conviction records. To highlight the importance of the reissued guidance, today I plan to focus my presentation on a 2004/5 study by Princeton Professor Devah Pager, *Race at Work: Discrimination in Low Wage Labor Markets*. I served as the Project Manager for the study, which was housed at the NYC Commission on Human Rights, which afforded me the opportunity to not only help execute the research, but also to be privy to the many insightful and sometimes disturbing anecdotal experiences of our testers.

Unfortunately, decades of civil rights progress have led some researchers and policymakers to doubt that discrimination remains an important cause of economic inequality. To study present-day discrimination, Principle Investigators Devah Pager and Bruce Western collaboratively conducted a field experiment in the low-wage labor market of New York City, recruiting white, black, and Latino job applicants who were matched on demographic characteristics and interpersonal skills. These applicants were given equivalent résumés, carefully manufactured by the research team, and sent to apply in tandem for hundreds of randomly assigned entry-level jobs in NYC.

**The results show that black applicants were half as likely as equally qualified whites to receive a callback or job offer. In fact, black and Latino applicants with clean backgrounds fared no better than white applicants just released from prison. Moreover, the positive outcomes for black applicants, when presenting evidence of a criminal record, were reduced by 57%.** Additional qualitative evidence from the applicants' experiences further illustrates the multiple points at which employment trajectories can be deflected by various forms of racial bias. These results point to the subtle yet systematic forms of discrimination that continue to shape employment opportunities for low-wage workers.

Exacerbating the problem, the criminal background check industry has grown exponentially and remains relatively under regulated. Particularly in the wake of 9/11, the ready availability of inexpensive commercial background checks has made them a more popular screening tool, even for relatively small and medium sized employers. In one 2010 survey by the Society of Human Resource Management, more than 90 percent of employers reported using criminal background checks for their hiring decisions. At the same time that the background check industry has expanded, the share of the U.S. population with criminal records has soared to over one in four adults.

Pager and Western recognized that without observing discrimination directly, it is difficult to make causal statements about the nature or magnitude of the barriers to employment for disadvantaged groups. Using an experimental audit methodology for the study, we sent teams of male testers with equivalent resumes to apply for entry level jobs in New York City. Testers were matched on the basis of age and appearance; after selection, they participated in extensive training to ensure consistency in their interactions with employers. The testers used fictitious matched resumes reflecting equal levels of education and work experience. In several of the teams, the resumes also reflected evidence of an 18-month term of incarceration. Testers within teams rotated which member of the team served in the criminal record condition to control for unobserved differences within tester pairs that could affect hiring outcomes. Because testers are given equivalent resumes, and criminal conviction status is randomly assigned, the unobserved heterogeneity that typically plagues studies of workers is minimized in this experimental setting.

The audit study began in February 2004, employing a dozen different black, white, and Latino testers, in 14 experimental conditions. By the completion of our data collection, we audited over 1350 employers. After each visit to an employer, testers complete a detailed debriefing form to record their interactions. Voicemail boxes also record whether employers called back testers to make job offers or schedule second-round interviews, with additional voicemail boxes set up to record calls to references. This study represents the largest and most complex audit experiment ever conducted in a single field site.

Add to the above-mentioned findings of this study the sobering fact that 1 in 3 black male babies born in the United States today will have criminal justice involvement by the age of 29 and we find ourselves confronted with the collateral consequences of this nation's addiction to incarceration. Essentially, whether deliberate or inadvertent, criminal record based discrimination serves as a surrogate for race-based discrimination. The sheer scale of arrest, prosecution and incarceration of people of color has resulted in the phenomenon of mass incarceration. Based on current rates of first incarceration, an estimated 32% of black males will enter State or Federal prison during their lifetime, compared to 17% of Hispanic males and 5.9% of white males. Black males ages 20-30 have significantly higher rates of incarceration than other racial groups. An estimated 1 in 3 black men ages 16-34 has a criminal record; 12% of black men in that age group are incarcerated; roughly twice that number is on probation or parole. According to the Justice Policy Institute here in DC, so pervasive is the criminal justice system in the lives of black men that more of them have done prison time than have earned college degrees.

The collateral consequences of criminal conviction in the era of mass incarceration, particularly in employment, must be understood in the context of civil rights. A new divide has been created all across America. Prior to *Brown v. Bd of Ed*, race was the dominant instrument of social control. Today, the criminal justice system and its collateral consequences are the means by which racial discrimination and exclusion are perpetuated and justified, albeit through the back door. Although the collateral consequences of conviction are increasingly identified and understood, they are usually framed as arguments for the rehabilitation of formerly incarcerated people, rather than analyzed as the repackaging of institutional racism with structural impact on entire communities. Unfortunately, relatively

little attention has been given to the ways that federal and state laws barring employment are an affront to equal opportunity and affirmative action, underlying the importance of today's Briefing and the need for subsequent focus on this important civil rights issue.

Thank you for the opportunity to present at today's Briefing and I look forward to questions.

## New York City Audit Study



- Employment Audit: Matched pairs of individuals apply to real job openings
  - 6 teams
  - 13 testers
  - 1470 employers
  - 3500 individual visits
  
- experimental variables: race, ethnicity, criminal background, educational attainment

## Experience: Prison Messhall vs Fast Food Restaurant



## Table 1. Occupational Distribution



Job Title	N	Percent
Waitstaff	242	16
Retail sales	161	11
Clerical	85	6
Busboy	68	5
Laborer	51	4
Driver	39	3
Telemarketing	36	3
Courier	26	2
Customer Service	26	2
Other	736	50



# NYC Audit Design



White

Black



C

N

C

N

> 200 audits

> 200 audits

C = criminal record, N = no criminal record

# Racial/Ethnic Queues



W

B

L

>250 audits

# Racial and Criminal Stigma



W,C



B,N



L,N

> 250 audits

C = criminal record, N = no criminal record



# The Role of Educational Credentials



## White



C,A



N

> 200 audits

## Black



C,A



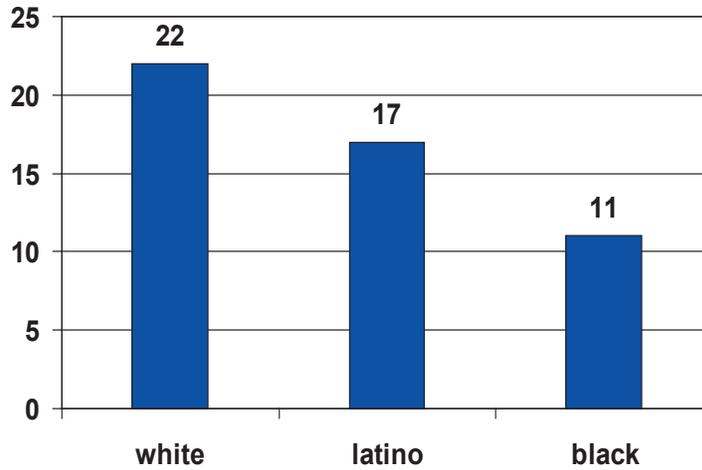
N

> 200 audits

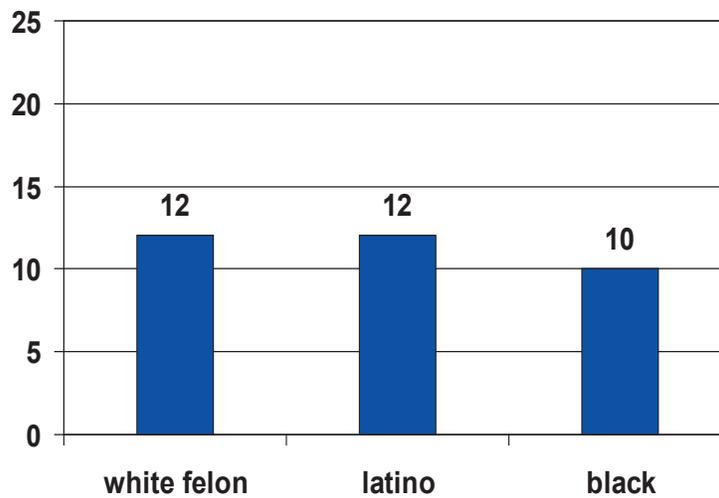
C = criminal record, N = no criminal record, A = Associates Degree



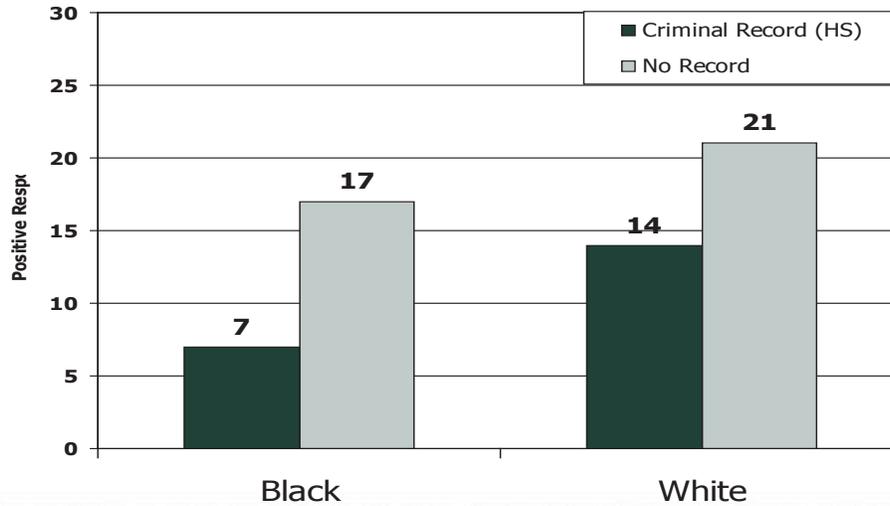
### Call-backs or Job Offers by Race/Ethnicity (Figure 1)



### Call-backs or Job Offers by Race and Criminal Record, (Figure 2)



The Effect of a Criminal Record for Black and White Job Applicants, (Figure 3)



Conclusion



- Audit data provides strong evidence of the causal effect of criminal stigma, reducing employment among jobseekers with criminal records
- There is some evidence that this effect is larger for blacks than whites
- There is also evidence of race discrimination, in which equally qualified blacks with clean records may do worse on the labor market than a white jobseeker with a criminal record

**Todd McCracken**



**Testimony of**

**Todd McCracken  
President**

**Before the**

**U.S. Commission on Civil Rights**

**Regarding**

**Criminal Background Screening**

**December 7, 2012**

My name is Todd McCracken. I am President of the National Small Business Association (NSBA). We are pleased to provide our perspective on criminal background screening in general and the recent initiatives in this area by the Equal Employment Opportunity Commission (EEOC) in particular. We appreciate your interest in our views.

NSBA was founded in 1937 to advocate for the interests of small businesses in the U.S. It is the oldest small business organization in the U.S. The NSBA represents more than 65,000 small businesses throughout the country in virtually all industries and of widely varying sizes.

*The Missions of the EEOC and the U.S. Commission on Civil Rights are Important*

The EEOC and the Commission have important missions. The EEOC enforces Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin; the Age Discrimination in Employment Act of 1967 which prohibits employment discrimination against individuals 40 years of age and older; the Equal Pay Act of 1963 which prohibits discrimination on the basis of sex regarding compensation, section 501 of the Rehabilitation Act of 1973 which prohibits employment discrimination against federal employees and applicants with disabilities; the Americans with Disabilities Act of 1990 which prohibits employment discrimination on the basis of disability; and the Genetic Information Non-Discrimination Act of 2008 which prohibits employment discrimination based on genetic information.

The Commission's mandate is broader than the EEOC's and it examines civil rights issues in all walks of life, not only in employment. NSBA welcomes strong protection of the civil rights and liberties of all Americans and supports the mission of both agencies.

*Background Screening Enhances the Safety of Employees and Customers of Small Businesses*

It is an unfortunate fact of life that not everyone is law abiding. It is also a fact of life that not everyone should be employed in certain types of jobs. We do not want rapists entering people's homes. We do not want child molesters working in day care centers. And we do not want embezzlers handling large sums of cash.

Employers want to provide a safe place for their employees to work and to do their best to prevent workplace crime. They want to do their best to ensure that the employees that they send to customers' homes as technicians, repair people or sales people do not inflict harm on their customers. They need to take steps to prevent theft, fraud and embezzlement.

Criminal background screening is an important tool – very nearly the only tool – that employers have to protect their customers, their employees and themselves from criminal behavior. Very, very few employers are using criminal background screening for illegitimate, discriminatory purposes. And there is little to no evidence that employers are doing so. Small Businesses Need to Know and Government Has the Obligation to Explain the Rules

That said, small businesses are willing to comply with reasonable rules designed to ensure that criminal background screening is not having a disproportionate impact on minorities provided that those rules do not endanger their employees or customers, do not substantially increase their risk of being victims of property crimes or do not increase their risk of being found liable for the tort of negligent hiring.

Government, however, has an obligation to articulate rules that are comprehensible and can actually be implemented. It is fundamentally unfair and, in practice, counterproductive for the rules to be so opaque that nobody can understand them. It leads to a situation where enforceable is starkly arbitrary and the rules, since they cannot be understood, are effectively ignored.

As I will discuss in detail later, the EEOC guidance is not guidance at all. It provides no meaningful rules about how to proceed. It is really just a threat that the EEOC may proceed against employers if, in hindsight, it decides it wants to do so.

#### Small Businesses are Often Caught Between Competing Government Priorities

Small businesses are caught between competing government priorities and perspectives among different federal agencies, the courts and the state and federal governments. The recent EEOC guidance, for example, explicitly stated that the fact that a small business was complying with a state legal requirement to conduct a criminal background check or to bar a felon from a particular position would not prevent an EEOC enforcement action. With respect, it is ridiculous that a small business is forced to choose between two conflicting government requirements. If the EEOC has a problem with a state statute, it should challenge the statute, not launch an enforcement action against a small business who complied with state law. Unlike the federal government, small businesses have limited resources and defending such a lawsuit will damage the financial health of the business.

Similarly, state and federal courts will allow potentially devastating tort lawsuits against businesses that hire felons who commit crimes at the workplace or in customers' homes. Yet the EEOC is threatening to launch lawsuits if they do not hire those same felons.

Small businesses really want to know what the rules are so they can comply with those rules and get on with running their businesses. They want the state and federal governments, including the courts, the legislative branch and the executive branch to set forth consistent and comprehensible rules. That does not seem like it is asking for too much. The rules applying to small businesses should not be that they are at substantial legal risk no matter what they do.

#### The EEOC Should Focus on Areas Where Discrimination is an Important Problem

The EEOC should focus its enforcement efforts where unlawful discrimination is an important problem. A corollary of that proposition is that it should not expend its resources in areas where it is not an important problem. It should be particularly careful about focusing resources in areas that are not a demonstrated problem and where there are strong

countervailing policy reasons for employers to engage in the activities that result in the alleged disparate impact.

One such area is criminal background screening.

NSBA has conducted a review of the legal and economics literature on these issues. We have discussed this with our members. We have found no evidence that criminal background screening is a significant civil rights problem.

On the other hand preventing workplace violence, protecting customers and preventing property crime is a continuing and serious problem. Moreover, in the absence of criminal background screening, our members are subject to substantial risk of being successfully sued for the tort of negligent hiring.

#### The EEOC Needs to Seriously Rethink the Complexity of Its Guidance

Neither the small business community nor the EEOC countenances discrimination. We, like this body and the EEOC, oppose bigotry. But the issues that I am discussing today do not involve attempted bigotry. Virtually no small businesses are conducting background checks for the purposes of excluding minorities. They are trying to hire qualified employees. They are trying to prevent their employees, their customers and, in the case of family-owned businesses, their own families, from becoming victims of crime. They are trying to avoid liability for crimes committed by employees. And they are trying to limit theft, fraud, embezzlement and other property crimes.

The vast majority of small firms are also trying to comply with the law and with EEOC guidance. In the current situation, they are unable to do so.

I can assure you that virtually no small business owner is going to be able to read, absorb and apply the 55 page, 167 footnote "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964" issued by the EEOC on April 25, 2012. More importantly, we have had many discussions with sophisticated attorneys who grapple with these issues for a living, including those that work for large law firms advising large corporations. They do not know how to advise their clients either. If they are at a loss, then small firms and their generalist attorneys will fare no better.

In the real world, small firms and their advisors are not going to be able to understand what the EEOC regards as permissible with respect to the use of criminal background checks. The reason is fairly straight forward. The EEOC has not clearly stated what it expects from the small business community. All the EEOC has done is indicate that it expects small firms to conduct a complex individualized assessment weighing numerous factors regarding the use of conviction records in each hiring decision. How that is to be done in practice is anybody's guess.

Presumably, the goal of the EEOC is to prevent discrimination. To do so, it must enunciate a coherent, intelligible policy that businesses, large and small, can actually understand and implement. The EEOC needs to do better.

At the very least, the EEOC needs to give a large number of actual examples of what it regards as lawful and unlawful. The EEOC, for example, has not even had the courage to state that a 20 year old conviction for marijuana possession would not be a legitimate reason to fail to hire a laborer or conversely that it is legitimate to not hire someone just released from prison for child molestation as a day care provider. And they need to get a lot more specific than that for these rules to have any practical effect.

The rules that business owners have to grapple with now are so opaque and complex that they will, in practice, have to be ignored. The clear and quite understandable concerns about tort liability and worker, customer and family safety will take precedence over amorphous and ill-defined EEOC guidance. In short, the EEOC guidance will not achieve its objective.

NSBA would be happy to work with the Commission and the EEOC to develop a new and better policy that meets our mutual objectives. So far, however, the EEOC has sought very little input from employers.

#### Workplace Violence is a Significant Problem

We do not believe that criminal background checks are being misused to any significant degree for an unlawful discriminatory purpose.

Workplace violence, on the other hand, is a significant problem. Workplace theft and embezzlement are also major problems. Both can be reduced through proper background screening. According to the Bureau of Justice Statistics, approximately 572,000 nonfatal violent crimes (rape, sexual assault, robbery, and aggravated and simple assault) occurred against persons age 16 or older while they were at work in 2009.<sup>1</sup> Workplace violence accounted for 15% of nonfatal violent crime against persons age 16 or older. In short, workplace violence remains a very serious problem even though it has declined over the past 15 years.

A Westlaw search of the law reviews regarding negligent hiring indicate that the trial bar is quite busy filing negligent hiring lawsuits. Businesses have to take that risk into account when making hiring decisions. The EEOC needs to consider the tort law in its guidance and, based on its discussion in the guidance, does not appear to have done so. It is not right that complying with EEOC guidance (such as it is) can lead to substantial and potentially devastating tort liability for a business that does so.

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<sup>1</sup> Workplace Violence, 1993-2009 National Crime Victimization Survey and the Census of Fatal Occupational Injuries, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, March, 2011. <http://bjs.ojp.usdoj.gov/content/pub/pdf/wv09.pdf>

It is not in an employer's interest to fail to hire an otherwise qualified applicant because they smoked some marijuana 20 years earlier and got caught. It is not in their interest to fail to hire someone that perhaps got in an altercation years ago and has otherwise had no problems with the law and a good employment record. It does not take a major enforcement effort to achieve these results.

The true issue is whether minority applicants are being unfairly affected by criminal background checks. In other words, are minority applicants that should be hired not being hired (because their criminal background is minor or not relevant). There is no evidence that this is the case. Certainly, there is no evidence that this is a major problem. This should give the EEOC or this body some pause about prioritizing this area.

#### Conclusion

We urge the Commission to not prioritize enforcement against firms with educational attainment requirements or that conduct criminal background checks unless there is a substantial, factual basis to believe that they have an unlawful purpose.

We also strongly urge the Commission to clarify its guidance with respect to criminal background checks so that the Commission's expectations are made clear and so businesses can effectively meet those expectations.

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**Richard T. Mellor**



**Richard T. Mellor, Vice President,  
Loss Prevention**

**November 26, 2012**

On behalf of the National Retail Federation (NRF), I want to thank the U.S. Commission on Civil Rights for holding this briefing on the April 2012 Equal Opportunity Commission's (EEOC) new Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions. In the retail industry, background checks are widely utilized and provide a necessary safety net as retailers seek to protect their employees, customers, and businesses. NRF appreciates being able to share our thoughts on this matter with the Commission.

As the world's largest retail trade association and the voice of retail worldwide, NRF's global membership includes retailers of all sizes, formats and distribution channels as well as chain restaurants and industry partners from the United States and more than 45 countries abroad. In the U.S., NRF represents an industry that includes more than 3.6 million establishments and which directly and indirectly accounts for 42 million jobs – one in four U.S. jobs. The total U.S. GDP impact of retail is \$2.5 trillion annually, and retail is a daily barometer of the health of the nation's economy.

My name is Richard Mellor and I serve as Vice President of Loss Prevention for NRF. I am here to represent the retailers we serve. My responsibilities at the NRF include the communication of pertinent information to the Retail Loss Prevention community, facilitating educational conferences, engaging law enforcement to meet and build alliances in preventing retail crime and advocating for appropriate legislation to better protect the assets of retailers.

Prior to my position at the NRF, I served as a senior loss prevention executive for more than 25 years at a number of retailers, most recently over a decade with a nationwide jewelry chain. As part of my responsibilities, I directed the company's employment screening process. This included testing and background investigations.

The executive responsibility of conducting business in a professional and law abiding manner is paramount when protecting the company brand and reputation. Over the past decade the use of background checks has been steadily rising as retailers shoulder the liability of protecting the ever growing amount of personal data pertaining to customers, employees, and company assets. More important than ever before is the prevention of litigation and legal expense. Unnecessary expenses that stem from carelessness, and

specifically employment related matters, can have a significant impact on a company's financial stability.

Employers are extraordinarily careful to manage their employment process, preventing even the appearance of discrimination. With the evolution of social networking, the protection of the retailer's brand and reputation is carefully monitored and has become a top priority. Social consciousness is part of every retailer's business strategy. Employment practices and policies play an important role in creating a brand identity that encourages customers to want to shop and work for that company. Retailers therefore place a high priority on demonstrating fairness, credibility, and serving the communities in which they do business. As a result, hiring within the communities is important to perpetuating a healthy business environment. There is a fine line that retailers must walk between social responsibility and the obligation to protect customers, especially children, to ensure the safety and security of employees, and at the same time to prevent needless losses to the company bottom line.

NRF strongly believes that hiring practices should be fair and equitable for both potential and existing employees. This is especially true during such a challenging economic time. At the same time, a background check is an important resource for employers who seek to provide a safe and stable work environment. It is an important tool in making sure that we fulfill our obligation to employees and customers. When removing the handcuffs from the criminals and placing them on the retailers instead, the retailers have great difficulty fulfilling their responsibility.

Retailers have both a legal requirement and moral responsibility to ensure a safe workforce and secure workplace. Background screenings are an essential aspect of the hiring process for businesses and provide employers a better sense of the individuals they are putting into their workforce, representing their company and interacting with their customers.

Inserting someone with a criminal conviction for theft or fraud into an organization that deals with large amounts of cash, credit card and checking account information is extremely risky; and if the person commits a crime, there is never a reasonable recovery of assets lost. A retailer who makes the decision to hire a criminal who compromises customer privacy has no protection under the EEOC guidelines to fall back upon. They will suffer the consequences, not the criminal they hired.

The retailer who hires a delivery driver who has a criminal record for violence and that person hurts an employee or customer will again suffer the consequences and liability for the injuries and suffering that result from the crime. If a child is abused or hurt by a known sex offender the damage to the child and the retailer can be so severe that it can put a company out of business. Statistics show this criminal behavior is often repeated and the predictability is too high to take the risks of employing such criminals.

The matter of discussing criminal history cannot be left to a chance opportunity, hopefully addressed at a later date and by someone not specialized in handling these difficult conversations. Criminals are skillful in the art of deception and can easily manipulate the

conversation, causing bad employment decisions. For those seeking to turn over a new leaf, these conversations are better addressed by HR professionals before the offer of employment, not after someone is hired by a local, often young and inexperienced, manager of a store. Store personnel are trained to be sales managers and not crime intervention specialists. These often intimidating conversations, if not handled properly can result in discrimination actions brought by and under the EEOC Enforcement Guidance. Again, the potential for harm to the company is immeasurable.

With a workforce of 42 million employees, retailers have worked diligently to provide opportunities and second chances for individuals committed to rehabilitation. There is always room for improvement but the recent EEOC guidance recommending that employers remove the question concerning criminal convictions puts retailers and their customers at increased and unnecessary risk.

When crimes do occur, the investigators, prosecutors and judges always ask the questions: how did this person get access to the information; the restricted area; the merchandise or even access to the child. Criminals demonstrate tremendous creativity when an opportunity is presented to commit another offense. What is even more perplexing is they become harder to catch and more difficult to prosecute given their knowledge of the legal process and investigative techniques.

NRF believes that the criminal background question needs to remain on the employment application. This vital information is every bit as relevant as an applicant's education, previous employment experience, and any formal training. We believe the potential employer has the right and responsibility to know who they are putting into their workplace to represent their company. Removing a first line of defense, specifically the criminal background history question, on an employment application, leaves retailers, shoppers and the entire business community at risk. If an applicant identifies they have a prior conviction, many factors are taken into account while their application is being considered. These factors include age, date of the offense, seriousness and nature of the violation, as well as rehabilitation. Of course, the relevance of the conviction and open position are considered; but, as is the norm in retailing, employees are regularly asked to perform duties not included in the job description. Additionally, how does an employer effectively manage the private information of a criminal history and yet protect the workplace from risk.

In July 2011 and again in 2012, NRF researched the use and scope of criminal background screening in the retail industry. The survey collected information from 96 companies, ranging from restaurants to department stores to specialty retailers and grocery stores. The survey found that 97% of retailers utilize background screening as part of their applicant hiring process and 87% use criminal record checks. The positions most commonly screened using a criminal background history include Loss Prevention/Security (97%), Senior Executive (95%), Store Manager (95%), Assistant Store Manager (94%), and Distribution Center Employees (89%). Other positions screened include Store Associates, Corporate Employees and third party delivery and service contractors.

Transparent criminal history provides an effective way of protecting employees and customers within the bounds of the law. This responsibility is not just one of morality, but also a legal requirement in many states. The Guidance released by the EEOC is complicated by the various state laws that all have different requirements in how to handle background checks. This can lead to confusion for employers who have facilities in more than one state. As employers seek to follow these various laws, they also have a responsibility to demonstrate that due diligence has taken place in their hiring practices in order to protect themselves against liability should something happen in their facilities.

In the retail industry, there are positions that cover a spectrum of responsibilities. Just a few examples include home delivery and repair workers, salespeople on the floor, buyers of the products that are sold, accountants, attorneys, human resource professionals, and security personnel. Many of these employees have responsibilities that involve handling cash, checks and credit cards of customers and vendors. Employees who perform accounting services have access to confidential company and customer financial information. Employees working in human resources have access to a myriad of personal information about fellow employees. Loss Prevention professionals investigate theft issues, work with homeland security and manage the safety and security of customers, employees and assets.

Retail employers big and small promise the delivery of goods and services. They hire personnel that drive on public roads and routinely enter customers' homes. Delivery drivers are entrusted with company vehicles and often handle thousands of dollars' worth of goods for delivery. In the case of prepared food delivery, drivers are also likely to handle cash on a regular basis. These employees are entrusted with not only the company's money and products, but by customers who hope such individuals will not harm them or steal their property or private information.

Having illustrated to you why the retail industry feels that background checks are an important part of the hiring process, NRF wants to highlight some specific concerns as to the Guidance itself. While there are a number of concerns that NRF has with the Guidance, there are a few items that are of most interest to retail.

The process of drafting and implementing the Guidance took place without any public review of any actual text. While the EEOC did hold some public meetings where they heard from a select group of predetermined stakeholders, all of this was done without being able to comment on an actual document. Releasing, passing, and implementation all took place in one morning. As a result, no comments were accepted on actual text, and there was absolutely no phase-in time for employers to adjust to the new Guidance.

The document puts employers in a difficult place when trying to comply with state and local laws that have been passed. An employer who seeks to be in compliance with state laws has no assurances they the company will not be charged by the EEOC of violating Title VII. It can put companies in a situation of choosing to follow the state/local law and possibly be the subject of an EEOC investigation or follow the Guidance and be in violation of specific states/localities.

The Guidance seems to make an assumption that the use of background checks is the biggest hurdle for ex-offenders seeking employment. While NRF believes strongly in second chances and providing an opportunity for people to prove themselves, the problems which ex-offenders face extend far beyond background checks. To try and address a complex problem by just limiting employer resources does nothing to help with some underlying problems that many ex-offenders face such as lack of skills, substance abuse, and limited education.

The Guidance “recommends” that employers not ask about convictions on job applications. Many retailers still use this question on job applications, though many are considering changing their policy in light of the EEOC’s actions. NRF would argue that this question is not a way to automatically rule out an applicant. Instead, this is a tool used to find out important information about a candidate that often leads to an upfront discussion about prior acts. It is better for potential employees as well as the employers to know this information up front. The question can also provide an indication of a potential employee’s honesty and ability to acknowledge prior bad acts.

NRF believes that the Guidance imposes new burdens on responsible employers. The “suggestion” that individual assessments occur in every situation to avoid an EEOC investigation is an onerous, impractical, time-consuming, and expensive undertaking. This is especially the case in retail with its fluctuation in hiring. Consider, for example, how large a burden this would be to those retailers who are now “staffing up” for the holiday season. Such assessments would greatly slow down the hiring process and divert resources during the busiest time of the year.

In our view, the new Guidance makes it more of a challenge for retailers to use background checks. Risks need to be weighed if one forgoes background checks all together. For example, if a company decides not to do background checks there is:

- The increased risk to the safety and well being of customers and employees;
- Security breaches to information;
- The potential exposure to negligent hiring/retention claims;
- The potential for increased discrimination due to decisions made based on the incarceration rate in the United States rather than the individual;
- Possible exposure to negligence claims;
- Increased risk of workplace violence;
- Potential harm to the business if an employee engages in criminal activity on the job;
- Damage to the brand;
- Economic loss due to theft;

Should a retailer continue to conduct background checks, the new Guidance has made this more burdensome and costly. It also invites the possibility of the EEOC examining policies that NRF would say are unclear and open to interpretation. This in turn could lead to investigations and legal battles that take time and money for both the government as well as the business.

The retail industry wants to keep our workplaces safe, from both internal and external factors which could cause harm. Criminal background checks are an important tool, and the updated Guidance puts retailers in a precarious position. The vast majority of employers are creating workplace policies in good faith and in a fair manner that balance with the real needs of the business.

NRF asks that the Commission closely examine the impact of the new EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions will have on all employers. It is our view that earlier interpretations of the guidelines were working fairly and this overly burdensome Guidance will add risk, increase expense, cause confusion, and legal challenges for many retailers.

Thank you for your consideration of our views as the U.S. Commission on Civil Rights evaluates this new Guidance. NRF would be happy to answer questions you may have or provide more insight from the retail perspective.



Richard Mellor  
Vice President of Loss Prevention  
National Retail Federation

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**Roberta Meyers**

**“The Impact of Criminal Background Checks and the EEOC’s Conviction Records  
Policy**

**on the Employment of Black and Hispanic Workers”**

**Written Testimony Submitted To**

**The United States Commission on Civil Rights**

**Friday, December 7, 2012**

**Presented by:**

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Thank you for hosting this briefing to discuss the impact of criminal record checks on black and Latino job seekers in the labor market. I am Roberta Meyers, Director of Legal Action Center’s National **H**elping **I**ndividuals with criminal records **R**eenter through **E**mployment Network (also known as H.I.R.E.). The Legal Action Center is the only nonprofit law and policy organization whose sole mission is to fight discrimination against people with criminal records, histories of addiction, or HIV/AIDS and to advocate for sound public policies in these areas. HIRE, which is a project of Legal Action Center, aims to increase the number and quality of job opportunities available to people with criminal records by changing public policies, employment practices and public opinion. Since 2001, my project has provided leadership on public policy advocacy and technical assistance and training all across the country to private and public agencies on strategies to eliminate or reduce the number of criminal record barriers faced by jobseekers in the labor market.

For the past decade we have used the Equal Employment Opportunity Commission’s (EEOC) guidance on the consideration of arrest and conviction records as a policy model that states could adopt as a fair employment standard to give more qualified individuals with criminal histories a fair opportunity to compete for employment and qualify for occupational licensing. We have also used it to educate employers on the use of criminal records in hiring

decisions. While conducting these educational activities over the years we have also worked with other legal and policy groups to encourage the EEOC to strengthen its position on employers' use of criminal record screenings as well as urged them to become more vigorous in its investigation of criminal record-based claims of discrimination. Therefore, we considered it a tremendous victory when the EEOC released its update of the guidance it had released nearly 30 years ago that discouraged employers from establishing blanket bans against hiring people with arrest and conviction records.

The update of the EEOC guidance includes new provisions that:

- Put employers on notice that categorical exclusions for people with certain arrest and conviction records may violate Title VII;
- Emphasized its earlier recommendation that job applications not ask about criminal records, and if they do ask, that they limit inquiries to conviction records for which exclusion would be job-related with business necessity;
- Offered a series of examples of common policies and practices that violate Title VII; and
- Informed local and state governments that barring people with certain criminal records from jobs or occupational licenses also could violate Title VII.

This issue has become of greatest importance because (1) there are over 65 million individuals with criminal records in this country; (2) a criminal record is usually the number one automatic disqualifier for employment and we know that many employers (public and private) will go as far as noting it on job postings; and (3) we cannot ignore that criminal records serve as a double stigma for people of color.

In 2006, HIRE partnered with the Center for Community Alternatives in New York to conduct a project called "Unchaining Civil Rights," which identified, documented and described the institutional and structural exclusions in what we called the four Es - employment, education, enfranchisement and equality and the ways that these exclusions result in de facto discrimination of racial minorities. We concluded that the structural and institutional barriers to education and employment for people with criminal records are more than collateral consequences; they are an abrogation of fundamental civil rights<sup>1</sup>. The release of Michelle Alexander's book in 2011, The New Jim Crow, catapulted this issue into mainstream media and has really forced the country to take note and acknowledge that people of color are significantly and disproportionately represented in the criminal justice system and that a criminal record has become a surrogate for race-based discrimination throughout the U.S. Employment statistics for blacks and Latinos, particularly males, continue to be worse than any other demographic<sup>2</sup>.

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<sup>1</sup> See [www.unchainingcivilrights.org](http://www.unchainingcivilrights.org).

<sup>2</sup> U.S. Department of Labor, Bureau of Labor Statistics. *The Employment Situation—October 2012*. Retrieved from <http://www.bls.gov/news.release/pdf/empst.pdf>.

The experimental audit studies of Devah Pager out of Princeton University encapsulate the real challenges faced by black and Latino males with or without criminal histories in the labor market. In the last study she and Bruce Western conducted in 2004 in New York City, they concluded that a black man without a criminal record was less likely to get a job than a white man with a criminal record<sup>3</sup>. Needless to say, a black man with a criminal record barely stood a chance at getting a call back for a job. Race discrimination and race bias is pervasive in the job market and we have to attack it from every angle through which it exists.

We respectfully ask that the members of the U.S. Commission on Civil Rights consider supporting the EEOC's position on limiting the use of criminal background checks in employment decisions as well work with HIRE to promote criminal record barriers as civil and human rights issues, as they are. Here are a few additional thoughts.

- Few states (only 14) have laws prohibiting discrimination against individuals with criminal histories in public and/or private employment and/or for occupational licensing, and as you know there is no federal law<sup>4</sup>. Therefore, we need federal enforcement agencies to commit to ensuring that qualified individuals with criminal histories are given a fair chance and opportunity to work and not face discrimination.
- Most states give unfettered access to criminal record information and indefinitely, which perpetuates the lifelong stigma suffered by millions of individuals with criminal records who are disproportionately people of color.
- Until now, the employer community was not very concerned about being challenged on their discriminatory hiring practices because the threat of a criminal record-based discrimination lawsuit seemed more unlikely and remote than a negligent hiring liability suit.
- Employers must continue to be encouraged to not consider arrest records that did not result in a conviction as well as old or minor convictions that really cannot justifiably be considered relevant to the ability and potential behavior of an applicant.

We also ask that the Commission:

- Recommend the creation of a federal civil and human rights standard that encourages employers to hire qualified applicants with criminal histories and prohibits flat bans against hiring qualified individuals with criminal histories.
- Recommend that employers and other non-law enforcement agencies be prohibited from inquiring about or using arrest information that did not lead to conviction or

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<sup>3</sup> Devah Pager, Bruce Western, & Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, *American Sociological Review*, 77, pp. 777-799 (2009). See also Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 *The Annals of the American Academy*, pp. 195-199 (2009).

<sup>4</sup> Ariz. Rev. Stat. § 13-904(E); Colo. Rev. Stat. § 24-5-101; Conn. Gen. Stat. § 46a-80, Conn. Gen. Stat. § 31-51i; Fla. Stat. § 112.011; Haw. Rev. Stat. § 378-2.5(a)-(d); Kan. Stat. Ann. § 22-4710(f); Ky. Rev. Stat. §§ 335B.020 and 335B.070; La. Rev. Stat. § 37:2950; Minn. Stat. § 364.03; N.M. Stat. §§ 28-2-3, 28-2-4, and 28-206; N.Y. Exec. Law § 296(15), N.Y. Correct. Law §§ 750-753; 18 Pa. Cons. Stat. §§ 9124, 9125; Wash. Rev. Code §§ 9.96A.020, 9.96A.030, and 9.96A.060; Wis. Stat. § 111.335.

- missing dispositions on criminal record reports issued by the Federal Bureau of Investigation, state criminal record repositories, and commercial reporting companies.
- Support the enactment of a federal standard based on recommendations outlined in the EEOC guidance on the use of background checks for employment purposes when screening applicants with criminal records.
  - Recommend that all current and future legislation that authorizes the disqualification of individuals with criminal records to include a waiver/appeal process whereby the applicant can challenge inaccuracies in criminal record reports, present evidence of rehabilitation and provide other mitigating information relevant to their criminal history and rehabilitation.
  - Support the creation of a federal employment standard that limits how long a criminal record can be considered. The period of consideration of the criminal record should be based upon the severity of the individual's criminal history (i.e. misdemeanors-3 years, felony--5 years), and should be supported by social science research that measures the risk of re-offending.
  - Recommend that the federal Office of Personnel Management (OPM) report to Congress annually on federal employment policies concerning people with criminal records. The annual report should include the number of individuals with criminal records who applied for positions, the number of individuals hired or denied, the types of jobs they applied for, and whether or not a denial for the position was based on their criminal record.

Thank you for considering my comments on this critical issue. Criminal background checks and related employment and licensing policies continue to be an important civil and human rights issue. Please consider HIRE as a resource as the Commission continues to work on this extremely important issue.

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**Carol R. Miaskoff**

STATEMENT OF CAROL R. MIASKOFF  
ACTING ASSOCIATE LEGAL COUNSEL  
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
BEFORE THE  
U.S. COMMISSION ON CIVIL RIGHTS  
DECEMBER 7, 2012

**I. Introduction**

Chairman Castro, distinguished members of the Commission, thank you for the opportunity to appear before you at this briefing titled “The Impact of Criminal Background Checks and the EEOC’s Conviction Records Policy on the Employment of Black and Hispanic Workers.” I am Carol Miaskoff, Acting Associate Legal Counsel for the U.S. Equal Employment Opportunity Commission. The EEOC is comprised of five presidentially-appointed and Senate-confirmed Commissioners, including the Chair. The EEOC’s congressionally-mandated role is to enforce Title VII of the Civil Rights Act of 1964, as amended, in addition to the other federal equal employment opportunity laws. Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. The statute was last amended in 1991 and it is the subject of judicial construction and EEOC policy.

My statement today summarizes the EEOC’s *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*.<sup>5</sup> The EEOC’s Commissioners approved this Guidance on April 25, 2012 with a bipartisan, 4-1 vote, after two public hearings and over 300 written submissions.<sup>6</sup> This Enforcement Guidance supersedes the EEOC’s four prior policy statements on the topic from 1987, 1990, and 2007.<sup>7</sup> In short, the updated Guidance stands

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<sup>5</sup> The 2012 Enforcement Guidance is available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) .

<sup>6</sup> Three members of the United States Commission on Civil Rights submitted written comments in their individual capacities.

<sup>7</sup> *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964*, U.S. Equal Emp’t Opportunity Comm’n (Feb. 4, 1987), <http://www.eeoc.gov/policy/docs/convict1.html>; *EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*, U.S. Equal Emp’t Opportunity Comm’n (July 29, 1987)

for the proposition that conviction records may be considered in employment decisions as evidence of past conduct that may be relevant to an individual's suitability for employment, in the context of all the facts. The updated Guidance does not prohibit employers' use of criminal background checks or criminal history information to make employment decisions. The Guidance does, however, outline how employers can use such background checks and the information they yield in a fact-based and targeted way that is consistent with Title VII.

The 2012 Enforcement Guidance is rooted in a long line of EEOC administrative and federal court decisions that applied Title VII analysis to determine if individuals with known convictions experienced unlawful employment discrimination when they were not hired. The EEOC Commissioners' first administrative decisions on such Title VII private sector charges were issued in the late 1960s and 1970s,<sup>8</sup> and continued into the 1980s when the EEOC Commissioners delegated this authority to staff as the number of charges increased.<sup>9</sup> Federal courts, in turn, issued Title VII opinions assessing such alleged discrimination starting in

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<http://www.eeoc.gov/policy/docs/convict2.html>; *Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII*, U.S. Equal Emp't Opportunity Comm'n (Sept. 7, 1990), [http://www.eeoc.gov/policy/docs/arrest\\_records.html](http://www.eeoc.gov/policy/docs/arrest_records.html); *Compliance Manual Section 15: Race & Color Discrimination*, U.S. Equal Emp't Opportunity Comm'n, § 15-VI.B.2 (April 19, 2006), <http://www.eeoc.gov/policy/docs/race-color.pdf>.

<sup>8</sup> *See, e.g.*, EEOC Decision No. 70-43, 1969 EEOC LEXIS 16 (July 14, 1969) (finding no reasonable cause where employee was discharged based on a criminal background check reporting a larceny conviction and several other arrests for which disposition was not shown, where employee had denied having a criminal record on his job application and employee also was recently charged with assault with intent to commit murder); EEOC Decision No. 71-1902, 1971 EEOC LEXIS 73 (April 28, 1971) (finding reasonable cause where employer discharged a White woman dating an African American man due to the suspicion that she had engaged in criminal activity, even though she had not had any contact with the criminal justice system); EEOC Decision No. 77-30, 1977 EEOC LEXIS 30 (Aug. 15, 1977) (finding reasonable cause where employer automatically rejected African American man for employment as a brakeman because he disclosed a narcotics conviction at the interview; employer did not consider job-relatedness of the conviction or his past employment record, among other circumstances); EEOC Decision No. 79-18, 1978 WL 5810 (Dec. 5, 1978) (finding no reasonable cause where a city rejected individual for employment as a uniformed Special Officer, after fingerprint check came back with five convictions including forgery, robbery, and grand larceny).

<sup>9</sup> *See, e.g.*, EEOC Decision No. 81-15, 1981 EEOC LEXIS 1 (Feb. 2, 1981) (finding reasonable cause where retail employer justified termination of African American man based on conviction for theft of \$18 sunglasses where the conviction was almost four years old, it was his only conviction, and it predated two other periods when he was employed by the same store as a Management Trainee); EEOC Decision No. 81-6, 1980 WL 8896 (Nov. 7, 1980) (finding reasonable cause where trucking company refused to rehire Hispanic man as a casual truck driver due to single five-year-old conviction for possession of marijuana and there was evidence that he had worked successfully as a driver since the conviction; the employer did not submit evidence that the exclusion was job related); EEOC Dec. No. 80-12, 1980 WL 8881 (Aug. 1, 1980) (finding reasonable cause where shipping company terminated employment of African-American man after 2 and a half years of successful work as a part-time dock worker because a background check returned evidence of 15 misdemeanors, mostly for public drunkenness and disorderly conduct between eight and ten years earlier; employer did not offer evidence of job-relatedness to rebut evidence of prior successful job performance).

1970<sup>10</sup> and, most recently, in 2007.<sup>11</sup> The application of Title VII to criminal record screening, under both disparate treatment and disparate impact analysis, is clearly established.

The EEOC decided in 2012 to issue its updated Enforcement Guidance for several reasons. First, the EEOC's 1987 and 1990 documents were issued before enactment of the Civil Rights Act of 1991. This Act amended Title VII to expressly incorporate the elements and the burdens of proof for disparate impact analysis, including interpreting the employer's burden of showing that its policy or practice is job related and consistent with business necessity in light of the Supreme Court's decision in *Griggs v. Duke Power Co.*<sup>12</sup> Second, in 2007, the Third Circuit in *El v. Southeastern Pennsylvania Transportation Authority*<sup>13</sup> called upon the EEOC to update its three 1987 and 1990 documents. The Third Circuit also analyzed how to harmonize the risk-based analysis of criminal records exclusions with Supreme Court disparate impact precedent that largely focuses on the relevance of test results to job qualifications.

Third, statistics show that the number of Americans with criminal records in the working-age population has increased significantly since 1990,<sup>14</sup> meaning that substantially more people now face the challenges of entering the workforce after an arrest or conviction than in 1990.

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<sup>10</sup> *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401 (CD Cal. 1970) (arrest record); **Green v. Mo. Pac. R.R.**, 523 F.2d 1290, 1293 (8th Cir. 1975) ("Green I"); *Green v. Mo. Pac. R.R.*, 549 F.2d 1158, 1160 (8th Cir. 1977) ("Green II").

<sup>11</sup> *El v. S.E. Pa. Transp. Auth.*, 479 F.3d 232 (3d Cir. 2007).

<sup>12</sup> 401 U.S. 424 (1971). *See* 42 U.S.C. 2000e-2(k)(1)(A); 137 CONG. REC. 15273 (1991) (statement of Sen. Danforth).

<sup>13</sup> 479 F.3d 232 (3d Cir. 2007).

<sup>14</sup> *See* THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, at 3 (2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf> [hereinafter *Prevalence of Imprisonment*] ("Between 1974 and 2001 the number of former prisoners living in the United States more than doubled, from 1,603,000 to 4,299,000."); SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006, STATISTICAL TABLES 1 (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf> (reporting that between 1990 and 2006, there has been a 37% increase in the number of felony offenders sentenced in state courts); *see also* PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 4 (2009), [http://www.pewcenteronthestates.org/uploadedFiles/PSPP\\_1in31\\_report\\_FINAL\\_WEB\\_3-26-09.pdf](http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf) [hereinafter *One in 31*] ("During the past quarter-century, the number of prison and jail inmates has grown by 274 percent . . . [bringing] the total population in custody to 2.3 million. During the same period, the number under community supervision grew by a staggering 3,535,660 to a total of 5.1 million."); PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3 (2008), [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf) ("[M]ore than one in every 100 adults is now confined in an American jail or prison."); Robert Brame et al., *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample*, 129 *Pediatrics* 21, 25, 26 (2012) (finding that approximately 1 out of 3 of all American youth will experience at least 1 arrest for a nontraffic offense by the age of 23).

Indeed, arrest and incarceration rates are now especially high for African American and Hispanic men.<sup>15</sup> Finally, with the advent of the Internet, criminal records are easily available to employers but, at the same time, still include data that may be inaccurate, incomplete, or misleading.<sup>16</sup> The 2012 Enforcement Guidance takes account of all of these factors.

## **II. Summary of the 2012 Enforcement Guidance**

After an introductory section, the 2012 Enforcement Guidance provides the Commission's interpretation of Title VII as applied to criminal background exclusions from employment.

### *A. Disparate Treatment Analysis*

In contrast to the 1987 and 1990 policy documents, the 2012 Enforcement Guidance includes EEOC's analysis of Title VII disparate treatment discrimination. The EEOC included this analysis in light of studies over the last twenty years demonstrating that racial assumptions about criminality may impact hiring decisions, both when the employer lacks criminal background check information about job applicants (and may assume that people have criminal records based on their race)<sup>17</sup> and, significantly, also when the employer has

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<sup>15</sup> See, e.g., *Prevalence of Imprisonment*, *supra* note 8, at 5, Table 5; cf. Pew Ctr. on the States, *Collateral Costs: Incarceration's Effect on Economic Mobility* 6 (2010), [http://www.pewcenteronthestates.org/uploadedFiles/Collateral\\_Costs.pdf?n=8653](http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653) ("Simply stated, incarceration in America is concentrated among African American men. While 1 in every 87 white males ages 18 to 64 is incarcerated and the number for similarly-aged Hispanic males is 1 in 36, for black men it is 1 in 12.").

<sup>16</sup> See Dennis A. DeBacco & Owen M. Greenspan, Bureau of Justice Statistics, U.S. Dep't of Justice, *Survey of State Criminal History Information Systems*, 2010, at 2 (2011), <https://www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf> [hereinafter *State Criminal History*] (Major Findings: Criminal history files; Overview of state criminal history record systems, December 31, 2010); SEARCH, *Interstate Identification Name Check Efficacy: Report of the National Task Force to the U.S. Attorney General* 21, 22 (1999), [www.search.org/files/pdf/III\\_Name\\_Check.pdf](http://www.search.org/files/pdf/III_Name_Check.pdf) ("A so-called 'name check' is based not only on an individual's name, but also on other personal identifiers such as sex, race, date of birth and Social Security Number. . . . [N]ame checks are known to produce inaccurate results as a consequence of identical or similar names and other identifiers."); *id.* at 7 (finding that in a sample of 82,601 employment applicants, 4,562 of these individuals were **inaccurately** indicated by a "name check" to have criminal records, which represents approximately 5.5% of the overall sample). Additionally, if applicants deny the existence of expunged or sealed records, as they are permitted to do in several states, they may appear dishonest if such records are reported in a criminal background check. See generally *Debbie A. Mukamal & Paul N. Samuels, Statutory Limitations on Civil Rights of People with Criminal Records*, 30 *Fordham Urb. L.J.* 1501, 1509-10 (2003) (noting that 29 of the 40 states that allow expungement/sealing of arrest records permit the subject of the record to deny its existence if asked about it on employment applications or similar forms, and 13 of the 16 states that allow the expungement/sealing of adult conviction records permit the subject of the record to deny its existence under similar circumstances).

<sup>17</sup> A 2006 study demonstrated that employers who are averse to hiring people with criminal records sometimes presumed, in the absence of criminal background checks, that African American men applying for jobs have disqualifying criminal records. Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 *J.L. & Econ.* 451 (2006),

information from applicants about their actual criminal history (based on self-disclosure on the job application).<sup>18</sup> In the latter studies, results demonstrated worse treatment of qualified African American job applicants who disclosed the same criminal history as White applicants with equivalent qualifications. Both of these scenarios could support allegations of disparate treatment discrimination based on race under Title VII.

The EEOC's 2012 Enforcement Guidance discusses circumstances where an employer treats individuals with the same criminal history information differently, based on their race or national origin. The Guidance provides hypothetical examples to illustrate such discrimination, and also discusses the types of evidence that may indicate that this kind of discrimination has occurred.

### B. *Disparate Impact Analysis*

The 2012 Enforcement Guidance provides a more in-depth statutory interpretation of Title VII disparate impact analysis than did the earlier EEOC policy documents. The Guidance analyzes the statute as amended by the 1991 Civil Rights Act,<sup>19</sup> which provides that:

An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or

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<http://www.jstor.org/stable/pdfplus/10.1086/501089.pdf>; see also Harry Holzer et al., *Urban Inst., Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles* 6-7 (2003), [http://www.urban.org/UploadedPDF/410779\\_ExOffenders.pdf](http://www.urban.org/UploadedPDF/410779_ExOffenders.pdf) (describing the results of an employer survey where over 40% of the employers indicated that they would “probably not” or “definitely not” be willing to hire an applicant with a criminal record).

<sup>18</sup> A 2003 study demonstrated that White applicants who had disclosed the same qualifications and criminal records as Black applicants were three times more likely to be invited for interviews than the Black applicants. See Devah Pager, **The Mark of a Criminal Record**, 108 *Am. J. Soc.* 937, 958, Figure 6 (2003), [www.princeton.edu/~pager/pager\\_ajs.pdf](http://www.princeton.edu/~pager/pager_ajs.pdf). Pager matched pairs of young Black and White men as “testers” for her study. The “testers” in Pager’s study were college students who applied for 350 low-skilled jobs advertised in Milwaukee-area classified advertisements, to test the degree to which a criminal record affects subsequent employment opportunities. The same study showed that White job applicants with a criminal record were called back for interviews more often than equally-qualified Black applicants who **did not have** a criminal record. **Id.** at 958. See also Devah Pager et al., **Sequencing Disadvantage: The Effects of Race and Criminal Background for Low Wage Job Seekers**, 623 *Annals Am. Acad. Pol. & Soc. Sci.*, 199 (2009), [www.princeton.edu/~pager/annals\\_sequencingdisadvantage.pdf](http://www.princeton.edu/~pager/annals_sequencingdisadvantage.pdf) (finding that among Black and White testers with similar backgrounds and criminal records, “the negative effect of a criminal conviction is substantially larger for [B]lacks than [W]hites . . . the magnitude of the criminal record penalty suffered by [B]lack applicants (60 percent) is roughly double the size of the penalty for [W]hites with a record (30 percent)”); see **id.** at 200-01 (finding that personal contact plays an important role in mediating the effects of a criminal stigma in the hiring process, and that Black applicants are less often invited to interview, thereby having fewer opportunities to counteract the stigma by establishing rapport with the hiring official).

<sup>19</sup> The Civil Rights Act of 1991, Pub. L. No. 102-166, § 105; see also *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010) (reaffirming disparate impact analysis); *Ricci v. DeStefano*, 557 U.S. 557 (2009) (same).

national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. . . .<sup>20</sup>

The 2012 Enforcement Guidance notes that Congress stated both in the purpose section of the 1991 Civil Rights Act and in its authoritative interpretive memorandum that “[t]he terms ‘business necessity’ and ‘job related’ are intended to reflect the concepts announced by the Supreme Court in” *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989).<sup>21</sup>

The Enforcement Guidance turns to a step-by-step analysis of each element of a Title VII disparate impact case, with an emphasis on how these play out in EEOC administrative investigations of criminal record exclusions.

The first step of disparate impact analysis is to identify the particular policy or practice that allegedly caused the disparate impact. The Enforcement Guidance provides examples of relevant information to consider when making this determination.

The second step is to determine whether the particular policy or practice caused the disparate impact on a Title VII-protected basis. For this step, the Commission cites to extensive national criminal justice data to demonstrate that Blacks and Hispanics are arrested and incarcerated in numbers greatly disproportionate to their representation in the general population.<sup>22</sup> The EEOC concluded that this data provides a basis for the agency, in its administrative investigations, to consider such disparate impact claims. The EEOC makes clear, however, that during its investigations, the employer is welcome to provide relevant evidence to demonstrate that its specific policy or practice does not have a disparate impact

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<sup>20</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i) (emphasis supplied). Title VII states that if an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, the plaintiff has the opportunity to demonstrate that there is a less discriminatory “alternative employment practice” that serves the employer’s legitimate goals as effectively as the challenged practice but that the employer refused to adopt. 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C).

<sup>21</sup> 137 Cong. Rec. S15, 273-01 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth); *see also* Civil Rights Act of 1991, §§ 3(2) & 105(b) (adopting the *Griggs* definition of “business necessity” and stating that only the interpretative memorandum quoted may be used in construing the Act).

<sup>22</sup> *See, e.g.*, UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, CRIME IN THE U.S. 2010, at Table 43a (2011), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-43/10tbl43a.xls> (reporting that in 2010, 28% of all arrests were of African Americans); MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2009 – STATISTICAL TABLES, at 6, Table 1.4 (2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf> (reporting that from October 1, 2008 to September 30, 2009, 45.5% of drug arrests made by the DEA were of Hispanics or Latinos); THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1, 3, 8 (2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf> (estimating in 2001 that 1 out of every 17 White men (5.9% of the White men in the U.S.) is expected to go to prison at some point during his lifetime, assuming that current incarceration rates remain unchanged; this rate climbs to 1 in 6 (or 17.2%) for Hispanic men and 1 in 3 (or 32.2%) for African American men).

on Title VII-protected individuals. For example, an employer may present regional or local data showing that African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer's particular geographic area. An employer's own applicant data may also show that its policy or practice did not cause a disparate impact.

If it is determined that a particular policy or practice has a disparate impact, then, under the third step in the analysis, the employer can avoid liability for discrimination by demonstrating that its policy or practice is job related for the position in question and consistent with business necessity.

Finally, under the fourth step, evidence of a less discriminatory alternative is considered.

### *C. Disparate Impact -- Job Related and Consistent with Business Necessity*

The discussion of Title VII's business necessity standard is the most detailed section in the Guidance, because of its importance for employers. Using a screen or selection procedure that has an unintended disparate impact on a protected group is not unlawful under Title VII if the employer shows that it was job related for the position in question and consistent with business necessity, and there is no evidence of a less discriminatory alternative.

First, the Guidance reaffirms the differences between arrest and conviction records, as previously stated in the EEOC's 1987 and 1990 policy documents. The fact of an arrest does not establish that criminal conduct has occurred, and an exclusion based on an arrest, standing alone, is not job related and consistent with business necessity. However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position. In contrast, a conviction record will usually serve as sufficient evidence that a person engaged in particular conduct.<sup>23</sup>

The Guidance then summarizes Supreme Court precedent<sup>24</sup> and focuses on the job-related and consistent with business necessity standard as applied to criminal record exclusions by

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<sup>23</sup> A conviction record shown to have factual errors or omissions may not, however, serve as sufficient evidence that a person engaged in the specified criminal conduct. The persuasiveness of the conviction record will depend on the nature of the errors, omissions, or circumstances.

<sup>24</sup> See, e.g., *Griggs*, 401 U.S. 431, 436 (stating that it is the employer's burden to show that its policy or practice is one that bear[s] a demonstrable relationship to successful performance of the jobs for which it was used" and "measures the person for the job and not the person in the abstract"); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 430-31 (1975) (endorsing the EEOC's position that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to predict or correlate with "important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated" (quoting 29 C.F.R. § 1607.4(c)); *Dothard v. Rawlinson*, 433 U.S. 321, 331-32 (1977) (concluding that using height and weight as proxies for strength did not satisfy the business necessity defense because the employer failed to establish a correlation between height and weight and the necessary strength, and also did not specify the amount of strength necessary to perform the job safely and efficiently).

the Eighth Circuit in *Green v. Missouri Pacific Railroad*<sup>25</sup> and the Third Circuit in *El v. SEPTA*.<sup>26</sup> The EEOC reiterates the *Green* court's conclusion that, where there is disparate impact, it violates Title VII for an employer to deny employment "solely and automatically" based on a conviction; however, an employer may consider a prior criminal record if it "takes into account the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied."<sup>27</sup> In the 2012 Enforcement Guidance, the EEOC applies these three factors in light of the *El* court's conclusion that Title VII requires employers to justify criminal record policies or practices that have a disparate impact by demonstrating that they "accurately distinguish between applicants [who] pose an unacceptable level of risk [in the workplace] and those [who] do not."<sup>28</sup> The Third Circuit indicated that empirical data may be relevant to making this assessment, including recidivism data.<sup>29</sup>

Building on these fact-based approaches, the Guidance discusses the two ways in which the EEOC believes employers will consistently meet the business necessity standard, and thereby avoid Title VII liability:

- The first way of meeting the business necessity standard involves validation of the policy under the Uniform Guidelines on Employee Selection Procedures if relevant data is available and validation is possible.<sup>30</sup>

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<sup>25</sup> 523 F.2d 1290, 1293 (8th Cir. 1975) (*Green I*). "In response to a question on an application form, Green [a 29-year-old African American man] disclosed that he had been convicted in December 1967 for refusing military induction. He stated that he had served 21 months in prison until paroled on July 24, 1970." *Id.* at 1292, 93. Based on this record, the employer found that he was not qualified for employment. *Id.* at 1293. Turning to the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Eighth Circuit analyzed whether this exclusion was job related and consistent with business necessity. *Id.* at 1295-96.

Subsequently, in *Green v. Missouri Pac. R. Co.* 549 F.2d 1158, 1160-61 (8th Cir. 1977) (*Green II*), the Eighth Circuit ordered "that defendants shall be enjoined from disqualifying and denying employment to an applicant solely and automatically for the reason that the applicant has been convicted of a criminal offense; provided, however, that nothing herein shall prevent defendant . . . from considering an applicants' [sic] prior criminal record as a factor in making individual hiring decisions so long as defendant takes into account the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied."

<sup>26</sup> 479 F.3d 232 (3d Cir. 2007).

<sup>27</sup> 549 F.2d 1158, 1160-61.

<sup>28</sup> 479 F.3d. at 245.

<sup>29</sup> *Id.* at 247 (stating that the outcome of the case might have been different if the plaintiff had, "for example, hired an expert who testified that there is a time at which a former criminal is no longer any more likely to recidivate than the average person, . . . [so] there would be a factual question for the jury to resolve").

<sup>30</sup> See 29 C.F.R. § 1607.5 (describing the general standards for validity studies).

- The second way of meeting the business necessity standard involves (1) developing a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v. Missouri Pacific Railroad*<sup>31</sup>), and then (2) providing an opportunity for an individualized assessment for those people targeted for exclusion, to determine if the policy as applied is job related and consistent with business necessity.
  - “Individualized assessment” generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether additional information shows that the policy as applied is not job related and consistent with business necessity. The individual’s showing may include information that he is not correctly identified in the criminal record, or that the record is otherwise inaccurate.
  - Other relevant individualized evidence presented may include, for example:
    - The facts or circumstances surrounding the offense or conduct;
    - The number of offenses for which the individual was convicted;
    - Older age at the time of conviction or release from prison;
    - Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
    - The length and consistency of employment history before and after the offense or conduct;
    - Rehabilitation efforts, e.g., education/training;
    - Employment or character references and any other information regarding fitness for the particular position; and
    - Whether the individual is bonded under a federal, state, or local bonding program.

If the individual does not respond to the employer’s attempt to gather additional information about his background, the employer may make its employment decision without the information.

In the 2012 Enforcement Guidance, the EEOC illustrates the application of these standards. First, the EEOC provides examples of exclusions that would violate Title VII because they do not apply this analysis at all; rather, they use automatic, across-the-board exclusions from

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<sup>31</sup> 549 F.2d 1158 (8th Cir. 1977).

all employment because of any criminal conduct. When such exclusions have a disparate impact, they are inconsistent with Title VII because they do not consider the dangers associated with particular criminal conduct and the risks in particular positions.

Second, the EEOC provides examples of “targeted exclusions” supplemented by individualized assessment. One of the examples shows a targeted exclusion and individualized assessment that satisfies Title VII; the other example describes a targeted exclusion and individualized assessment that is inconsistent with Title VII.

The EEOC also explains that individualized assessment is not always required:

An employer may be able to justify a targeted criminal records screen solely under the *Green* factors. Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question. Title VII thus does not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity.<sup>32</sup>

*D. Disparate Impact -- Federal, State and Local Restrictions*

In the last two sections of the Guidance, the EEOC discusses federal, state, and local restrictions concerning the use of criminal records in employment decisions. The EEOC recognizes that many employers are subject to federal laws that prohibit them from employing people with certain convictions in specified jobs. The EEOC states that an employer’s compliance with such federal laws – such as those regulating aspects of the transportation and financial industries – will prevent Title VII liability. At the state or local level, however, the text of Title VII itself – the statute as written by Congress – compels a different result. Title VII prohibits disparate impact discrimination and it also includes language that preempts state or local laws when those laws “purport[] to require or permit the doing of any act which would be an unlawful employment practice” under the statute.<sup>33</sup> Therefore, if an employer’s exclusionary policy or practice has a disparate impact and is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law does not shield the employer from Title VII liability.

At the end of the 2012 Guidance document, the EEOC lists several best practices for employers who consider criminal record information when making employment decisions. Some of these best practices include: eliminating exclusions that prohibit the employment of individuals based on any or all criminal records; developing a narrowly tailored written

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<sup>32</sup> 2012 Enforcement Guidance at V.B.8. The Enforcement Guidance then sets forth the fourth and final analytic step: determining if there is a less discriminatory alternative that the employer declined to use.

<sup>33</sup> 42 U.S.C. § 2000e-7.

policy and procedure for considering criminal records; and training hiring officials and decisionmakers on how to implement the policy and procedure consistent with Title VII.

### III. The Enforcement Guidance's Impact on the Employment of Black and Hispanic Workers

A large number of people in the working-age population have criminal records, and the number is expected to grow.<sup>34</sup> This coincides with increased employer reliance on criminal background checks as a screening tool.<sup>35</sup> The EEOC updated its Enforcement Guidance in part to provide more clarity and analysis on these issues so that employers have a better roadmap for Title VII compliance as they make assessments based on an applicant's or employee's criminal history information. However, some have argued that the Guidance will hurt the employment prospects of Black and Latino workers. For example, some have incorrectly asserted that the Guidance prohibits criminal background checks and that it therefore will have a negative effect on minority employment. These arguments are misguided.

As I stated at the beginning of my remarks, the updated Guidance does not prohibit employers' use of criminal background checks or criminal history information to make employment decisions. The Guidance does, however, outline how employers can use such background checks and the information they yield in a fact-based and targeted way that is consistent with Title VII. While background checks can help employers gain a better understanding of an individual's prior conduct, this tool has its limitations. Several studies have documented that criminal records may be inaccurate or incomplete.<sup>36</sup> In the 2012

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<sup>34</sup> See JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 12 (2010), [www.cepr.net/documents/publications/ex-offenders-2010-11.pdf](http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf) ("In 2008, ex-prisoners were 2.9 to 3.2 percent of the total working-age population (excluding those currently in prison or jail) or about one in 33 working-age adults. Ex-felons were a larger share of the total working-age population: 6.6 to 7.4 percent, or about one in 15 working-age adults [not all felons serve prison terms]."); see *id.* at 3 (concluding that "in the absence of some reform of the criminal justice system, the share of ex-offenders in the working-age population will rise substantially in coming decades").

<sup>35</sup> SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS, slide 3 (Jan. 22, 2010), [http://www.slideshare.net/shrm/background-check-criminal?from=share\\_email](http://www.slideshare.net/shrm/background-check-criminal?from=share_email) [hereinafter CONDUCTING CRIMINAL BACKGROUND CHECKS] (73% of the responding employers reported that they conducted criminal background checks on all of their job candidates, 19% reported that they conducted criminal background checks on selected job candidates, and a mere 7% reported that they did not conduct criminal background checks on any of their candidates). The survey excluded the "not sure" responses from its analysis, which may partly account for the 1% gap in the total number of employer responses. *Id.*

<sup>36</sup> See, e.g., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 17 (2006), [http://www.justice.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.justice.gov/olp/ag_bgchecks_report.pdf) (reporting that only 50% of arrest records in the FBI's III database were associated with a final disposition); SEARCH, INTERSTATE IDENTIFICATION NAME CHECK EFFICACY: REPORT OF THE NATIONAL TASK FORCE TO THE U.S. ATTORNEY GENERAL 21–22 (1999), [www.search.org/files/pdf/III\\_Name\\_Check.pdf](http://www.search.org/files/pdf/III_Name_Check.pdf) (reporting that criminal background checks may produce inaccurate results because criminal records may lack "unique" information or because of "misspellings, clerical errors or intentionally inaccurate identification information provided by search subjects who wish to avoid discovery of their prior criminal activities").

Enforcement Guidance, the EEOC construes Title VII to allow for consideration of criminal records in the context of facts about the criminal conduct, the job, the individual's work experience, and other relevant information or data.

**IV. Conclusion**

Thank you again for inviting me here today to testify about this very important issue.

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**Montserrat Miller**



**Montserrat Miller, Partner at Arnall Golden Gregory LLP, counsel for NAPBS**

**Written Testimony of the**

**National Association of Professional Background Screeners**

**U.S. Commission on Civil Rights Briefing**

**December 7, 2012**

**on**

***Assessing the Impact of Criminal Background Checks and the Equal Employment  
Opportunity Commission's Conviction Records Policy on the Employment of Black  
and Hispanic Workers***

The National Association of Professional Background Screeners (NAPBS) is a trade association representing screening professionals involved in employment and tenant background screening.

Our testimony will discuss: (i) the history and role of the NAPBS; (ii) the value of background screens as a sound business practice and a risk mitigation tool; (iii) compliance with the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (FCRA); and (iv) the Equal Employment Opportunity Commission's (EEOC) guidance on the use of criminal history records, specifically addressing the Ban the Box guidance, individualized assessments and the treatment of state laws.

### **NAPBS**

The NAPBS is a trade association founded in 2003 which represents 681 members, many of whom are engaged in employment and tenant background screening across the country.

NAPBS testimony will focus on the member companies engaged in the business of providing employment screening services directly to end users, such as employers, businesses and volunteer organizations. The majority of these member companies are small businesses, with 25 or less employees although our membership includes a range of companies – from Fortune 100 companies to small local businesses. Collectively NAPBS member companies conduct millions of employment and tenant screening checks each year.

In the employment context, we provide background checks for private employers, volunteer organizations, non-profits, government, public utilities, healthcare, higher education and publicly held corporations. The NAPBS exists to promote ethical business practices, compliance with the FCRA, equal employment opportunity and state consumer protection laws relating to the background screening profession. The NAPBS provides educational programs aimed at empowering members to better serve clients and to maintain standards of excellence in the background screening profession. This includes a company accreditation program, individual FCRA certification programs, as well as a provider exam. In addition, monthly webinars and Annual and Mid-Year Conferences provide NAPBS members with even more opportunities for educational courses.

In the past 10 years there has been an increase in the number of background screens conducted for employment purposes. There are several factors leading to this increase, including increased security concerns after 9/11 and greater emphasis by employers to focus on “safe hiring” to protect their business, employees and customers. Employers value a “good hire” over a “bad hire” and seek to ensure that the right person is hired for the right job to avoid potential litigation, shareholder suits or employee theft and fraud. In addition, there has been an increase in the number of federal, state and local lawmakers enacting laws mandating checks, especially for the most vulnerable populations, such as children and the elderly.

One important factor to bear in mind with this increase in the number of background screens is an associated increase in employers and the public’s desire to “know more” about individuals. With the desire for greater knowledge comes an increase in the number of individuals conducting their own online Google searches as well as an increase in the number of instant online searches available to the general public. However, there is a distinction between a Google or instant online search and a background screening report created by a professional background screening company under the requirements of the FCRA. A professional screening firm providing background reports for employment purposes is required to follow strict requirements pursuant to the FCRA and other state and local laws that limit how information is reported. Use of an online instant website or search engine offers none of the consumer protections afforded under the FCRA and other applicable laws.

### **Value of Background Checks**

The fair and appropriate use of criminal histories is one of the most important tools organizations have to protect themselves, their employees, customers and assets. We believe that background screening is an effective tool used by employers to protect persons, property and employers from risks. Risks such as theft in the workplace, employee on employee

violence, as well as ensuring that only appropriately screened individuals deliver goods or provide services in our homes. To be clear, background screening is not conducted to keep individuals out of the workplace or to, for instance, impair reintegration of ex-offenders into the workplace. Rather, background screens are conducted to facilitate the right person for the right job. Background screens provide employers with information to make informed hiring decisions.

These ideas are similar to what the federal government argued for in *NASA v. Nelson*, a case regarding the use of criminal background checks by the federal government on contract employees. The federal government argued before the U.S. Supreme Court for the right to conduct such checks. In a unanimous Supreme Court opinion, the Court said this: "...the Government has an interest in conducting basic background checks in order to ensure the security of its facilities and to employ a competent, reliable workforce to carry out the people's business."<sup>1</sup> Further, the Court stated that, "like any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will 'efficiently and effectively' discharge their duties."<sup>2</sup> The private sector is no different.

In many states, background checks are required for a variety of private-sector positions and state licenses. Many states have also passed laws or have common-law doctrines holding employers liable for negligent hiring and negligent retention of employees with a history of violent behavior that cause harm to co-workers or the public. Obviously, a consensus exists among most policy-makers that criminal background checks are an effective, important, and practical way to protect vulnerable individuals such as children, the elderly and the disabled, as well as the general public who might invite strangers into their homes for repairs and deliveries without knowledge of their criminal history. Employers and volunteer organizations want to make informed hiring decisions within the bounds of the law, and the use of background checks is one such tool.

As long as there is workplace violence, fraud, theft and a need to protect vulnerable populations, there will always be a need to review the criminal histories of applicants. We understand the frustration some have in finding employment, especially in a time of national economic stress, and we also appreciate the strong desire to reintegrate ex-offenders into American society. However, attempts to ease unemployment frustration or reentry desires should not come at the expense of keeping people and businesses safe from physical or financial harm.

### **FCRA Compliance**

In order to appreciate the regulatory oversight of background screening companies and the background reports they prepare and provide to employers, it is important to spend some time discussing the FCRA and the role of the Federal Trade Commission (FTC) as well as the Consumer Financial Protection Bureau (CFPB). Both of these federal agencies have enforcement and rulemaking authority over background screening companies. Additionally,

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<sup>1</sup> *NASA v. Nelson*, 562 U.S. 2011, p. 3 (2011).

<sup>2</sup> *Id.* at page 16.

employers must adhere to the recently released guidance by the EEOC entitled “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964”<sup>3</sup> (“EEOC Guidance”). Finally, both background screening companies and employers must be aware of state and local consumer protection laws regarding the reporting and use of criminal history information for employment screening purposes.

The following seeks to provide a general overview of the FCRA and background screening process as conducted by NAPBS member companies.

- **Who is a “background screener”?** Generally, a background screener is defined under the FCRA as a “consumer reporting agency” (CRA) and a CRA generates a “consumer report,” often referred to as a background report or check.<sup>4</sup> A consumer report is defined by the FCRA as a report “bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living” which is used for, among other reasons, employment purposes.<sup>5</sup>
- **Consent.** Written consent is required before a background check can be run on a job applicant and that consent is required by the FCRA.<sup>6</sup>
- **Consumer Protections.** Job applicants and other individuals who consent to a background check must be provided with a document entitled “A Summary of Your Rights Under the Fair Credit Reporting Act” which explains their major rights under the FCRA, including the right to dispute incomplete or inaccurate information in a consumer report.
- **How are Background Checks Conducted?** In order for a CRA to furnish a consumer report there must be a “permissible purpose” under the FCRA, and one such “permissible purpose” is for employment screening, defined in the law as, “...a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.”<sup>7</sup> CRAs operate nationally and their screening services are driven by an individual’s name, date of birth and social security number. Most primary sources of criminal information are stored by name and date of birth. Other verifiers, such as middle initials and address history may be used to verify the identity of an individual and CRAs obtain information from a variety of sources.
- **What Does a Background Report Include?** A consumer report can include information from a variety of sources, including public record information such as

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<sup>3</sup> U.S. Equal Employment Opportunity Commission, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, Number 915.002 (April 25, 2012).

<sup>4</sup> Fair Credit Reporting Act, 15 U.S.C. § 1681a.

<sup>5</sup> *Id.* at § 1681a(d).

<sup>6</sup> *Id.* at § 1681b(b).

<sup>7</sup> *Id.* at § 1681b(a)(3).

criminal information, driving records, address history, credit history or employment and education verifications.

- **What Happens if a Background Report Includes Inaccurate Information?** There are times when a background report may contain inaccurate or incomplete information due, for instance, to court inaccuracies or lack of identifiers. Although such instances are the exception rather than the rule, individuals are protected by the FCRA and they have a right to contest the accuracy of the report and where appropriate, corrections must be made.
- **Contesting a Background Report.** An individual has a right under the FCRA to challenge the accuracy and completeness of a report and CRAs must re-investigate the disputed information, within 30 days free of charge.<sup>8</sup> To facilitate the process of individuals contesting a background report, employers must provide individuals with pre-adverse and adverse action notices if any adverse action is going to be taken based in whole or in part on a consumer report.<sup>9</sup> Employers must also provide individuals with a copy of the report and a written summary of their rights under the FCRA.
- **Accuracy of Consumer Reports.** Accuracy of the information in consumer reports is paramount as customers demand it, the law requires it and NAPBS expects it from its members. The FCRA specifically requires that whenever a CRA prepares a consumer report it must “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates”.<sup>10</sup>

To summarize, background checks conducted by NAPBS member companies must follow steps in place under the FCRA. Similar to the banking industry, CRA’s must follow “know your client” procedures in accordance with the FCRA in order to establish that the client is a legitimate business with a permissible purpose for the data.<sup>11</sup> Prior to requesting a consumer report, an employer must provide to the prospective employee a written notice stating what information will be requested, the source of the information and the purpose for which it will be used. An employer must also provide a copy of the consumer report to the individual upon request, and prior to taking an adverse action which is based in whole or in part on the consumer report. With the report, an employer must also provide a copy of the FTC’s document entitled “A Summary of Rights Under the Fair Credit Reporting Act.”<sup>12</sup> The employer must then wait a reasonable period of time before making the ultimate decision thereby allowing the individual the opportunity to dispute any inaccurate information in the report. If an adverse employment action is taken against a prospective employee based on any information contained in a consumer report, the end user must provide the name and

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<sup>8</sup> *Id.* at § 1681i.

<sup>9</sup> *Id.* at § 1681b(b)(3).

<sup>10</sup> *Id.* at § 1681e.

<sup>11</sup> *Id.* at § 1681e.

<sup>12</sup> Effective January 1, 2013, this document will be provided pursuant to the Consumer Financial Protection Bureau’s authority.

contact information, including a toll free number of the CRA to the individual. Individuals can also request and obtain all the information about themselves in the files of a CRA and they have the right to dispute incomplete or inaccurate information.

### **EEOC Guidance**

The EEOC Guidance ignores the important role that background checks play in helping protect persons and property as well as gives scant attention to the role of the FCRA. Employers and volunteer organizations around the country rely on background checks to make informed hiring decisions to help keep workplaces safer and to aide in the selection of the best candidate for the job. The EEOC itself relies on background checks when hiring.

As companies who not only conduct background screens on our own employees, but also provide criminal history reports to employers, we have concerns with the following parts of the EEOC Guidance:

- Lack of guidance in the guidance and confusion caused by the EEOC Guidance's "individualized assessments" and the role of the FCRA in the adverse action process;
- Treatment of state requirements and law;
- Ban the Box as a Best Practice;
- Employers having to re-visit a criminal history, conviction and/or rehabilitation certificates and the potential to re-adjudicate one's criminal history.

By replacing the longstanding, concise policy with a new 52 page confusing and complex document leaves employers guessing as to what is/ is not a permissible use of criminal history background checks for employment purposes. Furthermore, the EEOC Guidance imposes new burdens on responsible employers who seek to comply and avoid an EEOC investigation. The introduction of "individualized assessments" is an onerous, time consuming and costly process, especially for small businesses and those with high turnover.

The EEOC Guidance is confusing to employers who are attempting to comply with state and local laws designed to protect the public from job applicants with an unsavory past. Employers who comply with a state law that bars the company from hiring an ex-drug offender as a pharmacist or a security guard with a prior felony conviction has no assurance that he or she may not be found to be in violation of Title VII of the Civil Rights Act of 1964. The EEOC Guidance ignores the public safety determinations of state and local lawmakers when it states, "...if an employer's exclusionary policy or practice is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability."<sup>13</sup> The guidance provided in the EEOC Guidance as to when a state or local law is a "good" law versus a "bad" law which would amount to an unlawful employment practice requires employers to

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<sup>13</sup> U.S. Equal Employment Opportunity Commission, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, Number 915.002, p. 24 (April 25, 2012).

second-guess state and local lawmakers and places them in a Catch-22. Either they comply with the state or local law or risk a Title VII investigation by the EEOC.

The EEOC Guidance states that, “as a best practice...the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.”<sup>14</sup> The reality of the EEOC Guidance is that employers will *de facto* treat it as law or run the risk of an EEOC investigation. Without opining on whether Ban the Box is a good policy or not, in practice, many employers use the job application for several purposes, including determining the truthfulness of job applicants. The reality is that applicants do lie on job applications and their resumes as well as under- or overstate their past or their qualifications and employers should be able to consider such during the hiring process.

We can all agree that the re-integration of ex-offenders into society is important. The use of background screening is not the dominant cause of the troubles ex-offenders face. The problems facing ex-offenders go well beyond an employer’s use of background screening in the hiring process. Substance abuse, lack of education and the absence of a stable family relationship can be looked at as problems facing the ex-offender. These are issues which we can all agree should and must be addressed.

### **Conclusion**

We appreciate the opportunity to provide this testimony to the U.S. Commission on Civil Rights given the importance and value of background screening.

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<sup>14</sup> *Id.* at page 13.

**Julie T. Payne**

**Submission of Julie T. Payne  
General Counsel, G4S Secure Solutions (USA) Inc.  
Before the U.S. Commission on Civil Rights**

**Hearing on**

**Assessing the Impact of Criminal Background Checks and the Equal  
Employment Opportunity Commission's Conviction Records Policy on the Employment  
of Black and Hispanic Workers**

**December 7, 2012**

**Julie Payne, General Counsel  
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Chairman Castro, Vice-Chairman Thernstrom and members of the Commission, thank you for this opportunity to testify regarding the impact of the Equal Employment Opportunity Commission's overreaching criminal conviction records policy on the business community, our employees, our customers and the general public.

My name is Julie Payne, and I am the General Counsel for G4S Secure Solutions (USA) Inc., a leading security company in the United States. G4S provides a wide range of security services and technology solutions. We employ more than 33,000 security officers across the U.S. Nearly 8,000 of our officers are armed. G4S contracts to provide security services to nearly every sector of our country's critical infrastructure, including government buildings and facilities, banks, commercial buildings, critical manufacturing, hospitals, petrochemical plants, nuclear power generation stations, transportation facilities and water treatment plants. Security officers have wide access to valuables and property, they often work independently without close supervision, and they are perceived by the public as an authority figure in uniform.

G4S is very concerned about hiring individuals with criminal felony convictions or misdemeanor convictions involving, among other things, theft and crimes of violence. Our vigilance helps ensure that the officers that G4S places on its clients' properties are qualified and trustworthy to be placed in positions protecting people, property, products and reputations. Our customers rely on and most contractually require G4S to provide security officers who do not have criminal convictions in their backgrounds. Our customers rely upon us to ensure that security personnel who are on their sites protecting their personnel and property are not a potential threat.

I am here today to cast light on the EEOC's targeting of companies, including my own, over legitimate and necessary business practices. The EEOC, relying on recent enforcement guidance, seeks to create "class" type actions out of individual charges and is targeting hundreds of employers who conduct criminal background checks.

### **I. EEOC's Case Against G4S Secure Solutions Inc.**

In April 2010, David Coleman – an individual with two prior convictions for theft – applied for a position with G4S in Pennsylvania. G4S did not hire Mr. Coleman as a result of his convictions, which the company discovered through a criminal background check. In November 2010, Mr. Coleman filed a charge of discrimination claiming G4S's refusal to hire him was based on his race, and that the use of criminal background checks adversely impacts African Americans. G4S responded to the charge by explaining its neutral policy of not hiring individuals who have been convicted of theft.

On May 11, 2011, the EEOC's Philadelphia office expanded the agency's investigation beyond the charging party to include G4S applicants and employees across the United States who were possibly aggrieved. In doing so, the EEOC sent a series of requests for information that were incredibly extensive and unreasonably burdensome seeking a vast amount of information related to the company's hiring policies and information about every employee and applicant of G4S, its parents, subsidiaries, affiliates, successors, predecessors, agents, and assigns and encompassing all facilities located in the United States and its territories. It sought the information for a period of time dating back to the date when G4S first implemented its policy regarding criminal convictions to the present. (G4S, formerly known as Wackenhut, was founded in 1958 and has been utilizing criminal background screening from the beginning. The exact date a policy was first implemented is not known.) G4S has hired multiple lawyers and statisticians to assist with complying with these onerous requests. We have spent hundreds of thousands of dollars to an uncertain result.

G4S cannot afford to hire security officers who it knows have been convicted of theft or dishonesty. Those persons, including Mr. Coleman, have already demonstrated that they are capable of committing theft and are not suitable for security officer positions with G4S. G4S should not have to bear the legal, financial and reputational risk of hiring persons who have been convicted of theft into positions where the opportunity for theft is great and where our customers have entrusted us to protect their assets.

### **II. G4S' Use of Criminal Background Screening Information Generally**

With respect to G4S's written policy on Screening, Basic Qualification and Interviewing of Applicants, security officer applicants who received a conditional offer of employment are required to pass a background check that includes a review of criminal conviction information. When criminal conviction information results in a disqualification issue, the security officer applicant receives notice of potential disqualification based upon information in the background investigation report and has the ability to dispute the information and may also request a disqualification waiver. If a waiver is requested, the local office where the applicant applied obtains information from the applicant about the

conviction and reviews the circumstances of the conviction in light of the position and significant business necessity considerations related to safety and security. After reviewing the circumstances of a criminal conviction and determining that a waiver may be warranted, the local office may elevate a request for a disqualification waiver to the Chief Operating Officer. G4S's Chief Operating Officer reviews the information and circumstances in light of G4S's significant business necessity considerations for the security/safety sensitive position. The Chief Operating Officer makes all final decisions on disqualification waivers. If at any point during appeal/waiver process, a decision is made to uphold a disqualification, the applicant is notified in writing of adverse employment action based upon information in the background check. (Mr. Coleman, the complainant referenced above, received a complete copy of the Background Screening Report along with a copy of The Summary of Your Rights under the Fair Credit Reporting Act. However, Mr. Coleman did not dispute the criminal information or initiate the waiver process.)

G4S formulated its current policy on criminal convictions over many years based upon job relatedness, business necessity considerations for security/safety sensitive positions, state licensing requirements, the Fair Credit Reporting Act, laws governing security officer criminal background requirements, and its past experiences with the significant adverse business consequences that can arise from hiring security officers who have been convicted of certain criminal offenses. G4S is responsible for providing and ensuring safety and security to the American public at large in virtually every facet of our daily lives. G4S's current clients include: nuclear power plants, government buildings and facilities, energy plants and refineries, ports, airports, railways, public transit buildings and facilities, financial institutions, corporate installations, residential communities, and an untold number and variety of private institutions. In addition, G4S provides transportation, safety and security services to protect America's borders, jails, detention facilities, tourism and leisure destinations, as well as critical disaster and emergency response functions.

Security officers are responsible for securing and protecting both persons and property from criminal acts. In doing their job, security officers have access to property, frequently function independently and without direct supervision, walk around and within the property (including restricted areas) they are charged with protecting, and have an air of authority in the area in which they are assigned. Security officers are often the first to notice, respond to and report criminal matters to the police. G4S's clients and the public place great trust in G4S to deploy security officers that have backgrounds that are in line with their safety/security sensitive positions. In order to meet client and public expectations, G4S's recruitment and screening process is one of the most thorough in the industry and seeks to maintain the highest standards. Clients understand and expect that when they enter a contract with G4S, they are receiving a security officer that has passed an extensive criminal background check. When those expectations are not met and a security officer with a past criminal conviction commits a crime, the result can be, at best, a damaged client relationship and financial loss to G4S, and at worst, the loss of the client's business, reputational damage and the loss of public trust.

### III. The Potential Costs for Not Screening Are Enormous

The EEOC also ignores the significant risk to G4S and other employers if they fail to conduct background checks. The panoply of potential civil claims seeking to impose liability upon employers for the consequences of a poorly vetted employee run the gamut from negligence actions for hiring, retention and supervision of an employee to intentional torts of infliction of emotional distress and breach of express or implied contract actions for providing a safe workplace or workforce. Employers can also be found vicariously liable for assault, battery, and false imprisonment by their employees.

The explosion of litigation against employers,<sup>1</sup> particularly in the area of negligent hiring and negligent retention,<sup>2</sup> makes the EEOC's guidelines and enforcement plan a very difficult, no-win situation for employers. If an on-duty employee causes harm to another, and the employer knew or should have known that the individual causing the harm had a criminal conviction in his/her background, the courts frequently hold that the employer is liable. Negligent hiring lawsuits not only result in potentially detrimental financial consequences but also cause damage to the company's reputation. A trusted business reputation is critically important to a private security company.

The increasing number of court decisions ruling in favor of plaintiffs based on negligent hiring and retention has put mounting pressure on companies to obtain more detailed and accurate information on prospective employees. Companies are expected to obtain more comprehensive information on applicants by mandating that all job prospects undergo a comprehensive background check. Despite employers' efforts in this area, they lose more than 70 percent of such lawsuits, and the average jury plaintiff award is more than \$1.6 million.<sup>3</sup> Approximately 66 percent of negligent hiring trials result in awards averaging \$600,000 in damages. The Workplace Violence Research Institute reports that the average jury award for civil suits on behalf of the injured is \$3 million.<sup>4</sup>

Indeed, even misdemeanor criminal convictions can lead to significant claims and lawsuits. As an example, in August 2010, a G4S security officer, who had a prior misdemeanor conviction for "disorderly conduct," was arrested after he was caught taking pictures of a minor undressing in her residence within the gated community the security officer was hired to protect. The security officer's disorderly conduct conviction was not a

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<sup>1</sup> For example, private employment lawsuits against employers *tripled* in one decade. In January of 1999, the Bureau of Justice Statistics published a study showing that from 1990 through 1998, employment-related civil cases nearly tripled. Private employment-related complaints accounted for approximately 65 percent of the overall increase in cases that flooded the U.S. District Courts in this period. Marika F.X. Litras, Civil Rights Complaints in U.S. District Court, 1990-98, (NCJ-173427). Employment discrimination cases increased from 8,413 filings in 1990 to 23,735 in 1998.

<sup>2</sup> See, Workplace Violence: Defending Against Negligent Hiring Litigation Requires Exercise of Due Care in Hiring. *Daily Labor Report*. Michael Bologna. No. 179, Page A-7. September 16, 2003; Negligent Retention of Employees: An Expanding Doctrine. Rosanne Lienhard. 63 Def. Counsel J. 389, 1996.

<sup>3</sup> Public Personnel Management, *USA Today*, Nov. 21, 2003.

<sup>4</sup> Workplace Violence: An Employer's Guide, Steve Kaufer, CPP and Jurg W. Mattmann, CPB, at p. 5, <http://consumerdatareporting.com/pdfs/wvri%20employers%20guide.pdf>

disqualifying conviction under G4S's policy. However, after the incident in question, it was discovered that the "disorderly conduct" offense involved a criminal act that was similar to the criminal act that the security officer committed while on duty. In addition to significant negative publicity from the local media, G4S is now a defendant in a lawsuit claiming negligent hiring. G4S has spent hundreds of thousands of dollars defending the case and is facing trial in 2013.

Additionally, in March 2010, G4S faced significant negative publicity about its hiring practices when it hired a security officer with a misdemeanor conviction to protect a courthouse in Wisconsin. Again, the misdemeanor conviction was not a disqualifying conviction when the security officer was hired. However, the fact that the security officer had served jail time for the misdemeanor offense was nationally and negatively publicized in the media because the public expects security officers to be law abiding persons who have not spent time in jail.

Attached as Appendix A is a list of representative cases involving allegations of negligent hiring and the actions of security officers. Many of these cases involve liability as a result of failure to conduct a criminal background check.

#### **IV. Broader Context of the EEOC's Actions**

##### **a. The EEOC's Restriction on Use of Criminal Background Checks Will Have Disastrous Effects on Public Safety**

According to its own enforcement guidance, issued April 25, 2012, the EEOC has begun targeting employers who use background checks as part of their pre-employment screening.<sup>5</sup> Specifically, the new guidance states:

National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.

The EEOC's determination that national data now supports the Agency's broad investigation into any employer who uses background checks fails to acknowledge and, in fact, ignores other data from the Department of Justice and other sources that clearly demonstrate the importance of using background checks to support employers' legitimate business concerns as well as the need to protect the general public. According to the U.S. Department of Justice, over two thirds of all convicted criminals are arrested for a *new offense* and almost half are convicted of a *new crime*.<sup>6</sup> The government's own statistics show that recidivism rates are high and recidivists are not necessarily going to commit the same crime they committed the first time.

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<sup>5</sup> [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf)

<sup>6</sup> Bureau of Justice Statistics Special Report: Recidivism of Prisoners Released in 1994, U.S. Department of Justice, NCJ 193427, Patrick A. Langan, Ph.D., David J. Levin, Ph.D., June 2002, at pg 1.

The EEOC's approach further ignores the right every employer has, as pronounced by the U.S. Supreme Court, to separate strong candidates for employment from weak ones.<sup>7</sup> In NASA v. Nelson,<sup>8</sup> the Supreme Court declared it reasonable and appropriate for the federal government to perform background checks on federal contractor employees. **The Court stated that: "Like any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will 'efficiently and effectively' discharge their duties."**<sup>9</sup>

Given the "20/20 hindsight" nature of most claims (i.e. *after* the harm has already occurred), the impetus and incentive for rigorous *pre*-hire vetting of potential members of the workforce is clear and well supported by the case law and large verdicts against employers who fail to properly screen using criminal background checks.

By restricting employers from utilizing neutral policies of screening individuals with criminal conviction records, the EEOC's guidance will result in more crimes committed at work, more companies and individuals harmed by criminal conduct, and more negligent hiring, retention and supervision lawsuits.<sup>10</sup>

**b. The EEOC's Strategic Enforcement Plan To Create Class Claims From Individual Claims Encourages Investigators to Conduct Overbroad Inquiries**

The EEOC has implemented a strategic enforcement plan whereby it seeks to expand individual claims of discrimination into class action claims.<sup>11</sup> That plan states:

In 2006, the Commission adopted its Systemic Initiative.[23] This Initiative makes the identification, investigation, and litigation of systemic discrimination cases - pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area - a top priority. The Systemic Initiative also seeks to ensure that the EEOC has a coordinated, strategic, and effective approach to such cases. The Initiative requires the agency to effectively use its administrative and litigation tools - including Commissioner Charges, directed investigations, and the strategic use of empirical data - to identify and stop discriminatory policies and other instances of systemic discrimination.

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<sup>7</sup> Id. at 761.

<sup>8</sup> 131 S. Ct 746 (2011).

<sup>9</sup> Id. at 759-760.

<sup>10</sup> This focus is curious considering its recent high-profile settlement, which included strong criticism by the EEOC of an employer for *not* doing a criminal-background check on a janitorial supervisor. On September 2, 2010, the EEOC announced the \$5.8 million settlement of its sexual harassment lawsuit against ABM Industries, Inc. <http://www.eeoc.gov/eeoc/newsroom/release/9-2-10.cfm>. In that case, the employer had moved for summary judgment. *Id.* In the EEOC's response memorandum, the EEOC laid blame for the alleged harasser's conduct on management: "Defendant's failed to initiate an investigation into [the harasser's] criminal background."

<sup>11</sup> [http://www.eeoc.gov/eeoc/plan/strategic\\_plan\\_12to16.cfm](http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm)

The EEOC's guidance shows the Commission is focused on using an individual case for expanding claims to national prominence. The EEOC's message to its investigators is to broaden the scope of their investigations to include information beyond simply redressing an individual's claim and to search for justification for establishing a class claim. This not only dilutes the claims filed by individuals who have turned to the EEOC for specific redress of their individual claims, but it also puts employers on the defensive as such fishing expeditions are extremely costly and highly unpredictable for employers. Further, with Courts now deferring more to the EEOC's discretion regarding subpoenas,<sup>12</sup> employers are without an effective means of protecting themselves from rogue investigators or extensive investigations beyond the fair and relevant scope of the underlying complaint.

G4S finds itself in exactly this type of situation. Because one applicant, who has two previous convictions for theft, applied for a position as a security officer and was denied, G4S is now being asked to defend its use of criminal background checks in every hiring decision it has made over a period of decades. The EEOC's guidance forces responsible employers to spend time, energy, and money defending legitimate policies and thousands of legitimate hiring decisions rather than the one decision in question.

**c. Conflict with State Regulations that Govern the Private Security Industry**

Most states, with few exceptions, require a background check in order for security officers to be licensed to work in a particular jurisdiction. In Pennsylvania, where Mr. Coleman applied, the state requires that those applying as an unarmed security officer submit to fingerprints that will be filed with the Pennsylvania State Police Central Repository and that the applicant submit to a criminal background check that will be done by the Clerk of Courts and the District Attorney.

The EEOC, while aware of this reasonable state regulatory scheme, says that state and local laws and regulations are preempted by Title VII of the Civil Rights Act if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice under Title VII." Simply by complying with state and local laws, private security contractors are put in an untenable position.

**d. Conflict with Federal Legislation**

G4S is a member of and worked with the National Association of Security Companies (NASCO) in support of congressional passage of the Private Security Officer Employment Authorization Act (PSOEAA) which became law in 2004.<sup>[1]</sup> The enactment of this legislation, which broadened federally authorized access for security officer employers to obtain FBI criminal background checks, was a clear public policy decision by Congress in support of more expansive and stringent criminal background checks for security officers. As stated in the law, Congress found that ***"the American public deserves the employment of qualified, well-trained private security personnel as an adjunct to sworn law enforcement***

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<sup>12</sup> See e.g., *EEOC v. Randstad*, Case No. 11-1759 (4th Cir. 2012).

<sup>[1]</sup> 28 U.S.C. 534 (2004)

*officers; and private security officers and applicants for private security officer positions should be thoroughly screened and trained.”*

However, the EEOC, in its revised criminal background check guidance and in its investigation of G4S for its use of criminal background checks, is clearly seeking to restrict the use of criminal background checks in the private security industry --- in clear contravention to the actions and intent of Congress in this arena.

#### V. Relevant Case Law Supports G4S

There is relevant case law upholding an employer's right to conduct criminal background checks as a "business necessity." The Third Circuit Court of Appeals found that an employer had established the business necessity of its broad policy barring the employment of any person convicted of a violent crime. *El v. SEPTA*, 479 F.3d 232, 247 (3rd Cir. 2007) *El*, 479 F.3d at 247. In *El*, the plaintiff was disqualified from a paratransit driver position because a criminal background check revealed he had been convicted of second-degree murder forty years prior to his application. SEPTA presented evidence that a person with a remote conviction involving violence had a slightly greater probability of committing a future crime than a person with no such conviction. *Id.* Based on this slightly higher risk and the concern for SEPTA's passengers' safety, the Third Circuit found that SEPTA's practice accurately screened out applicants and did not constitute an unlawful disparate impact. *Id.* at 248.

#### VI. Conclusion

Criminal background checks draw upon the most rigorous test of the past performance of a prospective employee upon which an employer can rely – the proof *beyond a reasonable doubt* standard of the U.S. criminal justice system. No individual is convicted unless and until he or she has been found guilty – either by trial or by voluntary plea – of the crime revealed by a background check. Further, the conviction reflects *only* the crime for which the individual was held responsible (i.e., not for what they were arrested, charges dropped or reduced by prosecutors, or of which an acquittal was rendered).

Despite this most rigorous standard for criminal convictions, the EEOC enforcement guidance states that “a conviction record will usually serve as sufficient evidence that a person engaged in particular conduct. In certain circumstances, however, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision.” (Emphasis added). The EEOC is requiring that employers substitute its judgment for that of our criminal justice system to make individualized assessments to determine if the employer's policy as applied is job related and consistent with business necessity. This is illogical and will lead to many more complaints against employers for discrimination as opposed to applying a neutral policy across the board to every applicant or employee.

The EEOC enforcement guidance further states that “[a]rrest and incarceration rates are particularly high for African American and Hispanic men. African Americans and

Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population. Assuming that current incarceration rates remain unchanged, about 1 in 17 White men are expected to serve time in prison during their lifetime; by contrast, this rate climbs to 1 in 6 for Hispanic men; and to 1 in 3 for African American men.” While this may indicate a problem with our criminal justice system, it is unreasonable to place the burden to rectify this societal problem upon employers – particularly employers who employ security officers. Given the burden which must be met for a conviction to occur, employer reliance upon convictions revealed by a criminal background check is justifiable, reasonable and less likely to lead to individual discrimination.

Employment criminal background checks are an appropriate, prudent, sensible, and reasonable employment practice for employers in evaluating their job applicants. With regard to more sensitive positions, such as security officers, the appropriateness is indisputable. It is appropriate, logical and, indeed, critical that companies who hire security officers have the broadest possible access to criminal background information pertaining to its applicants and employees.

We cannot give guns and badges, keys and combinations, passcodes, access to servers containing personal and sensitive information, and our trust to those who are at a high risk of abusing it and to those who have such a high chance of criminal recidivism. We must not take such a gamble with protecting our critical infrastructure and the lives of people who expect and deserve our protection.

Thank you again for the opportunity to testify on this critical issue of concern to the private security industry. I am happy to answer any questions that you may have.

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### **Appendix A - Julie Payne Statement**

- (1) In California, a store customer was injured in an altercation with a Kmart security guard after trying to return an item. The customer, while being restrained, was injured by the security guard. The customer was awarded \$3.8 million in damages in a lawsuit claiming negligent hiring against the store. Heiner v. Kmart Corp., 84 Cal. App. 4<sup>th</sup> 335 (Cal. Ct. App 2000).
- (2) A security company was found liable for negligently hiring guards who beat a spectator. Gonzales v. Sw. Sec. & Prot., 665 P. 2d 810 (N.M. App. 1983).
- (3) A court found corporate liability for negligently hiring a security guard with a prior criminal record who assaulted a woman in a parking lot. The case was settled for \$1M. Kanne v. Burns Int'l Sec. Servs., Inc., Los Angeles County Superior Court, No. SWC 61883, 5/18/84; 28 ATLA L. Rep. 78.

- (4) A car-rental company in Pennsylvania settled for \$2.5 million a lawsuit seeking to hold it liable for negligent hiring and entrustment of an intoxicated security guard. The guard had an on-duty traffic accident in a company car in which he and another motorist were killed. Butler v. Hertz Corp., Pa., Philadelphia County Court of Common Pleas, Apr. Term, 1990, No. 1691, Feb. 11, 1991, reported in 34 ATLA L. Rep. 247 (Sept. 1991).
- (5) An armored-car company settled a negligent hiring, training, and supervision lawsuit for \$12 million when it was alleged that it did not adequately investigate an employee's past work record or provide adequate driving training. Quinones v. Roe, Cal., Los Angeles County Superior Ct., No. BC 076751, Mar. 23, 1994, 37 ATLA L. Rep. No. 10, p. 376 (Dec. 1994).
- (6) A store was sued for negligent supervising and retention of a security guard who allegedly had sexual intercourse with a 15-year-old female shoplifting suspect in exchange for letting her go. Hoke v. May Dep't Stores Co., 133 Or. App. 410, 891 P. 2d 686 (1995).
- (7) A store customer detained by a security guard at a department store as a suspected shoplifter and injured while being restrained was awarded \$10 million in damages in a lawsuit against the store claiming negligent hiring. Porter v. Proffitt's, Inc., Tenn., Bradley County Cir. Ct., No. V-94-676, Sept. 19, 1996, reported in 40 ATLA L. Rptr. No. 2, P. 72 (March 1997).
- (8) A convenience store was held liable for negligently hiring a security guard with a criminal record after the guard shot a customer. The court explained that the foreseeability that some harm might come to a customer is greater when the employee is armed and charged with carrying out a hazardous job that requires skill or experience. Estate of Arrington v. Fields, 578 S.W.2d 173, 175-76 (Tex. App. 1979, writ ref'd n.r.e.)
- (9) Evidence of prior convictions ruled admissible to show that an employer should have known that a criminal tortious action was more likely to happen. In this case, a security guard had a previous conviction for impersonating a police officer, and then was overly aggressive with a customer he thought was a shoplifter. Panas v. Harakis, 529 A.2d 976 (N.H. 1987).
- (10) In 2008, at a hotel in Panama City, Florida, a hotel security guard raped an 18 year old girl staying at the hotel. The security guard forced the girl into an unoccupied room which he accessed with his pass key. After the girl fought back, the guard threw her off the balcony from the sixth floor. A subsequent criminal background check revealed that the guard had previously been convicted of burglary and theft. See "*Suspect in Sexual*

*Assault of UA Spring Breaker Now in Police Custody” March 19, 2008, Alabama 13.com.*

- (11) In 2009 in Ohio, a security guard who was on probation for a felony drug offense was hired to guard a hospital pharmacy where he was arrested for trying to steal drugs. See “*New Criminal background checks sought by Ohio’s Homeland Security chief*” November 16, 2010, *newsnet5.com*.

On the other hand, the courts have found when a security guard employer did conduct a criminal background that was sufficient, there is no liability.

- (12) In Honohan’s v. Martin’s Food of the South Burlington, Inc., 255 A.D. 2d 627 (3<sup>rd</sup> Dept. 1998), a security guard sexually molested the plaintiff after detaining her for shoplifting. The employer was exonerated since it had conducted a thorough background check and checked prior references.
- (13) In B.B. Walker Co. v. Burns Intern. Sec., 424 S.E.2d 172 (N.C. App. 1993), a security guard company was found not liable to manufacturing company for thefts allegedly committed by guards they supplied under contract because there was nothing in guards' backgrounds which should have put security firm on notice that they were unfit for the job.

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## Jeffrey Leigh Sedgwick

### Comments on the topic, “Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission’s Conviction Records Policy on the Employment of Black and Hispanic Workers,” before the U.S. Commission on Civil Rights

By  
Jeffrey Leigh Sedgwick, Ph.D.  
Managing Partner & Co-founder  
Keswick Advisors, LLC  
7 December 2012

On April 24 of this year, the Equal Employment Opportunity Commission (EEOC) issued its “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.” This Enforcement Guidance builds on longstanding court decisions and policy documents that were issued over twenty years ago. In light of employers’ increased access to criminal history information, case law analyzing Title VII requirements for criminal record exclusions, and other developments, the Commission updated and consolidated in this document all of its prior policy statements about Title VII and the use of criminal records in employment decisions.

Prior to issuing its updated Enforcement Guidance, the EEOC held two public hearings: *Employment Discrimination Faced by Individuals with Arrest and Conviction Records* on 20 November 2008; and *Arrest and Conviction Records as a Barrier to Employment* on 26 July 2011. At each of these meetings, selected individuals representing parts of the research, legal and advocacy communities offered statements concerning the potential impact of criminal histories on the employment prospects of job applicants.

According to many advocates and researchers, the increased interest in and attention to criminal history background checks is attributable to the increasing number of individuals with criminal histories<sup>1</sup> and to the increasing ease of access to such histories by employers concerned about negligent hiring liability.<sup>2</sup> This presumes that the increased supply of criminal histories drives demand for their use. However, there are significant factors independently creating employer demand for criminal history background checks including:

- The reality of recidivism.

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<sup>1</sup> See for example, Michelle Natividad Rodriguez and Maurice Emsellem, *65 Million “NEED NOT APPLY”: The Case for Reforming Criminal Background Checks for Employment*. New York: The National Employment Law Project, March 2011.

<sup>2</sup> See for example Alfred Blumstein and Kiminori Nakamura, “Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences.” Final Report Submitted to the National Institute of Justice Grant No. 2009-IJ-CX-0008: October 2012. Pp. 1, 4-5.

- The prevalence of violent and/or theft-related offenses among inmates.
- OSHA rules that require employers to provide a safe workplace.
- Federal, state and local laws and licensing requirements that restrict individuals with certain convictions from employment in selected occupations.
- State laws that put employers at risk for hiring mistakes.
- Employer desire to protect business assets.

In the brief summary that follows, I will make four points: (a) that the EEOC in its Guidance and supporting documentation misrepresents contemporary social science research on the disparate impact of criminal justice policies resulting in criminal history records ; (b) that the EEOC misunderstands the difference between correlation and causation in social science research; (c) that the EEOC in its Guidance and supporting documentation misrepresents contemporary social science research on employer behavior and predicting criminal behavior; and (d) that the revised Guidance issued by the EEOC offers no “safe harbor” for employers even if they follow scrupulously the EEOC’s own list of Employer Best Practices.

#### A. Social Science Research and the Disparate Impact of Criminal Justice Policy

Beginning in the Introduction to its updated Guidance, the EEOC notes that there has been a significant increase in the number of Americans who have had contact with the criminal justice system and, concomitantly, a major increase in the number of people with criminal records in the working-age population – indicative, perhaps, of a growing crisis or gathering storm.<sup>3</sup> The EEOC citations included to support this observation of a growing crisis are meant to emphasize the rapid growth in convictions and correctional populations (suggesting, perhaps, a “hyperactive” criminal justice system sweeping increasing numbers of citizens into its net). However, the EEOC ignores the fact that the average annual increase in the population of adults under correctional supervision has been *declining* since 1980 and has, indeed, been *negative* for the past two years.<sup>4</sup> This means that even were we to do nothing in terms of changes in incarceration policy over the next several years, the prison population would fall as smaller and smaller cohorts are convicted and admitted to prison and larger cohorts are released.

The fact that smaller cohorts are being admitted reflects declining rates for imprisonable crimes since the peak in 1992, while the larger release cohorts reflect the increasing violent crime rates between 1960 and 1992. According to the FBI’s Uniform Crime Report, between 1960 and 1992, the number of violent crimes in the United States increased nearly sevenfold, from approximately 288,000 to more than 1.9 million, and the violent crime rate increased nearly fivefold from 160.9 to 757.7 per 100,000 population. According to FBI Uniform Crime Report data, the rate of all seven index offenses (homicide, rape, robbery, aggravated

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<sup>3</sup> Equal Employment Opportunity Commission, “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*” No. 915-002, 25 April 2012, 3.

<sup>4</sup> Department of Justice, *Correctional Population in the United States, 2010*. (Washington, DC: Bureau of Justice Statistics, 2011), 1 Figure 1, <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf> and Franklin E. Zimring, *The Great American Crime Decline*. (New York: Oxford University Press, 2007), 3-8.

assault, burglary, larceny and auto theft) declined significantly over the 1990s, with the aggregate declines ranging from 23% to 44%. For five of the seven offenses (homicide, rape, robbery, burglary and auto theft), the declines are of a similar magnitude: about 40%. Two crimes (aggravated assault and larceny) dropped by a lesser amount: about 23% to 24%.

If we look at *National Crime Victimization Survey* (NCVS) data, the crime declines estimated from the household survey are equal to or greater than the FBI/police statistics in all six crime categories (the NCVS does not measure homicide), with the survey showing much larger declines in larceny, assault and rape. The victim survey not only confirms the trends found in the police data, but also moves the larceny and assault declines much closer to the average declines for the other index crimes than do the police statistics. The violent victimization rate in the United States has fallen 67% since its peak in 1994 and now equals the lowest rate measured in the thirty-six year history of the NCVS. In short, the trends in arrests, convictions, and incarcerations are now not indicative of a growing crisis.

The EEOC Guidance quickly shifts from emphasizing the growth in the number of those with criminal histories to emphasizing the disparate impact of such records: "Arrest and incarceration rates are particularly high for African American and Hispanic men. African Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population."<sup>5</sup> Here the EEOC argument is misleading and its citation<sup>6</sup> irrelevant since both suggest that the appropriate denominator for calculating arrest and incarceration rates is a protected groups' proportion of the general population. Since offenders are not a protected class under Title VII of the Civil Rights Act, EEOC has no jurisdiction in employment decisions pertaining to offenders unless it can be shown that their criminal record itself is the result of unlawful discrimination. But on this precise point, EEOC overlooks a very large body of social science research dating back a number of years.

Michael Hindelang compared the demographic characteristics of persons the police arrested with the characteristics of offenders crime victims reported. The results showed a very consistent relationship between the racial distribution reported in police arrest statistics and that reported by victims of robbery, rape, and assault (where there was direct contact with the offender) when they were interviewed in the 1974 Victimization Survey.<sup>7</sup> Patrick Langan's study<sup>8</sup>, comparing the race composition of crime victims' recounting of the identity of their offender to the race composition of prison admissions confirms that of Alfred Blumstein<sup>9</sup> who, in a pioneering study using police arrest statistics to investigate one-day prison populations, also concluded that differential involvement, not racial discrimination, accounts

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<sup>5</sup> EEOC, "Enforcement Guidance," 3.

<sup>6</sup> PEW CTR. ON THE STATES, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 6 (2010), [http://www.pewcenteronthestates.org/uploadedFiles/Collateral\\_Costs.pdf?n=8653](http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653) at 8, Figure 2.

<sup>7</sup> Michael Hindelang, "Race and Involvement in Common Law Personal Crimes," *American Sociological Review* 43 (1978), 93- 109; and Michael J. Hindelang, *Analysis of Victimization Survey Results from the Eight Impact Cities*. (Washington : Dept. of Justice, Law Enforcement Assistance Administration, 1976)

<sup>8</sup> Patrick A. Langan, "Racism on Trial," *The Journal of Criminal Law and Criminology* 76 (Autumn 1985) 666-683.

<sup>9</sup> Alfred Blumstein, "On the Racial Disproportionality of United States' Prison Populations," *The Journal of Criminal Law and Criminology* 73 (Autumn, 1982), 1259-1281.

for 80% of the disproportionality between black and white incarceration rates in the United States. And Robert Sampson and Janet Lauritsen<sup>10</sup> reviewed the massive literature on charging and sentencing. They concluded that “large racial differences in criminal offending,” not racism, explained why more blacks were in prison proportionately than whites and for longer terms.

Somewhat later in its updated Guidance, the EEOC returned to this theme of racially-biased criminal justice policy in observing that “[i]n 2008, Hispanics were arrested for federal drug charges at a rate of approximately three times their proportion of the general population. Moreover, African Americans and Hispanics were more likely than Whites to be arrested, convicted, or sentenced for drug offenses even though their rate of drug use is similar to the rate of drug use for Whites.”<sup>11</sup> Pointing to drug usage statistics is misleading in this context since it is *dealing* rather than *usage* that drives arrests, convictions and incarcerations (indeed, many convictions for use are the result of plea bargaining the arrest charge down from dealing).

The focus on dealing is reasonable since some illicit drug markets are violent, particularly those organized around a physical place as opposed to virtual markets embedded within social networks. Business arrangements involving illegal drug distribution cannot be enforced by law. Thus we should expect drug dealers to be more commonly and more heavily armed than entrepreneurs and employees in other lines of work, and indeed they seem to be better armed than other perpetrators of deadly violence. While the presence of guns deters violent encounters, it tends to raise the lethality of incidents that do take place.<sup>12</sup> Large areas of flagrant drug dealing – either in the open or in dedicated locations such as crack houses – constitute serious problems for the neighborhoods where they exist. Violence and theft by and against both users and dealers can make flagrant market areas into hot spots for non-drug crime. One reason that urban police continue to pursue the Sisyphean task of locking up drug dealers one by one, only to have them replaced by others, is that the neighbors demand it. The same community leadership that criticizes the police for overly aggressive and impolite enforcement activity often also complains about the failure of the police to stop a set of illegal activities that stand out in plain view.

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<sup>10</sup> Robert J. Sampson and Janet L. Lauritsen, “Racial and Ethnic Disparities in Crime and Criminal Justice in the United States,” *Crime and Justice* 21 (1997), 311-374.

<sup>11</sup> EEOC, “Enforcement Guidance,” 9.

<sup>12</sup> On the importance of differences between drug markets and their intersection with violence, see David A. Boyum, Jonathan P. Caulkins & Mark A. R. Kleiman, “Drugs, Crime and Public Policy,” in *Crime and Public Policy*. Ed. James Q. Wilson and Joan Petersilia. (New York: Oxford University Press, 2011), 368-410; Paul J. Goldstein and Henry H. Browstein, *Drug Related Crime Analysis: Homicide*. Report to the National Institute of Justice Drugs, Alcohol, and Crime Program. (Washington, DC: United States Department of Justice, July 1987); Alfred Blumstein and Dan Cork, “Linking Gun Availability to Youth Gun Violence,” *Law and Contemporary Problems* 59 (1996), 5-24; Joseph F. Sheley and James D. Wright, *Gun Acquisition and Possession in Selected Juvenile Samples*. National Institute of Justice, Office of Juvenile Justice and Delinquency Prevention, Research in Brief. (Washington, DC: U.S. Department of Justice, December 1993); and David M. Kennedy, “Can We Keep Guns Away from Kids?” *The American Prospect* 5 (1994), 74-80.

## B. Correlation and Causation in Social Science Research

Much of the testimony offered to the Commission in its two hearings on criminal history background checks asserted, strongly suggested or implied that the current level of unemployment in the Black community constitutes a threat to public safety. The unspoken assumption is that the lack of legitimate earning opportunities leads to higher crime rates. But the relationship between unemployment and criminal conduct is not one of simple cause and effect. This is demonstrated by several facts commonly known in the social science community, such as:

- *Two-thirds of inmates in State prisons were employed during the month before they were arrested for their current offense; over half were employed full time.*<sup>13</sup>
- *From 1979 to 1997, the property and violent crime rates (adjusted for changes in demographic characteristics) increased by 21% and 35%, respectively, in the United States despite no change in the long term unemployment rate.*<sup>14</sup> and
- *Decreasing wage trends for low skill workers account for over 50% of the increase in both the property and violent crime indices during the same period. A sustained long-term decrease in crime rates thus depends on whether the wages of less skilled men improve.*<sup>15</sup>

Successful reentry to legitimate society is shaped by factors that have nothing to do with employment but may, in fact, affect employment prospects *as well as* successful desistance from crime.<sup>16</sup> These factors include not only the individual's characteristics, but also offending and substance abuse histories, family relationships, community contexts, and State policies offering supportive re-entry services. Discouraging the use of background checks will not by itself enhance re-integration into society, especially if it diverts attention from the provision of adequate supportive re-entry services. It will certainly, however, expose employers and the public to the harm of re-offense due to factors that have nothing to do with the regular presence of a paycheck. The following characteristics of state inmates make clear that their problems upon re-entry extend far beyond issues related to background checks.

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<sup>13</sup> Department of Justice, *Survey of State Prison Inmates, 1991*. (Washington, DC: Bureau of Justice Statistics, 1993) 3. See also, Department of Justice, *Mental Health and Treatment of Inmates and Probationers*. (Washington, DC: Bureau of Justice Statistics, 1991)

<sup>14</sup> Eric D. Gould et al, "Crime Rates and Local Labor Market Opportunities in the United States: 1979-1997," *The Review of Economics and Statistics* 84, no. 1 (2002): 57-8. In this context, it is interesting to note that according to the FBI's Preliminary Annual Uniform Crime Report on 2010, property and violent crime rates in the United States have fallen each year since 2006, despite rising unemployment and the large number of inmates released back into the community annually during that same period.

<sup>15</sup> *Ibid.*, 58.

<sup>16</sup> Christy A. Visher and Jeremy Travis, "Transitions from Prison to Community: Understanding Individual Pathways," *Annual Review of Sociology* 29 (2003): 91.

Consider the following facts<sup>17</sup>:

- *Over 60% of inmates had been incarcerated in the past.* A Department of Justice study of 272,111 inmates released from prison in 1994 found that they had accumulated 4.1 million arrest charges before their most recent imprisonment and another 744,000 charges within 3 years of release.<sup>18</sup> *This is an average of 17.9 charges each.* The number of times a prisoner has been arrested in the past is a good predictor of whether that prisoner will continue to commit crimes after being released.<sup>19</sup>
- *Substance abuse is a significant contributing factor to the likelihood of incarceration.* Thirty-one percent of inmates committed their offense under the influence of drugs, and 17% committed their offense to get money for drugs. Thirty-two percent of inmates committed their offense under the influence of alcohol having consumed on average the equivalent of three six-packs of beer or two quarts of wine. Half of these had been drinking for six hours or more before their offense. Studies of released prisoners report that their success or failure to confront their substance abuse problem often emerges as a *primary factor* in their post-prison adjustment.<sup>20</sup>
- *The presence of stable marital and family relationships greatly reduces the likelihood that an offender will re-offend.* Fifty-five percent of inmates had never married, while 27% were widowed, divorced or separated; yet 43% of female inmates and 32% of male inmates had 2 or more children under age 18. Although the day-to-day role of husband or parent and reintegration into a family are not social roles that ex-offenders (particularly men) necessarily adopt immediately upon release, acceptance of that role is highly significant in the transformation toward law-abiding citizen after release. Indeed, interpersonal conflict with heterosexual partners is mentioned by recidivists as a common problem leading to failure *second only to problems involving substance abuse.* In an inmate's early life, it is well-known that the absence of such stable relationships can serve as a harbinger of trouble to come.<sup>21</sup> Most inmates did not live with both parents while growing up; over 25% had parents who abused drugs or alcohol; and 37% had an immediate family member with a jail or prison record.
- *Lack of educational advancement leads to enhanced risks of incarceration.* Thirty-four percent of inmates had completed high school while another quarter had gotten a general equivalency degree (GED). Limited education often translates into poor job skills, creating diminished prospects for stable employment and decent wages upon release.

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<sup>17</sup> *Survey of State Prison Inmates, 1991.*

<sup>18</sup> Department of Justice, *Recidivism of Prisoners Released in 1994.* (Washington, DC: Bureau of Justice Statistics, 2002) 1.

<sup>19</sup> Visher and Travis, p. 95.

<sup>20</sup> *Ibid.*

<sup>21</sup> Visher and Travis, p. 99.

The EEOC's confusion between correlation with causation appears in the Guidance on page 8 where the following quote appears: "A covered employer is liable for violating Title VII when the plaintiff demonstrates that the employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity." The Guidance then cites *Griggs v. Duke Power Company*<sup>22</sup> to support this position. However, recent scholarship has called into question the viability of the *Griggs* reasoning. A recent law review article is worth quoting at length here:

In the interim since *Griggs*, social scientists have generated a substantial body of research designed to help employers comply with the mandates of the doctrine. This evidence has undermined two key elements of *Griggs* that have informed the application of the disparate impact rule more generally. First, *Griggs* and its progeny rest on the implicit assumption that fair and valid staffing practices will result in workers from each race being hired or promoted in rough proportion to their numbers in the background population or in an otherwise appropriately defined pool of candidates. The so-called four-fifths rule, under which an employer is presumptively liable if the rate of hiring for minority workers is less than 80 percent of the rate for the majority white population, reflects this assumption. Second, the Court in *Griggs* noted the absence of evidence that the screening criteria in that case--a high school diploma and scores on a "professionally prepared aptitude test"--were related to subsequent performance of the service jobs at issue, and expressed doubt about the existence of such a relationship.

Social science research casts doubt on both of these aspects of *Griggs*. First, research in industrial and organizational psychology (IOP) has repeatedly documented that, despite their imperfections, tests and criteria such as those at issue in *Griggs* (which are heavily "g"-loaded and thus dependent on cognitive ability) remain the best predictors of performance for jobs at all levels of complexity. Second, work in psychometrics, educational demography, and labor economics indicates that blacks, and to a lesser extent Hispanics, currently lag behind whites both in cognitive ability test performance and in the skills needed for success on the job. These gaps are reflected in lower scores on the types of g-loaded job screens that best predict job success.

The combination of well-documented racial differences in cognitive ability and the consistent link between ability and job performance generates a pattern that experts term the "validity-diversity tradeoff": the most effective job selection criteria consistently generate the smallest number of minority hires. Indeed, the evidence indicates that most valid screening devices will have a significant adverse impact on blacks and will also violate the four-fifths rule under the law of disparate impact.

In sum, the IOP literature demonstrates that the empirical and demographic premises behind the disparate impact rule do not match reality and have turned out to be myths.

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<sup>22</sup> 401 U.S. 424, 431–32 (1971).

As a consequence, most legitimate job selection practices, including those that predict productivity better than alternatives, will routinely trigger liability under the current rule.

Although the Supreme Court in *Griggs* and subsequent cases has repeatedly stated that disparate impact doctrine is consistent with a rigorously competitive meritocracy, employers seeking to maintain such a meritocracy among a diverse population will run a high risk of being sued for violations of the rule. Such lawsuits will put employers to the onerous, uncertain, and sometimes impossible task of justifying their job selection practices. This may result in unwarranted liability or induce undesirable, self-protective strategies. Even in the absence of those consequences, a proper application of the doctrine is unlikely to change the racial composition of the workplace or to increase demographic diversity. The best explanation for current workforce imbalances is the existence of real average group differences in knowledge, skills, and abilities. These human capital disparities, and not the use of non-merit-related selection or the erection of arbitrary barriers, best explain observed employment patterns. And given the present magnitude of skill differences and the shortage of qualified minority workers, the correct application of the disparate impact rule will not increase workforce diversity and could well make some jobs less diverse.<sup>23</sup>

The EEOC Guidance also ignores recent research and court decisions on the use of social framework analysis (e.g. disparate impact analysis) in arguing discrimination cases. For example, in discussing determining the disparate impact of policies or practices that screen individuals based on records of criminal conduct (page 9), the Guidance notes that “African Americans and Hispanics also are incarcerated at rates disproportionate to their numbers in the general population. Based on national incarceration data, the U.S. Department of Justice estimated in 2001 that 1 out of every 17 White men (5.9% of the White men in the U.S.) is expected to go to prison at some point during his lifetime, assuming that current incarceration rates remain unchanged. This rate climbs to 1 in 6 (or 17.2%) for Hispanic men. For African American men, the rate of expected incarceration rises to 1 in 3 (or 32.2%). Based on a state-by-state examination of incarceration rates in 2005, African Americans were incarcerated at a rate 5.6 times higher than Whites, and 7 states had a Black-to-White ratio of incarceration that was 10 to 1. In 2010, Black men had an imprisonment rate that was nearly 7 times higher than White men and almost 3 times higher than Hispanic men.”

This establishes a framework for analysis of employment screens that makes consideration of incarceration inherently discriminatory (unless the employer can conclusively demonstrate that the policy or practice is job related for the position in question and consistent with business necessity – more on that in a moment!). Yet this use of social frameworks is far from uncontroversial or uncontested. Consider the following:

Since it was first introduced in court by Louis Brandeis over a century ago, evidence drawn from social science research has played an important role in many forms of

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<sup>23</sup> Wax, Amy L. "Disparate Impact Realism," *William and Mary Law Review* (November 2011), 621-711.

litigation. Perhaps the most prominent current use of social science evidence occurs in employment discrimination class actions, where the plaintiffs often rely on the testimony of an expert to identify factors within the defendant organization that social science studies suggest could pose a common risk of harm to all class members. The prototypical example is found in *Dukes v. Wal-Mart*, a gender discrimination class action involving over 1.5 million women, in which a sociology expert reviewed the case record on Wal-Mart's employment practices—in light of what social science research shows to be factors that create and sustain bias and those that minimize bias and concluded that Wal-Mart's practices contribute to disparities between men and women in their compensation and career trajectories at the company.

The approach the expert used in the *Dukes* case has come to be known as social framework analysis - so called because an expert uses social science research as a framework for analyzing the facts of a particular case. In this approach, the expert uses her judgment rather than traditional empirical methods to link social science propositions to a particular case. For instance, the expert in *Dukes* conducted no observational, statistical or experimental tests to determine that any particular employment practice of Wal-Mart actually contributed to any sex disparities in pay; he simply reviewed discovery materials and judged Wal-Mart's practices to contain features that social science studies suggest can be associated with intergroup bias. This method has been developed by experts exclusively for use in litigation. Or, as the expert for the *Dukes* plaintiffs testified in a subsequent case, *social framework analysis is a legal term and not a scientific term. It's a label that's been applied to what social scientists do when they come into a litigation context. Issues of causality in the social sciences have a long and rich methodological tradition that has nothing to do with social framework analysis.*

In stark contrast to those experts who engage in conjectural social framework analysis, other experts *do* use traditional social scientific techniques to assess conditions directly relevant to the case at hand. For instance, a psychologist may conduct an experiment to determine whether a photo lineup suggested the defendant as the perpetrator, or an economist may estimate the impact of alleged monopolist practices on consumer prices using econometric analyses of market data. In these instances, the expert applies scientific principles and methods to case-specific data in the same way that the expert would use scientific principles and methods to analyze data outside the litigation context. When social scientific principles and methods are used to develop opinions about the parties, practices, or behaviors involved in a particular case, [we refer] to such evidence as social facts.

We conclude that social fact studies are feasible for both plaintiffs and defendants, with or without special access to the parties involved in a case, and provide much

sounder conclusions about the relevance of social science to a litigated case than does social framework analysis.<sup>24</sup>

Significantly, in *Dukes v. Wal-Mart* the Supreme Court overturned the Ninth Circuit Court of Appeals and found for the Defendant, Wal-Mart, citing the authors of the above passage.<sup>25</sup> At the very least, this indicates that the Supreme Court does not look favorably on challenges to neutral employment policies and/or practices that are based on non-case specific invocations of social science theories of disparate impact.

### C. Misuse/misunderstanding of Contemporary Social Science Research on Employer Behavior and Predicting Criminal Behavior

Social Science research is often complex and presented in specialized professional jargon that makes it challenging for the layperson to understand. However, it is disconcerting to see misuse or misrepresentation of such research in a government document. On page 6 of the Guidance, for example, we find the following statement: “there is Title VII disparate treatment liability where the evidence shows that a covered employer rejected an African American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record.” The statement is supported by a citation to a peer-reviewed and published social science research study.<sup>26</sup> The study cited makes the point that race continues to play a dominant role in shaping employment opportunities, *equal to or greater than the impact of a criminal record* [emphasis added] producing a result where whites *with* criminal records received more favorable treatment (17%) than blacks *without* criminal records (14%).<sup>27</sup> This alone would suggest that the employment difficulties faced by black ex-offenders will not be materially improved simply by prohibiting use of criminal history background checks.

However, the EEOC failed to disclose what it knew to be true about disparate treatment versus disparate impact in this passage since the author of the study in question testified before the Commission [EEOC] in November 2008 on a then-forthcoming study that showed a rather different result.<sup>28</sup> Pager’s research demonstrated a large negative effect of race in the initial stages of selection prior to knowledge of criminal history. To pull apart the effect of race from criminal background, Pager’s research design involved matched pairs of job applicants for entry-level, low paying jobs in New York City. The only difference between

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<sup>24</sup> Gregory Mitchell, Laurens Walker, and John Monahan, “Beyond Context: Social Facts as Case-Specific Evidence.” Public Law and Legal Theory Research Paper Series No. 2010-14 (University of Virginia School of Law: March 2010), <http://ssrn.com/abstract=1564724>. See also John Monahan, Laurens Walker & Gregory Mitchell, *The Limits of Social Framework Evidence*, 8 LAW, PROBABILITY & RISK 307, 311-14 (2009).

<sup>25</sup> John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of “Social Frameworks,”* 94 VA L. REV. 1705, 1742-48 (2008).

<sup>26</sup> Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 958, Figure 6 (2003), [www.princeton.edu/~pager/pager\\_ajs.pdf](http://www.princeton.edu/~pager/pager_ajs.pdf).

<sup>27</sup> Where favorable treatment is defined as being offered a job interview after submission of a written job application.

<sup>28</sup> Devah Pager, Bruce Western and Naomi Sugie, “Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records,” *The Annals of the American Academy of Political and Social Science* (May 2009) 623: 195-213.

the members of the pairs was the indication on one resume of having been arrested, convicted and incarcerated for drug possession with intent to distribute. Two pairs of applicants, one white and one black, were sent in response to 250 job advertisements randomly selected from the classified sections of four newspapers and Craigslist.

Black applicants were less often invited to interview for jobs, thereby providing fewer opportunities to establish rapport with the employer. However, the sequencing of events involved in employer decision-making is important in this study. Pager noted that employers did not know of the presence or absence of a criminal record at the time they made the decision whether or not to meet face-to-face with the job applicant for an interview. Yet black applicants were offered interview opportunities roughly two-thirds as often as white applicants, again suggesting that race is a larger factor in obtaining an interview and subsequent job offer than presence or absence of a criminal history. Given the importance of an interview in establishing rapport between the employer and the job applicant, this initial decision whether or not to interview is crucial; *and yet it is not affected by the presence or absence of a criminal record*. Indeed, Pager conceded that “the effect of a criminal record has no discernible impact on the likelihood of interaction [i.e. interview].”<sup>29</sup>

Equally important is the fact that once an interview is granted, there is no statistically significant difference between blacks and whites whether the employer expresses sympathy with an applicant’s criminal background, expresses disapproval of it, or gives an ambiguous response. Thus it is hard to see how the criminal record plays an independent role in burdening a black job applicant more than a white job applicant. The answer may lie in a number of the anecdotes Pager offered, however. She presented several cases where employers overcome whatever qualms they may have about hiring an ex-offender based on “ethnic solidarity.” But this would suggest *that the differential outcome in hiring outcomes for white and black applicants with a criminal record may be the product of the paucity of black employers capable of feeling “ethnic solidarity” with black applicants having a criminal record*. This interpretation is supported by the fact that *there is no statistically significant difference in the likelihood of a positive response to a job application [i.e., a hiring offer] between blacks and whites for employers either sympathetic to applicants with a criminal history or hostile to such applicants*. The entire difference in positive hiring outcomes, by Pager’s own data, is attributable to employers who grant an interview during which they express no opinion on an applicant’s criminal history or express an ambiguous opinion, thus giving the applicant no opportunity to address employer qualms or to offer mitigating or offsetting personal qualities.

In sum, the EEOC Guidance placing limits on the use of criminal history background checks as a means of reducing discrimination against a class protected under Title VII of the Civil Rights Act of 1964 seems to miss the larger problem, overt racism in hiring facilitated by the paucity of minority hiring officials, and focuses too narrowly on the lesser problem of disparate incidence of criminal histories.

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<sup>29</sup> Ibid., p. 201.

In section A. above, I reviewed the way in which the EEOC Guidance seeks to establish that *any* use of criminal history background checks in an employment setting has a disparate impact on classes protected by Title VII of the Civil Rights Act of 1964 and is thus suspect. The Guidance does allow that there may be limited circumstances under which background checks may be permissible; these fall into two categories: employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations<sup>30</sup>; or the employer demonstrates that the criminal record screening policy or practice is job related for the positions in question and consistent with business necessity. According to the EEOC, to establish that a criminal conduct exclusion that has a disparate impact is job related and consistent with business necessity under Title VII, the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.

In its 1975 ruling in the case of *Green v. Missouri Pacific Railroad*, the Eight Circuit Court of Appeals identified three factors (the “*Green* factors”) that are relevant to assessing whether an exclusion is job related for the position in question and consistent with business necessity: the nature and gravity of the offense or conduct; the time that has passed since the offense or conduct and/or completion of the sentence; and the nature of the job held or sought. The Guidance makes reference to four studies on “redemption” or the point in time during which a released offender has avoided further contact with the criminal justice system that renders his or her criminal record essentially useless in predicting the risk of reoffending.<sup>31</sup> It is striking that only one of the four studies cited by the EEOC in this context uses national conviction data rather than arrest data (which the EEOC itself discounts as unreliable and insufficient as evidence of guilt. Cf. section V.B.2 of the Guidance) in estimating the optimal exclusion period. And this one study (Soothill & Francis) is based on data from England and Wales. But England and Wales have a considerably different mix of criminal offending than does the United States, calling into question whether an optimal period of exclusion calculated on their data is appropriate for use in the United States where violent crime rates are significantly higher and property crime rates (especially burglary) significantly lower.<sup>32</sup>

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<sup>30</sup> It should be noted that according to current estimates of the Department of Justice-funded *National Study on the Collateral Consequences of Criminal Convictions*, there are over 38,000 federal, state and local statutes that impose collateral consequences on individuals convicted of crimes including employment and occupational licensing exclusions. (See <http://isrweb.isr.temple.edu/projects/accproject>)

<sup>31</sup> Keith Soothill & Brian Francis, “When do Ex-Offenders Become Like Non-Offenders?”, 48 *Howard Journal of Criminal Justice*, 373, 380–81 (2009); Alfred Blumstein & Kiminori Nakamura, “Redemption in the Presence of Widespread Criminal Background Checks,” 47 *Criminology* 327 (2009); Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, “Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement,” 53 *Crime & Delinquency* 64 (2007); and Megan C. Kurlychek et al., “Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?”, 5 *Criminology & Public Policy* 483 (2006).

<sup>32</sup> See James P. Lynch and William Alex Pridemore, “Crime In International Perspective,” in *Crime and Public Policy*. Ed. James Q. Wilson and Joan Petersilia. (New York: Oxford University Press, 2011), 5-52.

The main points that I would make about these “redemption” studies are as follows:

- *Individuals with a prior arrest or juvenile contact with police always pose a risk of arrest that is statistically significantly higher than those without prior police contact or arrest.* Bushway et al estimates that an individual with a prior arrest at age 18 and no offenses for the following seven years is *twice* as likely to be arrested within the next four months as an individual with no prior arrests. If we estimate the risk of rearrest over the next two years (ages 25 and 26), then the ex-arrestee is *five and one-half times* as likely to be arrested.
- The risk of recidivism varies by age and crime at the time of first arrest; it also varies by the birth year of the offender (due to variations in crime rates over time). Consequently, *there is no single estimate of time “clean” or “straight” that applies to all ex-offenders specifying when their risk of re-offending is no greater than the general population.*
- These research articles note that the determination of time “clean” or “straight” that renders an ex-offender employable *depends on specific attributes of the employer or job.* And none offers any helpful insight on these attributes.

It is most unfortunate that, despite the above, these articles have been misinterpreted and used to claim, quite prematurely, that criminal records become “stale” and useless as guides to risk assessment after a very short time – as little as three to seven years. Blumstein and Nakamura conclude their article with a list of issues still to be addressed, underlining the preliminary and incomplete character of their current findings. While their article demonstrates that in theory one could define the time “clean” or “straight” at which an ex-offender faces an equal risk (or “sufficiently close”) of arrest as the general population of the same age (“general population” meaning a blended population of ex-arrestees and the never-arrested) given sufficient information on birth year, age at first offense, and first arrest offense replicated for more jurisdictions, more offense types and more birth years, the gap between theory and practice still yawns before us. In addition to the still incomplete research agenda mentioned by Blumstein et al., one would also want to correct for the problem of out-of-jurisdiction arrests and for time incarcerated/incapacitated. As well, when determining when comparative risks are “sufficiently close,” one would need information on the distribution and variation in risk preference among employers and the characteristics of jobs especially suited for re-entering offenders. In short, there is much more research to be done on these questions.

But it is important to note that even when this more extensive research agenda is completed, the result will not be a single estimate of the time since last contact with the criminal justice system at which a criminal record becomes “stale” and unpredictable, but rather a very large number of such estimates, each tailored to the unique circumstances of particular offenders including their age at first offense, nature of most recent offense, and current age (to mention just of few). What we won’t get is a single estimate on which a regulatory standard or administrative “bright line” sealing past criminal records can be anchored. The fruits of this particular line of research are more relevant to the employers’ assessment of the comparative risk of individual job applicants than to the articulation of administrative or regulatory guidances or rules uniformly applied.

While witnesses have over interpreted the preliminary literature on redemption, it is quite striking that they have been reticent to engage a similarly preliminary body of research demonstrating that criminal history background checks *reduce* employment discrimination against Blacks. This is, of course, the literature on statistical discrimination by scholars such as Harry J. Holzer<sup>33</sup> and Lior Jacob Strahilevitz.<sup>34</sup> Holzer et al found that employers who conducted criminal background checks on applicants were more than 50% more likely to hire African Americans than employers who did not (24% versus 14.8%, respectively).<sup>35</sup> Interestingly, Shawn Bushway has found that African Americans have *higher* wages in those states that have automated access to criminal history records to the greatest degree, and he attributes this finding to statistical discrimination in those states that have not automated access.<sup>36</sup> Bushway also found that access to criminal history records reduced the differential between whites' wages and blacks' wages and the differential between whites and black employment levels (but the results were not statistically significant). At this early stage of the research on statistical discrimination, the policy conclusion reached by Strahilevitz is quite striking: we should "provide decision makers with something that approximates complete information about each applicant, so that readily discernible facts like race or gender will not be overemphasized and more obscure but relevant facts, like past job performance and social capital, will loom larger."<sup>37</sup> This recommendation points in exactly the opposite direction as those recommending curtailing access to criminal histories through background checks; indeed, it suggests that such limits on access to information will make racial discrimination *worse*.

D. Revised Guidance issued by the EEOC offers no "safe harbor" for employers even if they follow scrupulously the EEOC's own list of Employer Best Practices.

On page 14 of the current Guidance, EEOC offers its opinion that it believes employers will consistently meet the "job related and consistent with business necessity" defense for using employment screens (such as criminal history background checks) that have a disparate impact if: the employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures standards; or the employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three *Green* factors), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

Having offered the appearance of a "safe harbor" to employers, the Guidance quickly casts doubt on the reality of any such safe harbor. First, on the matter of validation of any criminal conduct employment screen, the Guidance notes that "Although there may be social science

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<sup>33</sup> Harry J. Holzer, Steven Raphael and Michael A. Stoll, "Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers," *Journal of Law & Economics* 49 (2006): 451-80.

<sup>34</sup> Lior Jacob Strahilevitz, "Privacy Versus AntiDiscrimination," John M. Olin Law & Economics Working Paper No. 349, The University of Chicago, July 2007.

<sup>35</sup> Holzer et al. at 464.

<sup>36</sup> Shawn D. Bushway, "Labor Market Effects of Permitting Employer Access to Criminal History Records," *Journal of Contemporary Criminal Justice* 20 (2004): 282.

<sup>37</sup> Strahilevitz at 10.

studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications, and thereby provide a framework for validating some employment exclusions, such studies are rare at the time of this drafting.”<sup>38</sup> It is rather astonishing that EEOC would admit that there is insufficient social science evidence pertaining to whether convictions are linked to future behaviors, traits or conduct with workplace ramifications to meet their own requirement that employment screens be validated. Second, item V.C. (page 20) of the Guidance bluntly states that “If an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory “alternative employment practice” that serves the employer’s legitimate goals as effectively as the challenged practice but that the employer refused to adopt.” Of course, it is the EEOC who will make the determination of what practice is less discriminatory and what are an employer’s legitimate goals using its own judgment.

*Jeffrey L. Sedgwick was appointed on January 2008 by President George W. Bush to serve as Assistant Attorney General for the Office of Justice Programs; he was confirmed by the Senate of the United States in October 2008 and served until January 2009. Mr. Sedgwick also served until October 2008 as director of the Bureau of Justice Statistics, the statistical agency of the Department of Justice, a position to which he was appointed by President George W. Bush in January 2006. Prior to his appointments, Dr. Sedgwick taught for 30 years at the University of Massachusetts - Amherst. He is currently Professor Emeritus of Political Science at the University.*

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<sup>38</sup> EEOC, “Enforcement Guidance,” 15.

**Jonathan A. Segal**



**STATEMENT OF JONATHAN A. SEGAL**

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**PHILADELPHIA, PA**

**ON BEHALF OF THE**

**SOCIETY FOR HUMAN RESOURCE MANAGEMENT**

**SUBMITTED TO THE**

**U.S. COMMISSION ON CIVIL RIGHTS**

**BRIEFING ON**

**“ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL  
EMPLOYMENT OPPORTUNITY COMMISSION’S CONVICTION RECORDS AND POLICY ON THE  
EMPLOYMENT OF BLACK AND HISPANIC WORKERS”**

**DECEMBER 7, 2012**

**Introduction**

Good morning Chairman Castro, Vice-Chair Thernstrom, and distinguished members of the Commission. My name is Jonathan Segal, and I am Partner at Duane Morris LLP specializing in employment law in general and equal employment opportunity in particular. I also am the Managing Principal of the Duane Morris Institute. The Institute provides training for human resource professionals, in-house counsel, benefits administrators and managers. I frequently speak and write on employment law and issues affecting human resource professionals and the workplace. I am also the Pennsylvania state legislative director for the

Society for Human Resource Management, also known as SHRM, and it is in that capacity that I appear before you today as a member and representative of SHRM.

SHRM is the world's largest association devoted to human resource (HR) management. Representing more than 260,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

HR professionals play a critical role in creating a workforce comprised of skilled and talented employees as well as creating a work environment that yields high levels of employee satisfaction. SHRM has participated in ongoing discussions at both the national and state levels regarding the appropriate use of background information in the employment process. These discussions are heightened by the competitive employment environment created by today's economy. SHRM and its members are supportive of, and involved with, various public policy initiatives focused on finding jobs for the unemployed. SHRM, for example, is currently working with the US Departments of Labor and Defense to help increase employment among returning military veterans and disabled individuals.

My comments will describe the hiring process, shed some light on how HR professionals use background checks in the hiring process, the specific role of criminal background checks, and touch on various aspects of the recent EEOC guidance on the use of criminal background checks.

At organizations large and small, HR professionals are charged with ensuring that each individual hired possesses the talent, skills, and work ethic needed for the organization's success. The consequences of making a poor hiring choice can be great, possibly leading to financial losses, an unsafe work environment, and, if the employee engages in severe misconduct, legal liability to customers, shareholders or other employees in the form of a negligent hiring lawsuit or other legal claims. As a result, HR professionals strive to make the most informed choices possible under the law when selecting candidates for their organizations.

In today's market, it is not uncommon to receive hundreds of applications in response to just one advertisement for a vacant position. To cull through these job candidates, employers must use many factors to narrow the applicant pool to those who are most qualified. Factors may include years of work experience, work experience in the same industry, education, certifications and more. Once a group of candidates or a finalist is selected for a position, most often after an initial round of interviews, the HR department typically conducts a background check on the candidates or candidate.

While the background check process is often a standard practice for most employers, the process varies, depending on the employer and the position being filled. Employers typically run a credit check, for example, on only those finalists for positions that involve money-handling or other fiduciary responsibility.

It is important to remember that certain federal and state laws, along with county and local ordinances, statutorily require employers to conduct specific background checks for certain positions such as licensed health care professionals, day-care providers, teachers and athletic coaches, and police and firefighters. The U.S. Congress has also been supportive of targeted criminal background checks, passing legislation allowing certain organizations to obtain national and state criminal history background checks on their volunteers and, in other legislation, tying federal funding to mandatory criminal background checks of employees. Many state laws require the use of criminal background checks for certain industries to maintain their licenses. Health care and child care are two industries that commonly have state law requirements that all or virtually all applicants submit to criminal background checks as a condition of employment. Some convictions under such state laws are automatic disqualifiers for employment. I include this information to illustrate the legal requirements placed on employers and the apparent recognition from Congress of the importance of these types of checks in the employment process.

One difficulty faced by organizations seeking to hire an employee is that an individual's previous employer is frequently reluctant to provide an accurate assessment of the former employee's work history, strengths, and weaknesses for fear of potential liability. In the reference check process, employers can face claims made by the former employees themselves (in the form of a defamation or retaliation lawsuit) or a future employer (negligent referral) simply by giving an unabridged assessment of a candidate's work background. As a result, most employers only provide the bare minimum amount of information in response to a reference check – confirming only that the candidate had worked for them, their title, and dates of employment. This lack of direct and complete reference information from the previous employer is one reason that many employers use the services of a background check company in an attempt to obtain the most accurate and complete picture of the potential employee.

SHRM has surveyed its HR professional members on their use of background checks—including seeking information from references and obtaining credit and criminal background information. Employers have identified several reasons for the use of criminal history information. Fifty-two percent of employers cite the need to reduce the chances of legal liability because of a negligent hire. For example, assume a landlord of apartments hires someone to fix problems in apartments and the employee has unescorted access to all apartments. What if an applicant has a recent rape conviction, no background check is done, the individual is hired and he tragically rapes a tenant. A negligent hire claim is inevitable.

This reason is followed closely by the need to provide a safe work environment for employees, cited by 49 percent of respondents. Providing each and every employee access to a safe work environment is required under the general duty clause of the Occupational Safety and Health Act. People are an employer's greatest asset and a top priority for most employers is to protect their assets. I will provide a specific safety example in a few minutes.

In addition, thirty-six percent of employers use this information to reduce their risk of theft and embezzlement within their organization or by an employee against a customer. The National Retail Security Survey estimates that the U.S. retail industry lost more than \$34

billion in 2011 due to employee theft. With losses such as these, it's understandable why employers are using every type of screening method they can to avoid making a poor hiring decision.

Lastly, twenty-eight percent cite compliance with *state law* as the primary reason for conducting criminal background checks. In these cases, an employer must comply or the consequence may be the employer's loss of its license to operate.

SHRM's own survey data provides a more complete picture of current HR practices and demonstrates that having a criminal record is not an automatic bar to employment. In fact, employers are more heavily influenced in the hiring decision by factors unrelated to criminal background information. According to SHRM surveys, 85 percent of HR professionals, when making hiring decisions, are most interested in finding an employee who will be a "good fit" with the organization (based on legal criteria), 82 percent want to know whether the candidate has previous work experience that is directly applicable to the job, 80 percent whether the candidate possesses specific skills or expertise needed to perform the job requirements, and 67 percent are most interested in whether the candidate performs admirably during the interview process.

Once an employer identifies candidates that they believe will help meet these objectives, they look at several legally-available sources of information about the candidate to supplement what the applicant has supplied. This supplementary information includes criminal history checks which are conducted by 87 percent of employers according to SHRM research data. HR professionals will also often talk to the candidate's named references, verify information with the educational institutions included on the resume, and talk with former employers. If adverse information is found as a result of the criminal background check, 62 percent of SHRM respondents indicated they offer the candidate the opportunity to explain the circumstances surrounding the results *before* the job decision to hire or not hire is made.

Failure to conduct a criminal check can result in an unreasonable risk. One illustrative example of the risk employers and employees may face involved BP's efforts during the Gulf Oil Spill a few years ago. BP worked with state unemployment offices in Florida, Alabama, and Mississippi to fill thousands of positions to clean-up affected beaches. In this case, no criminal background checks were required—only drug tests. A BP contractor ended up hiring a supervisor who had a criminal history and had been placed on the national sex offender registry who, during his employment on a clean-up crew, allegedly raped one of the workers he supervised. As you can imagine, the media stories about the clean-up efforts quickly changed from kudos for the job opportunities provided to thousands of unemployed individuals to stories condemning the company for failing to protect the safety of other employees and the public by not performing a criminal background check on every clean-up employee hired.

We should also keep in mind the fact that employers must comply with legal restraints on how they obtain and use criminal history information. First, the federal Fair Credit Reporting Act (FCRA) specifically allows for the use of background checks for

“employment purposes.” Under the Act, an employer that uses a third-party provider in the background process must notify the potential employee in advance of the process and obtain the applicant’s written approval to have his or her background checked by the provider. An employer is also required to notify the applicant if the individual was not chosen because of information in the report.

In addition, the federal Equal Employment Opportunity Commission (EEOC) published updated guidance for employers to avoid discrimination when using criminal history information in April 2012. SHRM members were pleased to see that the guidance did not impose any new bright-line rules explicitly designed to prohibit employer access to and use of certain information. Instead, the Commission, in this guidance, continues to embrace use of the long-standing three-factor test identified by the case *Green v. Missouri Pacific Railroad Company* when evaluating criminal history. The *Green* factors are:

- (1) The nature or gravity of the offense or conduct;
- (2) The time elapsed since the conviction and/or completion of the sentence; and
- (3) The nature of the job sought or held.

These factors are familiar to HR professionals. Indeed, SHRM has not received significant negative feedback from its members about the guidance as a whole. HR professionals have long taken seriously the need to balance the rights of job applicants against the needs of the employer when criminal history information is considered.

Two specific aspects of the guidance, however, have been mentioned as areas of concern by SHRM and its members. First, our members have expressed concern and confusion about the statement in the guidance that compliance with state and local laws will not shield employers from liability under Title VII. Although we appreciate preemption, this provision places employers between a rock and a hard place—between losing their state license (or opening themselves up to liability) if they don’t comply with a state law mandating criminal background checks and risking a class action lawsuit if they go forward with criminal background checks and base hiring decisions on the results. State laws serve an important purpose—that of protecting certain segments of the population, often the most vulnerable—from harm. The laws themselves are often the result of devastating events that no one wants repeated.

We believe state law requirements can fit within the EEOC’s concept of a “targeted exclusion” based on the *Green* factors and specifically allowed for by the guidance. While our members have not reported any investigations brought against an employer resulting from this provision, the guidance raises the possibility and we are hopeful that the EEOC will clarify the validity of state law requirements as “targeted exclusions.”

Secondly, SHRM is concerned about the guidance’s interpretation of disparate impact. The guidance states, “National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.” It is not clear how imputing disparate impact based on national data can

be reconciled with the concept of the individualized assessment. Further, as written, it appears that employers may be vulnerable to EEOC investigation anytime they take an adverse employment action against individuals of certain races or national origins based on criminal background checks regardless of whether they have conducted a valid individualized assessment—seemingly making criminal convictions a new protected status. More specifically, under the guidance, assume an employer rejects one applicant and one applicant only for rape. The applicant is African American. It appears that the EEOC could allege adverse impact, even though only one applicant was adversely impacted. While I don't know the exact number necessary for there to be a large enough pool for adverse impact to exist, I know it is larger than one. SHRM believes this section should be clarified to help employers comply.

In conclusion, we believe that the EEOC's guidance serves an important societal interest and is generally consistent with long-standing case law. We do believe, however, that the two areas I have mentioned should be clarified for the benefit of employers, employees and third parties who do business with an employer.

Thank you for your invitation to participate in today's discussion, and I welcome the opportunity to answer any questions.

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## SPEAKERS' BIOGRAPHIES

### Alfred Blumstein

Alfred Blumstein is a University Professor and the J. Erik Jonsson Professor of Urban Systems and Operations Research and former Dean (from 1986 to 1993) at the H. John Heinz III College of Public Policy and Management of Carnegie Mellon University.

He has had extensive experience in both research and policy with the criminal justice system since serving the President's Commission on Law Enforcement and Administration of Justice in 1966-67 as Director of its Task Force on Science and Technology.

Dr. Blumstein was a member of the National Academy of Sciences Committee on Research on Law Enforcement and the Administration of Justice from its founding in 1975 until 1986. He served as Chairman of that Committee between 1979 and 1984, and has chaired the committee's panels on Research on Deterrent and Incapacitative Effects, on Sentencing Research, and on Research on Criminal Careers. He was a member of the Academy's Commission on Behavioral and Social Sciences and Education from 1994-2000. In 1998, he was elected to membership in the National Academy of Engineering.

On the policy side, Dr. Blumstein served from 1979 to 1990 as Chairman of the Pennsylvania Commission on Crime and Delinquency, the state's criminal justice planning agency. He served on the Pennsylvania Commission on Sentencing from 1986-96. He was recently appointed by US Attorney General Eric Holder as chair of the Science Advisory Board for the DoJ's Office of Justice Programs.

His degrees from Cornell University include a Bachelor of Engineering Physics and a Ph.D. in Operations Research. He was awarded an honorary degree of Doctor of Laws by the John Jay College of Criminal Justice of the City University of New York.

He was President of the Operations Research Society of America (ORSA) in 1977-78, he was awarded its Kimball Medal "for service to the profession and the society" in 1985, and its President's Award in 1993 "for service to society." He was president of the Institute of Management Sciences (TIMS) in 1987-88 and was President of the Institute for Operations Research and the Management Sciences (INFORMS) in 1996. He is a Fellow of the American Association for the Advancement of Science (AAAS), and INFORMS, and he served as President of COSSA (the Consortium of Social Science Associations) in 1998-2000.

Dr. Blumstein is a Fellow of the American Society of Criminology, was the 1987 recipient of the Society's Sutherland Award for "contributions to research," and was the president of the Society in 1991-92. At the 1998 meeting of the ASC, he was presented with the Wolfgang Award for Distinguished Achievement in Criminology. He was awarded the 2007 Stockholm Prize in Criminology.

His research over the past thirty years has covered many aspects of criminal-justice phenomena and policy, including crime measurement, criminal careers, sentencing, deterrence and incapacitation, prison population, demographic trends, juvenile violence, and drug policy.

## **Lucia Bone**

Lucia Bone, is the Founder of The Sue Weaver C.A.U.S.E., Consumer Awareness of Unsafe Service Employment, a nonprofit organization founded in memory of her murdered sister, Sue Weaver.

C.A.U.S.E. proactively keeps you and your family safe, one service worker at a time, by educating consumers and employers on the dangers of not knowing who you hire and the importance of proper annual criminal background checks on people working at our homes or with the vulnerable populations

C.A.U.S.E. Certification is a program designed to offer employers and consumers a means to hire safer workers. Consumers can search for C.A.U.S.E. Certified businesses by zip code and type of service for FREE at SueWeaverCAUSE.org. C.A.U.S.E. Certified businesses background screen employees annually following C.A.U.S.E. guidelines for your protection.

Nationally, Lucia shares her sister's murder, how to protect yourself and your business, the importance of proper background screening and C.A.U.S.E. Certification. She campaigns for state and federal legislation requiring proper background investigations on individuals entering consumers' homes or working with vulnerable populations. This type of consumer safety legislation should have saved her sister's life. Lucia has appeared on national television, magazines and newspapers, and written a published chapter for a Christian book.

## **Garen E. Dodge**

Garen Dodge is a Partner in the Washington, D.C. Region office of Jackson Lewis LLP. He is co-Leader of the firm's Government Relations practice, and coordinator of the firm's Government Contracts industry group.

Mr. Dodge's practice covers the spectrum of labor and employment litigation, including both state and federal claims involving labor; privacy; discrimination; background checks; harassment; wage and hour; and occupational safety and health. He assists companies in establishing workplace programs, and trains supervisors and employees on effective personnel policies. He represents clients before Congress and key federal agencies on labor and employment issues.

Mr. Dodge has been recognized by *Smart CEO* as one of its "Go To Lawyers" and by *Lawdragon* as a "Leading Lawyer. He has also been named a "Super Lawyer" in both Washington, D.C. and Virginia, and has long been "AV" rated by Martindale-Hubbell.

Mr. Dodge is a member of the Virginia, District of Columbia and Wisconsin bars. He is a Member of the United States Supreme Court bar, as well the federal and state courts in Virginia, District of Columbia and Wisconsin. He is a member of the Labor Relations Committee of the U.S. Chamber of Commerce, and serves on the Labor and Employment Litigation Steering Committee of the National Chamber Litigation Center. He is a law firm member of the Retail Litigation Center of the Retail Industry Leaders Association and serves as General Counsel to the Council for Employment Law Equity. He served as an Attorney-Advisor for the U.S. Department of Labor, Office of the Secretary, Benefits Review Board from 1982-1985.

Mr. Dodge received his B.A. *summa cum laude* from the University of Wisconsin – Green Bay in 1979. He earned his J.D. in 1982 from the College of William & Mary's Marshall-Wythe School of Law.

### **William A. Dombi**

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Director, Center for Health Care Law (CHCL)  
Executive Director, Home Care and Hospice Financial Managers Association (HHFMA)  
Executive Director, National Council on Medicaid Home Care

Bill Dombi specializes in legal, legislative, and regulatory advocacy on behalf of patients and providers of home health and hospice care. With over 37 years of experience in health care law and policy, Bill Dombi has been involved in virtually all legislative and regulatory efforts affecting home care and hospice since 1975, including the expansion of the Medicare home health benefit in 1980, the formation of the hospice benefit in 1983, the institution on Medicare PPS for home health in 2000, and the national health care reform legislation in 2010. With litigation, Dombi was lead counsel in the landmark lawsuit that reformed the Medicare home health services benefit, challenges to HMO home care cutbacks for high-tech home care patients, lawsuits against Medicaid programs for inadequate payment rates, a nationwide class action against then-HCFA for its failure to enforce the federal HMO Act, litigation directed against the "Interim Payment System" for the Medicare home health benefit, and a lawsuit addressing the so-called Medicare "case mix creep adjustments" in 2008-2010.

In addition to litigation, Bill offers extensive community and professional educational services through lectures, publications, teleconferences, and videos. He is the Editor and lead author of *Home Care & Hospice Law: A Handbook for Executives*, the only comprehensive legal treatise on the topic. His lectures include market trends in home care, compliance, risk management, patient rights, fraud and abuse, health care reimbursement, legislative and regulatory reforms, and legal issues in telehealth services.

Bill Dombi is admitted to practice in Connecticut and Washington, DC. He is also admitted to numerous federal courts including, the US Supreme Court and several Court of Appeals. He serves on the Advisory Board for BNA's *Medicare Report*. Bill also is a longstanding member of the American Health Lawyers Association and the American Bar Association.

## **Nick Fishman**

Nick Fishman co-founded EmployeeScreenIQ in 1999 and serves as the company's Chief Marketing Officer and Executive Vice President. Nick oversees all of EmployeeScreenIQ's marketing activities, including business development and brand building initiatives. Nick is the chief pioneer and architect of EmployeeScreen University, a first-of-its-kind online, educational learning resource for human resource, security and risk-management professionals. He is a frequent speaker on industry issues including: New Technologies in Employment Screening, Best Practices and Industry Trends. Nick is also a frequent blogger on the company's "IQ Blog", conducts regular podcast interviews with industry insiders and serves as editor of the company's quarterly newsletter, The Verifier.

Nick currently serves on the Communications Committee for the National Association of Professional Background Screeners (NAPBS) and has also served as the organization's co-chair of the Public Awareness Committee. Prior to his work with EmployeeScreenIQ, Nick helped Fortune 500 organizations build their brands through sports sponsorships including the Olympics, the National Football League, NASCAR and Major League Baseball. Nick holds a Bachelor of Arts in Political Science from The Ohio State University and has

extensive experience in the development of sales and marketing campaigns for both, large and small organizations.

### **Harry J. Holzer**

Harry J. Holzer is a Professor of Public Policy at Georgetown University and a Senior Fellow at the American Institute for Research in Washington DC. He is a former Chief Economist for the U.S. Department of Labor and a former Professor of Economics at Michigan State University. He received his A.B. from Harvard in 1978 and his Ph.D. in Economics from Harvard in 1983. He is a Senior Affiliate of the National Poverty Center at the University of Michigan and a Research Affiliate of the Institute for Research on Poverty at the University of Wisconsin-Madison. He is also a Nonresident Senior Fellow with the Brookings Metropolitan Policy Program, an Affiliated Scholar with the Urban Institute, and a member of the editorial board at the *Journal of Policy Analysis and Management*. Holzer has authored or edited 11 books and several dozen journal articles, mostly on disadvantaged American workers and their employers.

### **Richard S. Larson**

Richard S. Larson is President and Owner of Winning Work Teams, Inc. a Florida-based strategic Human Resources consulting firm supporting small to midsize companies throughout the United States.

Mr. Larson's focus is to bring creative HR business solutions to growing companies in order to build a strategic foundation that fosters sustained organizational improvement through strong legal compliance, talent development, employee engagement and leadership coaching.

Mr. Larson practiced law in Las Vegas, NV, before joining Universal Studios, Inc. in 1983 as Director of Human Resources. While at the Los Angeles entertainment company Mr. Larson initiated the organization's first executive development program and first employee assistance program. He also resolved numerous labor contract issues under industry-wide collective bargaining agreements.

In 1988, Mr. Larson was appointed Vice President of Administration for Universal Studios' Orlando, Florida, operations. As such, Mr. Larson was charged with the responsibility to lead and develop the Human Resources function as well as numerous other disciplines including Legal, Risk Management, Safety and Security. The key mission was the successful recruitment and training of 5,000 employees to ensure a world-class guest experience at the Universal Studios Florida theme park upon Grand Opening in 1990.

Mr. Larson continued in his executive leadership role directing HR activities to successfully support the recruitment and training of another 7,500 new employees to support the 1998 Grand Opening of CityWalk, a 30-acre nighttime attraction complex, and the 1999 Grand

Opening of Universal's Islands of Adventure theme park (current home of the Harry Potter attraction).

During Mr. Larson's 15-year tenure with the Universal Studios Resort in Orlando, Universal built strong community-based partnerships with key Central Florida stakeholders including schools, churches, seniors and the disabled to create a highly diverse workforce growing from 15 to 12,500 employees.

Mr. Larson joined the InterContinental Hotels Group family in 2004 as Senior Vice President People Services and Organizational Development at the Orlando, FL, Holiday Inn Family Suites complex to direct the Human Resources function in support of the branding efforts and the 2005 successful Grand Opening of the Nickelodeon Hotel as the world's first themed hotel designed for kids.

Mr. Larson subsequently joined the Florida law firm of Wicker, Smith, O'Hara, McCoy & Ford, P.A. as senior labor and employment counsel for the state-wide legal defense firm to handle employment litigation matters and conflict resolution.

Since 2008, Mr. Larson has been active with Winning Work Teams, Inc. to provide leadership direction and to deliver creative HR business solutions to companies throughout various market sectors--from medical to hospitality, from non-profit to retail to insurance.

Mr. Larson is highly active within the Central Florida community as a public speaker on topical employment issues. He also teaches Society for Human Resources Management ("SHRM") certification classes to rising HR professionals through the University of Central Florida. Mr. Larson is also an active speaker for the Florida Bar Speakers' Bureau. He is also an active member of the Florida Bar and Nevada Bar.

Mr. Larson dedicates time to his local Rotary Club and its community service projects in Orlando, FL, where he continues to make his home.

Mr. Larson earned a double major with a B.A. degree in Political Science and Geography from the University of California, Davis. He then earned a M.J. degree from the University of California, Berkeley. Subsequently, he earned his J.D. in two years from Southwestern University School of Law, Los Angeles, CA, where he was Associate Editor on the Law Review. Mr. Larson may be reached at (321) 438-3392 or at [www.winningworkteams.com](http://www.winningworkteams.com)

## **Donald R. Livingston**

Donald R. Livingston is a partner in the Washington, D.C. office of Akin Gump Strauss Hauer & Feld, where he represents large employers in all aspects of civil rights and employment discrimination law, with an emphasis on complex employment litigation.

Mr. Livingston is a former general counsel of the U.S. Equal Employment Opportunity Commission serving in the administration of President George H. W. Bush, where he was

responsible for the federal government's enforcement of Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

He is a member of District of Columbia, Georgia, and American Bar Associations, and serves on the ABA's EEO Committee. He is a former chair of the Labor and Employment Law Section of the State Bar of Georgia.

Mr. Livingston is the author of *EEOC Litigation and Charge Resolution* (BNA 2004), a treatise covering all aspects of attorney interactions with the EEOC. In addition, he has written numerous articles and spoken extensively on employment discrimination. He has provided testimony before Congress on pending legislation and before the EEOC on pending enforcement guidance.

In 2003, Mr. Livingston was elected to the College of Labor and Employment Lawyers, which he has served as chair of the credentials' committee for the District of Columbia Circuit.

## **Glenn E. Martin**

Glenn E. Martin, born and raised in Bedford Stuyvesant, Brooklyn, NY. He is the son of a retired police officer, brother of a federal correction officer and was formerly incarcerated himself. Today, Martin has risen to the role of Vice President of Development and Public Affairs and Director of the David Rothenberg Center for Public Policy at The Fortune Society, Inc., a social service and advocacy organization devoted to the successful reentry and reintegration of individuals with criminal histories.

In his current role roles, Martin is responsible for developing and advancing Fortune's criminal justice policy advocacy agenda and providing leadership over the agency's Development and Communication Units. After exiting prison in 2000, Martin began working at the Legal Action Center (LAC), eventually serving as the Co-Director of LAC's National H.I.R.E. Network (HIRE), a national project dedicated to eliminating barriers to employment for jobseekers with criminal records. For Martin, his work is an authentic extension of his life.

Martin has drafted and advanced major legislation to remove barriers to employment in six states, co-authored the Independent Committee on Reentry and Employment transition document for former NYS Governor Spitzer, and served as project manager on the largest audit study ever conducted in the US on race and criminal record based discrimination in low-wage labor markets.

Additionally, Martin has written and advanced legislation and policy reform proposals in a number of states to remove barriers to employment, housing, education and voting for formerly incarcerated people. Specifically, Martin advocated to the US EEOC for the recently adopted US EEOC Title 7 Guidance on Jobseekers with Arrests and Conviction

records. In 2012, he served as keynote speaker at the Department of Justice's Annual COPS Conference.

Knowing both sides of the justice system has made Martin extremely well versed in the issues. Martin has appeared on several national news outlets, including CNN, MSNBC and CSPAN. He has also served as an expert on local television and radio, contributing on the controversial issue of Stop and Frisk, as well as a number of other topics such as policing, alternatives to incarceration and reentry issues. In addition to television appearances, Martin hosts a NYC-based cable television show, *Both Sides of the Bars*, where he engages criminal justice stakeholders and the local community in conversations about criminal justice reform.

Mr. Martin is currently a 2011-2012 Americas Leaders of Change National Urban Fellow and a member of the Board of the NY Foundation. He also currently serves on NYC Community Board #10, the NYC Council Task Force to End Gun Violence, NYC Mayor Bloomberg's Ban the Box Advisory Board, Governor Cuomo's Executive *Work for Success* Committee, NYS Executive Reentry Housing Committee, NYS Reentry Task Force, National Network for Safe Communities, the DCJS Service Provider Advisory Committee (SPAC), the Steering Committee of Reentry.net, the Correction Committee of the NYC Bar Association (*adjunct*), the Policy Committee of Interfaith Coalition of Advocates for Reentry and Employment (ICARE), the Employment Working Group of the NYC Discharge Planning Initiative, the Board of Directors of the College and Community Fellowship and a number of other boards and working groups addressing issues related to the reintegration of people with criminal records.

#### **WORK AUTHORED:**

To Build a Better Criminal Justice System: 25 Experts Envision the Next 25 Years of Reform: Marching Upstream, Moving Beyond Reentry Mania, The Sentencing Project (2012).

Locking Down Civil Rights: Criminal Record-based Discrimination: Journal on Race/Ethnicity: Multidisciplinary Global Contexts. Ohio State University (2008).

Co-authored the Independent Committee on Reentry and Employment Report, which offered recommendations to the new gubernatorial administration to address criminal-record barriers to labor market participation facing jobseekers with records (2006).

Co-authored HIRE's Know Your Rights manual, a document created to help people with criminal records and those who work with them to understand juvenile and criminal records and their impact on employment (2005).

Authored revision of 2003 version of client manual How to Get and Clean Up Your New York State Rap Sheet (2003).

**AWARDS:**

*Hudson Link for College in Prison Brian Fischer Award (2010)*  
*United States Probation Office of Southern Ohio Achievement Award (2010)*  
*Exodus Transitional Community: Lonny McLeod Award (2009)*  
*United States Probation Outstanding Commitment Award (2009)*  
*Project Build Organization Community Reintegration Programs Award (2009)*  
*The Laurie L. Scott Visionary Award (2008)*  
*Kings County District Attorney Citation of Honor (2008)*  
*National Offender Workforce Development Annual Policy Advocacy Award Winner (2007)*  
*Citizens Against Recidivism Thurgood Marshall Advocacy Award (2007)*

**AFFILIATIONS**

- National Transition from Jail to Community Initiative (TLC), Advisory Board Member
- NYC Mayor's 'Ban the Box' Advisory Workgroup
- College and Community Fellowship - Board of Directors, Member
- Americas Leaders of Change National Urban Fellow 2011-2012 Cohort Member
- NYC Discharge Planning Initiative Employment Working Group - Member and Former Chair
- NYC Council Task Force on Gun Violence, Member
- Reentry.Net - Steering Committee, Former Member
- NYC Department of Probation Collateral Consequences Improvement Team, Former Member
- NYC Community Board 10, Member
- NYC Bar Association - Correction Committee, Adjunct Member
- Interfaith Coalition of Advocates for Reentry and Employment - Policy Committee, Former Member
- National Reentry Resource Center- Committee on Families and Communities, Former Chair
- National Parole Resource Center - Steering Committee, Member
- NYS Service Provider - Advisory Council
- Voter Enfranchisement Project - Advisory Board, Former Member
- Career Gear Board of Directors - Former Member
- TCI Human Services Council – Member
- NY Foundation - Board of Directors, Member

**MEDIA APPEARANCES/ CLIPS**

MSNBC: The School to Prison Pipeline  
<http://video.msnbc.msn.com/melissa-harris-perry/48184011#48184011>

MSNBC: Prison Nation  
<http://video.msnbc.msn.com/melissa-harris-perry/48952584#48952584>

C SPAN: Criminal Justice and African Americans

<http://www.c-spanvideo.org/program/305391-2/>

WPIX: Crime in New York City

<http://www.wpix.com/videogallery/70505878/News/News-Closeup-6-17-Segment-1>

<http://www.wpix.com/videogallery/70505393/News/News-Closeup-6-17-Segment-2>

<http://www.wpix.com/videobeta/f411441b-8d1c-4efc-a3f3-b8c7a1612b5d/News/News-Closeup-6-17-Segment-3>

NY1: Stop and Frisk

[http://www.ny1.com/content/top\\_stories/166055/number-of-nypd-stop-and-frisks-plummets-stats-show](http://www.ny1.com/content/top_stories/166055/number-of-nypd-stop-and-frisks-plummets-stats-show)

[http://www.ny1.com/content/news\\_beats/ny1\\_political\\_itch/161478/ny1-itch--quinn-gets-ready-as-kelly-tweaks-a-policy](http://www.ny1.com/content/news_beats/ny1_political_itch/161478/ny1-itch--quinn-gets-ready-as-kelly-tweaks-a-policy)

NEW YORK TIMES LETTER TO THE EDITOR

<http://www.nytimes.com/2012/06/14/opinion/the-problems-with-stop-and-frisk.html>

HUFFINGTON POST

[http://www.huffingtonpost.com/2012/04/11/trayvon-martin-eric-holder\\_n\\_1418003.html](http://www.huffingtonpost.com/2012/04/11/trayvon-martin-eric-holder_n_1418003.html)

## **Todd McCracken**

Todd McCracken currently serves as president of National Small Business Association (NSBA), directing all activities of the advocacy-oriented association. Mr. McCracken became president of NSBA in 1997. Mr. McCracken started with the association in 1988, previously serving as vice president of government affairs.

Mr. McCracken is a registered lobbyist before the U.S. Congress, representing the organization in myriad settings. As director of its government affairs arm, Mr. McCracken played a key role in developing NSBA's policies on issues and the strategies in implementing them. Since coming to the association, Mr. McCracken has testified before Congress numerous times about issues ranging from fundamental health care reform to tax code restructuring.

Mr. McCracken also is a frequent commentator in the media, having appeared on CNN, CNBC, Fox News Channel, MSNBC, CBS Evening News, and NBC Nightly News as well as in the *Financial Times*, *USA Today*, *The Wall Street Journal*, *The Washington Post*, *The New York Times*, and myriad other publications.

As a non-partisan organization, NSBA works proactively with elected and administration officials to promote policies that support small business growth and development. NSBA is the nation's oldest small business organization. It was founded in 1937.

A native of New Mexico, Mr. McCracken is a graduate of Trinity University in San Antonio, Texas, with a B.A. in Economics.

### **Richard T. Mellor**

Richard Mellor serves as Vice President, Loss Prevention for the National Retail Federation. Mellor joined NRF in November 2011 and is responsible for the direction of initiatives ranging from NRF's Annual Loss Prevention Conference and LP Advisory Council to NRF's Investigator's Network. He works to raise the visibility of retail loss prevention issues, including organized retail crime and return fraud.

Prior to joining NRF, Mellor served as an executive with companies such as Helzberg Diamonds, Macy's, Woodward & Lothrop and John Wanamaker. He spent 12 years with Helzberg Diamonds, having most recently served as Divisional Vice President of Loss Prevention. Previously, Mellor was Divisional Vice President of Loss Prevention and Security for The Bon-Ton Stores and Regional Director of Security for Macy's East.

In 2005, Mellor was awarded NRF's Silver Plaque, which recognizes his leadership and influence on the retail LP community. He has been an active member of the NRF LP Advisory Council for more than 20 years, which includes his tenure as Chairman of the Council from 2002 to 2005.

### **Roberta Meyers**

Roberta Meyers, Director of the Legal Action Center's National H.I.R.E. (Helping Individuals with criminal records Reenter through Employment) Network.

Roberta has worked at the Legal Action Center for 20 years in various capacities and has been a staff member of the National H.I.R.E. Network project since its inception, serving as field educator and organizer, co-deputy director, co-director, and as of October 2007 as director. She works directly with policy makers and advocates around the country to identify public policy priorities that directly affect employment opportunities for people with criminal records and helps develop appropriate advocacy strategies that strengthen or challenge existing legislation in those states. She has accepted invitations to present at dozens of national, regional, and local criminal justice and workforce development conferences around the country. She has been called to testify before Congress and state legislators around the country.

Roberta was a contributing author for the U.S. Department of Labor guidebook, *Working Ahead: A Guide for Connecting Youth Offenders with Employment Opportunities* (July 2004), author of the "Completing Employment Applications" section of Legal Action Center's *How to Get and Clean Up Your New York State Rap Sheet*, author of SAMHSA's monograph *Serving the Employment Needs of Justice-Involved Juveniles and Adults: A Primer for Treatment and Recovery Support Service Providers* (May 2008), co-author of the

*National Reentry Blueprint: Model policies to promote the successful reentry of individuals with criminal records through employment and education* (October 2008), and contributor to *Closing the Doors to Higher Education: Another Collateral Consequence for a Conviction* (Dec. 2008). She has served as an advisor on publications and White Papers issued by the National Governors Association, U.S. Department of Health and Human Services, NYS Department of Labor, and by many state, regional, and national organizations.

Roberta has a Bachelor of Science degree in Business, Management, and Economics with a concentration in Management from the State University of New York/Empire State College and she is candidate for a Master of Science in Public Leadership and Public Administration at Capella University. She serves on the Board of Directors of Youth Represent, steering committee member of the National Transitional Jobs Network, and as an Advisory Board member of the National Reentry Resource Center that was authorized under the Second Chance Act, the National Alliance on Mental Illness Veterans and Military Council, and on various projects of the American Bar Association.

### **Carol R. Miaskoff**

Carol R. Miaskoff is Acting Associate Legal Counsel in the EEOC's Office of Legal Counsel, where she supervises development of policy and regulations implementing Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Equal Pay Act. During her career at the EEOC, Ms. Miaskoff participated in the EEOC's response to employment discrimination following the September 11<sup>th</sup> attacks, rulemakings under the ADEA and the Rehabilitation Act, issues related to online job applicants, and development of guidance on criminal record exclusions. She also led the Coordination Division of the Office of Legal Counsel, negotiating with other federal agencies to maximize the consistency of their workplace rules with the federal EEO laws.

Ms. Miaskoff served on the EEOC's Equal Pay Working Group and represented the Commission on the American Bar Association's Fair Labor Standards Committee from 2008 - 2011. She speaks regularly to labor and employment groups.

### **Montserrat Miller**

Montserrat Miller is a Partner with Arnall Golden Gregory LLP's Privacy and Immigration Practice Groups and co-chair of the firm's Diversity Committee. Ms. Miller is Washington Counsel to the National Association of Professional Background Screeners (NAPBS), a trade association representing screening professionals involved in employment and tenant background screening.

Ms. Miller focuses her practice on compliance, risk mitigation and governmental policy-related issues related to clients' workforce. Her practice includes a focus on background screening and employment-related issues and she works with consumer reporting agencies

and employers regarding compliance with the Fair Credit Reporting Act, equal employment opportunity laws as well as state consumer protection laws.

In addition to private practice experience, Ms. Miller worked in the U.S. Senate as Judiciary Committee Counsel to Senator Dianne Feinstein, advising her on immigration, homeland security, and data privacy and security matters. She began her legal career as a trial attorney for the U.S. Department of Justice, Immigration and Naturalization Service, entering service through the Attorney General's Honors Program.

## **Julie Payne**

Julie Payne is the Chief Legal Officer of G4S's Americas Region, providing legal guidance and oversight to G4S companies operating from Canada to Chile, and is also the General Counsel of G4S Secure Solutions (USA) Inc., the largest operating business unit of G4S in the U.S. Julie joined G4S in 2005 as Senior Vice President and General Counsel and is currently responsible for the provision of all legal services to the Americas Region business units and all risk and claims management in the United States.

Prior to joining G4S, Julie held the position of Senior Counsel for Bayer CropScience LLP. Additionally, Julie has worked for Barton Protective Services, Inc. as Vice President and General Counsel, and as an Attorney for APAC, Inc., a large construction subsidiary of Ashland Inc.

Julie holds two degrees from the University of Kentucky, where she earned a Juris Doctor. She is a member of The Georgia Bar and certified as Authorized House Counsel by The Florida Bar. She also serves on the Board of Directors for NASCO, the nation's largest contract security industry association. In addition, Julie serves on the Board of Directors for the Literacy Coalition of Palm Beach County.

## **Jeffrey L. Sedgwick**

Jeffrey L. Sedgwick was appointed on January 2008 by President George W. Bush to serve as Assistant Attorney General for the Office of Justice Programs; he was confirmed by the Senate of the United States in October 2008 and served until January 2009. In this capacity, Mr. Sedgwick was responsible for providing overall management and oversight of OJP, whose mission is to enlarge the nation's capacity to prevent and control crime, improve the criminal and juvenile justice systems, increase knowledge about crime and related issues, and assist crime victims.

He also both guided the development of OJP policy and priorities and coordinated the activities of its bureaus and offices. As Attorney General, Sedgwick oversaw OJP activities related to major Bush Administration and Department of Justice initiatives, including Project Safe Neighborhoods, Project Safe Childhood, the President's DNA Initiative, the Prisoner Reentry Initiative, and Helping America's Youth.

Mr. Sedgwick also served until October 2008 as director of the Bureau of Justice Statistics, the statistical agency of the Department of Justice, a position to which he was appointed by President George W. Bush in January 2006. He was confirmed by the United States Senate in March 2006. In this capacity, Mr. Sedgwick guided the collection, analysis, publication, and dissemination of information on crime, criminal offenders, victims of crime, and the operation of justice systems at all levels of government.

He was responsible for approximately 48 distinct statistical collections together comprising the official national statistics on all aspects of the criminal justice system. These data are critical to federal, state, and local policymakers in combating crime and ensuring that justice is both efficient and evenhanded.

Prior to his appointment, Mr. Sedgwick taught for 30 years at the University of Massachusetts - Amherst. He is currently Professor Emeritus of Political Science at the University. In his academic career, Mr. Sedgwick has taught and written on a variety of aspects of American Government including public finance, policy analysis and evaluation, criminal justice policy, and executive leadership. He is the author of *Law Enforcement Planning: the Limits of an Economic Approach* and *Detering Criminals: Policymaking and the American Political Tradition*.

Mr. Sedgwick has directed or participated in a wide variety of international programs in the past decade including lecturing or teaching in countries as diverse as Kyrgyzstan, Armenia, Romania, Ukraine, Russia, Belgium, Germany and Trinidad/Tobago.

Mr. Sedgwick earned his A.B. from Kenyon College (1973) and his M.A.P.A. and Ph.D. from the University of Virginia (1975 and 1978 respectively). Mr. Sedgwick and his wife, Patricia Young Sedgwick, have two adult children: son Alexander of Manhattan, New York and daughter Hilary of Philadelphia, Pennsylvania.

### **Jonathan A. Segal**

- Jonathan A. Segal is a partner at Duane Morris LLP in the Employment, Labor, Benefits and Immigration Practice Group.
- Jonathan is also the Managing Principal of the Duane Morris Institute. An accredited HRCI provider, The Duane Morris Institute provides seminars and webinars on employment, labor, immigration and benefits issues.
- Previously a litigator, Jonathan's practice now focuses entirely on preventive counseling, strategic planning, management training and policy development.
- Areas of focus include: equal employment opportunity; wage and hour compliance; glass ceiling issues; performance management; social media.

- Jonathan has provided training to federal and state judges across the country on gender bias, performance management and other employment issues.
- Jonathan also has provided employment training to HR professionals in various intelligence agencies.
- Jonathan has been cited as a national authority on employment issues in articles in The Wall Street Journal, The New York Times, Fortune, The Los Angeles Times, The Washington Post, CNN, Business Week and Money, among others.
- Jonathan has published approximately 200 articles for various publications on employment issues.
- Jonathan is a contributing editor to HRMagazine and a regular contributor to Fortune/CNN.
- Jonathan received his B.A., summa cum laude, from the University of Pennsylvania and his J.D., cum laude, from the University of Pennsylvania School of Law.

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## COMMISSIONERS' STATEMENTS

### Statement of Chairman Martin R. Castro

“We could choose to be a nation that extends care, compassion, and concern to those who are locked up and locked out or headed for prison before they are old enough to vote. We could seek for them the same opportunities we seek for our own children; we could treat them like one of ‘us.’ We could do that. Or we can choose to be a nation that shames and blames its most vulnerable, affixes badges of dishonor upon them at young ages, and then relegates them to a permanent second-class status for life. That is the path we have chosen, and it leads to a familiar place.”

— Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*

I believe that the unfettered practice of conducting criminal background checks, which disproportionately impacts-- some would say “targets-- African-Americans and Latinos, has the effect of not only denying those former offenders a job, but serves to increase recidivism and perpetuates a cycle of poverty, second-class citizenship and dishonor for them, for their families and their communities. We must give these former offenders a chance to break that vicious cycle. The Equal Employment Opportunity Commission (hereafter “EEOC”) Guidelines do not eradicate the use of criminal background checks across the board, but they do away with across the board relegation of former offenders to the scrap heap of our society as it sets forth reasonable guidelines on how criminal background checks should be used to minimize discriminatory impact on minorities.

I vividly recall going door-to-door when I ran for U.S. Congress a dozen years ago. In speaking with potential voters on a warm summer night, I encountered a young Latino man sitting on the stairs of his “apartment,” which was just an old store front converted into living space for himself, his wife and toddler. While his wife was the only registered voter at that address, she was busy in the apartment, so I struck up a conversation with the young man. He lamented to me that he had recently returned from prison and was earnestly looking for a job in order to support his family. However, everywhere he tried to apply for a job, he was not given a chance to apply due to his criminal history. While he planned to continue the job search, he was fearful that the consistent bar on his employment due to his status as a former offender would leave him no choice but to return to a life of crime in order to provide for his family. He was clearly pained about this prospect, and I was frustrated because there was nothing I could do to assure him that things would work out, or that I could even do anything to help him overcome the circumstances he was encountering as he was trying to do the right thing and make an honest living for himself and his family.

While I never saw him again, I often think about him and what may have happened to him and his family. Did he find a job or did potential employers cast him away after potential employer, and eventually end up a statistic on the chart of recidivism? Based on the written public comments received by the Commission from ex-offenders, they continue to be

routinely rejected out of hand by employers as a result of their former offenses. Well, perhaps now, as Chairman of the United States Commission on Civil Rights, I can do something to help make a difference for that man I met while campaigning and for those countless, similarly situated others in communities of color across the nation, who are disproportionately impacted by laws and practices that have the effect of perpetuating a cycle of poverty and crime. For that, and other reasons, I stand in full support of the EEOC's 2012 Guidance on the Use of Criminal Background Histories.

Based on the testimony we received during the course of our briefing, I support the following conclusions:

1. Since at least 1972, the EEOC has asserted that disparate impact theory drawn from the *Griggs*<sup>1</sup> decision forbids the blanket exclusion by an employer of all applicants with criminal histories;
2. The EEOC does not prohibit or restrict employers from asking for or obtaining background histories<sup>2</sup>;
3. The 2012 Guidance states categorically that any employer policy disfavoring persons with criminal records disproportionately affects racial and ethnic minorities, particularly blacks or Hispanics with criminal records nationwide.<sup>3</sup> It bases this declaration on data from the U.S. Department of Justice's Bureau of Justice Statistics showing nationwide conviction rates of blacks and Hispanics<sup>4</sup> disproportionately higher than their representation in the general population of the United States;
4. Based on its statistical information, the EEOC regards as likely disparate impact any exclusion of a black or Hispanic job applicant or employee with a criminal record. This would hold true regardless of the type of crime, the type of job, the location, or the nature of the employer's business, unless the employer uses what the EEOC considers a narrowly drawn or "targeted" screen that does not exclude all persons with criminal records, or enquires into the details of each applicant's history to determine suitability and establishes a rationale that is consistent with business necessity<sup>5</sup>;
5. The new guidance does not forbid or restrict employers from obtaining background checks<sup>6</sup>;
6. The 2012 Guidance is couched largely in a series of factual examples followed by "best practices," rather than commands<sup>7</sup>;

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<sup>1</sup> U.S. COMMISSION ON CIVIL RIGHTS, "Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Record Policy," page 4, citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>2</sup> *Id.* at 4-5.

<sup>3</sup> *Id.* at 7.

<sup>4</sup> *Id.* (The Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 2012 Guidance at 10 uses the phrase "race and national origin.").

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Id.*

7. The 2012 Guidance suggests that elapsed crime-free time subsequent to the offense offers an objective metric supporting the EEOC's view that automatically excluding former offenders from employment is unwarranted and illegal<sup>8</sup>;
8. Advocates for ex-offenders expressed the concern that former offenders are never given a chance to make their case to an employer because they are usually turned down immediately with no further explanation<sup>9</sup>;
9. Minority ex-offenders are hired less often, compared to non-minorities with the same criminal record<sup>10</sup>; and
10. "Redemption," as they call it, is the theory, supported by their studies, that as a certain number of years pass with no further convictions, an ex-offender rapidly approaches the risk level of someone with no record of convictions.<sup>11</sup>

As a result of the above conclusions from the testimony we received, I find it very hard to believe that increased or across the board use of criminal background checks actually helps, rather than hurts the employment of minority ex-offenders. Such a conclusion by conservative commentators is not supported by the weight of reality. In my personal experience these are not merely statistics, but real, and often shattered lives, which cannot be repaired because we have chosen to be a society, as Michelle Alexander says, that "shames and blames its most vulnerable, affixes badges of dishonor." We must change this, not just for the benefit of these ex-offenders, but for all of our benefit, so that we can become a society that redeems rather re-damns those who have erred and who are seeking a second chance.

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<sup>8</sup> *Id.* at 11.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 5.

## Statement of Commissioner Peter N. Kirsanow, Joined by Vice Chair Thernstrom and Commissioner Gaziano

### Introduction

In April 2012, the EEOC issued new policy guidance regarding hiring people with criminal records.<sup>1</sup> Although the EEOC presents this guidance as a mere refinement of the previous guidance, the EEOC's triumphalism accompanying the new guidance suggests otherwise.

The Guidance is deeply flawed. It exceeds the EEOC's authority and was adopted without releasing a draft to the public. The foundation of the Guidance is flawed, because it misapplies disparate impact theory by failing to appropriately compare non-offenders to offenders, and by conflating arrestees with convicts. The Guidance is too difficult for a layperson to effectively apply to their hiring process, and the individualized assessment reintroduces the prospect of disparate treatment into the hiring process. In discouraging the use of criminal background checks through the complexity of the Guidance and the fear that a little knowledge can be a dangerous thing when your friendly neighborhood EEOC investigator comes calling, the EEOC leaves employers exposed to negligent hiring lawsuits. Perhaps more importantly, discouraging the use of criminal background checks leaves Americans more likely to fall victim to the behavior that leads to negligent hiring lawsuits. And unfortunately, the Guidance is unlikely to increase employment among African-American men, who are the primary purported beneficiaries.

#### **I. The Guidance is Premised on a Misapplication of Disparate Impact Theory.**

##### **a. The EEOC Misapplied Disparate Impact Theory by Comparing Ex-Offenders to Non-Offenders.**

The Guidance is based on the EEOC's pet theory, disparate impact. The Supreme Court first recognized this theory in the 1971 case *Griggs v. Duke Power*, and Congress incorporated the theory into the Civil Rights Act of 1991. We have in other contexts discussed the constitutional problems with disparate impact theory.<sup>2</sup> Setting aside the constitutional problems, a problem remains: the Guidance does not satisfy the standards for disparate impact established in *Griggs*.

In *Griggs*, employees who wanted to transfer into certain positions were required either to possess a high school diploma or achieve a certain score on an intelligence test. However, the high school diploma requirement had been instituted in 1955, and therefore, at

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<sup>1</sup> Equal Employ. Opp'ty Comm., ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 [hereinafter "Guidance"].

<sup>2</sup> See Brief for Gail Heriot, Peter Kirsanow, and Todd Gaziano as Amici Curiae Supporting Petitioner, *Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507 (2013).

the time of trial there were still employees working at the power plant who had been promoted into these positions before the requirement was introduced. These employees performed satisfactorily in those roles and had even been promoted from their initial positions.<sup>3</sup> Because there were successful employees who did not meet the high school diploma requirement, the Court found that these requirements were not job-related and therefore violated Title VII because of the disparate impact on minority workers.<sup>4</sup>

As debatable as the Court's decision may have been in regard to interpreting Title VII,<sup>5</sup> at least the Court had some evidence on which to base its claim that the education and testing requirements were not job-related. No such evidence was available on which the EEOC could base its new guidance.<sup>6</sup> Furthermore, the EEOC massages the available social science to suggest that there is no way to tell which offenders may be high-volume offenders, which contradicts the available research.<sup>7</sup>

Therefore, the EEOC completely abandoned this aspect of the *Griggs* decision in formulating the Guidance. The EEOC adduced no evidence regarding whether people with criminal records are better, comparable, or worse employees than people without criminal records.<sup>8</sup> The EEOC's representative, Carol Miaskoff, admitted this at the Commission's hearing.<sup>9</sup> Without such data, the EEOC cannot determine whether a criminal history is in fact immaterial when predicting an applicant's job performance. Furthermore, the EEOC fails to

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<sup>3</sup> *Griggs v. Duke Power*, 401 US 424, 427, 432, note 7 (1971).

The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used. The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. . . . For example, between July 2, 1965, and November 14, 1966, the percentage of white employees who were promoted but who were not high school graduates was nearly identical to the percentage of nongraduates in the entire white work force.

<sup>4</sup> *Id.* at 432-436.

<sup>5</sup> See Brief for Heriot et al., *supra* note 2.

<sup>6</sup> Guidance at 13 ("Although there may be social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications, and thereby provide a framework for validating some employment exclusions, such studies are rare at the time of this drafting.").

<sup>7</sup> See *infra* at 3-6.

<sup>8</sup> See Guidance at note 14. The Guidance relies upon a study of New Zealand youths that found that adolescent criminal convictions did not predict counterproductive work behaviors in adulthood, see Brent W. Roberts et al., *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 J. APP. PSYCHOL. 1427, 1430 (2007). This study is not terribly useful because criminal behavior in adolescence is quite common, but most people desist during or shortly after adolescence, see John H. Laub and Robert H. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUSTICE 1, 6 (2001) ("based on the available data, desistance occurs most often during and after adolescence. Based on the evidence, desistance is normative for most offenders."). If indeed "it is statistically aberrant to refrain from crime during adolescence," *id.* (citation omitted), it is unsurprising that adolescent criminal convictions in and of themselves do not predict the presence of counterproductive work behaviors in adulthood. See also Alfred Blumstein and Jacqueline Cohen, *Characterizing Criminal Careers*, 237 SCIENCE 985, 989 (1987) (there is a "rapid buildup of participation [in crime] in the early teen years, followed by steady termination of criminal careers in the later teen years and early 20s.").

<sup>9</sup> Report at 47-48.

consider that even if an employee who is an ex-offender does not exhibit so-called counterproductive work behaviors, if he recidivates it will cost the company money and manpower. The likelihood that a particular employee will be arrested and therefore unable to come to work is a legitimate business concern, and one that social science can predict with some accuracy.<sup>10</sup> This undercuts the EEOC's use of disparate impact theory as applied to criminal records. If a criminal history is a meaningful predictor of an applicant's job performance, then employer use of criminal history is job-related and consistent with business necessity, and whether or not its use has a disparate impact on minorities is substantially irrelevant.

The question is whether applicants with criminal records, particularly those who have been incarcerated, differ in important ways from applicants who do not have criminal records. We already know that former inmates differ in one important way: they have been incarcerated. The importance of that fact should not be overlooked. The EEOC's Guidance states that the percentage of Americans who have been incarcerated may reach 6.6%.<sup>11</sup> That means that 93.4% of Americans never serve time in prison. Based on the Guidance, you would think every other person you see on the street has been incarcerated. That simply is not the case. Spending time in prison does set you apart from the vast majority of Americans.

The question the EEOC does not answer is whether ex-inmates differ from non-offenders in other ways that are relevant to employment. For example, is ex-inmate status correlated with a lack of respect for authority as compared to the 93.4% of Americans who do not have a criminal record? Almost all Americans have wittingly or unwittingly broken a law at some point—trespassing, speeding, failing to report all their tips on their taxes. Yet the overwhelming majority sufficiently conform their behavior to the requirements of the law to avoid prison time. As Steven Raphael writes, “Those who serve time in U.S. prisons are hardly a random sample of the U.S. population. Individuals who pass through the nation's prisons tend to come from poverty, [and] suffer disproportionately from physical and mental health problems, as well as substance abuse problems,”<sup>12</sup> all of which may cause employers to doubt an ex-offender's reliability and ability to work well with others.<sup>13</sup> The EEOC addresses none of these issues and blithely assumes that ex-offenders as a group do not differ significantly from the non-offender population.

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<sup>10</sup> See Alfred Blumstein et al., *Delinquency Careers: Innocents, Desisters, and Persisters*, 6 CRIME AND JUSTICE 187 (1985) (stating that at least a third of cohort members from multiple delinquency studies are arrested, but most have only one or a few contacts with the justice system; however, if a cohort member has six or more contacts with the criminal justice system the probability of recidivism is eighty percent); see also Blumstein and Cohen, *supra* note 7 (“common belief suggests that offenders are about to terminate their criminal careers by age 30 . . . however, it becomes clear that among those offenders who do remain active, mean residual careers length actually rises until about age 30, is fairly flat through the 30s, and then begins to decline rapidly in the early 40s”).

<sup>11</sup> Guidance at note 9.

<sup>12</sup> Steven Raphael, *Improving Employment Prospects for Former Prison Inmates: Challenges and Policy* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 15874, 2010), available at <http://www.nber.org/papers/w15874>.

<sup>13</sup> The Americans with Disabilities Act and similar state laws sometimes prevent employers from taking into account an employee's physical or mental health problems. We mention untreated substance abuse as a factor that can affect an employee's reliability.

**b. The EEOC Misapplied Disparate Impact Theory by Conflating Arrestees with Ex-Prisoners.**

An additional problem with the EEOC's failure to accurately compare ex-offenders with non-offenders is that the EEOC misapplies the scholarly research that is available regarding redemption and recidivism. The Guidance is primarily concerned with problems surrounding the reentry of ex-offenders following incarceration.<sup>14</sup> However, all but one of the works they cite on redemption only examine arrest records<sup>15</sup> – and the one paper that examines people convicted of crimes is far less sanguine regarding speedy desistance.<sup>16</sup> For example, Blumstein and Nakamura specifically state that they studied first-time arrestees who had been arrested for robbery, burglary, or sexual assault. These criteria were adopted in part to avoid arrestees who would be sentenced to imprisonment.<sup>17</sup> First-time arrestees and ex-prisoners are simply not comparable. Blumstein and Nakamura cite a 1967 study that “estimated that 50 percent of the U.S. male population would be arrested for a nontraffic offense in their lifetime.”<sup>18</sup> Yet the EEOC cites an FBI estimate that at some point in the future, 6.6 percent of Americans may have experienced incarceration. The 50 percent of the population that is ever arrested likely differs substantially from the 6.6 percent of the population that is ever incarcerated, yet the EEOC is basing a policy intended to help the latter group on research conducted on the former group.

Ex-convicts, especially ex-prisoners, are very unlike first-time arrestees, yet the Guidance conflates the two groups. The research regarding first-time arrestees tells us little about the possibility of future offending by people who have been convicted of crimes. In fact, the only study used by the EEOC that examined people convicted of crimes found that 10-13 years must elapse before first-time offenders aged 12-26 are a re-conviction risk comparable to their nonoffending peers, which is a significantly longer period of time than that seemingly contemplated by the Guidance.<sup>19</sup> The risk of recidivism for first-time offenders declines sharply with increased age, but this is due to the fact that 40-year-old first-time offenders are “almost indistinguishable from the general population.”<sup>20</sup> If someone hasn't embarked on a criminal career before age 40, they are unlikely to do so.

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<sup>14</sup> Guidance at 3 (focusing on percentage of Americans in various ethnic groups who are ever incarcerated); Guidance at note 16 (discussing Cabinet-level interagency Reentry Council's efforts to remove barriers to ex-offender employment).

<sup>15</sup> See Shawn D. Bushway, Paul Nieuwebeerta, & Arjan Blokland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?* 49 CRIMINOLOGY 27, 32-33 (2011)(stating that the four studies that had been conducted regarding redemption, which are the same four relied upon by the EEOC, all only examined arrestees, not people convicted of crimes).

<sup>16</sup> See *infra* at 4.

<sup>17</sup> Alfred Blumstein and Kimorini Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, at 335 (2009).

<sup>18</sup> *Id.* at 330.

<sup>19</sup> Bushway et al. at 49-50.

<sup>20</sup> *Id.* at 49-51. It is important to note that the Bushway study uses convictions as a marker of recidivism, while the Blumstein and Nakamura study uses arrests as a marker of recidivism, which may account for the differing findings regarding recidivism. It is possible both that at some point ex-convicts are no more likely to be *convicted* of a crime than are nonoffenders, and that they are more likely to be *arrested* than nonoffenders.

These findings regarding the recidivism of ex-convicts are more sobering than the Guidance would have us believe, but they do not tell the whole story. The risk of recidivism is much higher among people who have even one prior criminal conviction. More importantly, given that most people released from prison will have multiple offenses, “those with multiple prior offenses never have the same level of risk of offending as those with no records.”<sup>21</sup> This group is far more comparable to people released from prison, given that “the 272,111 offenders discharged in 1994 had accumulated 4.1 million arrest charges before their most recent imprisonment and another 744,000 charges within 3 years of release.”<sup>22</sup> (The 4.1 million arrests do not include the arrest that resulted in their imprisonment.)<sup>23</sup> The mean number of prior arrests was eight.<sup>24</sup> Obviously, arrests and convictions are not interchangeable, but the large number of arrests does indicate frequent contact with the justice system.

In a three-year study of prisoners who were released in 1994 conducted by the Bureau of Justice Statistics, “67.5% of the prisoners were rearrested for a new offense (almost exclusively for a new felony or a serious misdemeanor), 46.9% were reconvicted for a new crime,” and 25.4% were resentenced to prison for a new crime.”<sup>25</sup> Furthermore, these ex-offenders as a group had committed a substantial number of crimes: Following their release, the ex-prisoners “accounted for 8.4% of all the homicides in the 13 States [that were studied] in 1995,” as well as “5.4% of all the arrests for rape in the 13 States in 1994 and 9.0% of all the arrests for robbery in the 13 States from 1994-1997.”<sup>26</sup> The prisoners released in 1994 also constituted 9.9% of the arrests for motor vehicle theft and 12.4% of the arrests for burglary in 1994.<sup>27</sup> The authors note:

Although these percentages may seem small, they are actually the product of high rates of criminality. For example, to account for the 8.4% of homicides, the 234,358 released prisoners were arrested for homicide at a rate 53 times higher than the homicide arrest rate for the adult population. Note also that the 8.4% arrest rate does not include homicides by

- (a) prisoners released in 1995;
- (b) prisoners released before 1994, or
- (c) released prisoners who had crossed state lines. The percentage of homicides attributable to released prisoners would be substantially greater if it included persons in categories *a*, *b*, and *c*.<sup>28</sup>

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<sup>21</sup> Bushway et al. at 34.

<sup>22</sup> Patrick A. Langan and David J. Levin, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, 1 (2002), available at <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.* at 1. The number of ex-prisoners resentenced to prison does not include people resentenced to local jails, see *id.* at 7.

<sup>26</sup> *Id.* at 6.

<sup>27</sup> *Id.* at Table 5.

<sup>28</sup> *Id.* at 6.

Furthermore, ex-offenders, even when that is defined as people who were arrested once, are always at a higher risk of re-arrest than are people who have never offended.<sup>29</sup> As Dr. Blumstein's work shows, if the ex-offender avoids re-arrest for several years, his risk of re-arrest declines until it is roughly the same as the risk that someone in the general population (which includes both non-offenders and repeat offenders) will be arrested.<sup>30</sup> If the person stays clean long enough, eventually their risk of offending drops *below* that of the general population, but not below the risk level of non-offenders.<sup>31</sup>

The Guidance also ignores the fact that even specialists don't really understand what causes someone to desist from crime<sup>32</sup>, or even what constitutes desistance.<sup>33</sup> There are correlates of desistance<sup>34</sup>, but even remaining crime-free for a long period is no guarantee that the person has abandoned criminality.<sup>35</sup> It is possible to predict that someone may persist in crime, but it is difficult to know when they have permanently desisted from crime. The EEOC ignores this reality.<sup>36</sup> It is simply beyond an employer's capacity to determine if someone has desisted from crime when experts cannot even predict desistance with precision, yet the Guidance expects employers to do exactly that.

## II. The Guidance is Overly Complex and Vague

The standards to which employers must adhere when considering an applicant's

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<sup>29</sup> Blumstein and Nakamura at 340 ("Because the risk of rearrest for a redemption candidate might be expected to approach, but not cross, the risk of arrest for the never arrested, it becomes a matter of having to assess when the two curves are "close enough.").

<sup>30</sup> Report at 36-38.

<sup>31</sup> Blumstein and Nakamura at 340.

<sup>32</sup> Laub and Sampson, *supra* note 8, at 2 (2001) ("Indeed, the characteristics that distinguish persistence in a life of crime from desistance within any group of high-risk offenders are generally unknown.").

<sup>33</sup> *See id.* at 4-8.

<sup>34</sup> *Id.* at 2.

Elements such as family formation and gaining employment, for example, appear to predict desistance from crime in adulthood. But the research evidence is not strong or convincing. To cite but one example, Wright and Wright (1992, p. 54) concluded that "no clearly confirming set of findings has emerged from research to date that demonstrates that getting married and having children reduces the likelihood of criminal offense.

<sup>35</sup> Bushway et al. at 52 ("offenders with four or more offenses either never resemble nonoffenders or only begin to do so after a minimum of 23 years. Their history of frequent offending continues to resonate in their life course even after they have been crime free for more than 20 years.").

<sup>36</sup> *See* Guidance at note 14. The Guidance relies upon a study of New Zealand youths that found that adolescent criminal convictions did not predict counterproductive work behaviors in adulthood, *see* Roberts, *supra* note 8, at 1430. This is likely because offending is very common in adolescence, and therefore adolescent offenders do not significantly differ from the general population, *see* Laub and Sampson, *supra* note 8, at 6 ("based on the available data, desistance occurs most often during and after adolescence. Based on the evidence, desistance is normative for most offenders. Moffit, for example, has written, 'Indeed, numerous rigorous self-report studies has now documented that it is statistically aberrant to refrain from crime during adolescence' (citation omitted)). Offenders who do not desist during or shortly after adolescence may have a significantly longer criminal career, *see* Blumstein and Cohen, *supra* note 8, at, 989 ("common belief suggest that offenders are about to terminate their criminal careers by age 30 . . . [but] it is clear that among those offenders who do remain active, mean residual career length actually rises until about age 30, is fairly flat through the 30s, and then begins to decline rapidly in the early 40s.").

criminal history are complex. First, if the employer decides not to hire someone based on their criminal record, the employer must consider three factors and use them to justify the exclusion: 1) the nature and gravity of the offense; 2) the time elapsed since the offense; and 3) the nature of the job held or sought. These factors were first articulated in the Eighth Circuit case *Green v. Missouri Pacific Railroad*.<sup>37</sup> According to the EEOC, if an employer has a policy of excluding people with certain criminal records, the policy must not only take the *Green* factors into account, but there must also be a very tight fit between the factors and the exclusion.<sup>38</sup> For example, a company policy against hiring anyone convicted of a felony would almost certainly run afoul of the *Green* factors.<sup>39</sup> Discussing the then-forthcoming guidance, EEOC Commissioner Victoria Lipnic said exactly that to the Chamber of Commerce: “One bright-line policy you should not adopt is having a no-felons policy. If you have that policy, that’s going to be a problem if you’re subject to an EEOC investigation.”<sup>40</sup> Unfortunately, creating a policy that has the required nexus between the factors and the exclusion will be very difficult for most small businesses, especially because the Guidance has almost no bright-line rules. The Guidance does not even state that certain crimes are so serious that a company would be justified in having a blanket policy against hiring anyone convicted of such crimes.

#### a. Factor One: The Nature and Gravity of the Offense

The EEOC’s focus on the first *Green* factor deserves scrutiny. The analysis required to create such a policy is too difficult for most small businesses. The Guidance states that the employer should “carefully consider” the nature and gravity of the offense by considering the specific harm caused by the crime and perhaps by examining the legal elements of the offense. “For example, a conviction for felony theft may involve deception, threat, or intimidation.”<sup>41</sup> This is simply beyond the capability of almost all small business owners and even beyond the capability of the HR departments of smaller companies. Researching the elements of a crime and determining their applicability to a particular position is a job for an attorney, not an HR professional. The phrase “elements of the crime” will elicit only a blank stare from most nonattorneys.

The focus on job-relatedness assumes that if an offender is going to re-offend, he will commit a similar crime, and therefore that is all that should concern the employer. Studies of recidivism and criminal careers only partially support this assumption (the roots of which admittedly lie with the Eighth Circuit, not the EEOC). Although ex-offenders are more likely than not to reoffend, they will not necessarily commit the same crime.<sup>42</sup> Interestingly,

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<sup>37</sup> *Green v. Missouri Pac. R.R.*, 549 F.2d 1158, 1160 (8th Cir. 1977).

<sup>38</sup> Guidance at 17-18.

<sup>39</sup> *Id.* at 16-17.

<sup>40</sup> Victoria Lipnic, Commissioner, Equal Employment Opp’y Comm’n, Keynote Address at the U.S. Chamber of Commerce: A View from the EEOC, <http://link.brightcove.com/services/player/bcpid1062994879001?bckey=AQ~~.AAAAEkkpZUK~.X1iY6-4YH0xD1Wm6D1VB4kWeHRwgu8hA&bctid=1505101556001>, at 48:00 (March 13, 2012).

<sup>41</sup> Guidance at 15.

<sup>42</sup> Alfred Blumstein et al., *Specialization and Seriousness During Adult Criminal Careers*, 4 J. QUANT. CRIM. 303, 336 (1988). [T]he direction of switching from most crime types [to more or less serious crimes] is

offenders who committed the most serious crimes are less likely to commit the same crime than are offenders who committed less serious crimes, but the gravity of the offenses means that employers will still probably be more worried about hiring a murderer or rapist than a car thief.<sup>43</sup> crimes both in the workplace and out of the workplace, job-relatedness is not as useful a concept as the EEOC thinks it is.

### **b. Factor Two: The Time Elapsed Since the Offense**

The Guidance provides almost no actual guidance regarding how soon an employer must disregard an applicant's criminal record. First it refers to the *Green* decision, which "acknowledge[d] that permanent exclusions from all employment based on any and all offenses were not consistent with the business necessity standard."<sup>44</sup> The Guidance quotes the Third Circuit *El v. SEPTA*<sup>45</sup> decision (which allowed an exclusion based on Douglas El's forty-year old murder conviction) that summary judgment might not have been granted if El had presented expert testimony that a forty-year-old conviction made him no more of a risk than a member of the general population.<sup>46</sup> The EEOC then helpfully notes that the time factor is fact-specific, and that "Relevant and available information includes, for example, studies demonstrating how much the risk of recidivism declines over a specified time."<sup>47</sup> The studies to which the EEOC cites, however, are the same studies discussed above, with all their attendant predictive shortcomings. More importantly, Coca-Cola or American Express can hire lawyers and social scientists to read the available literature and try to craft a temporal exclusion that provides some measure of protection to the company while satisfying the EEOC. Bob, sole owner of Bob's Garage, does not have the resources to do so and is left to try to sort it out on his own.

Furthermore, the few examples the EEOC provides of temporal requirements are either overly optimistic regarding the time frame for "redemption" or simply unhelpful. Example Seven provides an example of a targeted exclusion for convictions from four years ago or less and indicates that this is acceptable.<sup>48</sup> Based on the recidivism research discussed above, this may be too optimistic. In Example Eight, which is the other example regarding the temporal requirement, the employee had "pled guilty to misdemeanor insurance fraud five years ago, because he exaggerated the costs of several home repairs after a winter

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independent of that crime type.... There are, nevertheless, some indications of trends in seriousness. White arrestees in the two Michigan samples show high levels of de-escalation in seriousness following arrests for rape. There is consistent evidence of escalation in seriousness in all subgroups after arrests for aggravated assault, and some escalation is observed following arrests for robbery, especially among white offenders, following arrests for auto theft, and following weapons offenses for white offenders in South Michigan.

<sup>43</sup> *Id.* at 341-42.

[S]ome specialization was found in all crime types for adult offenders.... Specialization was highest in drugs and fraud (especially among white offenders) and in auto theft (especially among black offenders).... In contrast, the more impulsive, violent crimes of homicide, rape, and weapons violations were among the least specialized.

<sup>44</sup> Guidance at 15.

<sup>45</sup> *El v. Southeastern Penn. Transp. Auth.*, 479 F.3d 232 (2007).

<sup>46</sup> Guidance at 15.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 19.

storm.”<sup>49</sup> The employee had achieved a good work reputation for honesty and trustworthiness for five years subsequent to the conviction. Then the shredding company for which he worked changed ownership. The employee re-applied for his job, and the new owner ran a criminal background check on him. Despite his strong performance reviews, “management informs Jamie that his guilty plea is evidence of criminal conduct and that his employment will be terminated.” The EEOC says this likely constitutes a Title VII violation.<sup>50</sup> However, an employer will not usually be in a situation where he is deciding whether to retain an employee with a misdemeanor conviction who also has a years-long track record of success and honesty at a company that the employer has purchased. Instead, employers are usually interviewing a previously-unknown applicant and assessing how risky it would be to hire him. This limits the usefulness of Example Eight.

Additionally, none of the examples explain how an employer should calculate the temporal exclusion in circumstances where the applicant served prison time. This is a particularly odd omission because the Guidance is largely motivated by concerns about prisoner reentry. Does the EEOC expect an employer to use the time elapsed since the conviction itself in calculating the temporal exclusion? Or should the employer use the time elapsed since the person was released from prison?

### **c. The Nature of the Job Held or Sought**

In regard to factor three, how do you judge what crimes are important in the context of the job sought? Probably everyone agrees on the easy cases – someone convicted of sexual assault shouldn’t work with children, and someone convicted of animal abuse shouldn’t work at a vet’s office. But what about harder cases? What if a trucking company has a policy against hiring anyone convicted of drug use in the past five years? Drug use might not seem to be connected to trucking in the same way that it would be connected to working at a pharmacy, but the owner of the company might think that people recently convicted of drug crimes are prone to begin using again and fear that they might drive his trucks while under the influence. These are the sorts of questions that the guidance does not answer.

### **d. The Individualized Assessment**

Even after applying the *Green* factors, the employer must then conduct an “individualized assessment,” which gives the job applicant an opportunity to explain why he should be hired despite his criminal record and despite having been screened out by the company’s policy that adheres to the *Green* factors.

The EEOC may reply that this is exactly why companies should not have policies against hiring people with criminal records and should instead apply the *Green* factors to each applicant and then conduct an individualized assessment. The problem with that position is that it is terribly inefficient and opens the door to a new set of problems. If a company needs to hire someone quickly and is leery about hiring someone with a criminal

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<sup>49</sup> *Id.* at 19-20.

<sup>50</sup> *Id.* at 20.

record, they already have to wait a few days for a background check to be conducted. If the report indicates that the person has a criminal record, the company then has to apply the Green factors and conduct an individualized assessment, which basically amounts to a second interview. In the meantime, the company is shorthanded, which can be a major problem when, for example, hiring holiday help.

The individualized assessment also creates the possibility of being sued for disparate treatment instead of disparate impact. Disparate treatment suits could manifest in two ways. First, a minority applicant could sue claiming that they were treated differently than a white applicant. Even if an inexperienced hiring manager treated two applicants differently for a consciously innocent reason – i.e., they developed a better rapport with one candidate than the other – the mere fact that the process wasn't uniform exposes the company to a disparate treatment suit. Second, in an attempt to avoid a disparate impact suit, an employer could preferentially hire minority applicants instead of white applicants, thus creating an opportunity to be sued by white applicants. The purpose of having set hiring policies is to avoid discriminatory treatment by ensuring that all applicants are treated the same way. As EEOC Commissioner Lipnic said in a speech to the Chamber of Commerce, companies long thought that the best 10 practice was to have policies in place to treat everyone the same way. That new Guidance turns that longstanding approach on its head.<sup>51</sup>

Admittedly, Ms. Miaskoff denied at the briefing that an individual assessment is required.<sup>52</sup> We take her at her word. However, due to the plain language of the Guidance, businesses will likely fear adverse consequences if they do not conduct an individualized assessment. The average hiring manager has never heard of Carol Miaskoff, let alone that she

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<sup>51</sup> Victoria Lipnic, Commissioner, Equal Employment Opp'ty Comm'n, Keynote Address at the U.S. Chamber of Commerce: A View from the EEOC, <http://link.brightcove.com/services/player/bcpid1062994879001?bckey=AQ~~.AAAAEkkpZUK~.X1iY6-4YH0xD1Wm6DIVB4kWeHRwgu8hA&bctid=1505101556001>, at 1:03:50 (March 13, 2012).

You know, it used to be the case, when I started doing employment law twenty years ago, that everyone was taught, particularly human resources professionals, 'Treat everyone the same. That's how we want to make sure that there is non-discrimination in the workplace.' I think we're at a bit of an inflection point on that principle, particularly when it comes to issues like using a criminal background check or a credit screen in your hiring process, because even if you have a policy in place that meets the Title VII standard, what you also have to show and demonstrate is some due process for the individual. So there has to be some sort of individualized assessment, which is a term - for those of you who are familiar with the Americans with Disabilities Act (you can also thank Randy Johnson for his handiwork on the ADA), but an individualized assessment is something that you also have to look at in the context of using criminal background checks. So if you have a policy where you look at the nature of the offense, maybe again it's not "all felons are prohibited," but you get the background report in and if you do not as an employer have a policy in place or procedures in place where you in fact allow someone to explain what the situation was, maybe it was a situation similar to the facts in the *El v. SEPTA* case in the Third Circuit, but you have to be in a situation where you are assessing that risk on a more individualized basis. Now, I know that that is not particularly comforting, because it is much easier to have a blanket rule and a blanket policy and a bright line and that makes it easier. It will not necessarily though meet the standards of, one, nondiscrimination in the workplace, and two, what we care about, which is equal employment opportunity in the workplace.

<sup>52</sup> Report at 33.

told the U.S. Commission on Civil Rights that an individual assessment is unnecessary. A hiring manager knows that the Guidance says: “Title VII thus does not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability....”<sup>53</sup> The average layperson who reads that an individual assessment is not *necessarily* required in *all* circumstances will reasonably infer that an individualized assessment is highly advisable in most circumstances. This is an important departure from the previous Guidance.

The EEOC claims that the goal of the Guidance is not to discourage the use of criminal background checks, but merely to encourage companies to use them judiciously. However, the EEOC’s guidelines for judicious use of criminal history in hiring are so opaque and nebulous that it is very difficult for employers to be sure that they are following the rules. If they obtain a criminal background check on an applicant, they are immediately on the defensive if the EEOC decides to open an investigation.<sup>54</sup> A rational company could easily decide it is safer not to even obtain a criminal background check on prospective employees. If you never had the information, then you won’t find yourself in the position of bickering with the EEOC over whether you properly went through every laborious step.

**III. The Lack of Safe Harbor for Compliance with Conflicting State and Local Laws Puts Employers in an Untenable Position.**

An additional problem with the Guidance is its lack of safe harbor for businesses that are prohibited from hiring ex-offenders by state law. Businesses are warned not to comply with state or local laws prohibiting such hires if doing so would run afoul of the Guidance.<sup>55</sup> However, business owners are not in a position to apply the *Green* factors to a state law. The idea that they should do so is ludicrous. A small construction contractor is not in a position to look at state requirements regarding employment of ex-felons and determine whether they conform to the *Green* factors. And if the contractor decides the state requirements do not meet the standards of the *Green* factors and hires an ex-felon anyway, the state contracting board is unlikely to be impressed with his display of legal acumen.

Practically speaking, the Guidance’s lack of safe harbor places businesses in the unenviable position of choosing whether to be put out of business by the state or the EEOC. If a business owner in good faith believes that a state hiring prohibition falls afoul of the *Green* factors and subsequently hires an ex-offender, he may lose his business license. If he decides that surely, it is job-related and consistent with business necessity for him to only

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<sup>53</sup> Guidance at 14.

<sup>54</sup> *Id.* at note 64.

The Commission presumes that employers use the information sought and obtained from its applicants and others in making an employment decision. *See Gregory v. Litton Sys. Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970). If an employer asserts that it did not factor the applicant’s or employee’s known criminal record into an employment decision, the EEOC will seek evidence supporting this assertion. For example, evidence that the employer has other employees from the same protected group with roughly comparable criminal records may support the conclusion that the employer did not use the applicant’s or employee’s criminal record to exclude him from employment.

<sup>55</sup> Guidance at 24.

hire non-offenders since doing otherwise would cost him his license, he has run afoul of the EEOC. And contra very sensible suggestions made by some of my colleagues<sup>56</sup>, both the EEOC Guidance and EEOC Commissioner Feldblum are clear on this point. According to the Guidance:

States and local jurisdictions also have laws and/or regulations that restrict or prohibit the employment of individuals with records of certain criminal conduct. Unlike federal laws or regulations, however, state and local laws or regulations are preempted by Title VII if they “purport[] to require or permit the doing of any employee’s known criminal record into an act which would be an unlawful employment practice” under Title VII. Therefore, if an employer’s exclusionary policy or practice is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability. (citations omitted)<sup>57</sup>

In her public comment to the Commission, EEOC Commissioner Feldblum agrees that the Guidance could be improved with regard to “the intersection of Title VII and state laws that require the use of background checks for certain professions.” However, “the Commission is not in a position to offer blanket ‘safe harbors’ to employers....especially when the statutory language regarding liability for compliance with state laws which ‘purport to require or permit the doing of any [sic] which would be an unlawful employment practice under Title VII’ is so explicit.”<sup>58</sup> One could argue that a state is unlikely to require an exclusion for reasons that are not job-related and consistent with business necessity, but there is no guarantee that the EEOC will agree with the state’s analysis that a particular exclusion is job-related and consistent with business necessity. In fact, Example Twelve in the Guidance is about a county requirement that prohibits anyone with a criminal conviction from working for the county and that therefore violates the Guidance.<sup>59</sup> Most people would agree that the exclusion in Example 12 is too broad, but that will be cold comfort to a small

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<sup>56</sup> Report at 94-95.

Chairman Castro:

Presumably these state laws that require background checks in certain instances are doing it because they feel in those instances there is a business necessity, is that not right? And that it is consistent with the job so it's job related, right? So that would seem to me that in those instances the issue of Title VII liability would not be there because they're allowing you to do the background check. They're not saying you can't at the federal level. As long as it's consistent with business necessity and job related it's not violating Title VII.

So I don't understand where that conflict resides, because presumably if you do the background check you're going to do it for those reasons. You're not going to do a background check that's not going to be job related, right, and that has nothing to do with business necessity, right?

<sup>57</sup> Guidance at 24.

<sup>58</sup> Chai Feldblum, Commissioner, Equal Employment Opp'ty Comm'n, “The Impact of Criminal Background Checks and the EEOC’s Conviction Records Policy on the Employment of Black and Hispanic Workers,” U.S. Comm’n on Civil Rights, at 3 (Dec. 7, 2012).

<sup>59</sup> Guidance at 24.

business owner with a county contract who is trapped between a similar requirement and the Guidance.

Furthermore, it appears that the EEOC is acting in accordance with the Guidance's warning that a state requirement will not provide safe harbor. Julie Payne testified before the Commission that local law required G4S to conduct background checks on applicants, but the EEOC continued its investigation anyway.<sup>60</sup>

**IV. The Real Motivation for the Guidance is that African-American and Hispanic Men are Disproportionately Likely to Have Criminal Records, Which the Guidance Implies is Due to Unlawful Racial Discrimination. This is False.**

An additional problem with the Guidance is that the EEOC's real disparate impact preoccupation is the fact that African-American and Hispanic males are arrested and convicted at higher rates than are white males. The Guidance says:

Arrest and incarceration rates are particularly high for African American and Hispanic men. African Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population. Assuming that current incarceration rates remain unchanged, about 1 in 17 White men are expected to serve time in prison during their lifetime; by contrast, this rate climbs to 1 in 6 for Hispanic men and 1 in 3 for African American men (citations omitted).<sup>61</sup>

In her written comment to the Commission, EEOC Commissioner Chai Feldblum writes, "[T]he disparate impact that we first noted in the 1970's was continuing unabated and, in some ways, was becoming worse. As our Revised Guidance states, African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population."<sup>62</sup> Her fellow EEOC Commissioner Victoria Lipnic writes, "[W]e have today a greater understanding of the demographics of our criminal justice system – indeed, current data on incarceration rates and the criminal justice system more broadly show a marked racial disparity in arrests and convictions."<sup>63</sup> The EEOC's main concern is that African-Americans and Hispanics are more likely to have a criminal record. This concern was echoed by panelists Glenn Martin and Roberta Meyers.<sup>64</sup>

The assumption in the Guidance, EEOC Commissioner Feldblum's comment, and the panelists' statements is that the racial disparity in arrests and convictions is attributable to racial discrimination. The panelists explicitly stated as much. Roberta Meyers stated,

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<sup>60</sup> Report at 66-67.

<sup>61</sup> Guidance at 3.

<sup>62</sup> Feldblum at 2.

<sup>63</sup> Victoria Lipnic, Commissioner, Equal Employment Opp'ty Comm'n, "The Impact of Criminal Background Checks and the EEOC's Conviction Records Policy on the Employment of Black and Hispanic Workers," U.S. Comm'n on Civil Rights, at 2 (Dec. 7, 2012).

<sup>64</sup> See Martin Statement at 197; see also Meyer Statement at 219.

“[P]eople of color are significantly and disproportionately represented in the criminal justice system, and [] a criminal record has become a surrogate for race-based discrimination.”<sup>65</sup> Glenn Martin said in his statement, “Over the years, race- and class-biased policy-making has successfully been hidden in the midst of a culture of low tolerance and fear of crime... we must deal with the racism proxy we have created with our burgeoning criminal justice system.”<sup>66</sup>

The facts do not support the panelists' assertions that the American criminal justice system is an unjust system of racial oppression.<sup>67</sup> African-Americans and Hispanics are more likely to commit crimes than are members of other ethnic groups, and therefore there is no great unfairness in their greater representation in the ranks of ex-offenders. As Jeffrey Sedgwick testified at the Commission's hearing, several decades of scholarly research indicate that African-Americans and Hispanics are disproportionately likely to come in contact with the criminal justice system because they are disproportionately likely to be involved in criminal activity.<sup>68</sup>

Earlier in his career, Dr. Blumstein specifically addressed the possibility that differing incarceration rates were attributable to racial discrimination, noting that the disproportionate incarceration of African-American men “generate[s] a deep concern that the disproportionality may be a consequence of profound racial discrimination within the criminal justice system.”<sup>69</sup> After analyzing arrests and convictions, Dr. Blumstein concluded that differential rates of involvement in crime, not racial discrimination, were the primary reason for the disproportionate incarceration of African-Americans.<sup>70</sup> His findings are supported by over twenty years' worth of research.<sup>71</sup>

Ex-offender status is therefore markedly different from race or sex, which are both immutable characteristics. A person is not born a criminal. He chooses to engage in criminal activity. Our legal system is not perfect, and discrimination surely exists, but there is little evidence it is systematically biased against minorities.

#### **V. The Guidance Will Harm the Employment Prospects of Those it Purports to Help, Both Non-offenders and Ex-offenders.**

The icing on the cake is that the Guidance will likely hurt the job prospects of members of minority groups who do not have criminal records. As Professor Harry Holzer

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<sup>65</sup>Report at 49.

<sup>66</sup>See Martin Statement at 197-198.

<sup>67</sup>See *id.* at 197-198, 200-201; see also Meyer Statement at 220.

<sup>68</sup>Sedgwick Statement at 255-57.

<sup>69</sup>Alfred Blumstein, *On the Racial Disproportionality of the United States' Prison Populations*, 73 J. CRIM. LAW & CRIMINOLOGY 1259, 1261 (1982).

<sup>70</sup>*Id.* at 1270, 1278.

<sup>71</sup>See Patrick A. Langan, *Racism on Trial*, 76 J. CRIM. L & CRIMINOLOGY 666 (1985); see also Robert J. Sampson and Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME AND JUSTICE 311 (1997); Amy L. Wax, *RACE, WRONGS, AND REMEDIES: GROUP JUSTICE IN THE 21ST CENTURY* 78 (2008).

testified, the use of criminal background checks increases employment among African-American men without criminal records.<sup>72</sup> Professor Holzer's research is supported by research conducted by Shawn Bushway, Michael Stoll, and Steven Raphael. Multiple studies have shown that access to information regarding criminal history is correlated with increased employment and wages among African-American men. Raphael writes, "[T]he data strongly indicate that establishments that check are consistently more likely to hire African-American males."<sup>73</sup> Raphael's research also found that businesses legally prohibited from hiring employees with criminal records are more likely to hire African-Americans.<sup>74</sup> This also supports the argument that reducing the use of criminal background checks will harm the job prospects of many African-Americans.

Panelist Glenn Martin objected strongly to the argument that utilization of background checks increases the employment of African-Americans overall, saying, "[W]innowing out black applicants....to find the good black applicants from the bad black applicants feels very un-American to me."<sup>75</sup> Although everyone agrees that ex-offenders should have the opportunity to find gainful employment, Mr. Martin's reaction misses the point. Every hiring process consists of "winnowing through applicants" to find the best person for the job. In the case of ex-offenders, the employer may believe that a particular criminal history is pertinent to whether someone is the best person for the job. If they are discouraged from obtaining that information, they may simply avoid everyone they think might have a criminal history, whether that means avoiding most African-American males or all white males with shaved heads and visible tattoos. Mr. Martin has it exactly backwards when he says that "criminal record-based discrimination easily serves as a surrogate for race-based discrimination."<sup>76</sup> The fact that more African-Americans are hired when employers utilize criminal background checks indicates that in the absence of better information, employers use race as a proxy for criminal history, not vice versa.<sup>77</sup>

It is better by far to encourage employers to use reputable background check companies to obtain as much information as possible about each person's criminal history or lack thereof so they can have confidence in their hiring decisions, rather than making erroneous generalizations based on his race and sex.<sup>78</sup> If this results in fewer job opportunities for ex-prisoners, that is very unfortunate on an individual level, but given the sixty percent recidivism rate, one cannot say that employers are acting irrationally. A recently released prisoner is more likely to recidivate than not. That alone is a rational tiebreaker between an ex-offender and a non-offender.

In some cases, discouraging employers from using criminal background checks may even harm the employment prospects of ex-offenders. Many employers are willing to hire an

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<sup>72</sup> Holzer Statement at 177.

<sup>73</sup> Raphael, *supra* note 12, at 4.

<sup>74</sup> *Id.* at 23.

<sup>75</sup> Report at 53.

<sup>76</sup> *Id.*

<sup>77</sup> Unfortunately, it may be rational, albeit illegal, to discriminate on the basis of race in the absence of criminal history information. See Lior Jacob Strahilevitz, 75 U. Chi. L. Rev. 363 (2008).

<sup>78</sup> *Id.* at 371-73.

ex-offender, but only if they know the person's criminal history and are able to assess the risk of hiring that person. Therefore, it should not come as a surprise that

employers who indicate that their willingness to hire ex-offenders depends on the crime are more likely to check than even unwilling employers....the evidence...is consistent with the idea that some firms check to gain information and not necessarily to exclude altogether the hiring of ex-offenders.<sup>79</sup>

## **VI. Statutory and Procedural Problems with the Adoption of the Guidance**

There are also significant problems surrounding the adoption of the guidance. It is doubtful that the EEOC has the statutory authority to issue guidances that have the effect of rules. The process surrounding the adoption of the Guidance also suggests that the EEOC had arrived at a preordained conclusion about what it would issue, and therefore sought little input from people who were opposed to its decision.

### **a. The New Guidance Exceeds the EEOC's Authority.**

The basic problem with the EEOC's guidance is that the EEOC is exceeding its authority. The EEOC does not have rulemaking authority. As we have noted before, Congress deliberately withheld rulemaking authority from the EEOC.<sup>80</sup> Yet the attorneys of the EEOC fell prey to the all-too-human temptation to arrogate power, and with unshakeable faith in the justice of their cause, they transformed "guidances" into de facto regulations.

At this point, the EEOC and its defenders will likely protest that the agency has done no such thing. But the effect of the Guidance is indistinguishable from that of a rule. A company that the EEOC believes has run afoul of the Guidance will find itself subject to an expensive and lengthy investigation. If litigation results, the process becomes even more painful. Julie Payne testified that as part of its investigation of G4S Security Solutions' use of criminal background checks, the EEOC required G4S to provide information about every person who was employed by or applied for employment with G4S since 1958.<sup>81</sup> Even if litigation never results, such an investigation is a punishment in and of itself. The cost of complying with the investigation alone could easily bankrupt small companies.

### **b. The Process Surrounding the Adoption of the Guidance was Opaque.**

The EEOC is correct that the Guidance can be distinguished from a regulation in one way, other than its lack of congressional authorization. The Guidance is not subject to the same notice and-comment requirements as are regulations. The EEOC held two public hearings on the proposed guidance, but the hearings were dominated by witnesses who

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<sup>79</sup> Michael Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders* 21-22.

<sup>80</sup> See Brief for Heriot et al., *supra* note 2, at 1-11.

<sup>81</sup> Statement of Julie Payne at 243.

supported increasing the stringency of the Guidance. Furthermore, the EEOC never released a draft of the Guidance for members of the public to read and comment upon. Instead, the EEOC released the text of the Guidance and passed it on the same day. At least when agencies are bound by notice-and comment requirements, the public knows what is contained in the regulations on which they are commenting. In this case, the public could only make general comments about the usefulness or failings of using criminal background checks in hiring.

Admittedly, the EEOC Commissioners did meet with interested parties to discuss drafts of the Guidance. But there are constraints on commissioners' time, and they cannot meet with everyone who is interested. The EEOC should have released draft guidance to the public. A policy change of this magnitude, which affects every business with over fifteen employees, should be the subject of a vigorous public debate. The ability to read and comment upon the draft of a policy that will affect so many people should not be limited to those companies that have the financial resources to hire expensive attorneys. And as Lucia Bone pointed out, the EEOC was not interested in hearing from groups representing victims of crime.<sup>82</sup> Given that we are all potential crime victims, it would seem to be incumbent upon the EEOC to at least invite such a group to testify. Also, based upon the large number of comments received by this Commission supporting the widespread use of criminal background checks, this seems to be an issue that members of the public care about when they are aware that it is under discussion.

## **VII. The Guidance Has No Limiting Principle**

An additional problem with the Guidance is that it has no limiting principle. The EEOC exercises sweeping enforcement power and is only constrained by the courts. There is nothing within the Guidance itself that prevents it from being applied to any company that is not prohibited by federal law from hiring an ex-offender for a particular position. The EEOC is second-guessing employers' hiring decisions on the basis of a characteristic that is not protected by Title VII. Even if the racial composition of a workplace mirrors the racial composition of the surrounding available workforce, the employer is not protected from a disparate impact suit.<sup>83</sup> Nor does the Guidance have any sort of bright-line rule that allows an employer to have confidence that it is in compliance. The Guidance does not even allow an employer to have a bright-line rule that they will not hire anyone convicted of rape or murder. Instead, the Guidance is designed to allow the EEOC to force businesses – even those that believe they are in compliance – to preferentially hire ex-offenders.<sup>84</sup>

## **Conclusion**

No one wants a truly reformed ex-offender to be forever unemployed. The question is whether this Guidance is the best way, or even a reasonable way, of increasing employment among ex-offenders. The EEOC should also remember that employers' interests should be

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<sup>82</sup> Report at 55, 77.

<sup>83</sup> Guidance at 10.

<sup>84</sup> See Lipnic, *supra* note 51.

taken into account as well. After all, they are not the ones who broke the law. “I was complying with the EEOC’s Guidance” is not much of a defense in a negligent hiring lawsuit. Although the Guidance does not prohibit the use of criminal background checks, it strongly discourages their use and encourages employers to err on the side of hiring ex-offenders. In many cases, the Guidance encourages employers to hire an ex-offender against their better judgment. If that were not so, employers would be leaping to hire ex-offenders without being prodded by the EEOC. Whether the employer fears the ex-offender will steal from the business or harm a customer, it is foolish to push him to override his judgment, especially when sixty percent of ex-offenders will recidivate.

EEOC Commissioner Lipnic and Ms. Miaskoff both portrayed this guidance as a mere refinement of the 1987 Guidance, rather than a sharp departure. But then why would EEOC Commissioner Lipnic state that a blanket rule against hiring felons would no longer be permissible? That is a sharp departure from previous practice. Additionally, the effort the EEOC has put into publicizing this Guidance, taken in conjunction with the many lawsuits it has filed over the last few years regarding the use of criminal history in hiring, suggests that the EEOC will be interpreting and enforcing the Guidance more aggressively than it has in the past.<sup>85</sup>

The EEOC and various groups representing ex-offenders will argue that a criminal record should not be a life-long scarlet letter. If ex-offenders cannot find employment, they are more likely to reoffend. Fair enough. But the burden of rehabilitation shouldn’t fall on private companies. If a company believes that an applicant is the best person for a job regardless of their criminal record, they will hire them. If they wouldn’t hire the person with a criminal record but for the fear of an EEOC investigation, the employment market is distorted and a cost is imposed on the company. *Griggs* imposes this sort of regime on companies with regard to race and the use of tests and education requirements, but at least Title VII was clearly enacted to prohibit racial discrimination. Despite the Guidance’s invocation of disparate impact theory, the main goal is to increase the employment of ex-offenders. Title VII was definitely not enacted to prohibit discrimination on the basis of criminal history. If the country wants to shift the cost of criminal rehabilitation onto private employers, Congress should pass a statute prohibiting discrimination on the basis of criminal history.<sup>86</sup> Otherwise, this is outside the EEOC’s purview.

The Guidance will have other costs too. For small companies that have the resources to hire attorneys, figuring out how to comply with the Guidance will cost several thousand dollars – money that could have been used to hire a new employee. For large companies,

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<sup>85</sup> Report at 12-13.

<sup>86</sup> We believe such a statute would be unwise. Rather, it is perhaps preferable to encourage employers to hire ex-offenders by offering tax credits for doing so. The employer is unlikely to take a large risk for a mere tax credit, but such a tax credit could be an effective tiebreaker between a non-offender applicant and an otherwise similarly qualified ex-offender applicant; see Strahilevitz, *supra* note 77, at 379-380. Such an approach ensures that the cost of reintegrating ex-offenders is spread across society as a whole, rather than being concentrated on individual employers. We also believe that encouraging employers to conduct criminal background checks in order to obtain as complete a picture as possible of the ex-offender could be helpful.

complying with the Guidance will add another level of inefficiency to hiring. In an effort to avoid the eye of the EEOC, companies may avoid using background checks and simply hire only the number of blacks they need to avoid scrutiny – and no more. The EEOC seems to live in a magical world where forcing employers to hire a person they do not want to hire because he may be untrustworthy or dangerous has no costs. But just because the EEOC does not see the cost doesn't mean it doesn't exist.

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## Statement and Rebuttal of Commissioner Gail Heriot

### I. Introduction

A desire to lend a helping hand to those who need it—including ex-offenders—is commendable. But as most of us learn sooner or later, helping others is not always as easy as it seems—especially when increased government regulation is the only tool as one's disposal. While there are some worthy ideas out there, unworthy ones are far more common.

This briefing was about an especially ill-considered idea—the EEOC's policy on criminal background checks, particularly as reflected in its *2012 Guidance*. This policy will almost certainly do more harm than good.<sup>1</sup> Moreover, there is a strong argument—and I believe a meritorious one—that because the criminal background check policy is based on a disparate impact liability, it violates the U.S. Constitution—at least in the form it is administered today.<sup>2</sup>

Bad federal regulatory ideas—even when they are constitutional—can do a great deal of damage. In that respect, they are unlike many garden-variety bad ideas. If a business owner makes a mistake about what his customers want, competitors will likely take advantage of the error, and his business will suffer. With any luck, the business owner will learn from the experience and attempt a course correction. If not, his business will likely shrink or disappear altogether. But the collateral damage to the supposed beneficiaries of his bad idea is often minimal.

Government regulatory policies, on the other hand, tend not to be so isolated in their impact. When the EEOC tells employers that they risk liability for race discrimination if they reject job applicants on account of their criminal records, that action will have effects from Maine to the Midway Atoll. The self-correcting mechanism that works (albeit imperfectly) when a small business owner makes a mistake tends not to work nearly as well in the regulatory context. The most tempting course of action for a federal bureaucrat who has erred is often to deny that a mistake has been made and push ever forward.

Of course, it is not my intent to be dismissive about the very real problem of integrating ex-offenders into the job market. But there are good ways and bad ways to encourage employers to hire ex-offenders, and the EEOC has been pursuing a bad way.

For contrast, consider the Work Opportunity Tax Credit Program. See Small

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<sup>1</sup> See *infra* at Part IV. See also *infra* at Part III (discussing how disparate impact liability deviates substantially from what Congress intended when it passed the original version of Title VII).

<sup>2</sup> See *infra* at Part V.

Business Job Protection Act, Pub. Law 104-188 (1996).<sup>3</sup> Under that program, employers who choose to hire a qualified ex-felon get a small tax credit. No one is forced or threatened with litigation to participate. Those businesses that perceive themselves as benefiting from the arrangement will be the ones that take advantage of it. Eligibility and other ground rules are clearly defined, so no one need be confused about what the law permits.

Employers have many things to worry about when they hire. All of them are vulnerable. If they make a wrong choice, they can wind up with someone who is undependable, difficult to work with or incompetent. A bad employee can steal from the employer, harass fellow employees, drive away the customers, and cause devastating harm.<sup>4</sup> Employers can end up legally responsible for the actions of their employees under doctrines of negligent hire or supervision, respondeat superior and actual or apparent authority. The need to fire an employee often brings lawsuits and thus must be avoided where possible. No wonder employers are sometimes hesitant to hire. Policymakers need to avoid making them more hesitant.

But that doesn't mean that no employer will find hiring ex-offenders an attractive option. Jobs vary immensely. Some provide the employee with very little opportunity for wrongdoing; others can be made that way by adding a little extra supervision. Individuals with criminal records vary immensely too. There are some whose integrity is not open to serious doubt; there are others who will likely do well when working with colleagues who are aware of their weaknesses and sensitive to the need to avoid creating problems. A modest tax credit can be a useful tool to persuade an employer who is considering hiring an ex-offender but has not yet taken the plunge. In the long run, if administered properly, this program can reduce crime and save the taxpayer money.<sup>5</sup>

The Work Opportunity Tax Credit Program allows the employers who are in the best position to offer employment to ex-offenders (or to a particular ex-offender) to self-select. Some employers may find that they are in a good position to hire a large number of ex-offenders; others may prefer to hire none. The latter group won't have to worry about their ability to prove to the satisfaction of any government bureaucrat that they had good reason for their decision; instead, they simply won't be able to enjoy the tax credit that employers who make the opposite decision will enjoy. The important thing is that the decision will be made by individuals who are intimately familiar with the actual job and job applicant at issue and have an incentive to make the right decision instead of by far away bureaucrats and judges, who have no such familiarity with the situation.

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<sup>3</sup> The Work Opportunity Tax Credit Program was originally set to expire on September 30, 1997. 110 Stat. 1772. It has been revised and extended on several occasions, most recently the American Taxpayer Relief Act, Pub. L. 112-40 (2012).

<sup>4</sup> See *Employee Kills 8, Himself in Connecticut Shooting Rampage*, **L.A. TIMES** (August 4, 2010).

<sup>5</sup> I do not mean to suggest that the tax code is an instrument to which Congress should routinely resort to achieve goals that are unrelated to revenue raising. It should be used sparingly for that purpose.

## II. The EEOC's Policy on Criminal Background Checks

The EEOC's policy has none of the virtues of the Work Opportunity Tax Credit Program. The 2012 *Guidance* ham-fistedly discourages all employers from checking into the criminal backgrounds of its job applicants and from acting on the information they obtain if they do. Because acting on criminal background checks is thought to have a disparate impact on African-American and Hispanic employees, employers are instructed that they must be able to demonstrate a "business necessity" for doing so. But the so-called guidance provides almost no actual guidance to employers on what constitutes "business necessity."<sup>6</sup> Most

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<sup>6</sup> It is worth emphasizing that the applicable legal standard is not reasonableness, but "business necessity." Nobody knows for sure what that means—at least not since the Civil Rights Act of 1991. Some have argued for an extraordinarily high standard. For example, William & Mary law professor Susan Grover has stated:

The overarching issue continues to be whether the term 'necessity' in the business necessity defense literally requires that the discriminatory practice be essential to the continued viability of the business, or whether it requires something less. This Article argues for the former interpretation.

Susan Grover, *The Business Necessity Defense in Disparate Impact Employment Discrimination Cases*, 30 Ga. L. Rev. 387 (1996). See also *id.* at 429 ("That defense [the business necessity defense] should require an employer to prove that its discriminatory practice is essential to its continued operation. Under the structure created by the 1991 Act, an employer must prove that the goal it seeks to achieve through the practice is crucial to its continued viability and, in turn, that the practice selected is crucial to the achievement of that goal. ... Alternatives to this standard thwart the objectives of Title VII by disproportionately favoring defendants.").

Professor Grover clarifies her use of the term "continued viability" by stating that it means that "relinquishing the discriminatory practice will compel the employer to cut back on its business, resulting in employee layoffs." *Id.* at n. 5. That is quite a standard—particularly when applied to criminal background checks. The problem with hiring an ex-offender is that it increases the *risk* to the employer, her employees, her customers and her property. It will seldom be the case that she can prove *ex ante* that it "will compel" her "to cut back" on her business, "resulting in employee layoffs." She may well be able to prove beyond any shadow of a doubt that she is being reasonable, but that is not the standard.

One thing everyone seems to agree on is that the 1991 Act and the case law that preceded it are ambiguous. Oklahoma City University law professor Andrew Spiropoulos describes the problem this way:

[T]he [Supreme] Court articulated two very different versions of the business necessity defense: a strict one that would be very difficult for employers to meet and a lenient one that would give employers more discretion. ... [T]hose who contend that the Act establishes a strict business necessity defense and those who argue that the Act enacted the more lenient business necessity defense both have plausible arguments for their interpretations founded in two different lines of Supreme Court precedent. ... [N]either side can conclusively show that their interpretation was embodied in the Act.

Andrew Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. Rev. 1478, 1483-85 (1995). As Professor Spiropoulos describes, this ambiguity was built into the Act by Congress. *Id.* Put simply, Congress punted. It left the issue to be decided in future litigation.

For its part, the EEOC has studiously avoided coming down clearly on this issue—perhaps out of concern that a court would come down clearly in the other direction. Its enforcement strategy—especially its

employers will be at sea. Even employers who decline to hire job applicants with criminal records because they are required to do so by state law are warned that they may or may not be opening themselves up to a lawsuit.<sup>7</sup> If the fact that state law commands an employer to act in a particular way is not enough to establish “business necessity,” then it is doubtful that any employer could ever know for sure that it can decline to hire an employee on the basis of his criminal record.

No doubt, some employers will err on the side of not doing criminal background checks at all in order to avoid having to sink time and money into figuring out this very complex and ambiguous guidance. Some of those will later regret that decision. Others will undertake the background checks, but will be careful—against their better judgment—not to act on them in some cases in order to demonstrate their compliance with the *2012 Guidance*. Some of these employers will also come to regret their decisions.

Insofar as the EEOC’s recent pattern of enforcement provides additional guidance for worried employers, it is ill-conceived guidance. The EEOC has targeted employers whose line of work is sensitive enough that the need for clean criminal records should be viewed as an obvious business necessity. That the EEOC would pursue employers like G4S—a provider of security personnel—is strong evidence of the agency’s overreach on this issue.<sup>8</sup>

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singling out of a security guard company, G4S, for investigation—demonstrates that it regards the standard as very high. Employers who hope to avoid becoming ensnared in litigation must act accordingly.

<sup>7</sup> One of the most astonishing assertions in the draft Statement of Commissioners Kladney and Achtenberg was this:

Despite the frequent references to employers being apoplectic over the potential demands of federal and state law, **no one at the briefing could cite a case in which an actual employer found himself threatened with a federal lawsuit as a result of his scrupulous compliance with state law, or threatened with a state or local enforcement action as a result of scrupulous compliance with EEOC guidance concerning criminal records.**

Draft Statement of Commissioners Achtenberg and Kladney at 2 (boldface and underlining in original). But Julie Payne of G4S, a major provider of security personnel to the business world, testified at our briefing that Pennsylvania law requires that unarmed security officers submit to criminal background checks and that the EEOC’s investigation of her employer threatens litigation when G4S complies with that law. Testimony of Julie Payne at 8. See also James Bovard, *Perform Criminal Background Checks at Your Peril: A Federal Policy Intended to Help Minorities is Likely to Have the Opposite Effect*, **WALL ST. J.** (Feb. 14, 2013).

Has the EEOC threatened litigation against other employers merely for complying with state law? We may never know. The EEOC keeps its investigations (and hence its threatened litigation) secret—even from the Commission. See *infra* at note 32. As I indicate in that footnote, I believe the EEOC has an obligation to cooperate with the Commission, which is charged with oversight of federal enforcement of civil rights laws like Title VII.

Meanwhile, Texas recently filed a lawsuit in federal court against the EEOC for the EEOC’s role in instructing employers that the 2012 Guidance trumps Texas laws requiring criminal background checks. See Complaint in *Texas v. EEOC*, Case 5:13-cv-00255-C (N.D. Tex. filed Nov. 4, 2013).

<sup>8</sup> The investigation of G4S is not the only case of overreach on the part of the EEOC. See *EEOC v. Peoplemark*, 2011 U.S. Dist. LEXIS\_38696 (W.D. Mich. 2011), *aff’d* \_\_ F.3d \_\_ (6<sup>th</sup> Cir. Oct. 7, 2013) (lawsuit brought against company for its criminal background policy where EEOC wrongly accused employer of having

This increases the likelihood that some employers will err on the side of not doing criminal background checks (or not acting upon them) even when doing so would have been a “business necessity” under any reasonable interpretation of that standard. Instead of helping to place ex-offenders in right jobs, this approach will put ex-offenders in the wrong jobs. Moreover, to substitute for criminal background checks, some of these employers may be tempted to avoid hiring job applicants about whom they have the slightest suspicion. The result, perversely, may be more racial discrimination rather than less.

But here’s the aspect that concerns me most: The EEOC’s *2012 Guidance* and its recent pattern of enforcement may be more aggressive than what we have seen before, but it was not exactly a bolt from the blue. The notion that Title VII prohibits employers from conducting criminal background checks on job applicants unless the employer can convince a court that it is acting from business necessity arguably follows from *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In that forty-two-year-old case, the Supreme Court followed the EEOC’s urging and adopted disparate impact liability, which holds that liability under Title VII does not require that the defendant employer be motivated by race, color, religion, sex or national origin. Instead, under *Griggs*, if an employer requires its job applicants to have qualifications that have a disparate impact on women or racial minorities (e.g. high school diplomas), it must be able to demonstrate to the satisfaction of the court that the qualification is job-related and that the employer is acting from business necessity. This was a stunning misinterpretation of the 88<sup>th</sup> Congress’s intent in passing Title VII in 1964, made worse by the fact that Congress acquiesced in this bad policy when it passed the Civil Rights Act of 1991 (which amended Title VII). See *infra* at Part V.<sup>9</sup>

Not long after *Griggs*, the U.S. Court of Appeals for the Eighth Circuit applied its logic to criminal background qualifications. It took the position endorsed by the EEOC that *Griggs* requires an employer who refuses to hire a job applicant on account of his criminal record to demonstrate business necessity for its action. Neither conscious nor unconscious

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more stringent policy than it in fact had); *EEOC v. Freeman*, 2013 U.S. Dist. LEXIS 112368 (D. Md. 2013) (court rejected testimony of EEOC experts, concluding that: “The story of the present action has been that of a theory in search of facts to support it. But there are simply no facts here to support a theory of disparate impact resulting from any identified, specific practice of the Defendant”). In *Peplemark*, the trial court ordered the EEOC to pay Peplemark \$751,942.48 in attorneys’ fees, expert witness fees, and other costs. *Freeman* was also dismissed. Win or lose, however, employers who get sued are worse off—even when they are compensated for their attorneys’ fees and costs. Many, like PepsiCo, would prefer to settle prior to litigation rather than wind up in costly and time-consuming litigation. See, e.g. *Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans: Company’s Former Use of Criminal Background Checks Discriminated Based on Race*, Agency Found, EEOC Press Release (Jan. 11, 2012); Evan Pontz, *Labor: Dealing with the “New” EEOC*, Inside Counsel (Nov. 14, 2011) (“Smart employers... will seek opportunities to resolve EEOC charges quickly, efficiently, through other means (such as through private settlements or private mediations) and to try to encourage the EEOC to expend its limited resources elsewhere.”)

<sup>9</sup> Additionally, as I suggested in the introductory paragraphs, it is likely unconstitutional at least in the form that it is practiced today. See *infra* at Part V.

intent to discriminate on the basis of race was a necessary element of the cause of action. See *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8<sup>th</sup> Cir. 1975)(*Green I*).<sup>10</sup>

In *Green I*, the Missouri Pacific Railroad had a policy of not hiring job applicants with criminal records. As a result, 5.35% of African-American and 2.23% of white job applicants were rejected.<sup>11</sup> To explain its policy, Missouri Pacific advanced the following concerns (in the court's words): "1) fear of cargo theft, 2) handling company funds, 3) bonding qualifications, 4) possible impeachment of an employee as witness, 5) possible liability for hiring persons with known violent tendencies, 6) employment disruption caused by recidivism, and 7) alleged lack of moral character of persons with convictions." *Id.* at 1298.

This was not good enough. The *Green I* panel chided Missouri Pacific for failing to "validat[e] its policy with respect to conviction records." The EEOC had argued as amicus curiae and the court apparently agreed that the law requires an employer to prove with the precision of a social scientist that the job qualifications it uses produce better employees.

The best I can say is that if the law requires that, then "the law is an ass—a[n] idiot."<sup>12</sup> Job qualifications that have a disparate impact on some group under a prohibited classification are the rule, not the exception. See *infra* at Part IV(A). Yet only the very largest employers have any chance of conducting the kind of research the EEOC and the Eighth Circuit demanded in *Green I*. The rest will not have enough data—even if they have

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<sup>10</sup> *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (1970), modified on other grounds and aff'd 472 F.2d 631 (8<sup>th</sup> Cir. 1972), is also worth noting. In it, the court held that an employer could not, consistently with Title VII, decline to hire job applicants with 14 arrests for offenses other than traffic violations but no convictions. The court stated:

There is no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees. In fact, the evidence in the case is overwhelmingly to the contrary. Thus, information concerning a prospective employee's record of arrests without convictions, is irrelevant to his suitability or qualification for employment. In recognition of this irrelevance, the County of Los Angeles, a large-scale employer, has ceased to ask for arrest information in application for employment.

The court did not specify the evidence that it was relying on. Whatever it was, it was unlikely to apply to an employee with *fourteen* arrests. I am very doubtful that Judge Hill would have hired a law clerk, a housekeeper, a baby sitter or any other job applicant with a record of fourteen arrests himself without overwhelming evidence that the particular job applicant's character had changed radically.

See also *Carter v. Gallagher*, 452 F.2d 315 (8<sup>th</sup> Cir. 1971), cert. denied, 406 U.S. 950 (1972) (involving allegations of discrimination against state agency governed by the Fourteenth Amendment and Section 1981 rather than Title VII).

<sup>11</sup> Missouri Pacific also had a policy against hiring certain applicants with arrest records, but the numbers involved in that policy were much smaller. *Green v. Missouri Pacific Railroad*, 381 F. Supp. 992 (E.D. Mo.1974).

<sup>12</sup> Charles Dickens, **OLIVER TWIST** ch. 51 (1838) (quoting Mr. Bumble).

the surplus time and energy necessary to conduct the research. Can a plumbing company *prove* that plumbers with at least three years' experience do better than those with less? Probably not. Can a small bank *prove* that hiring tellers who did well in school in basic mathematics will result in fewer errors? Can a department store *prove* that job applicants with positive letters of recommendation from previous retail employers will make better sales clerks? I doubt it—not without a significant investment of time and resources. And yet they are probably right. Certainly, the EEOC cannot prove the contrary (and it conveniently did not require itself to do so).

The fact is that very little of what we know or think we know is “known” to the degree of certainty the EEOC and *Green I* demanded. If human beings only acted on what we know with scientific certainty, the result would be paralysis. At some point we all rely on experience, common sense and the spirit of experimentation. Employers making hiring and promotion decisions are no different. If the validation requirement were taken seriously (as opposed to applied only when it suits the EEOC to apply it), it would invalidate almost all job qualifications.<sup>13</sup>

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<sup>13</sup> Nevertheless, this same argument was successfully made before the Supreme Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)—a case in which the employer had actually made the effort—by hiring an industrial psychologist to validate its job requirements. But the Court rejected these efforts because, among other things, the data the employer was able to generate was too scanty to be statistically significant. It is likely that the justices did not realize that their own job qualifications for hiring clerks—a law degree, law review experience, and graduation from a prestigious law school—would almost certainly fail the test they had set out in *Albemarle Paper Co.*

A few years later, the EEOC promulgated the 1978 Uniform Guidelines on Employee Selection Procedures, under which a selection procedure that has a disparate impact on the members of any race, sex, or ethnic group is considered a violation of Title VII unless the selection procedure has been validated. 29 C.F.R. § 1607.3(A). Section 1607.5 elaborated on what validation entails.

#### § 1607.5

General standards for validity studies.

A. Acceptable types of validity studies. For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B. Criterion-related, content, and construct validity. Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See section 14B below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D below.

C. Guidelines are consistent with professional standards. The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American

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Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, DC, 1974) (hereinafter "A.P.A. Standards") and standard textbooks and journals in the field of personnel selection.

D. Need for documentation of validity. For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 below.

E. Accuracy and standardization. Validity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions.

F. Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period. In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

G. Method of use of selection procedures. The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See sections 3B, 14B (5) and (6), and 14C (8) and (9).

H. Cutoff scores. Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

I. Use of selection procedures for higher level jobs. If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A "reasonable period of time" will vary for different jobs and employment situations but will seldom be more than 5 years.

Use of selection procedures to evaluate applicants for a higher level job would not be appropriate:

- (1) If the majority of those remaining employed do not progress to the higher level job;
- (2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or
- (3) If the selection procedures measure knowledges, skills, or abilities required for advancement, which would be expected to develop principally from the training or experience on the job.

J. Interim use of selection procedures. Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided: (1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time. If such a study is not technically feasible, see section 6B. If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligations arising under Federal law.

K. Review of validity studies for currency. Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B above. There are no absolutes in the area of determining the currency of a validity study. All

*Green I* went on to state that “blacks who have been summarily denied employment by MoPac on the basis of conviction records have been discriminated against on the basis of race in violation of Title VII and that the district court should enjoin MoPac's practice of using convictions as an absolute bar to employment.” *Id.* at 1298-99.<sup>14</sup>

On remand, the trial court issued an order enjoining Missouri Pacific from disqualifying job applicants on account of any past criminal conviction. But it specifically allowed Missouri Pacific to consider an applicants' prior criminal record as a factor in making individual hiring decisions so long as defendant takes into account (1) the nature and gravity of the offense or offenses, (2) the time that has passed since the conviction and/or completion of sentence, and (3) the nature of the job for which the applicant has applied. These three items have come to be known as the “*Green* factors.”

Neither side of the litigation was happy with this result. But it was the plaintiffs, not the defendant, who were most dissatisfied and appealed. They requested that the court enjoin Missouri Pacific from considering a job applicant's criminal record at all unless and until it could produce a valid study showing that ex-offenders do indeed perform poorly at Missouri Pacific as employees. A different panel of the Eighth Circuit (with only Judge Heaney in common) held that the *Green I* panel's discussion of the need for a validated study was dictum and affirmed the trial court. *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8<sup>th</sup> Cir. 1977)(“*Green II*”).

Over the course of the next two decades, the EEOC issued several policy statements on the issue. The first—issued on February 4, 1987—essentially overruled an earlier EEOC decision that had curtailed employer discretion more than the *Green* factors and applied the *Green* factors instead.<sup>15</sup> A second policy statement was issued a few months later and

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circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

It was not until a decade later that the Supreme Court began to back away from *Albemarle Paper* and state that such formal validation studies are not necessarily required to demonstrate business necessity. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (plurality opinion). After the Civil Rights Act of 1991, the status of this issue is quite uncertain.

<sup>14</sup> Note that the court stated that “*blacks* who have been summarily denied employment by MoPac on the basis of conviction records have been discriminated against on the basis of race in violation of Title VII.” (Emphasis added). What about whites or Asians? One of the aspects of Chairman Castro's draft Statement that struck me is how little the arguments that he uses in favor of laws that help ex-offenders find jobs depend (or should depend) on issues of race, color, sex, religion or national origin. If it is good policy for the federal government to encourage employers to hire ex-offenders (and through the Work Opportunity Tax Credit Program I believe it is), it is not clear why this should depend on the race, color, sex, religion or national origin of the ex-offender. Trying to deal with this issue as a race question is misguided.

<sup>15</sup> See EEOC Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e et seq. (Feb. 4, 1987). An earlier decision of the EEOC had taken the position that an employer should consider (1) the number of offenses and the circumstances of each offense for which the individual was convicted; (2) the length of time intervening between the conviction for

clarified that, if an employer could show that within its applicant pool its conviction policy did not have a disparate impact, then no violation of Title VII would have occurred.<sup>16</sup> The latter was arguably an obvious point to a lawyer familiar with disparate impact analysis, but sometimes obvious points have to be made, since these policy statements must be applied by non-lawyers.

The *2012 Guidance* moves things in the opposite direction from those two policy statements. While it insists that it “does not necessarily require individualized assessment in all circumstances ... the use of a screen that does not include individualized assessment is more likely to violate Title VII ... [and] the use of individualized assessments can help employers avoid Title VII liability....” One can be confident that employers will read this as requiring individualized assessments at least for members of the groups for whose benefit the policy is intended (African Americans and Hispanics).

Although the guidance is far from clear, an individualized assessment appears to include application of the *Green* factors followed by a second, more subjective assessment. The latter part of the procedure ordinarily must include “notice that [the job applicant] has been screened out because of a criminal conviction, an opportunity to ... demonstrate that [the employer’s policy] should not be applied due to his particular circumstances; and ... whether the additional information ... warrants an exception ... show[ing] that the policy as applied is not job related and consistent with business necessity.” *2012 Guidance* at 15.

Put differently, the *2012 Guidance* requires that employers telegraph to job applicants that they have been screened out on account of their criminal records. It thus exponentially increases the odds of a lawsuit. The vague discussion of business necessity in the guidance means that reasonable minds will disagree as to whether the employer has sufficient reason to reject a job applicant on account of his criminal record. The fact that ex-offenders are sometimes *unreasonable* should not be lost sight of.<sup>17</sup>

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the offense and the employment decision; (3) the individual’s employment history; and (4) the individual’s efforts at rehabilitation. See Commission Decision No. 78-35, CCH EEOC Decisions, Para. 6720 (June 8, 1978). Employers considered the two latter factors to open up the inquiry far too broadly. *Green II* was problem enough for employers, but it was water under the bridge. Knowledge of rehabilitation efforts would require more interaction with the job applicant than is often justified under the circumstances and would likely encourage litigation. The *Green* factors narrowed the required inquiry relative to the EEOC’s earlier decision.

<sup>16</sup> EEOC Policy Statement on the Use of Statistics Involving the Exclusion of Individuals with Criminal Records from Employment (Jul. 29, 1987). In 1990, the EEOC adopted a policy that applied specifically to the use of arrest records. See Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e et seq. (Sept. 7, 1990).

<sup>17</sup> Back in 1978, a “charging party” complained to the EEOC that he had been denied a job at a public auditorium on account of convictions for rape, drunkenness, assault & battery, carrying a pistol with a license and carrying a concealed weapon as well as various and sundry arrests, including one for burglary. He apparently did not think his record should pose a problem. The EEOC disagreed. But the *2012 Guidance* will ensure that litigation of this type will become more common, because it pushes employers hard to question their job applicants about the particular circumstances of their convictions, their efforts at rehabilitation, etc.

Once an ex-offender brings a case to the EEOC's attention (or the employer's exercise of discretion is brought to the EEOC's attention by other means), it will be the EEOC's judgment concerning what constitutes "business necessity," rather than the employer's, that counts. The only way to avoid this is for the employer to bend over backwards to hire ex-offenders.

In their draft Statement, Commissioners Kladney and Achtenberg recount a disagreement among the members of the Commission. The staff member who composed the initial draft of the report had written: "Taken as a whole it [the *2012 Guidance*] emphasizes the judgment of the EEOC over that of employers in the selection or retention of employees with criminal histories." Commissioner Kladney wanted that language removed from the report. He also objected to the staff member's suggested alternative wording, which was to place the word "subjective" before the word "judgment." In an effort to accommodate Commissioner Kladney's concerns, the Commission adopted the following, which Commissioner Kladney *also* objected to:

"Although the 2012 Guidance acknowledges as a legitimate selection concern, the physical or other security risks to customers or other employees inherent in hiring any employee, it leaves employers exposed to the discretionary judgment of the EEOC as to individual hiring decisions."

But the staff member had it exactly right. Both the original wording and the various alternatives we considered were correct. Commissioner Kladney can argue about whether this is a good thing or a bad thing, but it is difficult to deny the accuracy of the statement in its various forms. The whole point of the EEOC's guidance was to inform employers that the EEOC's (and ultimately a court's) judgment on the issue of the risk of hiring a particular ex-offender or class of ex-offenders for a particular job or class of jobs would trump the employer's. I have no confidence that the EEOC will be a better judge of these matters than employers. Instead it will almost certainly do a worse job.<sup>18</sup>

Still, the *2012 Guidance* is not the root of the problem. The root of the problem is disparate impact liability itself. I shall therefore turn to the curious history of that doctrine, its perverse consequences (particularly in the area of criminal background checks) and the troubling constitutional issues it raises.

### **III. The Invention of Disparate Impact Liability by the EEOC Was Contrary to the Intent of Congress in 1964, But Has Unfortunately Become Embedded in the Law through the 1991 Act, Thus Paving the Way for its Ill-Considered *2012 Guidance*.**

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<sup>18</sup> If the EEOC interprets "business necessity" to require anything more than a good faith business reason for the employer's decision, the EEOC's intervention in this area is guaranteed to cause very serious problems. See *supra* at note 6. But even a very limited intervention will cause problems. Lest we forget: The EEOC is unlikely to understand an individual employer's business needs as well as the employer.

The passage of Title VII of the Civil Rights Act of 1964 was historic. But it was not intended to assert federal control over every aspect of the workplace. Its carefully limited purpose was to prohibit employment discrimination based on race, color, religion, sex and national origin. As Representative William M. McCulloch and his co-authors put it:

“[M]anagement prerogatives and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.”<sup>19</sup>

At the time, this was likely seen as an obvious, but important, point. Free enterprise has always been the engine that drives the nation’s prosperity. For that and other reasons, the best way for the federal government to promote the general welfare, including the welfare of women and minorities, has usually been to allow individuals the freedom to run their own business affairs when acting in a peaceable and honest manner. When exceptions become necessary (as they were in 1964), those exceptions were understood by most of their Congressional supporters as precisely that—exceptions. They were not intended to swallow the rule.<sup>20</sup>

With the leadership of Rep. McCulloch and others, H.R. 7152 passed the House of Representatives on February 10, 1964 by a vote of 290 to 110.<sup>21</sup> Passing the Senate would prove more difficult, since Senate rules at the time requires 67 votes to cut off the inevitable Southern filibuster. Every vote would count. Senate leaders carefully assured their colleagues that Title VII would not interfere with employer discretion to set job qualifications—so long as race, color, religion, sex and national origin were not among them. Senators Clifford Case (R-N.J.) and Joseph Clark (D-Pa.), co-managers of the bill on the Senate floor, emphasized this in an interpretative memorandum:

“There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests

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<sup>19</sup> Statement of William M. McCulloch et al., H.R. Rep. No. 914, 88 Cong., 2d Sess. (1964). McCulloch was the ranking member of the House Judiciary Committee and was considered by many on both sides of the aisle to have been indispensable in drafting and securing the passage of the Act. See William N. Eskridge, Jr., Philip Frickey and Elizabeth Garrett, **CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY** 3-10 (3d ed. 2001)(discussing McCulloch’s critical role in passing the Civil Rights Act of 1964).

<sup>20</sup> There is a reason that countless employers proclaim, “Our employees are our most valuable asset.” Using care in selecting employees is what gives many businesses their competitive edge. Some use tried-and-true methods to make their choices. Others use innovative approaches. Straight-jacketing employer discretion in this crucial area only serves to damage the competitiveness of American enterprise.

<sup>21</sup> See Hugh Davis Graham, **THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY** 129-138 (1990). Support for the bill was bipartisan with 152 Democrats and 138 Republicans voting in favor and 96 Democrats and 34 Republicans voting against. Overwhelmingly the negative votes came from members from states of the former Confederacy. *Id.*

than members of other groups. *An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.*"

Case & Clark Memorandum, 110 Cong. Rec. 7213 (emphasis added).

Note that Case and Clark used the term "bona fide qualification tests," meaning qualification tests adopted in good faith, and not "necessary" or "scientifically valid" qualification tests. To Case and Clark, the issue was whether the employer chose a particular job qualification *because* he believed that it would bring him better employees or *because* he believed it would help him exclude applicants based on their race, color, religion, sex or national origin. Neither the EEOC nor the courts were authorized to second-guess an employer acting in good faith.<sup>22</sup>

Indeed, Clark and Case celebrated this aspect of Title VII, pointing out that it "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications." "Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color," they wrote. Case & Clark Memorandum, 110 Cong. Rec. 7247.

Congress's intention to outlaw only discriminatory treatment and not disparate impact is made clear from Title VII's central prohibitions:

#### Section 703. Unlawful employment practices

##### (a) Employer practices

It shall be an unlawful employment practice for an employer—

- (1) to fail of refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's race, color, religion, sex, or national origin*.

42 U.S.C. sec. 2000e-2 (emphasis added).

To "discriminate" against a job applicant "because of" his "race, color, religion, sex or national origin" always requires some level of intentionality.<sup>23</sup> As Richard K. Berg, who

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<sup>22</sup> Clark and Case's remarks were likely inspired at least in part by the controversy over *Myart v. Motorola, Inc.*, No. 63C-127 (Ill. F.E.P.C. 1964), reprinted in 110 Cong. Rec. 5662 (1964). See *infra* at note 27.

<sup>23</sup> I believe that the term "discriminate" does not always require *conscious* intentionality. If an employer rejects a Hispanic job applicant, when he would have hired an applicant who is identical in every way

as an attorney in the Office of Legal Counsel at the Department of Justice helped draft the Kennedy Administration's original proposal and who advised Senator Humphrey during the debates, put it: "Discrimination is by its nature intentional. It involves both an action and a reason for action. To discriminate 'unintentionally' on grounds of race, color, religion, sex or national origin appears a contradiction in terms." See Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 **BROOKLYN L. REV.** 62, 71 (1964).<sup>24</sup>

But just in case Section 703 were to be misinterpreted, the bill was amended in the Senate at the insistence of Republican Leader Everett Dirksen—without whose support the bill likely never would have gotten past the Southern filibuster. For example, at Dirksen's behest, the word "intentionally" was added to Section 706(g), which deals with judicial power to enforce the prohibitions of Section 703. As modified, Section 706(g)(1) read:

(1) If the court finds that the respondent has *intentionally* engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate. . . .

42 U.S.C. sec. 2000e-5(g)(1) (emphasis added).

In explaining why the term "intentionally" was added here, Senator Humphrey said, "Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief.... The expressed requirement of intent is designed to make it wholly clear that inadvertent or accidental discrimination will not violate the title or result in entry of court orders." 110 Cong. Rec. 12,723-28 (1964).<sup>25</sup> See also Hugh Davis Graham, *supra* note

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except that he is not Hispanic, the employer is discriminating against the Hispanic applicant because of his race or national origin. To discriminate against an individual because of his race or national origin is to treat him differently from how one would have treated an otherwise identical person of a different race or national origin. The employer need not be consciously aware of the double standard he is applying. That is, however, a very great distance from disparate impact liability, which does not require that the employer be motivated by race or national origin at all, consciously, subconsciously or unconsciously.

<sup>24</sup> Berg later became Deputy General Counsel of the EEOC, where he apparently clashed with Alfred W. Blumrosen. See *infra* at 325-326.

<sup>25</sup> Dirksen's amendment and Humphrey's explanation are not in perfect harmony, since the amendment applied only to judicial remedies, while Humphrey's explanation applies generally. Dirksen may have intended to foreclose courts from intervening even in the case of unconscious disparate treatment and to leave such cases entirely to the mediation efforts of the EEOC. An employer who engaged in unconscious discrimination would essentially be allowed "one free bite." If the employer continued its practices after EEOC mediation efforts, it would be difficult for the employer to maintain that its actions were unconscious. None of this comes close to allowing disparate *impact* liability. It is simply a debate over various sorts of disparate *treatment* liability.

11 at 387 (1990); Daniel Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PENN. L. REV. 1417 (2003) (both arguing that the 88<sup>th</sup> Congress would have been astonished at the application of disparate impact liability).<sup>26</sup>

Dirksen also insisted that the EEOC be reconfigured to ensure that it would not exercise what he and his allies were convinced could grow to be excessive power over the employment relationship.<sup>27</sup> Dirksen saw to it that it would have neither the authority to

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<sup>26</sup> Indeed, while Title VII was under consideration, an Illinois hearing examiner, interpreting the more loosely worded Illinois Fair Employment Practices Act, concluded that an employer could not administer a general intelligence test to job applicants, despite a lack of intent to discriminate on the basis of race, because African Americans had not received the kind of education that would allow them to do well on the test. *Myart v. Motorola, Inc.*, No. 63C-127 (Ill. F.E.P.C. 1964), re-printed in 110 Cong. Rec. 5662 (1964). Title VII supporters were frantic to assure their colleagues that their proposed law would not permit such a result. Just in case, an amendment was proposed by Senator John Tower and adopted stating that notwithstanding any other provision, employers are free “to give and to act upon the results of any professionally developed ability test provided that such test is not designed, intended or used to discriminate because of race ....” In the view of most observers, including newspaper editorial pages at the time, the hearing examiner had badly overreached. See *Hiring Tests Wait for the Score: Case Involving Motorola’s Employment Test Raises Issue of Whether Employers Can Use Screening Devices That Might Discriminate Against “Deprived” Persons*, **BUS. WEEK** 45 (Feb. 13, 1965) (reporting that Title VII would not permit such a result). No one in Congress defended the *Myart* decision. Not surprisingly, it was eventually overturned. *Motorola, Inc. v. Illinois Fair Employment Commission*, 34 Ill.2d 266, 215 N.E.2d 286 (1966). But see *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (interpreting the Tower Amendment to impose on employers a duty to use only those tests that can be proven in court to be job-related and using it as the primary textual support for adopting rather than rejecting disparate impact liability). See also George Rutherglen & John Donohue III, **EMPLOYMENT DISCRIMINATION: LAW AND THEORY** 158 (3d ed. 2012) (critically questioning the *Griggs* interpretation of the Tower Amendment).

<sup>27</sup> This process of ensuring that the EEOC would not become an all-powerful regulator of employment practices had already begun in the House of Representatives. Although the Kennedy Administration’s original proposal did not contain a general ban on employment discrimination at all, a new proposal, which emerged in subcommittee, did so. This early version of what eventually became Title VII proposed an EEOC modeled on the National Labor Relations Board (NLRB), complete with quasi-judicial cease-and-desist enforcement authority. Such power, however, was unacceptable to most of the Republicans and some of the Democrats whose votes would be crucial to secure the bill’s passage. Over the years, these members had become increasingly concerned by what they viewed as pro-Labor bias and regulatory abuse of the NLRB (and similar biases and abuses by similarly empowered administrative agencies). In their view, administrative procedures made it difficult for courts to intervene to prevent further abuse. They argued that federal courts “so rarely overturned the decisions of such administrative tribunals that the normal burden of proof was reversed, and the accused on appeal found that ‘he must bear the burden of proving his freedom from guilt.’” See Hugh Davis Graham, **THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY** 130-31 (1990) (quoting Statement of Griffin and Frelinghuysen, House Rep. No. 570 at 15).

The House bill had to be stripped of cease-and-desist authority on the part of the EEOC and it was. Instead, the bill was amended to rely on what House Republicans referred to as the “prosecutorial model” under which the EEOC would be authorized to bring actions in federal court, but those courts would ultimately control the interpretation of Title VII. This was in keeping with the standard model under which the Department of Labor enforced the recently passed Equal Pay Act, the wage-and-hour provisions of the Fair Labor Standards Act, and the unfair labor practices prohibited by the Landrum-Griffin Act. See Hugh Davis Graham at 130.

engage in substantive rulemaking nor the authority to litigate. Fearful of the tendency of administrative agencies to be captured by political ideologues, Dirksen and his Senate allies wanted an EEOC whose charge was simply to investigate and mediate complaints.

Under Dirksen's model, when a complainant was dissatisfied with the EEOC's efforts at mediation, he or she could bring a Title VII action in federal court against the employer.<sup>28</sup> The only governmental agency authorized to institute litigation against an employer on behalf of the United States was the Department of Justice and then only if it found a "pattern or practice" of violations.

Courts would thus be the primary interpreter of Title VII and not the EEOC. Dirksen adamantly opposed substantive rulemaking authority on the part of the new agency, because he saw it as an opportunity for the agency to extend Title VII's reach through the promulgation of prophylactic rules that go beyond the scope of Title VII's actual prohibitions. If the EEOC's role could be confined to investigation and mediation, Dirksen believed the risk of agency overreach would be minimized.<sup>29</sup>

No one publicly objected to Dirksen's insertion of the word "intentional" into Section 706(g)(1). It was uncontroversial at the time. But some advocates were infuriated by Dirksen's reconfiguration of the EEOC. One scholar famously called it "a poor enfeebled thing." Michael I. Sovern, **LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT** 102, 205-06 (1966). It was commonplace to refer to the EEOC as a "toothless tiger" until it received the power to pursue lawsuits against employers in 1972. Indeed, the EEOC's own web site acknowledges this:

"Because of its lack of enforcement powers, most civil rights groups viewed the Commission as a "toothless tiger." Nevertheless, EEOC made significant contributions to equal employment opportunity between 1965 and 1971 by using the powers it had to help define discrimination in the workplace."<sup>30</sup>

But the plain truth was that without these and other modifications to the bill required by

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The prosecutorial model, however, was not satisfactory to Dirksen and a significant number of Senate Republicans whose vote were crucial to the bill's passage. The Senate version of the bill, which eventually became law, gave the EEOC the authority to mediate disputes arising out of Title VII, but nothing more.

<sup>28</sup> Another of Dirksen's amendments eliminated the ability of advocacy organizations like the NAACP to sue on behalf of victims. Dirksen wanted Title VII litigation to work the way most civil litigation does—with actual victims suing actual wrongdoers. See Daniel Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 **U. PENN. L. REV.** 1417, 1490 (2003).

<sup>29</sup> Compare *Alexander v. Sandoval*, 532 U.S. 275 (2001) (noting that *Title VI* does confer upon the Department of Justice the authority to promulgate regulations and assuming without deciding that those regulations may go somewhat beyond Title VI's ban on actual discrimination).

<sup>30</sup> See EEOC 35<sup>th</sup> Anniversary: 1965 - 1971: A "Toothless Tiger" Helps Shape the Law and Educate the Public, available at <http://www.eeoc.gov/eeoc/history/35th/1965-71/index.html>

Dirksen, the Civil Rights Act of 1964 would not have passed.<sup>31</sup> Like most major legislation, it was the product of compromise.

The story, however, did not end there. In the next phase of Title VII's history, "creative" EEOC officials, concerned about what they considered to be an otherwise "powerless" agency implementing a "weak statute," supplanted the original design of Title VII with a disparate impact framework that they believed would be more effective in "coping with the major problems of [their] time." Alfred W. Blumrosen, **BLACK EMPLOYMENT AND THE LAW** 53 (1971) ("BLACK EMPLOYMENT").

Early on, EEOC officials seized upon the idea of issuing "guidelines" (more commonly called "guidances" today) as an alternative to the substantive rulemaking power that Dirksen and his allies had denied them. **BLACK EMPLOYMENT** at 52. Given the eagerness of most employers to stay on the right side of the law, these guidances have proven to be as effective as regulations at influencing employer practices.

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<sup>31</sup>Among the other amendments pressed by Senator Dirksen and acquiesced in by Congress were (1) a restriction requiring complaints to attempt to exhaust their remedies before state fair employment practices commissions before they file a complaint with the EEOC; (2) an exemption for employers whose employees work less than twenty weeks per year (largely designed for agricultural employers); (3) the deletion of a provision that would have allowed outside organizations like the NAACP to sue on behalf of an employee or applicant for employment; (4) the deletion of language at the beginning of Title VII suggesting broad purpose on the part of Congress. As to the fourth item on this list, see *infra* at 327-328. Most of Dirksen's changes can fairly be described as weakening the bill. But one amendment—the expansion of the definition of "employment agency" to include union hiring halls—significantly strengthened the bill. See Daniel Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 **U. PENN. L. REV.** 1417, 1490 (2003).

One of Dirksen's final additions to the bill read:

"(j) Preferential treatment not to be granted on account of existing number or percentage balance

Nothing contained in this subchapter shall be interpreted to require any employer ... subject to this subchapter to grant preferential treatment to any individual or to any group because of race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer ... in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community ... or in the available work force ...."

This amendment was important in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), when it was interpreted not to cover cases in which an employer was engaging in affirmative action on a voluntary basis. A slim five-member majority held that while Title VII did not *require* preferential treatment for under-represented minorities, it did, at least under certain circumstances, *permit* it. At the time, the employer, Kaiser Aluminum & Chemical Corp., was coming under pressure from the EEOC to increase the number of minority members in its craft-training positions. The Court nevertheless treated Kaiser's preferential treatment of under-represented minority member as voluntary.

Indeed, in some ways, in some ways it worked to the EEOC's advantage not to have substantive rulemaking authority. Unlike substantive rules, guidances are not subject to the Administrative Procedure Act procedures like notice and comment and thus tend to receive less public scrutiny or government oversight.<sup>32</sup> The one-sided, truncated procedure leading up to the adoption of the *2012 Guidance* is just one example.<sup>33</sup>

It did not take long before the EEOC began to promote disparate impact policy despite the contradiction between that policy and Title VII as it was actually passed by Congress. Alfred Blumrosen, the EEOC's first "Chief of Conciliations" and one of the architects of its disparate impact policy, was unabashed in describing the extent to which the EEOC was (and in his view should be) aggressive in its interpretation of Title VII:

Creative administration converted a powerless agency operating under an apparently weak statute into a major force for the elimination of employment discrimination. ... [Legal education] rarely deals with the affirmative aspects of administration. Rather, the law schools provide elaborate intellectual equipment to *restrict* the efforts of administrators. Constitutional law and administrative law are still largely concerned with what government may not do, rather than with how it should decide what it may do. Students impatient with the negativism of present legal education would be better equipped as lawyers if they would focus sharply on the question of "how we can best fulfill the purposes which brought our agency into being" rather than on the question of "whether the courts will sustain this course of action."

**BLACK EMPLOYMENT** at 53 (emphasis in original).

Historian Hugh Davis Graham wrote in **THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY**:

The EEOC legal staff was aware from the beginning that a normal, traditional, and literal interpretation of Title VII could blunt their efforts [based on disparate impact theory] against employers who used either professionally developed tests or bona fide

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<sup>32</sup> The fact that Title VII and arguably other laws make EEOC investigations and mediations confidential adds to the degree to which EEOC policymaking tends to escape both public scrutiny and government oversight. See 42 U.S.C. sec. 2000e-5(b). Moreover, the EEOC's practices in this regard sometimes go beyond its statutory mandate. For example, the EEOC has refused to share information about its investigations, mediations and settlements with the Civil Rights Commission despite the fact that the Commission's authorizing statute specifically requires agencies like the EEOC to cooperate with the Commission in its oversight role. See Letter of Peggy R. Mastroianni, EEOC Associate Legal Counsel, to David Blackwood, Commission General Counsel (February 6, 2009). This is not in keeping with Title VII's original design. As Senator Hubert Humphrey explained, "It should be noted that this is a ban on publicizing and not on such disclosure as is necessary to the carrying out of the [EEOC's] duties under the statute. ... The amendment is not intended to hamper ... proper cooperation with other State and Federal agencies, but rather is aimed at making available to the general public of unproven charges." 110 Cong. Rec. 12297 (June 4, 1964).

<sup>33</sup> The statement of Commissioner Peter Kirsanow details the ways in which the EEOC failed to hear from employers.

seniority systems. The EEOC's own official history of these early years records with unusual candor the commission's fundamental disagreement with its founding charter, especially Title VII's literal requirement that the discrimination be intentional. "Under the traditional meaning," which was the "common definition of Title VII," the EEOC's first *Administrative History* observes, an act of discrimination "must be one of intent in the state of mind of the actor." ... But by the end of the Johnson administration the EEOC, by its own self-description, was disregarding Title VII's intent requirement."

Hugh Davis Graham at 248.

The *Administrative History* cited by Graham stated that "unlike state FEP agencies which continue to rely on intent," the EEOC "has begun to rely on the constructive proof of discrimination." Hugh Davis Graham at 248-49.

Writing for the NAACP's **THE CRISIS** in 1968, EEOC Commissioner Samuel Jackson reiterated this policy:

"[The] EEOC has taken its interpretation of Title VII a step further than other agencies have taken their statutes. It has reasoned that in addition to discrimination in employment, it is also an unlawful practice to fail or refuse to hire, to discharge or to compensate unevenly ... on criteria which prove to have a demonstrable racial effect without a clear and convincing business motive."

Note Jackson's admission that the EEOC's new approach is "in addition to discrimination in employment." Yet discrimination is what Title VII bans, not the use of job qualifications that "prove to have a demonstrable racial effect."

Jackson attempts to justify the EEOC's departure from Title VII's intent requirement by stating that "Congress, with its elaborate exploration of the economic plight of the minority worker, sought to establish a comprehensive instrument with which to adjust the needless employment hardships resulting from the arbitrary operation of personnel practices, as well as purposeful discrimination." Samuel C. Jackson, *EEOC vs. Discrimination, Inc*, **THE CRISIS** 16-17 (January 1968). But the statute is what it is (or it was what it was). It is no more "a comprehensive instrument with which to adjust ... needless employment hardships" than the Patriot Act is a comprehensive instrument with which to promote national security or the No Child Left Behind Act is a comprehensive instrument by which the federal government is given authority to "make schools better." Words matter.<sup>34</sup> The

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<sup>34</sup> "Only the most extraordinary showing of contrary intentions would justify a limitation on the 'plain meaning' of the statutory language," the Supreme Court has stated. *Garcia v United States*, 469 U.S. 70, 75 (1984). Congress's general objective in passing Title VII may have been primarily to remove barriers to the employment of African Americans or it may have been to impress Jodie Foster. But the means it chose to accomplish that objective was to prohibit discrimination on the basis of race, color, sex, religion or national origin, and that is what counts.

88<sup>th</sup> Congress banned discrimination on the basis of race, color, sex, religion, and national origin in employment. Period.

The Supreme Court nevertheless followed the EEOC's lead in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Although the Court did not render a detailed analysis, it suggests two reasons for its decision.

The first was simple deference to the EEOC and its Guidelines on Employment Testing Procedures (August 24, 1966) as "expressing the will of Congress." *Id.* at 435\_ & n. 9. But there are several problems with deference in this context. The most obvious is that the EEOC's interpretation clearly conflicts with the text of Title VII, which explicitly prohibits Courts from ordering a remedy in cases that do not involve "intentional" violations. (Remarkably, however, the Court does not even mention Section 706(g)(1)'s requirement of intention.) Next is that no argument was made as to why an agency that Congress had made every effort to render toothless should be presumed to express the will of Congress. Congress's clear intent in 1964 was to confine the EEOC to a role of investigation and mediation. Since at the time the EEOC was not the agency charged with enforcing Title VII (the only authority to litigate Title VII actions belonged to the Department of Justice), it is difficult to see why deference was appropriate.<sup>35</sup>

Second, the Court adopted reasoning like Jackson's in stating that the "objective of Congress" in enacting Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 429-30 (emphasis added). It held therefore that under Title VII "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* (emphasis added). "The touchstone is business necessity," it stated. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.<sup>36</sup>

The Court's reliance on Congress's larger intent was curious in view of the pains members of the Senate had taken to avoid arguments based on its supposed larger intent. The original bill approved by the House of Representatives contained the following vague, prefatory language:

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<sup>35</sup> The Court referred to the EEOC as "having enforcement responsibility" and as "the enforcing agency" for Title VII. *Id.* at 434 (emphasis added). But this was going too far. After the Dirksen amendments, the EEOC was simply a mediating agency. It had no authority to adjudicate claims or to issue cease and desist orders; it had no litigation authority. Mediators are not enforcers.

The Guidelines on Employment Testing Procedures would not be entitled to Chevron-deference today, since they do not have the force of law. See *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>36</sup> *Griggs* may well have involved intentional discrimination. But if so, it was incumbent upon the plaintiffs to prove their case on that theory.

The Congress hereby declares that the opportunity for employment without discrimination of the types described in sections 704 and 705 is a right of all persons within the jurisdiction of the United States, and it is the national policy to protect the right of the individual to be free from such discrimination.

Dirksen conditioned his support and the support of his allies on the deletion of this language. Note that it is nevertheless inconsistent with the Court's notion that the statute was intended to generally remove barriers to employment for African Americans and other under-represented minorities. Instead it expresses in flowery language a broad intention to protect *all* persons from discrimination based on race, color, sex, religion or national origin.

But even that much in the way of broad declarations was too much for Dirksen and his allies. It seems likely that they foresaw the possibility that if future courts could attribute broad declarations to Congress in passing Title VII, those courts might be tempted to reason backwards that Congress must have intended the statute to be interpreted more broadly than the actual operative language. Dirksen wanted the operative language of the statute to speak for itself: When Congress passed a law prohibiting employers from discriminating on the basis of race, color, religion, sex or national origin, it was because they wanted to prohibit employers from discriminating on the basis of race, color, religion, sex, or national origin—nothing more and nothing less.

After *Griggs*, Title VII was interpreted to demand two things of employers: (1) They must provide equality of opportunity to all persons regardless of race, color, sex, religion or national origin; and (2) In deciding upon job qualifications, they must provide equality of group results (or at least women and minorities must do as well as men and whites) unless they can prove they were driven by business necessity to do otherwise. These two requirements are at war with each other. Equality of treatment and equality of results are not the same thing.

In the ensuing years, the sweeping nature of the disparate impact liability became more evident. In *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988)(plurality opinion) and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Court began to limit and clarify disparate impact liability. Only then, in 1991, did Congress pass legislation recognizing in any way the disparate impact theory. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 2(2), 3(2) 3(3), 105 Stat. 1071, 1074-75 (1991).

**IV. Disparate Impact Liability, as Represented by the EEOC's 2012 Guidance, Leads to Unjustified Federal Control Over Ordinary Decisions by Employers, Provides Opportunities for Political Favoritism, Is Logically Incoherent, Creates Perverse Incentives on the Part of Employers and May Well Work to the Disadvantage of the Very Persons It Was Intended to Benefit.**

**A. Because all job qualifications have a disparate impact on some protected group, disparate impact theory is a sprawling, incoherent mess.**

*A central problem with disparate impact liability is that all job qualifications have a disparate impact.* Those that relate to criminal background checks are by no means special. It is no exaggeration to state that there is always some protected group that will do comparatively well or comparatively poorly with any particular job qualification. As a group, men are stronger than women, while women are generally more capable of fine handiwork. Chinese Americans and Korean Americans score higher on standardized math tests and other measures of mathematical ability than most other ethnic groups. Subcontinental Indian Americans (and also Hindus) are disproportionately likely to have experience in motel management. Norwegian Americans (and also Lutherans) are more likely to have experience growing durum wheat. Women tend to get better grades in school than men.<sup>37</sup> And Unitarians are more likely to have a college degree than Baptists. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (recognizing that disparate impact theory would have to apply to subjective as well as objective job qualifications).<sup>38</sup>

Some of the disparities are surprising. Cambodian Americans are disproportionately likely to own or work for doughnut shops and hence are more likely to have experience in that industry when an employer calls for it—apparently because a Cambodian immigrant happened to get a job at a doughnut shop and passed his skills onto members of his immigrant community. See Seth Mydans, *Long Beach Journal: From Cambodia to Doughnut Shops*, N.Y. TIMES (May 26, 1995). Other disparities have more obvious origins: Non-Muslims are more likely to have an interest in wine and hence develop qualifications necessary to get a job in the wine industry than are Muslims, because Muslims tend to be non-drinkers.

Will Unitarians always be more likely to graduate from college than Baptists? Will Cambodian Americans always have a strong position in the doughnut industry? No one can say. Our multi-racial, multi-faith, multi-ethnic nation is complicated, and it won't be getting any simpler anytime soon.

Only one thing is for certain: There is no end to racial, religious, color, sex and national origin disparities in job qualifications that one will find if one looks carefully. Indeed, I will happily write a check for \$10,000 to the favorite charity of the first person who identifies an actual job qualification—one that has actually been used to separate a

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<sup>37</sup> See Gail Heriot & Alison Somin, *Affirmative Action for Men? Strange Bedfellows and Strange Silences in the Public Debate Over Discrimination Against Women In College Admissions*, 12 ENGAGE 14 (December 2011).

<sup>38</sup> The qualifications that have given rise to disparate impact claims hiring, promotion and retention include veterans' preferences, employee performance reviews and seniority. See *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726 (1984); *Terry v. City of San Diego*, 2012 U.S. Dist. LEXIS 7661 (S.D. Cal. 2012); *Stagi v. Amtrak*, 407 F. Supp. 2d 671 (E.D. Pa. 2005).

significant number of successful from unsuccessful job applicants—that he or she can prove does not have a disparate impact on any racial, religious, color, sex or national origin group. I submit it cannot be done. Even picking job applicants by the first letter of their surnames will have disparate impact based on national origin (and probably other classifications).<sup>39</sup>

Given all this, Representative William McCulloch's statement that the "[i]nternal affairs of employers ... must not be interfered with except to the limited extent that correction is required in discrimination practices" sounds quaint and naïve. See *supra* at note 9. So long as disparate impact liability is the law, employer discretion in hiring is just an illusion and the labor market is anything but free and flexible.<sup>40</sup> All decisions are subject to second-guessing by the EEOC or by the courts. This is a profound change in the American workplace—and indeed in American culture.

Supporters of disparate impact liability sometimes argue that disparate impact's ubiquity is not a problem, because the EEOC has agreed to abide by a "four-fifths" or "80% rule." Under the Uniform Guidelines on Employee Selection Procedures, if a particular job qualification leads to a "selection rate for any race, sex, or ethnic group" that is "greater than four-fifths" of the "rate for the group with the highest rate" it will not be regarded by federal enforcement agencies as evidence of adverse impact." This is cold comfort. First of all, particularly when the population is broken into ethnic groups, selection rates of less than four-fifths relative to the ethnic group with the highest rate are the rule and not the exception. Consider, for example, the horse racing industry. Of the top five grossing North American jockeys of 2012, all are Hispanic males. Height and weight restrictions make it less likely that an African- or Irish-American male will qualify. Furthermore, this supposed limitation on disparate impact is not binding on private litigants (and does not even guarantee which approach federal agencies will take).

Moreover, while the "four-fifths" rule purports to be practical, it is useless in practice. Prior to adopting a particular job qualification, employers usually have no way of knowing what the selection rates will be. All they can be sure of is that the results won't be equal across the board, since nothing ever is.

As a consequence, modern hiring and firing practices must be shrouded in secrecy. Employers do not dare advertise clear job qualifications for fear they will attract a lawsuit. Performance tests, indeed any kind of innovative hiring practices, are invitations to a lawsuit.<sup>41</sup> Wise employers try to be on good terms with the EEOC, knowing that when

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<sup>39</sup> I note that Chinese-Americans disproportionately have surnames beginning with "L", "W", and "Y"; and Americans of Scottish ancestry disproportionately have surnames beginning with "Mc".

<sup>40</sup> Disparate impact liability has been held to apply to promotions and terminations too. See *George v. Farmers Electric Cooperative, Inc.*, 715 F.2d 175 (5<sup>th</sup> Cir. 1983); *Wilmore v. Wilmington*, 699 F.2d 667 (3d Cir. 1983).

<sup>41</sup> Heman Belz, **EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION** (1991).

everything is potentially illegal, the name of the game is to avoid antagonizing the regulator.<sup>42</sup>

The *2012 Guidance* is itself a good example of how the system sometimes works. It does not prohibit or restrict employers from inquiring into applicant's arrest and conviction record. But it makes it less likely they will be willing to by requiring them to jump through hoops before they can decline to hire an applicant on account of such a record, and making it more likely they will be sued if they do decline to hire.

In general, employers cannot have rules that simply screen out ex-offenders; those that screen out some ex-offenders will be under great pressure to hire others in order to demonstrate that they are not simply screening out all of them. Employers must in most cases conduct "individualized assessments," which include "notice to the individual that he has been screened out because of a criminal conviction" and "an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances." *2012 Guidance* at 14. The procedure is so cumbersome and fraught with risk of litigation that one way or another employers will act to avoid it.

Note that disparate impact theory is essentially incoherent. Even when it is applied only for the benefit of women and minorities, for every protected group that is benefitted by prohibiting a particular job qualification, there is always a protected group that is harmed. If the EEOC hoped to benefit African Americans and Hispanics by issuing its guidance on criminal background checks, it did so with the knowledge that other groups, including Asian Americans, Quakers, and women, will be disadvantaged by reducing employers' discretion to reject applicants with criminal records. Logically, an employer who eliminates a job qualification that had worked to the advantage of Asian Americans, Quakers, and women in the past must be required to demonstrate business necessity too.

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<sup>42</sup> Supporters of disparate impact liability similarly argue that the EEOC has not attempted to push disparate impact to its logical limits. Apparently, we are not to worry about a body of law that makes everything potentially illegal until the day the EEOC officials are seen by these supporters as actually enforcing that law. But selective enforcement is simply an opportunity for political favoritism. It isn't law at all, and I find it troubling that anyone would be willing to subject employers to it. Moreover, I note that there has been a marked uptick in the interest of various government agencies in disparate impact liability over the past few years. Disparate impact liability is a growth industry. For example, the Department of Education has also implemented a policy of prohibiting disparate impact in school discipline. See Statement of Gail Heriot in U.S. Commission on Civil Rights, *School Discipline and Disparate Impact* 97 (2012); see also Statement of Todd Gaziano in *id.* at 87. The Department of Housing and Urban Development has attempted to apply it in the context of the Fair Housing Act. Twice this issue has been accepted for review by the Supreme Court. *Mount Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375 (3d Cir. 2011), cert. granted, \_\_\_ U.S. \_\_\_ (June 17, 2013), cert. dismissed \_\_\_ U.S. \_\_\_ (Nov. 15, 2013); *Gallagher v. Magner*, 619 F.3d 823 (8<sup>th</sup> Cir. 2010), cert. granted 132 S. Ct. 548 (2011), cert. dismissed, 132 S. Ct. 1306 (2012). In *Gallagher*, a settlement was reached in part due to the mediation efforts of the Department of Justice, causing the case to be withdrawn from the Court's docket. See Mr. Perez Works the Phones: A Top Justice Official Interferes with a Supreme Court Case, **WALL ST. J.** (Mar. 28, 2012). Just a few weeks ago, the *Mount Holly* case was also settled. *Rigging Anti-Discrimination Law: With Township of Mount Holly v. Mount Holly Gardens Citizens, Another Disparate Impact Housing Lawsuit Gets Quashed*, **WALL ST. J.** (Nov. 18, 2013).

Note also that disparate impact liability does not simply interfere with an employer's ability to "set his qualifications as high as he likes" and a job applicant's ability to draw the employer's attention to the characteristics that make him suited for the job in question. It also interferes with the ability of state and local governments to regulate employment. The EEOC takes the position that the Supremacy Clause vaults its interpretation of Title VII regarding criminal background checks over state legislation requiring employers to run criminal background checks on certain kinds of hires (e.g. employees who work with the aged). *2012 Guidance* at 24.

### **B. Disparate Impact Liability at Least in the Context of Criminal Background Checks May Be Doing More Harm than Good.**

Also troubling is the evidence that disparate impact liability may not even accomplish its goal of increasing employment opportunities for women and minorities.

The *2012 Guidance* is again an example. In Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 **J.L. & ECON.** 451 (2006) ("*Perceived Criminality*"), the authors discussed the double effect of using criminal background checks. As they explain, it must be kept in mind that African-American and Hispanic men are not simply more likely to have a criminal record, they are likely to be perceived that way too. Consequently, if the *2012 Guidance* discourages some employers from checking the criminal background of job applicants out of fear of liability, some will almost certainly shy away from hiring African-American or Hispanic males in the (not necessarily unfounded) belief that members of these groups are somewhat more likely to have criminal records than white or Asian American male applicants. Put differently, the EEOC's attempt to prevent the "disparate impact effect" creates an incentive for a "real discrimination effect."

Of course, prohibiting real discrimination is exactly what Title VII was supposed to be about. Congress was well aware that some discrimination—call it "statistical discrimination"—is rooted in stereotypes that may or may not have some basis in fact. For example, women really are on average less physically able to lift heavy weights than men. But if an employer wanted an employee who was strong, well-educated, good with people, mathematically inclined or trustworthy, Congress took the position that the employer should look for evidence of those characteristics and not depend on racial, gender, religion or national origin stereotypes. But the success of that approach depends upon the ability of employers to seek evidence of the actual desired traits. If the employer is looking for trustworthy employees who will not commit crimes, they need some source of information. The applicant's criminal record (or lack of a criminal record) is often the best method for separating the cases that are most likely to be a problem from those that are not. If employers are prevented from using the information they can obtain through criminal background checks, they may be tempted, consciously or unconsciously, to dispense with the checks and use race as a proxy for criminal record.

Other employers may make adjustments to their hiring policies that are not in any way motivated by race, but which ultimately decrease the likelihood that African American and Hispanic job applicants will be hired. Suppose, for example, an employer regularly hires

young, unskilled, high school drop-outs as packers for his moving van business. Given the business location's demographics, this yields a labor pool that is disproportionately African American and Hispanic, but not overwhelmingly so. Until his lawyer instructed him that the requirement of "individualized assessments" made excluding applicants with criminal records too risky, he had been doing criminal background checks on all job applicants and declining to hire most of those with a record. But after he stopped acting routinely on those checks, he hired a young, white 19-year-old who ended up stealing from one of the employer's customers. Another white recent hire turned out to have a serious drug problem (in addition to his criminal record). Criminal background checks would have identified these employees as risky, but the employer had decided he needed to hire anyway to demonstrate his compliance with the *2012 Guidance*. In order to deal with the problem, he decides to convert the full-time jobs that come open into part-time jobs and to advertise in the campus newspaper at a nearby highly competitive liberal arts college. He figures (rightly or wrongly) that the students there will likely be more trustworthy than the pool he had been hiring from. Given the demographics of the school, this yields an overall labor pool that has proportionately fewer minorities. The EEOC guidance would have accomplished precisely the opposite its intentions.

From a policy standpoint, one obvious question is which effect dominates—the disparate impact effect or the disparate treatment one. The evidence adduced by the authors of *Perceived Criminality* indicates that it could be the latter. That article examined the answers to interview questions provided by slightly over 3000 employers that hired workers without college degrees from Atlanta, Boston, Detroit and Los Angeles during the early 1990s. Approximately half those employers either always or sometimes conduct criminal backgrounds on job applicants. Further data collected in 2001 in Los Angeles showed this number had climbed from 48.2% to 62.3% for that city specifically.

The article found that employers who conduct background checks were more likely to have recently hired an African American applicant than employers who do not. Among those employers who were unwilling to hire ex-offenders, the employers who checked were 10.7% more likely to have recently hired an African American. This finding was highly significant.<sup>43</sup>

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<sup>43</sup> It is always difficult to tease out what is cause and what is effect. In conducting studies of this kind, one could argue that the reason that employers who undertake background checks are more likely to hire African Americans is that they face labor pools that are heavily African American and are biased against African Americans. But the authors used statistical methods to account for this possibility as best they could and still found evidence that background checks helped.

Similarly, research has been undertaken attempting to confirm or refute the hypothesis that easy availability of criminal background information overall benefits black males as a group by comparing the black-to-white wage ratio in states that make criminal records broadly available to that in states that do not. Shawn D. Bushway, *Labor Market Effects of Permitting Access to Criminal History Records*, 20 **J. CONTEMP. CRIM. JUSTICE** 276 (2004). Bushway's data did indeed show that states that make criminal records broadly available have higher black-to-white wage ratios, but those data were too skimpy for this difference to be statistically significant. Bushway has called for more research in this area. *Id.* at 288-89.

**V. Since Congress's Purpose in Adopting Disparate Impact Liability in 1991 Was to Confer an Economic Benefit on Racial Minorities (and Women), It Must Be Subjected to Strict Scrutiny—Scrutiny That it Likely Cannot Withstand.**

**A. The Application of Disparate Impact Liability Was Intended to Be and in Fact Is Racially Discriminatory.**

To my knowledge, the EEOC has never brought a disparate impact investigation or lawsuit on behalf of white males. While the Uniform Guidelines on Employee Selection Procedures do not explicitly limit disparate impact liability to cases in aid of women and minorities, such a policy can be inferred from the EEOC's enforcement history. Indeed, it is difficult to avoid.

The Supreme Court has never entertained a disparate impact case on behalf of anyone other than women and racial minorities, and its past decisions indicate it did not expect to. In *Griggs* the Court repeatedly noted that the purpose of disparate impact liability was to assist African Americans or non-whites in particular. One of the "objective[s] of Congress in the enactment of Title VII," it wrote, "was to "remove barriers that have operated in the past to favor an identifiable group of *white* employees over other employees." *Id.* at 429-30 (emphasis added). It concluded that if "an employment practice which operates to exclude *Negroes* cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431 (emphasis added). This language was consistent with the EEOC's Guidelines on Employment Testing Procedures (August 24, 1966) upon which the Court relied, which referred to the problem of "inadvertently excluding qualified minority applicants through inappropriate testing procedures" and the need to be "[m]indful of the special concerns of minorities."

In 1981, the U.S. Commission on Civil Rights issued a report that flatly stated that disparate impact liability "cannot be sensibly applied to white males" given that the purpose of the liability is to uproot historical and contemporary sexism and racism. U.S. Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* 17 n.20 (1981). Contemporary commentators agreed. *See, e.g.,* Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 **U.C.L.A. L. REV.** 305, 366-68 (1983) ("In sum, disparate impact has been inherently one-sided. Blacks and women may object to a test that tends to reduce job opportunities for them. ... It is probable that the courts, in an effort to reduce the intrusion on employer discretion, will continue to limit disparate impact challenges to those brought by minorities."); David A. Strauss, *The Myth of Color Blindness*, 1986 **SUP. CT. REV.** 99 (arguing that affirmative action and disparate impact theory are conceptually related).

The only court to address the issue squarely also agreed that disparate impact theory is ordinarily unavailable to white males. *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10<sup>th</sup> Cir. 1986) ("in impact cases ... a member of a favored group must show background circumstances supporting the inference that a facially neutral policy with a disparate impact is in fact a vehicle for unlawful discrimination."). While a few white, male

private litigants have attempted to employ a disparate impact theory in Title VII cases, to our knowledge none has ever secured a judgment in his favor.

That was the zeitgeist when Congress undertook to amend Title VII in the early 1990s. Members who supported adding disparate impact liability to the statute perceived it as applying to women and racial minorities in particular. *See, e.g.*, Statement of Sen. Glenn, 137 Cong. Rec. 29,064 (1991) (“The Civil Rights Act of 1991 would reverse ... *Wards Cove v. Atonio* and restore ... *Griggs v. Duke Power Co.* In *Griggs*, the Supreme Court held that practices which disproportionately exclude qualified women and minorities from the workplace are unlawful unless they serve a business necessity.”); Statement of Sen. Metzenbaum, 137 Cong. Rec. 33,483 (1991) (The 1991 amendments provide “that employment practices which disproportionately exclude women or minorities are unlawful, unless employers prove both that these practices are ‘job related for the position in question’ and that they are ‘consistent with business necessity.’”); Statement of Sen. Dodd, 137 Cong. Rec. 29,026 (1991) (“[I]n *Wards Cove Packing Co. v. Atonio*, the Supreme Court overturned an 18-year precedent set by the *Griggs v. Duke Power Co.* decision regarding ... discrimination based upon the disparate impact of business hiring of minorities.”); Statement of Sen. Kohl, 137 Cong. Rec. 29,048 (1991) (“Under this proposal employers must justify work rules if the employee shows that the rules have a disparate impact on women and minorities.”); Statement of Rep. Ford, 137 Cong. Rec. 13,530 (1991) (“The *Griggs* standard worked well for nearly twenty years. Under *Griggs*, employers who chose to use selection practices with a significant disparate impact on women or minorities had to defend the practices by showing business necessity.”); Statement of Rep. Stenholm, 137 Cong. Rec. 13,537 (1991) (“The substitute creates a new standard of ‘business necessity’ that a business must meet to defend an employment practice whose result is a ‘disparate impact’ - meaning the percentage of the employer’s work force comprising women, minorities, or a given religious group, does not almost identically match that group’s percentage in the available labor pool.”); Statement of Rep. Fish, 137 Cong. Rec. 13,539 (1991) (“The complaining party in a disparate impact case carries the heavy burden of linking adverse impact on women or members of minority groups to a specific practice or practices unless the employer’s own conduct essentially forecloses the possibility of establishing such linkage.”). For additional examples, *see* Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 **N.W. L. REV.** 1505, 1539 n.169 (2004)(“*Upside Down*”).

Contemporary media reports also support the understanding that the amendments’ disparate impact provisions apply only to women and minorities. *See, e.g.*, Robert Pear, *With Rights Act Comes Fight to Clarify Congress’s Intent*, **N.Y. TIMES** (November 18, 1991) (Under the new legislation, “[i]f workers show that a particular practice tends to exclude women or minority members, then the employer must show that the practice is ‘job-related for the position in question and consistent with business necessity.’”).

More recent scholars have agreed that “[w]hat authority there is supports the view that employment practices with disparate impacts on historically dominant classes are, as a matter of law, not actionable under Title VII.” Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 **HARV. L. REV.** 493, 528 (2003). *See* John J. Donohue III,

*Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers*, 53 *STAN. L. REV.* 897 (2001) (“I conclude that disparate impact analysis will not protect white males as a matter of theory. . . . The first prong of a disparate impact case—finding a practice that adversely affects a member of a protected class—will not be met since white males will not be deemed to be ‘protected’ under this doctrine.”)

Indeed, the belief that disparate impact theory is not applicable to all groups is so prevalent that no less ubiquitous an authority than Wikipedia begins its entry for “Disparate Impact” with the sentence, “in United States employment law, the doctrine of disparate impact holds that employment practices may be considered discriminatory and illegal if they have a disproportionate ‘adverse impact’ on members of a minority group.” [http://en.wikipedia.org/wiki/Disparate\\_impact](http://en.wikipedia.org/wiki/Disparate_impact) (last visited Aug. 20, 2013).

But there is also increasing recognition that this raises thorny constitutional issues. One scholar has said that he used to “firmly announce” to his students that disparate impact theory “was not available to whites and males.” See *Upside Down* at 1505. When the Court began to take the position that strict scrutiny must be employed on behalf of members of majority as well as minority races, see *Grutter v. Bollinger*, 539 U.S. 306 (2003), he began to realize that applying disparate impact theory only on behalf of women and racial minorities would raise serious constitutional difficulties. He therefore urged a reinterpretation of disparate impact liability so that it would be applicable to white males as well.

There are several problems with such a reinterpretation, which would, in essence, extend the reach of a statute whose reach is already extraordinary. Among other things, there is no evidence that Congress would have supported such an extension. Suppose Congress had passed an unconstitutional tax on Asian Americans. It would be improper for a court to simply impose that tax on all Americans, since that court has no evidence that Congress would have been willing to tax all Americans if it had known its original tax would be found unconstitutional. The proper thing for the Court to do would be to nullify the original tax and let Congress decide whether to promulgate legislation imposing a generally applicable tax. The same logic applies here.

Moreover, even if there were overwhelming evidence that Congress would prefer a generally applicable disparate impact doctrine to no disparate impact doctrine at all, it would make no difference. Even generally applicable disparate impact theory is racially discriminatory. The Constitution protects individuals from race discrimination, not groups. If disparate impact theory is applied to help African Americans where they are under-represented and whites where they are under-represented, the result is more race discrimination, not equal treatment. It doesn’t make a white applicant for a job as a New Haven fire fighter feel better to know that the playing field would be tilted in his favor if he were applying for a position in the NBA. He is only qualified for the fire fighting job.

**B. In the Absence of a Compelling Purpose and Narrow Tailoring, Title VII’s Disparate Impact Liability Must Fail.**

A law that discriminates on the basis of race is permissible only if there is a compelling

purpose served by it, and the discriminatory law is narrowly tailored to serve that purpose. *See Fisher v. University of Texas*, 133 S. Ct. 2411 (2013). Congress did not attempt to offer a principled basis for upholding disparate impact liability under Title VII in the face of strict scrutiny: They apparently didn't think they were required to. I am dubious that such a basis can be offered.

A few scholars have attempted to step up to the plate, but their efforts leave much to be desired. Professor Richard Primus suggests the argument that disparate impact doctrine may have been regarded by Congress as "a prophylactic measure that is necessary because deliberate discrimination can be difficult to prove." *Primus* at 520. Ultimately, despite his view that the *Griggs* approach to Title VII is "normatively desirable," he rejects this argument as to Congress's motives as "neither technically smooth nor normatively desirable." *Id.* at 523. I agree that for the reasons Primus discusses, this does not describe Congress's motive in passing the 1991 Amendments. It cannot account for the allocation of burdens and defenses. It therefore cannot be put forth to justify disparate impact doctrine. Congress would need to re-vamp the law extensively in order to fit this very square peg into that round hole.

So what compelling purpose can be offered? And what evidence is there that it is narrowly tailored to serve such a purpose? Primus suggests workplace integration. But I submit that the evidence that this doctrine has helped integrate the workplace or even has systematically advanced the employment opportunities of African Americans, Hispanics, American Indians and/or women is thin to non-existent. *See Ian Ayres & Peter Siegelman, The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 **TEX. L. REV.** 1487 (1996) (disparate impact liability may make employers more reluctant to hire minority employees because disparate impact liability makes firing or demoting them later more risky). There is certainly no showing that it has actually served a compelling purpose or that it is narrowly tailored to that purpose. This sprawling and incoherent doctrine unduly complicates the American labor market in a time that the economy can ill-afford such a blow to its vitality.

It is interesting to compare the EEOC's efforts to require that employers (including small employers) prove that their job qualifications are job-related and a matter of business necessity with the precision of a social scientist to the utter lack of evidence that disparate impact liability is narrowly tailored to serve a compelling interest.

## **VI. An Addendum on the Problem of Record Error.**

Another issue raised in the Kladney-Achtenberg draft Statement is that there are sometimes errors in criminal background records. It is worth pointing out here that the Kladney-Achtenberg draft Statement itself contains a few errors. These errors may tend to make the problem seem larger than it is (although it is certainly not my intent to suggest these records are perfect). For example, as evidence that errors in criminal background checks are surprisingly common, the Kladney-Achtenberg draft Statement reports that in connection with the Transportation Security Administration's FBI screenings for port workers in 2007, more than 120,000 applications for port positions were "initially

disqualified due to a background check,” but that “[m]ore than half of those applicants filed appeals to prove their eligibility and 94% of those appeals were successful.”

Not true. Overwhelmingly these were waivers and not appeals—and there is a crucial distinction between the two. TSA is required by law to fingerprint all port workers and run those fingerprints against the FBI’s database. If a record of possible past criminal activity is uncovered, the port worker is routinely notified and given the opportunity to seek a waiver *or* to appeal, depending upon the situation. Most offenses can be waived; some cannot be. If one’s offense is waivable, one need only convince TSA that, despite one’s record, one is not a security threat. When TSA sent out its notifications, it anticipated that minor offenses that bear no relationship to terrorism, such as a 30-year-old conviction for public drunkenness, would be waived at the agency’s discretion. The agency was simply following its normal procedures to notify *all* employees of any FBI record it had obtained and providing an opportunity for a response. The fact that a large number of waivers were granted is not evidence of faulty information supplied by the FBI. A high rate of successful requests for a waiver was fully expected.

Since some offenses are permanently non-waivable or waivable only after a certain period of time has passed, evidence that one has committed such an offense can be rebutted only by evidence that the port worker did not in fact commit the offense (or, in appropriate cases, that the offense occurred long enough ago to qualify for a waiver). In this situation, an appeal, rather than a waiver, is the proper procedure. Suffice it to say that there were massively more successful requests for waiver (where the accuracy of the records were not denied) than there were successful appeals (where the basis of the appeal was that the FBI records were inaccurate). Appeals are rare. The Kladney-Achtenberg draft Statement suggesting the contrary is simply inaccurate.

The Kladney-Achtenberg draft Statement also reports that a study by the National Employment Law Project, a workers’ rights organization, “found that approximately 600,000 reports obtained from the FBI contained some form of error.” For this fact, the draft statement cites an article from the Washington Post, which in fact stated, “The advocacy group [i.e. NELP] estimates that *as many as* 600,000 of those reports contain incomplete or inaccurate information.” Ylan Q. Mui, *Growing Use of FBI Screens Raises Concerns About Accuracy, Racial Bias*, **WASH. POST** (July 29, 2013)(italics added). “As many as 600,000” is not the same thing as “approximately 600,000” especially coming from an advocacy group. It is an outside estimate.

Curiously, since there are many such records in the FBI database, 600,000 would actually be an error rate of about 1%—rather low in view of the fact that as far as NELP has been able to show all the errors are due to incomplete data. NELP did no independent research and did not uncover a single case of inaccurate (as opposed to incomplete) information.

But all this is neither here nor there, because the Washington Post’s article discussion of the NELP study was inaccurate, just as the Kladney-Achtenberg draft statement’s discussion of the Washington Post article was an inaccurate account of the Washington Post

article. Following the data on this topic is like opening a set of Russian matryoshka dolls one by one and discovering that each doll is different from the previous one. NELP's 600,000 was not an estimate of the number of inaccurate records. Instead, it is NELP's estimate of the number of "workers" who are "*potentially* harmed in their job search." That would be a more serious matter if it weren't for (1) the word "potentially" and (2) the fact that it appears to be a wild guess, based on numerous inaccurate assumptions.

I wish I had the time to sort through all the information—accurate and inaccurate—that is out there concerning the accuracy of the FBI database. But given time limitations, it makes more to point out that the FBI database is not used for the kinds of background checks that are most commonly made:

1. The FBI database is not used for routine criminal background checks by potential employers that are not required by law. State records are ordinarily used for that purpose instead. According to The Attorney General's Report on Criminal History Background Checks (which is the source used by NELP):

"Most of the non-criminal justice checks using FBI-maintained criminal history are done under the authority of Pub. L. 92-544, a federal law originally passed in 1972, that allows for the sharing of FBI-maintained criminal history information for licensing and employment background checks by state or local governmental agencies. These statutes generally require background checks in certain areas that the state has sought to regulate, such as individuals employed as civil servants, day care, school, or nursing home workers, taxi drivers, private security guards, or members of regulated professions. The results of these checks are supplied to public agencies that apply suitability criteria established by those agencies or under state law. . . . In addition, the National Child Protection Act (NCPA) and the Volunteers for Children Act (VCA) allow state governmental agencies without requiring a state statute to conduct background checks and suitability reviews of employees or volunteers of entities providing services to children, the elderly, and disabled persons." *Id.* at 19.

2. According to the same Department of Justice report, "State records are also more complete and up-to-date than the FBI-maintained records." *Id.* at 4. These are the records that private employers conducting criminal background checks are more likely to using (unless they have some statutory authority that allows them access to the FBI records). *Id.*
3. As of 2006, the rate of missing final dispositions in the FBI database was indeed unacceptably high—estimated by the Department of Justice at approximately 50%. (*Id.* at 7) Older records were more likely to contain missing data than newer records. For example, the record of an arrest might not have any information about whether the arrestee was charged or eventually convicted of a crime. (*Id.* at 7). In addition, the rate of missing

disposition data for minor crimes (like drunk driving) was higher than the rate of missing disposition data for serious crimes.

Of course, there are errors and of course more needs to be done to ensure the accuracy of both the FBI database and state and other databases. Wherever there are human beings, there will also be errors. The real issue is what the response to inevitable human error should be. Here is the answer is emphatically not to discourage employers from acting on information unless they can be absolutely sure it is accurate, seldom does anyone have the luxury of being able to make day-to-day decisions on information that they know to be 100% accurate. Instead, what is needed is a procedure for correcting and updating criminal records much as there is for correcting and updating credit records. No one should be surprised to learn that the Fair Credit Reporting Act already provides such a procedure. If there are ways to improve the procedure, I suspect most Americans would support them.

## VII. CONCLUSION

The Reverend Martin Luther King, Jr. famously looked forward to when his children would be judged by the content of their character rather than the color of their skin. Current law is just the opposite. Race may be the basis for preferring one job applicant over another. See *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (permitting some affirmative action plans). But under the EEOC's guidance, the content of one's character, at least as revealed by one's criminal record, cannot be without risking litigation. Something is wrong with this picture.

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## Statement of Commissioners David Kladney and Roberta Achtenberg

### EEOC Background Check Guidance

November 2013

**NOTE:** At the August 16, 2013 meeting of the U.S. Commission on Civil Rights, Commissioner Kladney objected to the following wording in the draft report as inaccurate and confusing. He requested the wording, *“Taken as a whole it emphasizes the judgment of the EEOC over that of employers in the selection or retention of employees with criminal histories,”* be stricken from the report. He could not obtain a majority for his motion. Staff suggested the word “subjective” be placed before the word judgment. That word was rejected. Then, our Chairman suggested the term “discretionary” be placed in front of the word judgment. Commissioner Kladney objected, but when he could not find a suitable alternative, he voted no on the change. The Commission passed the following language 6 to 2, with Commissioner Yaki joining him in dissent.

The final wording passed by the Commission states:

*“Although the 2012 guidance acknowledges as a legitimate selection concern the physical or other security risks to customers or other employees inherent in hiring any employee, it leaves employers exposed to the discretionary judgment of the EEOC as to individual hiring decisions.”*

Although “discretionary judgment” could be interpreted as akin to “prosecutorial discretion,” Commissioner Kladney’s concern was and is that the wording makes it sound like the EEOC is simply capricious and strikes unwitting employers like a bolt from the blue. The Guidance lays out EEOC’s understanding of Title VII with respect to arrest and conviction records. The Guidance informs employers of conduct that complies with or violates Title VII and could thereby be subject to an enforcement action by EEOC. Were the EEOC to bring a case willy-nilly—as suggested by the language to which he objected, the defendant (subject of the enforcement action) would prevail.

The United States Supreme Court holds the EEOC and complainants to a very “high standard of proof” that can be very difficult for plaintiffs (EEOC and complainants) to meet. Therefore, success by individuals should indicate that their claims were legitimate.<sup>1</sup>

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<sup>1</sup> “A second constraint on the application of disparate impact theory lies in the nature of the “business necessity” or “job-relatedness” defense. Although we have said that an employer has “the burden of showing that any given requirement must have a manifest relationship to the employment in question,” *Griggs*, 401 U.S. at 401 U. S. 432, such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.” *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 992, 997, 999 (1988).

### Statement

The members of our society continue to grow more mobile in terms of both their employment and their residence. Policing and mass incarceration policies have resulted in tens of millions of us gaining “a record,” which could confound our ability to start a new job or sign a new lease.

Within reason, a person should be judged by her or his past actions. Employers should be able to protect their employees and customers from people with a demonstrated proclivity for violence and theft. At the same time, our society would be a more dangerous place if we needlessly subjected able workers and their families to joblessness and poverty because of an aversion to any sort of criminal record.<sup>2</sup>

We supported this briefing because we had hopes it would help put to rest some misunderstandings about the new EEOC guidance<sup>3</sup> (“the Guidance”) that have been intentionally perpetrated by some who wish employers to have unfettered discretion in allowing discrimination in employment of workers. Unfortunately, some briefing participants—both during the briefing and afterward—have continued to misinform the public concerning the Guidance.<sup>4</sup>

#### **Background Checks Are Allowed Under the Guidance**

As was affirmed by Carol Miaskoff during the briefing,<sup>5</sup> the Guidance does not prohibit the use of criminal background checks. Although some employers may be “apoplectic” over the Guidance,<sup>6</sup> their agitation is largely the result of fear mongering by folks who ought to know better. The EEOC has been criticized for not creating bright-line rules or safe-harbors for employers who comply with the laws of their states. Of course, if the EEOC had done those things, the same critics would probably criticize them for making up rules that have no statutory basis—or worse, rules that are in opposition to the federal Civil Rights Act.

#### **Complaints about Safe Harbors are a Red Herring**

The fact of the matter is that Title VII is meant to combat employment discrimination on the

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<sup>2</sup>“Offenders who are provided even marginal employment opportunities are less likely to reoffend than those not provided such opportunities.” (Uggen, 2000: 542) See: Uggen, Christopher (2000) Work as a Turning Point in the Life of Criminals: A Duration model of Age, Employment, and Recidivism. *American Sociological Review*. Vol. 67. (August: 529-546).

<sup>3</sup> Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (issued April, 2012). Available at: [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

<sup>4</sup> Kirsanow, P. (2013, March 8). [Letter to the editor]. *The Wall Street Journal*. Bovard, See also: James (2013, February 15). Perform Criminal Background Checks at Your Peril. *The Wall Street Journal*. Retrieved from <http://www.online.wsj.com>.

<sup>5</sup> Carol Miaskoff, Testimony before the U.S. Commission on Civil Rights, briefing on EEOC Guidance Policy and the use of criminal background checks, transcript, Washington, DC, December 12, 2012, p. 11, lines 11-15 (hereafter cited as Miaskoff Testimony, Briefing Transcript).

<sup>6</sup> Kirsanow, P. (2013, March 8). [Letter to the editor]. *The Wall Street Journal*.

part of private employers and by state and local governments.<sup>7</sup> **Research<sup>8</sup> shows that black males without a criminal record have roughly the same employment prospects as white applicants with criminal records.** As a result, the “benefit” that black applicants with clean criminal records receive from employers’ use of criminal background checks only puts them on equal footing with white applicants who *have* criminal histories. This clearly acknowledges continued racial discrimination by employers. If employers could preserve discriminatory practices by taking advantage of a safe-harbor law, the efficacy of Title VII would be substantially diminished. The drafters of Title VII wisely chose to leave states largely free to regulate employment practices within their jurisdiction, which they do. Despite the frequent references to employers being apoplectic over the potential demands of federal and state law, **no one at the briefing could cite a case in which an actual employer found himself threatened with a federal lawsuit as a result of his scrupulous compliance with state law, or threatened with a state or local enforcement action as a result of scrupulous compliance with EEOC guidance concerning criminal records.**

**We challenge our colleagues on this Commission, who continue to complain about this issue, to point to specific, clear cases where this has happened during the 20 plus years that the guidance has been in effect.**

#### Comments from “the Public”

A large percentage of public comments the Commission received after this briefing included some variation of the following paragraph (emphasis added):

These comments are submitted to supplement the views previously stated by the National Association of Professional Background Screeners (“NAPBS”) to the U.S. Commission on Civil Rights (“USCCR”) at the December 7, 2012 briefing on the impact of criminal background checks and the EEOC’s conviction records policy on employment of black and Hispanic workers. ***Our company is a member of NAPBS, but we also provide these comments as an employer who conducts background screens of our employees.*** I appreciate the opportunity to provide these public comments regarding the importance and value of using criminal history records ***both as an employer and a background screening company.***

A sizeable number of comments containing the above language were in fact not from members of NAPBS. Rather, they were from clients of background screening companies, who were clearly encouraged to participate in an Astroturf campaign. Also, people with ties to panelist Lucia Bone (e.g. members of her family), submitted a number of other comments.

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<sup>7</sup> 42 U.S.C. §2000e-7 (“Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.”)

<sup>8</sup> Devah Pager, Bruce Western, & Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, *American Sociological Review*, 77, pp. 777-799 (2009). See also Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 *The Annals of the American Academy*, pp. 195-199 (2009).

Many of these comments featured language that was directly quoted from her business's website.

**Every case cited at the briefing—or in submissions as a result of the briefing—where violence or theft occurred, happened when employers failed to conduct background checks.<sup>9</sup> If these employers had applied the EEOC guidance and its elements, these risky employees would never have been hired. The employers' failure to use the EEOC guidance allowed these harms to occur.**

### **Ban The Box**

Some of our colleagues will go to any extent to slap the EEOC and its guidance, even though its approach is to assist the employers so they avoid engaging in employment discrimination. Though not required, the Guidance suggests a best practice is to delete the box on employment applications that asks if you have ever been arrested or convicted of a crime. This best practice helps employers by allowing them to first screen potential employees based on their skills and past employment record. In the second round of screening, employers can run a criminal background check to determine the existence of any risk factors to the employer, employees, customers, or the public. Should something come up in the criminal background check (assuming the background check is accurate), the employer would then provide an otherwise qualified job applicant the opportunity to explain any offense. Employers have the opportunity weigh the nature of the crime, the amount of time that has passed since the offense, and the relationship of the offense to the job to be performed. The new procedure is a step in the right direction, unlike the initial employment denial cases where the employer was not required to allow the applicant an opportunity to explain anything. The advantage of Ban the Box is that it eliminates the potential hires that do not have the requisite skill set for the position or those applicants with spotty work records and work habits while ensuring that the employer rarely faces the question of employment discrimination against those with a prior record.<sup>10</sup>

### **Errors in Consumer Reports and Government Records**

Although the problem of inaccurate records was briefly discussed by some of the panelists<sup>11</sup>, I believe that this issue is one of the most—if not *the* most—important aspects to consider when thinking about the use of criminal background records.

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<sup>9</sup> Lucia Bone, Testimony before the U.S. Commission on Civil Rights, briefing on EEOC Guidance Policy and the use of criminal background checks, transcript, Washington, DC, December 12, 2012, pp. 92-93 and Garen Dodge, Testimony before the U.S. Commission on Civil Rights, briefing on EEOC Guidance Policy and the use of criminal background checks, transcript, Washington, DC, December 12, 2012, pp. 108-113.

<sup>10</sup> This is the exact procedure set out by Target, Corp for mass hirings at new stores nationwide and individual hiring at each of their stores beginning early next year. Wal-Mart, the nation's largest employer deleted "the box" in 2010. Three states have adopted the ban the box law for either public employers, private employers or both. See: Moore, Janet "Target To Ban Criminal History On Job Applications," October 26, 2013 available at <http://www.startribune.com/business/229310141.html>.

<sup>11</sup> For references to inaccurate records, review the testimonies of Montserrat Miller and Nick Fishman.

Ms. Miller, of NAPBS, stressed the importance of compliance with the Fair Credit Reporting Act ("FCRA") and asserted the very high accuracy rates of NAPBS members.<sup>12</sup> While we applaud her insistence on FCRA compliance, we cannot help but to be skeptical of Ms. Miller's claim regarding the accuracy of the NAPBS members' consumer report. Admittedly, Ms. Miller did not attest to the accuracy herself, but rather she was conveying the rates of accuracy as reported to her by the NAPBS members.<sup>13</sup>

One such NAPBS member is HireRight Solutions, a background screening company that agreed to pay \$2.6 million in civil penalties for, among other faults, failing "to follow reasonable procedures to prevent the provision of obviously erroneous consumer report information to employers."<sup>14</sup> Perhaps HireRight is not a representative NAPBS member, but its poor past conduct alone must reduce the overall rate of accuracy of the NAPBS membership.

Even if there is a high compliance with the FCRA by background screening companies, there is ample evidence of errors in the public records upon which the screening companies rely. A study by the Legal Action Center ("LAC") estimated that there are 2.1 million errors in rap sheets of persons in New York State.<sup>15</sup>

The authors of the report suggest that the number of errors may be even higher because they were employing conservative methods to arrive at their published figure. The most common errors were missing information concerning the disposition of a case or failures to seal old violations or dismissals. Of course, these types of errors significantly affect the way an employer might likely view a prospective employee. A July 2013 study by the National Employment Law Project ("NELP")<sup>16</sup> confirms that errors have a negative impact on potential employees. The NELP study found that approximately 600,000 reports obtained from the FBI contained some form of an error. Highlighting the Transportation Security Administration's FBI screenings for port workers in 2007, NELP found that more than 120,000 applications for port positions were initially disqualified due to a background check. More than half of those applicants filed appeals to prove their eligibility and 94% of those appeals were successful.<sup>17</sup> A spokesperson for the FBI Criminal Justice Information Service

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<sup>12</sup> USCCR Transcript, Dec. 7, 2012, at 208.

<sup>13</sup> Id. Lines 10-12. ("Contrary to popular belief, and as reported in the media, our member companies report to me 99 percent accuracy rates.")

<sup>14</sup> *Employment Screening Services Provider Settles Charges of Violating Fair Credit Reporting Act*. Office of Public Affairs, Department of Justice. August 8, 2012. Available at: <http://www.justice.gov/opa/pr/2012/August/12-civ-986.html>. Also see: *United States v. HireRight Solutions, Inc.*, No. 1:11-cv-01313 (D.D.C. Aug. 8, 2012), available at: <http://www.ftc.gov/os/caselist/1023130/index.shtm>.

<sup>15</sup> "The Problem of RAP Sheet Errors: An Analysis By the Legal Action Center," available at [http://www.lac.org/doc\\_library/lac/publications/LAC\\_rap\\_sheet\\_report\\_final\\_2013.pdf](http://www.lac.org/doc_library/lac/publications/LAC_rap_sheet_report_final_2013.pdf).

<sup>16</sup> Mui, Ylan Q. "Growing use of FBI screens raises concerns about accuracy, racial bias," July 29, 2013 available at [http://articles.washingtonpost.com/2013-07-29/business/40887352\\_1\\_job-applicants-the-fbi-background](http://articles.washingtonpost.com/2013-07-29/business/40887352_1_job-applicants-the-fbi-background). Last accessed: August 12, 2013.

<sup>17</sup> Ylan O. Mui, *Growing use of FBI screens raises concerns about accuracy, racial bias*, The Washington Post, July 29, 2013.

said that the agency relies on the states to provide criminal records.<sup>18</sup> A 2010 Justice Department report found that as many as two in five records were missing final outcomes in about half the states.<sup>19</sup> To be accurate in reporting inaccurate records is to report nothing at all. The prevalence of errors in public records—which is increasingly compounded by errors introduced by online background screening companies<sup>20</sup>—makes clear the need for individual assessments. Further, the presence of these errors highlights the importance of compliance with the notification requirements of the FCRA. When used properly, the FCRA notification requirements—which inform applicants and employees of adverse information or actions in their records—create an opportunity for people to correct their records or provide important supplementary information. This produces a more accurate and complete picture of prospective employees for the decision-maker.

The result is that employers can avoid missing out on the talents and potential contributions of otherwise qualified employees and applicants can avoid needless denial of job-opportunities.

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<sup>18</sup> 18 Id.

<sup>19</sup> Id. See also: *WANTED: Accurate FBI Background Checks for Employment* by Madeline Neighly and Maurice Emsellem. National Employment Law Project July 2013. Available at <http://www.nelp.org/page/-/SCLP/2013/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf?nocdn=1>. Last accessed August 13, 2013.

<sup>20</sup> Especially the less well-established, web-based information clearinghouses (like Spokeo, Pipl, and others).

# ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S CONVICTION RECORDS POLICY



BRIEFING  
REPORT



DECEMBER 2013

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