January 18, 2013

Hon. Martin R. Castro, Chair
U.S. Commission on Civil Rights
1331 Pennsylvania Ave. NW, Suite 1150
Washington, DC 20425

Hon. Abigail Thernstrom, Vice-Chair
U.S. Commission on Civil Rights
1331 Pennsylvania Ave. NW, Suite 1150
Washington, DC 20425

Hon. Roberta Achtenberg, Commissioner
U.S. Commission on Civil Rights
1331 Pennsylvania Ave. NW, Suite 1150
Washington, DC 20425

Hon. Todd F. Gaziano, Commissioner
U.S. Commission on Civil Rights
1331 Pennsylvania Ave. NW, Suite 1150
Washington, DC 20425

Hon. Gail L. Heriot, Commissioner
U.S. Commission on Civil Rights
1331 Pennsylvania Ave. NW, Suite 1150
Washington, DC 20425

Hon. Peter N. Kirsanow, Commissioner
U.S. Commission on Civil Rights
1331 Pennsylvania Ave. NW, Suite 1150
Washington, DC 20425

Hon. David Kladney, Commissioner
U.S. Commission on Civil Rights
1331 Pennsylvania Ave. NW, Suite 1150
Washington, DC 20425

Hon. Michael Yaki, Commissioner
U.S. Commission on Civil Rights
1331 Pennsylvania Ave. NW, Suite 1150
Washington, DC 20425

Re: Briefing on EEOC Enforcement Guidance on Use of Criminal Records

Dear Chair Castro and Commissioners:

Thank you for inviting comments to supplement the Commission's Briefing on "The Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's (EEOC) Conviction Records Policy on the Employment of Black and Latino Workers," held on December 7, 2012. This letter is submitted on behalf of the organizations identified below, many of which are participants in the Employment Task Force of The Leadership Conference on Civil and Human Rights. Many other organizations joining in these comments work with people with criminal records to aid in workforce re-entry.

We join many of the witnesses who testified at the Commission briefing in wholeheartedly supporting the EEOC's April 2012 Enforcement Guidance on the Use of Arrest and Conviction Records in Employment Decisions ("Enforcement Guidance" or "Guidance") as an important bipartisan update explaining the legal rights and responsibilities of employers under Title VII of the Civil Rights Act of 1964. The Enforcement Guidance is a thoughtful, flexible,

and workable roadmap for employers to follow. The Guidance explains to employers how to conduct and use any appropriate background checks they reasonably require, without violating the rights that job applicants have under Title VII.

These comments emphasize the following points:

- Successful reentry requires that appropriate jobs be available to people with criminal records, and too many employers use criminal history record background checks to deny employment to qualified applicants
- The Enforcement Guidance encourages sensible use of background checks; it does not restrict or discourages employers from conducting criminal history record checks
- The Society of Human Resource Management and other management trade groups agree that the Guidance sets out flexible, fair, balanced, and workable hiring procedures
- No changes in legal requirements are reflected in the Guidance. It simply explains employers' obligations under Title VII, based on court decisions, adopted by the EEOC in 1987
- The EEOC developed the Guidance with the assistance of broad public input provided in two public hearings and in 300 public comments.[1]

I. In addition to the universal agreement that appropriate job opportunities must be open to people with criminal records, many witnesses at the briefing emphasized the severity of the barriers minority workers – particularly African-American men – face in the job market and that the combined effects of race and having a criminal conviction devastate the job prospects of minority workers, doing great harm to their families and communities.

Each Commissioner and witness at the briefing who addressed the question acknowledged that it is critically important for people with criminal records who are qualified, willing, and effective workers to have fair and equal access to appropriate jobs.[2] But as witness

[1] Commissioners Kirsanow, Heriot, and Gaziano submitted a joint comment opposing adoption of updated Guidance.

[2] *See, e.g.,* Commissioner Gaziano (MTB [Master Transcript of Briefing] at 42, lines 14-17: I "appreciate the importance of re-entry programs that help prisoners reenter and reentry programs afterwards. This has been a great interest to me for a number of years."); Dr. Sedgwick (MTB at 33, lines 6-8: "enhanc[ing] employment prospects for the ex-offender in aiding successful re-entry [is] … a goal that we all share."); Commissioner Kirsanow (MTB at 212, lines 8-12: "I haven't heard anybody say ... that we don't support reintegration of those with criminal records into society."); Mr. Martin (MTB at 91, lines 1-7: "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

after witness testified, there is a deeply entrenched bias against hiring African Americans, particularly African-American men. Studies consistently show that the barriers to jobs are much worse for African Americans with a criminal record. The effect is that many African Americans with a criminal record are locked out of the labor market.

Glenn Martin, now Vice-President of the Fortune Society, a non-profit agency with over 80 years of experience working with people re-entering the workforce after paying their debts to society, described the results of one of the studies that the EEOC relied on in the Enforcement Guidance, a study in which he served as project director on behalf of the National H.I.R.E. Network. Mr. Martin explained the study in his written statement (at page 3):

> 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%.** [Bold in original.]

The results of the New York City study[3] are typical of the findings of numerous labor market studies that have demonstrated both that African Americans, particularly men, have higher barriers to employment than do white workers and that having a criminal record does more harm to the job prospects of African-American workers, Hispanic workers and other workers of color than the harm having a criminal record does to the prospects of white job applicants.

These points were made very eloquently by Dr. Harry Holzer, whose research was the starting point for this Commission's briefing. Dr. Holzer made this primary point in his written testimony (page 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." In responding to questions from the Commissioners at the briefing, Dr. Holzer summarized his knowledge succinctly (MTB at 63-64):

---

you get a better life if you don't have access to the labor market?"); Ms. Miller (for NAPBS) (MTB at pages151-52: "we can all agree that reintegration of ex-offenders into society is important.").

[3] As Mr. Martin testified, the New York study replicated a study conducted earlier in Milwaukee, Wisconsin. MTB at pages 86-87.

> 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... 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.
>
> 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.

Automatically disqualifying all applicants who disclose a criminal conviction on an initial job application – no matter how old, minor, or unrelated to the position the conviction was – is a widespread practice that has devastating results on communities of color. As Roberta Meyers, co-director of the National H.I.R.E. Project testified (MTB at 81, lines 20-23): "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." Prior to the EEOC's issuance of the updated Enforcement Guidance, the use of automatic disqualifiers was extremely widespread, as documented in a study by the National Employment Law Project, "65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment" (2011).[4] To address this problem, the Guidance recommends as Best Practice that employers follow the procedure popularly known as "Ban the Box," i.e., not asking candidates to disclose criminal history in the initial application, because "an employer is more likely to objectively assess the relevance of an applicant's conviction if it becomes known when the employer is already knowledgeable about the applicant's qualifications and experience." (Guidance, Section V-B-3, text at n. 109.)

When people who have criminal records are denied opportunities to work, locking those workers out of the job market has a devastating impact on low-income communities of color. As Dr. Holzer emphasized (written testimony at page 3):

> 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 [citations omitted]. 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....

Prof. Holzer also pointed out that noncustodial fathers who cannot find work cannot make child support payments.

---

[4] The study is available online at http://nelp.3cdn.net/c1696a4161be2c85dd_t0m62vj76.pdf, last accessed January 10, 2013, at 12:05 p.m.

The EEOC's Guidance was sorely needed. Yet it is only a small first step in what will be a long journey to correcting the discrimination in hiring that so acutely affects people of color with criminal records in their attempts to re-enter society after completing a criminal sentence.

II. The record at the briefing plainly demonstrated that the EEOC designed the Guidance to help employers assess criminal history records sensibly; it does not discourage employers from doing criminal background checks.

The testimony presented at the briefing by Carol Miaskoff, Acting Associate Legal Counsel for the EEOC (written statement at 1-2), could not have been more clear on this point:

> "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."

In other words, the Guidance has neither the purpose nor the effect of reducing the use of criminal history record checks by employers. Instead, the Guidance illustrates appropriate procedures for evaluating candidates' criminal history information for those employers who conduct such checks.

The Guidance suggests that a selection process can be shown to be demonstrably job-related and consistent with business necessity when an employer follows two steps:

(1) uses a targeted screen that, *inter alia*, carefully identifies specific convictions that, if repeated in the position being filled, would present risks to the employer's legitimate interests and the length of time after the offense that the risks persist; and

(2) for any applicant who has a record within the parameters of the above screen, conducts an individualized assessment to determine whether the evidence of rehabilitation that the applicant offers persuades the employer that the applicant should not be considered at risk for committing another crime.

A. Individualized Assessment

With regard to the individualized assessment of an applicant with a criminal record, Dr. Jeffrey Sedgwick's testimony was critical of the EEOC's use of social science research data in the Guidance, but in fact Dr. Sedgwick's own review of social science data strongly supported the EEOC's recommendation for using an individualized assessment.

In his written testimony (at page 10), Dr. Sedgwick endorsed the views of Prof. Strahilevitz that, to evaluate the risk of hiring an applicant with a criminal history, "**decision makers [should have] 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." [Emphasis in bold added.] Past job performance is one of the main indicators to be consulted in the individual assessment. (*See* Guidance at Section V-B-9). From the social science literature, Dr. Sedgwick identified several other factors that he found to be particularly relevant for evaluating the potential success of person with a criminal conviction history as an employee, as follows (at pages 4-5):

1) The **number of past offenses** committed by someone is a good predictor of whether he will commit crimes in the future.

2) Lack of education increases the risk of committing another crime and, conversely, **attaining more formal education** makes re-offending less likely.

3) Success in overcoming a **substance abuse problem** is often a positive factor for people who avoid committing crimes after serving a sentence.

4) A person who is in a **stable family relationship** is much less likely to commit crimes in the future.

In the first two factors, Dr. Sedgwick endorses elements that are similar to those the EEOC Guidance recommends employers consider as part of the individual assessment (*i.e.*, the number of prior criminal convictions and whether the applicant has post-offense educational achievement; *see* Guidance at Section V-B-9). As for the third and fourth factors, Dr. Sedgwick apparently takes the view, based on the research literature, that the Guidance would be improved if it also recommended that employers consider both the time a person with a criminal history has been "clean and sober," *i.e.*, in recovery from alcohol or drug dependence, and whether he maintains stable family supportive relationships. The undersigned groups support criminal records policies that give applicants an opportunity to provide evidence of rehabilitation that may include sobriety and/or stable family supportive relationships of all types.

B. Negligent Hiring Liability and the Guidance

The Guidance provides employers with information effectively to avoid negligent hiring liability. An employer that uses the selection process outlined in the Guidance is virtually certain to be protected from liability for negligent hiring. When employers carefully consider the risks present in particular jobs, they will find that, as courts have observed,[5] most jobs do not pose

[5] *See, e.g., Ponticas v. KMS Invs.*, 331 NW.2d 907, 913 (Minn. 1983), discussing requirements when the job requires an employee "to regularly deal with members of the public." Unless there is some particular aspect of the job that requires greater concern (such as access to passkeys to apartments), "If the employer has made adequate inquiry or otherwise has a reasonably sufficient basis to conclude the employee is reliable and fit for the job, no affirmative duty rests on him to investigate the possibility that the applicant has a criminal record." *See also, Evans v. Morsell*, 284 Md. 160, 167, 395 A.2d 480, 484 (1978).

risks that require a criminal background check. Most cases imposing negligent hiring liability that involve individuals with conviction histories arise when the employer has completely failed to do either a check of all references or a criminal history records check. Julie Payne, General Counsel for the U.S. operations of G4S Secure Solutions (USA), Inc., a unit of a global private security company, included cases in her written testimony where doing a proper background check before hiring absolved the employer from liability for alleged negligent hiring (page 13, Appendix A, bottom of page).

There was speculation by some witnesses and Commissioners at the briefing that the prospect of the EEOC's either bringing an enforcement action or conducting a probing and expensive investigation of an employer's criminal history records screening practices would cause some employer, somewhere, to stop doing criminal history background checks to avoid the expense of defending an investigation of potential Title VII liability.[6] But this speculation was not supported by specific facts, or even by anecdotes. Garen Dodge, for example, admitted that he had not heard of any case where a company was considering discontinuing background checks because of the EEOC Enforcement Guidance. (Dodge, MTB at 116-17.)

Ms. Payne said in her written testimony (at page 4) that employers perceive "[t]he potential costs of not screening [for criminal records] are enormous," and that in her experience the "average" award in a negligent hiring case is as much as three million dollars. But while employers may fear multi-million dollar verdicts in negligent hiring cases (in part because consultants and counsel fan this particular flame), whether significant numbers of such verdicts actually exist is suspect. In one paragraph, Ms. Payne cites three widely different "average" award figures, all of which are ultimately sourced only to web pages maintained by human resources consultants or liability consultants who use those pages to promote their services.[7]

---

[6] While Ms. Payne complained that her company had spent "hundreds of thousands of dollars" in defending an EEOC class-wide investigation where the company had refused to hire a minority candidate for a security guard position when it found he had two misdemeanor theft convictions, (Payne, MTB at 99-100) it is hard to evaluate the merits of her complaint that the EEOC investigation is unreasonably burdensome, since she did not specify the annual revenues and profits of this privately held multi-national company that employs more than 33,000 security guards in the U.S. alone (Payne, written testimony at 2). Nor did she describe the company policy the EEOC is investigating. If the policy being reviewed is an automatic, permanent disqualification of any applicant ever convicted of a misdemeanor, it is hardly surprising that the EEOC has decided to open a systemic investigation of the company – such a policy would very likely have an adverse impact on minority applicants and would violate the fundamental principles of Title VII that the federal courts and the EEOC enunciated over 25 years ago.

[7] *See* Payne written testimony at page 5:

> 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***. Approximately 66 percent of ***negligent hiring trials result in awards averaging $600,000 in damages***. The Workplace Violence

Further, the majority of cases claiming "negligent hiring" involve employees who are alleged to be "unfit" for a wide variety of reasons that have nothing to do with having a criminal record.[8] In sum, while the risk of an employer facing a multi-million dollar verdict or settlement may exist, that risk is remote. If employers follow the procedures recommended in the Guidance, the possibility that the EEOC will launch a class-wide investigation is at least equally remote.

Certain positions that involve access to homes or care of children, the elderly, or people with disabilities, include higher levels of care in hiring decisions. Employers who have such positions in their workforce know full well that they need to conduct criminal background checks when they hire new employees for these positions and are frequently required to do so by state and federal laws. The Enforcement Guidance provides these and other employers with a roadmap to successfully perform such evaluations.

III. As confirmed by the testimony of the representative from the Society for Human Resource Management and other witnesses, the Guidance sets out flexible, fair, balanced, and workable procedures for assessing what prior convictions are relevant to the risks presented in the job and for evaluating applicants who have convictions.

The Society for Human Resource Management (SHRM) is the leading association in the world for human resource professionals. Mr. Segal, representing SHRM, testified (written testimony at pages 5-6) that when the updated Guidance was issued 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. [Nature of the offense, nature of the job, and time elapsed since conviction or completion of sentence.] ... 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." [Emphasis added.]

Research Institute reports that ***the average jury award for civil suits*** on behalf of the injured is ***$3 million***. [Bold italics added; citations omitted.]

Mr. Dodge's written testimony cites the same three figures (page 5, text at note 13 and page 6, text at notes 18-19). Neither Ms. Payne nor Mr. Dodge offer any explanation of why they assert three mutually incompatible "average" award figures as true facts about jury awards in negligent hiring cases.

[8] For example, a close reading of the descriptions of negligent hiring cases cited in the written testimony of Ms. Payne and Mr. Dodge reveals that the majority of these cases had nothing to do with hiring an employee who had a prior criminal conviction.

Since the Guidance fundamentally reflects only a restatement, with some clarification and additional detail, of long-standing principles followed by many human resource managers, it is natural that experienced human resource personnel do not see the Guidance as discouraging the use of criminal background checks. As Mr. Segal testified in response to a question from Commissioner Gaziano (MTB at 200, lines 15-21):

> 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 [*sic, i.e.,* as "guidance"] and in reviewing more carefully the Green factors.

Other human resource professionals and trade association representatives also indicated in their testimony that the Guidance provides guidelines for employers that are flexible, fair, balanced and workable. Mr. Larson, who consults with small businesses ranging from 15 to 300 employees, observed that smaller businesses that had not been previously alert to the issues addressed anew in the EEOC's updated Guidance should not even need to add staff to comply fully with the recommended procedures.[9]

IV. The Guidance did not change any legal requirements, it simply described a practical method for employers to comply with the legal requirements of Title VII.

The updated Guidance issued in 2012 was primarily a restatement and consolidation of prior policy documents issued during the Chairmanship of Clarence Thomas. (EEOC Enforcement Guidance, Section II, text at nn. 15-16 and those notes.) As Ms. Miaskoff also testified at the briefing, those policy statements grew out of a series of decisions by the EEOC in the 1970s and early 1980s that found criminal record disqualifications discriminatory based on an analysis similar to the *Green* factors noted in the preceding section of these comments. (Miaskoff written testimony at 2, notes 4-5.)

As noted in Mr. Segal's testimony, since the Guidance utilizes the *Green* factors, long-established concepts that are familiar and comfortable for human resource managers to apply, professionals in human resources have not reported encountering significant difficulties in

---

[9] Mr. Larson testified that the evaluation processes are familiar to employers who comply with other federal statutes such as the Americans with Disabilities Act Amendments Act (ADAAA) and the Family and Medical Leave Act (written statement at page 3):

> 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 make 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 process. Those familiar with processing FLMA leave requests will have a similar analytical framework.

following the procedures recommended in the Guidance for using targeted screens and individualized assessment to apply the *Green* factors to hiring applicants.

V. The EEOC developed the Guidance over a period of many years, with the assistance of broad public input provided in two public hearings and in 300 public comments.

The EEOC conducted a thoughtful and thorough process in soliciting input on this issue of critical concern to millions of U.S. workers. Beginning in 2006, under then Chair Naomi Earp, the EEOC conveyed its interest in updating the Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964. According to Commissioner Victoria Lipnic, this update was necessary "in light of the technological and case law developments of the last two decades" since the Commission first issued the guidance under Chairman Clarence Thomas in 1987.[10]

The EEOC has held several open meetings through which it has solicited and received the views of a diverse set of stakeholder groups, including employer representatives, and participated in numerous forums organized by the key stakeholders.[11] The EEOC invited leaders from the management community to participate on panels at public EEOC meetings in 2008 and 2011. At the 2011 meeting, the Commission received information about employer best practices for hiring individuals with criminal records. The Commission received roughly 300 comments after its July 2011 meeting, many of which were from employer representatives, small business owners, and human resource professionals.[12] Virtually every major industry group with a stake in

---

[10] Commissioner Lipnic's statement upon voting to adopt the Guidance, April 25, 2012, page 1.

[11] *See* Meeting of November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records *at* http://www.eeoc.gov/eeoc/meetings/11-20-08/index.cfm and Meeting of July 26, 2011 – EEOC to Examine Arrest and Conviction Records as a Hiring Barrier *at* http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm.

[12] The views of the organizations and constituencies that this Commission invited to testify at the briefing were all presented to the EEOC in public comments. In addition to the comments submitted jointly by Commissioners Kirsanow, Heriot and Gaziano, critical or cautionary comments about updating the Guidance were submitted by Mr. Dodge on behalf of the Council for Employment Law Equity; by Ms. Bone for Sue Weaver CAUSE; by the National Association of Professional Background Screeners; by the National Retail Federation; and by the Society for Human Resource Management, all of whom presented testimony at the briefing on December 7. Though Mr. Fishman's firm did not submit comments, six or eight consumer reporting agencies like his company did, in addition to the comments submitted by their association. The National Small Business Association does not appear to have commented to the EEOC, but the concerns of many of its constituents were undoubtedly reflected in the comments submitted by the National Federation of Independent Business. Mr. Dodge's discussion of negligent hiring, retention and supervision cases also covered most of the substance of the statement of Ms. Payne at the briefing on behalf of GS4 and private security companies.

criminal history record checks made its views known to the EEOC.[13] Notably, the comments were two to one in favor of updating the Guidance.

When drafting the 2012 Enforcement Guidance, Commission staff again met with various employer and employee representatives to obtain focused feedback on discrete issues. This review process culminated in the Commission's April 25, 2012, bipartisan vote to approve the Enforcement Guidance.

VI. The fact that Congress expressly provided in Title VII that the federal statute pre-empts any state or local laws that require an employer to violate Title VII, as stated in the Guidance, creates the theoretical potential for employers to face conflicting legal obligations, but few employers will ever encounter such a conflict in the real world.

Some concern has been raised because the Guidance states that asserted compliance with state or local law is not a defense to a violation of Title VII.[14] Ms. Miaskoff explained this provision very plainly (Miaskoff written testimony at page 10):

> 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. [Citing 42 U.S.C. § 2000e-7.] 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.

The cited section of the statute has been in place since 1964. It is not the Enforcement Guidance, but Title VII itself which preempts state or local laws that require an employer to violate Title VII. It would be a disservice to employers if the EEOC were to fail to inform them about Title VII's preemption of state law in this area.

---

[13] According to a list of the public comments on file at the EEOC, compiled by the National Employment Law Project, a signatory to this letter, major national business and trade associations that weighed in with public comments included the U.S. Chamber of Commerce, American Bankers Association, American Camp Association, American Insurance Association, Food Marketing Institute, International Association of Amusement Parks and Attractions, International Association of Exhibitions and Events, National Federation of Independent Business, National Multi Housing Council (NMHC) & National Apartment Association (NAA), National Council of Investigative and Security Services (NCISS), Petroleum Marketers Association of America, and Retail Industry Leaders Association.

[14] Footnote 167 of the Guidance states:

> *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 210 (1991) (noting that "[i]f state tort law furthers discrimination in the workplace and prevents employers from hiring women who are capable of manufacturing the product as efficiently as men, then it will impede the accomplishment of Congress' goals in enacting Title VII"); Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 380 (2d Cir. 2006) (affirming the district court's conclusion that "the mandates of state law are no defense to Title VII liability").

None of the witnesses at the briefing could relate a single instance in which one of their members or customers had identified a state statute or local law that might require an employer to violate Title VII. *See, e.g.,* Commissioner Kladney's question to the third panel of witnesses (MTB at 217-18): none of those panelists were aware of a single instance where a state statute that required a disqualification had been identified as a potential conflict between state law and Title VII.

The strict requirements to prove a disparate impact violation circumscribe narrowly the statutes that can present employers with this type of conflict. State statutes are not preempted simply because the statute requires background checks, but only if the statutes impose excessive disqualifications. Not only must a statutory disqualification have disparate impact on minority workers, but the required disqualification must be without relation to the job and not be required by business necessity. It is not surprising that none of the witnesses at the briefing could identify even one employer who has faced a conflict created by such a statute.

Conclusion

The EEOC Enforcement Guidance on the Use of Arrest and Conviction Records in Employment Decisions, as updated by the EEOC in 2012, is a thoughtful, flexible, and workable roadmap for employers to follow. The Guidance explains to employers how to conduct and use any appropriate background checks they reasonably require, without violating the rights that job applicants have under Title VII.

We thank the Commission for the opportunity to present these comments for the Commission's consideration in preparing any report on the briefing. If you have any questions, please contact Ray McClain at The Lawyers' Committee for Civil Rights Under Law at rmcclain@lawyerscommittee.org or Lexer Quamie at The Leadership Conference on Civil and Human Rights at quamie@civilrights.org.

Respectfully submitted,

Ray P. McClain
Director, Employment Project
Lawyers' Committee for Civil Rights Under Law
1401 New York Avenue, N.W., Suite 400
Washington, DC 20005

Joined by the following organizations:

9to5 [organizations continued on following page]

ACLU

All of Us or None

Bazelon Center for Mental Health Law

Connecticut Legal Services

Faces & Voices of Recovery

FedCURE

Greater Hartford Legal Aid, Inc.

Heartland Alliance for Human Needs & Human Rights, National Transitional Jobs Network

Lawyers' Committee for Civil Rights of the San Francisco Bay Area

Legal Action Center

Legal Assistance Resource Center of Connecticut

Legal Services for Prisoners with Children

Massachusetts Law Reform Institute, Inc.

NAACP

NAACP Legal Defense and Educational Fund, Inc.

National African American Drug Policy Coalition

National Association of Social Workers

National Employment Law Project

National Women's Law Center

New Haven Legal Assistance Association

Ohio Justice & Policy Center

Safer Foundation

The Leadership Conference on Civil and Human Rights

The United Auto Workers (UAW)

Youth Represent