Appendix A: Appropriations Report Arrest and Convictions Outreach

Report to the Committees on Appropriation

Public Outreach and Education Efforts Concerning EEOC Guidance on Arrest and Convictions Records

July 2013



Equal Employment Opportunity Commission

1. Introduction

On March 26, 2013, President Obama signed the continuing resolution funding government operations for the remainder of the fiscal year (PL 113-006). In addition to providing funding for the Equal Employment Opportunity Commission's (EEOC) operations for the rest of FY 2013, the House and Senate Committees on Appropriations included several reporting requirements that went into effect upon enactment. The Committees directed EEOC to report on the agency's public education and outreach efforts aimed at alleviating confusion about its guidance on the use of arrest and conviction records in employment decisions. The Committee language on the reporting requirement said:

Guidance on criminal background checks.—Section 544 of H.R. 5326 of the 112th Congress is not included. The EEOC recently finalized new guidance regarding the use of criminal record checks, without regard for a directive proposed by the Senate that such guidance should be circulated for public comment at least six months before adoption. The EEOC is directed to report to the Committees on Appropriations within 120 days of enactment of this Act detailing the steps it has taken to alleviate confusion about the new guidance.

The EEOC has a comprehensive outreach program in place to educate employers and workers about the applicability of its updated guidance on the use of arrest and conviction records in employment.

2. Background

On April 25, 2012, the Commission, in a 4-1 bi-partisan vote, issued its <u>Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964</u>, as amended, 42 U.S.C. § 2000e. The Guidance updates, consolidates, and supersedes the Commission's 1987 and 1990 policy statements on this issue, as well as the relevant discussion in the EEOC's Race and Color Discrimination Compliance Manual Chapter. The Guidance is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff.

While Title VII does not prohibit an employer from requiring applicants or employees to provide information about arrests, convictions or incarceration, it is unlawful to discriminate in employment based on race, color, national origin, religion, or sex. The guidance approved in 2012 builds on longstanding guidance documents that the EEOC issued over twenty years ago. The Commission originally issued three separate policy documents in February and July 1987 under Chair Clarence Thomas and in September 1990 under Chair Evan Kemp explaining when the use of arrest and conviction records in employment decisions may violate Title VII.

The Commission also held public meetings on the subject in 2008 and 2011. The 2012 Enforcement Guidance is predicated on, and supported by, federal court precedent concerning the application of Title VII to employers' consideration of a job applicant or employee's criminal history and incorporates judicial decisions issued since passage of the Civil Rights Act of 1991. The guidance also updates relevant data, consolidates previous EEOC policy statements on this issue into a single document and illustrates how Title VII applies to various scenarios that an

employer might encounter when considering the arrest or conviction history of a current or prospective employee. Among other topics, the guidance discusses:

- How an employer's use of an individual's criminal history in making employment decisions could violate the prohibition against employment discrimination under Title VII;
- Federal court decisions analyzing Title VII as applied to criminal record exclusions;
- The differences between the treatment of arrest records and conviction records;
- The applicability of disparate treatment and disparate impact analysis under Title VII;
- Compliance with other federal laws and/or regulations that restrict and/or prohibit the employment of individuals with certain criminal records; and
- Best practices for employers.

The Guidance was developed by the Commission with input from many members of the public. Representatives of employers, individuals with criminal records, and other federal agencies testified at public EEOC meetings in November 2008 and July 2011. The Commission also received and reviewed approximately 300 written comments from members of the general public and stakeholder groups that responded to topics discussed during the July 2011 meeting. The stakeholders that provided statements to express their interests and concerns include prominent organizations such as the NAACP, the U.S. Chamber of Commerce, the Society for Human Resource Management (SHRM), the Leadership Conference on Civil and Human Rights, the American Insurance Association, the Retail Industry Leaders Association, the Public Defender Service for the District of Columbia, the National Association of Professional Background Screeners, and the D.C. Prisoners' Project, among others.

Additionally, throughout the process of drafting the Guidance, individual Commissioners and staff met with representatives from various stakeholder groups to obtain more focused feedback on discrete and complex issues. Groups involved providing input to EEOC personnel during the development of this guidance included the U.S. Chamber of Commerce, SHRM, HR Policy Association, College and University Professional Association for Human Resources, the National Employment Law Project, and the Equal Employment Advisory Council.

3. Media Outreach

With the approval of the Enforcement Guidance in April 2012 the EEOC used this opportunity to begin a coordinated effort to educate the public about this issue. To reach as broad an audience as possible with information concerning the use of arrest and conviction records in employment, the EEOC distributed a press release announcing the approval of the revised guidance to more than 500 members of the media, posted the information on our public website (www.eeoc.gov) and utilized the social media tool, Twitter. The press release included links directly to the guidance, as well as to a question-and-answer document addressing frequently asked questions in a user-friendly plain-English format. The press release is available

at www.eeoc.gov/eeoc/newsroom/release/4-25-12.cfm and the question-and-answer document is at http://www.eeoc.gov/laws/guidance/qa arrest conviction.cfm.

Staff provided these materials to reporters and responded to inquiries – answering questions and providing information on the guidance and EEOC's position – numerous times since the guidance was approved. EEOC's efforts resulted in numerous stories – reaching millions of subscribers and readers nationwide. Highlights of the news coverage include:

- New Gov't Guidance on Employee Background Checks
 AP / The Washington Post, Bloomberg Business Week and others, April 25, 2012 www.businessweek.com/ap/2012-04/D9UC7I0G2.htm
- Equal Opportunity Panel Updates Hiring Policy
 The New York Times, April 25, 2012 www.nytimes.com/2012/04/26/business/equal-opportunity-panel-updates-hiring-policy.html
- US Gives Employers Fresh Advice on Background Checks
 Reuters / The Chicago Tribune and others, April 25, 2012
 http://articles.chicagotribune.com/2012-04-25/business/sns-rt-usa-employmentbackgroundchecks12e8fp9u1-20120425 1 background-checks-job-seekers-employers
- How do we respond to arrests and convictions? HR.BLR.com, July 20, 2012 http://hr.blr.com/HR-news/Staffing-Training/Background-Checks/How-do-we-respond-to-arrests-and-convictions/
- New Rules Set on Background Checks for Job Seekers
 MSNBC, April 25, 2012
 http://bottomline.msnbc.msn.com/_news/2012/04/25/11394190-new-rules-set-on-background-checks-for-job-seekers?lite
- EEOC Revises Rules on Job Seekers With Criminal Records
 McClatchy Newspapers / The Miami Herald, the Pittsburgh Post-Gazette and others, April 25, 2012
 <u>www.miamiherald.com/2012/04/25/2767832/eeoc-revises-rules-on-jobseekers.html#storylink=cpy</u>
- EEOC Issues New Guide on How Employers Should Screen Job Candidates' Criminal Records *The Minneapolis Star Tribune*, *April 25*, *2012* www.startribune.com/blogs/148971705.html
- Employers Advised on Considering Arrest Records
 The Wall Street Journal / MarketWatch, April 25, 2012
 www.marketwatch.com/story/employers-advised-on-considering-arrest-records-2012-04-25
- New Gov't Guidance on Employee Background Checks CBSNews.com, April 25, 2012www.cbsnews.com/8301-505245_162-57421493/new-govt-guidance-on-employee-background-checks/

Similarly, EEOC staff provided editorial writers with information and materials that led to several pieces in major daily newspapers:

- A Second Chance for Ex-Offenders (editorial)
 The New York Times, June 19, 2013
 http://www.nytimes.com/2013/06/20/opinion/a-second-chance-for-ex-offenders.html
- A Fair Shot at a Job (editorial)

 The New York Times, April 21, 2012

 http://www.nytimes.com/2012/04/22/opinion/sunday/a-fair-shot-at-a-job.html?_r=1
- After They Check the Box (editorial)
 The New York Times, April 29, 2012
 http://www.nytimes.com/2012/04/30/opinion/after-they-check-the-box.html?_r=1&pagewanted=all
- Criminal Record Shouldn't Be a Barrier to Work: Maryland Missed a Chance to Improve
 Opportunities for Workforce Reentry (editorial)

 The Baltimore Sun, May 2, 2012

 http://www.baltimoresun.com/news/opinion/oped/bs-ed-worker-reentry-

20120502,0,4693407.story

Despite our best efforts, there was some misinformation circulating on the internet and in the media in the weeks following the vote to approve the guidance. To combat this misinformation, the EEOC developed a short *What You Should Know* document that was posted on the EEOC website, distributed through social media and used by EEOC staff to answer inquiries. The *What You Should Know* document is available at www.eeoc.gov/eeoc/newsroom/wysk/arrest_conviction_records.cfm

Additionally, the EEOC responded to negative editorials in an effort to correct misinformation.

- No major change in EEOC guidelines Victoria A. Lipnic, EEOC Commissioner The Washington Examiner, June 11, 2012 http://washingtonexaminer.com/article/706776
- There's No Peril in Following EEOC's Hiring Guidance Peggy Mastroianni, EEOC Legal Counsel The Wall Street Journal, March 5, 2013 http://online.wsj.com/article/SB10001424127887323978104578334672164551446.html
- We Don't Ban Background Checks
 Jacqueline A. Berrien, EEOC Chair

 The Wall Street Journal, June 21, 2013
 http://online.wsj.com/article/SB10001424127887323893504578555722405188406.html

The press release, *Questions and Answers* and the *What You Should Know* have been attached as Appendix A.

4. Congressional Outreach

Due to immense public interest in the guidance, the Commission engaged in a robust congressional outreach campaign to educate Members of Congress and their staffs with an emphasis on members who have taken leadership roles on this issue. The campaign featured targeted distributions to the agency's key congressional partners to assist them in responding to constituent inquiries and employer concerns about the Guidance. The efforts helped to increase public awareness about important details of the guidance and mitigate misinformation about what the Guidance does and does not permit.

Highlights of EEOC's outreach included:

- Coordinating/conducting congressional staff briefings on the Guidance.
- Coordinating/conducting congressional member briefings on the Guidance.
- Responding to congressional requests for information on the Commission's updated Guidance.
- Circulating informational materials to members of the agency's appropriations and authorizing committees in the House and Senate.
- Information dissemination to supporters of the Second Chance Reauthorization Act of 2011.
- Providing educational materials to congressional caucuses who have an ongoing concern in the issue.

5. Public Testimony

On December 7, 2012, in testimony before the U. S. Commission on Civil Rights (USCCR), Carol Miaskoff, Acting Associate Legal Counsel for the EEOC, summarized the EEOC's enforcement guidance. She noted that 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, and continued into the 1980s when the EEOC Commissioners delegated this authority to staff as the number of charges increased. Federal courts, in turn, issued Title VII opinions assessing such alleged discrimination starting in 1970 and, most recently, in 2007. The application of Title VII to criminal record screening, under both disparate treatment and disparate impact analysis, is clearly established.

She described how 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.* ¹ Second, in 2007, the Third Circuit in *El v. Southeastern Pennsylvania Transportation Authority* ² 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, meaning that substantially more people now face the challenges of entering the workforce after an arrest or conviction than in 1990. 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. The 2012 Enforcement Guidance takes account of all of these factors.

Ms. Miaskoff's testimony summarized the 2012 enforcement guidance – deliberately and thoughtfully explaining the guidance and touching on issues of concern or confusion. She also took questions from Members of the USCCR and supplied supplemental answers as well as a time-line for the record. The testimony and supplemental materials are attached in Appendix B.

It is also important to note that EEOC Commissioner Victoria A. Lipnic provided a statement to the USCCR for the December 7, 2012, hearing. She noted that "it is my view that having issued the Revised Guidance, the Commission should now undertake efforts to let employers know, with specificity, what they *can* lawfully do with respect to developing criminal history policies, not merely what we believe they cannot. Since adoption of the Revised Guidance earlier this year, I have championed, and will continue to champion, such an effort, as it is my belief that where any administrative agency is going to hold a stakeholder to a standard, through the investigatory or litigation process, it is incumbent upon the agency to make that standard clear and explicit. In my view, the EEOC should be as much about educating employers about compliance with the law as it is about investigating and litigating charges."

6. Public Outreach

To increase public awareness and educate stakeholders, including the business community, about the *Enforcement Guidance*, the Commission has conducted a significant amount of outreach and technical assistance since its approval on April 25, 2012. The EEOC headquarters program offices as well as our 53 field offices joined in the effort. For the period April 25, 2012 to June 30, 2013, the Commission has conducted over 500 events on the topic and reached almost 45,000 individuals. This is in addition to the nearly 3,500 phone calls our Intake

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¹ 401 U.S. 424 (1971). *See* 42 U.S.C. 2000e-2(k)(1)(A); 137 CONG. REC. 15273 (1991) (statement of Sen. Danforth).

² 479 F.3d 232 (3d Cir. 2007).

Information Group responded to on the topic and the several hundred inquiries received directly by the field offices.

The Commission's Office of Legal Counsel (OLC) alone has averaged 4-8 presentations each month that include the arrest and conviction topic. OLC staff have spoken to various audiences, but mainly the employer and the legal community around the country. In addition, the EEOC Training Institute which provides the bulk of the services to the employer community has already held 14 technical assistance seminars in FY 2013 where specific training was provided on the *Enforcement Guidance*. This is significant because these seminars range in attendance from 75-400 participants. For example, EEOC General Counsel David Lopez presented on the topic at two technical assistance seminars this year - in Albuquerque, New Mexico and Lexington, Kentucky - reaching approximately 300 people. Acting Associate Legal Counsel Carol Miaskoff gave a presentation on the *Enforcement Guidance* at the Commission's last national training conference, August 2012, in Dallas, Texas, with approximately 400 attendees.

Specific Sample Outreach Activities

The list below highlights events conducted around the country to various audiences concerning the use of arrest and convictions records and the *Enforcement Guidance*. Notably, EEOC Updates from the Office of Legal Counsel always include discussion about the use of arrest and conviction records.

- Legal Counsel Peggy Mastroianni made an EEOC Update presentation during a seminar sponsored by the law firm of Capell and Howard and the Society for Human Resource Management (SHRM) in Montgomery, AL. In addition, she gave an EEOC Update and a Case Law Update at the Upper Midwest Employment Law Conference held in St. Paul, MN.
- Legal Counsel Mastroianni made a presentation on the *Enforcement Guidance* to the National Association of Attorneys General.
- Acting Associate Legal Counsel Carol Miaskoff gave an EEOC Update to the International Foodservice Distributors Association in Washington, D.C. and at an event sponsored by the Research Triangle Industry Liaison Group in Chapel Hill, NC.
- Senior Attorney Advisor Tanisha Wilburn made a presentation on the *Enforcement Guidance* during an event entitled "Breakfast Briefing: When Using Criminal Background Checks is Discriminatory." The event was sponsored by the Women's Bar Association of the District of Columbia. In addition, she also made a presentation in Chicago on the Commission's *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII to a Task Force on Inventorying Employment Restrictions impaneled by the State of Illinois.*
- Assistant Legal Counsel Corbett Anderson gave an EEOC Update and a general overview of laws enforced by the Commission to business executives of PBS and public radio stations at the annual conference of the Public Media Business Association in Washington, DC. He

also along with Senior Attorney Advisor Davis Kim made separate presentations at a TAPs sponsored by the Washington Field Office in McLean, Virginia where he gave an overview of the EEOC's Strategic Enforcement Plan and made a Legal Update presentation that included discussion of the Enforcement Guidance.

- Senior Attorney Advisor Jeanne Goldberg made an EEO update presentation on the new RFOA regulation, the new Enforcement Guidance on Arrest and Conviction Records, and a variety of other topics to the Industry Liaison Group and the Northwest EEO/Affirmative Action Association in Portland, OR.
- Carol Miaskoff and Senior Attorney Advisor Tanisha Wilburn made presentations at the FEPA conference in St. Louis on the new Enforcement Guidance on Arrest and Conviction Records.
- Charlotte District Office Trial Attorney Edward Loughlin spoke about harassment and EEOC's guidance on arrest and conviction records at the annual meeting of Sibley Hospital/Johns Hopkins Medicine.
- Los Angeles District Office Program Analyst Christine Park-Gonzalez provided training on the new arrest and convictions guidance issued by the EEOC to a group of about 10 re-entry service providers in conjunction with the WorkSource center in South Los Angeles. Ms. Park-Gonzalez co-presented with Jane Suhr, L.A. District Director for the DOL Office of Federal Contract Compliance Programs on services that both the EEOC and DOL can offer their clients who have trouble obtaining employment due to their criminal histories. In addition, she also conducted a presentation on the new EEOC guidance on arrest and conviction records for approximately 30 staff for the New Start WorkSource program in Los Angeles. The staff specializes in providing services for ex-offenders.
- St. Louis District Office Director James Neely, Deputy L. Jack Vasquez and Dana Engelhardt, Supervisory Investigator, represented the Commission at OFCCP's all day seminar, *Building Partnerships through Education and Outreach*, in St. Louis, Missouri where they presented on the ADAAA, Arrest and Conviction Records and LGBT issues.
- Seattle Field Office, Program Analyst Rodolfo Hurtado presented a workshop on "Case Processing and Mistakes Made by Employers." The workshop included an overview of the recently published "Enforcement Guidance on Arrest and Conviction Records" in Lewiston, ID.
- Tampa Field Office Director Georgia Marchbanks and Enforcement Manager Edwin Gonzalez-Rodriguez conducted a training workshop for attendees of the 5th Annual Re-Entry Expo at the Hillsborough County Lee Davis Neighborhood Service Center in Tampa FL.
 The presentation covered all the laws enforced by the EEOC with a focus on arrest and conviction records and the EEOC's investigative process.
- New Orleans Field Office Program Analyst Tydell Whitfield, met with five stakeholders representing the Justice & Accountability Center of Louisiana. The topic for this meeting

was the EEOC's guidance on arrest and conviction records. The stakeholders assist young adults/student workers who have been arrested and or convicted in getting their records expunged in order to have a better opportunity in obtaining employment.

- A presentation entitled Reentry: Arrest, Conviction and Credit Background Checks in the Workplace were provided before clients of Good Seed Good Ground, Inc. (a non-profit organization for troubled youth in Newport News, VA.) The presentation covered the origin and application of the adverse/disparate impact theory of employment discrimination, highlighted EEOC's guidance on pre-employment inquiries such as arrest, conviction, and credit histories, the charge processing procedures and discussed all of EEOC's anti-discrimination in employment laws.
- Tampa Field Office Enforcement Supervisor Tracy Smith provided the members of the Task Force of Citrus County an overview of the Commission's guidance on Arrest and Conviction Records in Inverness, FL.
- In Orlando, Tampa Field Office Senior Trial Attorney Gregory McClinton covered the use of Arrest and Conviction Records in his Technical Assistance Program Seminar (TAPS) presentation entitled, "Hiring, Firing and Best Practices in the FaceBook, LinkedIn and Google Generation". In addition, in Gainesville, Florida, the City of Gainesville Office of Equal Opportunity invited Miami District Office Senior Trial Attorney Muslima Lewis to speak on the topic of Arrest and Conviction Records at their Employment Law Seminar.
- San Francisco District Office Trial Attorney Sirithon Thanasombat presented on the EEOC's Enforcement Guidance on arrest and conviction records in employment decisions to the San Francisco Reentry Council. (Maurice Ensellem of National Employment Law Project spoke on the ETA guidance.) There were 20 distinguished council members representing the offices of the mayor, DA, law enforcement, city supervisors and advocacy groups) and about 70 public audience members. Reentry Policy Coordinator Verónica Martínez received several calls from people who thought the presentation was excellent and much needed, and there are requests to share the information with the California Reentry Council Network.
- Atlanta District Office Program Analyst Terrie Dandy participated, with a host of civic organizations, advocates and CBOs, in the "Ban-the-Box" program at the Atlanta City Hall, in recognition of Mayor Kasem Reid's commitment to ban-the-box for the City of Atlanta. The City of Atlanta is the first employer to ban-the-box in the State. Participating organizations include 9to5 (lead), NELP, GA Justice Project, NAACP, churches, The Center for Working Families, and others. Local media covered the event. In addition, in partnership with the Center for Working Families, PA Terrie Dandy conducted workshops on the use of arrest and conviction records in employment for ex-offenders.
- Birmingham District Office Program Analyst Eddi Abdulhaqq made a presentation to approximately 50 inmates scheduled for release from the Pensacola Federal Prison Camp. She provided information about the EEOC's laws, procedures, and guidance on the use and consideration of arrest and conviction records. In addition, she was also one of three

presenters at a re-entry workshop for inmates scheduled for release from the St. Clair County Correctional Facility.

- The Charlotte District Office Program Analyst Marilyn Booker provided two oral presentations on EEOC's "Employer Best Practices" as outline in the 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 before the employment committee, as well as, the general membership of the Norfolk Reentry Council. The employment committee met prior to the full Reentry Council. In addition, Ms. Booker also gave a presentation entitled "Arrest and Conviction Records in Employment Decisions: What YOU Need to Know" before the forty (40) clients of the staff of Virginia CARES, in Fredericksburg, VA.
- EEOC participated as a panelist during the Prisoner Re-entry: Issues and Initiatives workshop which was a part of the 3-day Spring 2013 Joint Conference. Marilyn S. Booker, Program Analyst provided a presentation covering considerations of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964. The BRPO-POSSESS-VASWP is a network of Benefit Program Specialists' and Social Work Practitioners' groups across the Commonwealth of Virginia.
- EEOC information relative to arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964 (namely the Arrest and Conviction Records in Employment Best Practices brochure) was distributed to approximately fifty vendors who participated in the Apprenticeship Career Fair in Charlotte.
- Carolyn King, Charlotte CRTIU Supervisor disseminated the following handouts to the attendees at the Restoration of Rights Forum: "What you Should Know About the EEOC and Arrest and Conviction Records", "Pre-Employment Inquiries and Arrest & Conviction", and "Facts About Race/Color Discrimination" (Title VII).
- John Hendrickson, Chicago District Office Regional Attorney, participated as a co-presenter at the "Indiana Journal of Law and Social Equality Symposium" held at the Indiana University Maurer School of Law in Bloomington, IN. The EEOC presentation on "Hot Button Issues in EEOC Litigation under the New Strategic Enforcement Plan" covered hiring issues and the EEOC's newer guidance on the use of arrest and conviction records and drew 100 attorney participants, nationwide, from the plaintiff's bar.
- In an ongoing partnership with the Wisconsin Department of Corrections, Maria Flores, Program Analyst, Milwaukee Area Office, conducted workshops on May 22, 2013 and June 19, 2013 to incarcerated offenders, an underserved population, participating in job-readiness programs at State correctional facilities. The workshop was conducted at one facility and was simultaneously video cast to multiple institutions across the state and in geographically underserved areas, reaching a total of 257 male and female offenders, including a significant number of African-Americans. In addition, Ms. Flores was also interviewed by the host of the radio program "Community Concepts" on the LocalJobNetwork.com radio station in Milwaukee. The purpose of the radio interview was to review EEOC's enforcement guidance on the use of arrest and conviction records in employment decisions under TVII.

- Dallas District Office Enforcement Supervisor Belinda McCallister talked about arrest and conviction records at a, Teens in Crisis, event in Dallas.
- Detroit Field Office Director Gail Cober presented to 35 members of the Statewide Re-Entry Group Workgroup on the EEOC Conviction Record Policy Guidance. Ms. Cober reviewed the policy with the group and discussed how the EEOC investigates and analyzes such cases.
- Indianapolis-Marion County City Council invited EEOC to conduct a presentation on EEOC's guidelines on the re-entry program on Arrests & Convictions. Indianapolis District Office Program Analyst Phyllis Wells conducted a presentation on EEOC's Best Practices on the re-entry program for 43 employers and 25 City Council Members. She also conducted a presentation on Arrests and Convictions for 75 HR members of the chamber and surrounding rural communities at the Richmond Chamber of Commerce in Richmond, Indiana.
- Reviving the Heart of Workforce Development: Cincinnati Area Director Wilma Javey conducted a presentation on the proper use of utilizing criminal background checks when past felons and offenders are looking for employment opportunities to a group of 64 employers and the Hamilton County Office of Re-entry and also how to adopt a fair hiring policy.
- Los Angeles Enforcement Manager Patricia Kane represented the EEOC at the Jericho Training Center in Los Angeles for a collaborative partners meeting centered on services for the ex-offender community in the greater Los Angeles area.
- Los Angeles District Office Investigator Richard Burgamy gave a presentation at the Cal State Reentry Initiative in San Bernardino, California, a community-based organization focused on assisting ex-offenders with re-entry into society. The training was also conducted in conjunction with the DOL WHD West Covina District.
- Memphis Investigator Michael Hollis gave a presentation to the Community Outreach Board
 of the U. S. Bureau of Prisons on background checks and Arrest and Conviction Records of
 formerly incarcerated individuals to 30 attendees. The meeting was held at the U. S. Federal
 Prison at Camp Millington, TN.
- Tampa Field Office Enforcement Supervisor Tracy Smith spoke before an audience of 65
 people at the Florida Council for Community Mental Health Human Resource forum on the
 topic of Arrest and Conviction Records.
- Miami District Office District Resource Manager Michael Bethea, Chief Administrative Judge Patrick Kokenge and Investigator Sergio Maldonaldo participated in the quarterly South Unit Re-entry Fair at the South Florida Reception Center in Miami FL. The eight different organizations in attendance, including EEOC, gave presentations about the assistance that could be provided to the soon to be ex-offenders. In total, there were approximately 100 inmates present from different prisons around south Miami-Dade County.

Each inmate was given a handout on the laws we enforce and myth-busters handouts to assist them in their future endeavors.

- Denver Program Analyst Patricia McMahon met with advocates from the Colorado Criminal Justice Reform Coalition to provide an EEOC overview and guidance on criminal records and background check.
- Washington Field Office Program Analyst Andrea Okwesa attended the monthly meeting of the DC Criminal Justice Coordinating Council (CJCC), Employment/Training Workgroup, and continuing efforts to assist the Reentry Committee in drafting a model, local arrest & conviction policy to provide guidelines for DC employers addressing the hiring of people with criminal records. She also attended the 9th Community Reentry & Expungement Summit in Washington, DC, sponsored by the DC Public Defender Service. It featured presentations & exhibit/resource.
- New York District Office Trial Attorney Jeffrey Burstein spoke about the Commission's Guidance on arrest and conviction records at a program sponsored by Law Seminars International.
- On September 26, Senior Attorney Advisor Tanisha Wilburn made a presentation on the recently issued Enforcement Guidance on the "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" and on the Federal Interagency Reentry Council during an event entitled "Time for Excellence" in Chicago, IL. The event was sponsored by Illinois State Representative La Shawn K. Ford and was targeted for individuals with criminal records and organizations that provide services to such individuals.
- Dallas District Director Janet Elizondo and CRTIU Supervisor Belinda McCallister attended
 the Felony/Misdemeanor Friendly Career Fair in Dallas. They discussed the latest EEOC
 guidance on arrest and conviction records and the EEOC's involvement in the Federal InterAgency Re-entry Council. The event drew approximately 80 attendees, along with State
 Senator Royce West, Mayor Mike Rawlings, Representative Eric Johnson, and County
 Commissioner Elba Garcia.
- Indianapolis District Office Senior Trial Attorney discussed the Commission's enforcement guidance on arrest and conviction records at an event sponsored by Taft Stettinius & Hollister. In addition, Trial Attorney Aimee McFerren discussed background checks in employment decisions and EEOC's guidance on arrest and conviction records with the Louisville Metro Human Relations Commission.
- Miami District Office Regional Attorney Robert E. Weisberg spoke about EEOC's
 enforcement guidance on arrest and conviction records with the Hillsborough County Bar
 Association.

Descriptions of additional outreach and education events that included information about the use of arrest and conviction records in employment are attached in Appendix C.

7. Coordination and Collaboration

As reflected in many of the outreach events mentioned in this document, the EEOC has worked with other agencies and organizations to expand public awareness on the issues associated with arrest and conviction records in employment.

The EEOC is part of the Federal Interagency Reentry Council. The Federal Interagency Reentry Council represents 20 federal agencies, working toward a mission to:

- make communities safer by reducing recidivism and victimization,
- assist those who return from prison and jail in becoming productive citizens, and
- save taxpayer dollars by lowering the direct and collateral costs of incarceration.

The Reentry Council, represents a significant executive branch commitment to coordinating reentry efforts and advancing effective reentry policies. A chief focus of the Reentry Council is to remove federal barriers to successful reentry, so that motivated individuals – who have served their time and paid their debts – are able to compete for a job, attain stable housing, support their children and their families, and contribute to their communities. In particular, the Reentry Council is working to reduce barriers to employment, so that people with past criminal involvement – after they have been held accountable and paid their dues – can compete for appropriate work opportunities in order to support themselves and their families, pay their taxes, and contribute to the economy. The EEOC is an important contributor to this effort and is leveraging this relationship and collaboration to deepen and expand its efforts to educate employers, job applicants, and workers.

For example, we are a constant resource for our partner agencies on the applicability of Title VII in this area in both the private and federal sectors. The EEOC enforcement and our guidance on the use of arrest and conviction records are important models for our agency partners, who relying in part on our guidance, are taking steps to ensure their constituent employers, workers, and job applicants are educated about the use of criminal records in the context of the various services provided by their agencies. The EEOC is providing technical assistance to them on the applicability of the updated EEOC guidance to their various programs and providing specific technical assistance as they develop their own parallel guidance.

One of the first products of this collaboration is an initial set of "Reentry MythBusters," designed to clarify existing federal policies that affect formerly incarcerated individuals and their families in areas such as public housing, access to benefits, parental rights, employer incentives, and more. Among others, there is a Reentry MythBuster that addresses the Title VII implications of using arrest and conviction records in employment. In July of this year, the council released a series of Snapshots, including one for employment, briefly describing the issue, summarizing Reentry Council accomplishments to date, laying out the Council's priorities moving forward, and pointing to key resources and links.

These Reentry MythBusters and the other materials included on the Reentry Council website are examples of how the Council is working to develop coordinated reentry strategies to

reduce crime and enhance community well-being. These efforts build on the considerable resources that the federal government is <u>already investing in states and localities to support successful reentry and reintegration</u>. More information about the Reentry Council, its goals, initial activities, and agency contacts is available at http://www.nationalreentryresourcecenter.org/reentry-council. The Mythbuster, Snapshot and other Federal Interagency Reentry Council materials are attached as Appendix D.

The EEOC is exploring further collaborating with these reentry council agency partners on joint trainings, presentations and the development of education materials. To this end, the Director of the Office of Communications and Legislative Affairs has been asked to join the steering committee of the Integrated Reentry and Employment Strategies project, a partnership that includes DOJ, DOL and the Annie E. Casey Foundation. The agency is also working with stakeholder groups to help expand outreach and education efforts regarding the *Enforcement Guidance*. Several of our field staff also participate in local versions of this collaborative effort.

8. Internal Training

The Commission wanted to ensure that all staff, especially those who conduct outreach and/or communicate directly with the public, are well-versed on the *Enforcement Guidance*. Therefore, the Office of Legal Counsel and the Office of Communications and Legislative Affairs, working with the Office of Field Programs, has conducted numerous internal training sessions. For example, on July 25, 2012, Assistant Legal Counsel Carol Miaskoff made a training presentation to an iClass audience comprised of over 400 EEOC investigators and litigators. A week later, she also trained the nearly 60 Intake Information Representatives who answer public inquiries through our internal call center. OLC also developed an internal training module about how to efficiently investigate Title VII charges stemming from the overbroad or unfair use of criminal background screens to deny employment, in light of the Commission's *Enforcement Guidance*.

9. Conclusion

The EEOC has a comprehensive outreach program in place and will continue its efforts to conduct outreach and education about the *EEOC 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. issued on April 25, 2012. We believe that it is very important for the employer, advocate and legal communities to understand our policies on this topic. We are confident that our continued public education efforts will advance understanding of this issue and minimize the need to use our very limited resources in adversarial proceedings.

U.S. Equal Employment Opportunity Commission 131 M Street, NE Washington, D.C. 20507 Phone (202) 663-4191 TTY (202) 663-4494 FAX (202) 663-4912

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CONTACT: Christine Nazer Justine Lisser

(202) 663-4191

TTY: (202) 663-4912

newsroom@eeoc.gov

EEOC ISSUES ENFORCEMENT GUIDANCE

Commission Updates Guidance on Employer Use of Arrest and Conviction Records

WASHINGTON — The U.S. Equal Employment Opportunity Commission (EEOC) today issued an updated Enforcement Guidance on employer use of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended (Title VII). The Commission today voted 4-1 to approve the guidance document. The Commission also issued a Question-and-Answer (Q&A) document about the guidance. The Enforcement Guidance and Q&A document will be available on the EEOC's website at www.eeoc.gov.

"When the Commission met publicly to discuss this subject in July, 2011, I said that I hoped the meeting would help to inform the Commission's consideration of revisions to existing EEOC guidance. We had excellent testimony from two public meetings and hundreds of written comments submitted by a diverse group of commenters to inform our deliberations concerning the new guidance," said EEOC Chair Jacqueline A. Berrien. Chair Berrien added, "The new guidance clarifies and updates the EEOC's longstanding policy concerning the use of arrest and conviction records in employment, which will assist job seekers, employees, employers, and many other agency stakeholders."

While Title VII does not prohibit an employer from requiring applicants or employees to provide information about arrests, convictions or incarceration, it is unlawful to discriminate in employment based on race, color, national origin, religion, or sex. The guidance builds on longstanding guidance documents that the EEOC issued over twenty years ago. The Commission originally issued three separate policy documents in February and July 1987 under Chair Clarence Thomas and in September 1990 under Chair Evan Kemp explaining when the use of arrest and conviction records in employment decisions may violate Title VII. The Commission also held public meetings on the subject in 2008 and 2011. The Enforcement Guidance issued today is predicated on, and supported by, federal court precedent concerning the application of Title VII to employers' consideration of a job applicant or employee's criminal history and incorporates judicial decisions issued since passage of the Civil Rights Act of 1991. The guidance also updates relevant data, consolidates previous EEOC policy statements on this issue into a single document and illustrates how Title VII applies to various scenarios that an employer might encounter when considering the arrest or conviction history of a current or prospective employee. Among other topics, the guidance discusses:

- How an employer's use of an individual's criminal history in making employment decisions could violate the prohibition against employment discrimination under Title VII;
- Federal court decisions analyzing Title VII as applied to criminal record exclusions;
- The differences between the treatment of arrest records and conviction records;
- The applicability of disparate treatment and disparate impact analysis under Title VII;
- Compliance with other federal laws and/or regulations that restrict and/or prohibit the employment of individuals with certain criminal records; and
- Best practices for employers.

The materials for the public meetings held on the use of arrest and conviction records, including testimony and transcripts, are available at http://eeoc.gov/eeoc/meetings/index.cfm.

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the EEOC is available on its web site at www.eeoc.gov.

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Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC or Commission) issued its <u>Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964</u>, as amended, 42 U.S.C. § 2000e. The Guidance consolidates and supersedes the Commission's 1987 and 1990 policy statements on this issue as well as the discussion on this issue in Section VI.B.2 of the Race & Color Discrimination Compliance Manual Chapter. It is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff.

1. How is Title VII relevant to the use of criminal history information?

There are two ways in which an employer's use of criminal history information may violate Title VII. First, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin ("disparate treatment discrimination").

Second, even where employers apply criminal record exclusions uniformly, the exclusions may still operate to disproportionately and unjustifiably exclude people of a particular race or national origin ("disparate impact discrimination"). If the employer does not show that such an exclusion is "job related and consistent with business necessity" for the position in question, the exclusion is unlawful under Title VII.

2. Does Title VII prohibit employers from obtaining criminal background reports about job applicants or employees?

No. Title VII does not regulate the acquisition of criminal history information. However, another federal law, the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (FCRA), does establish several procedures for employers to follow when they obtain criminal history information from third-party consumer reporting agencies. In addition, some state laws provide protections to individuals related to criminal history inquiries by employers.

3. Is it a new idea to apply Title VII to the use of criminal history information?

No. The Commission has investigated and decided Title VII charges from individuals challenging the discriminatory use of criminal history information since at least 1969, and several federal courts have analyzed Title VII as applied to criminal record exclusions over the past thirty years. Moreover, the EEOC issued three policy statements on this issue in 1987 and 1990, and also referenced it in its 2006 Race and Color Discrimination Compliance Manual Chapter. Finally, in 2008, the Commission's E-RACE (Eradicating Racism and Colorism from Employment) Initiative identified criminal record exclusions as one of the employment barriers that are linked to race and color discrimination in the workplace. Thus, applying Title VII analysis to the use of criminal history information in employment decisions is well-established.

4. Why did the EEOC decide to update its policy statements on this issue?

In the twenty years since the Commission issued its three policy statements, the Civil Rights Act of 1991 codified Title VII disparate impact analysis, and technology made criminal history information much more accessible to employers.

The Commission also began to re-evaluate its three policy statements after the Third Circuit Court of Appeals noted in its 2007 *El v. Southeastern Pennsylvania Transportation Authority*² decision that the Commission should provide in-depth legal analysis and updated research on this issue. Since then, the Commission has examined social science and criminological research, court decisions, and information about various state and federal laws, among other information, to further assess the impact of using criminal records in employment decisions.

5. Did the Commission receive input from its stakeholders on this topic?

Yes. The Commission held public meetings in November 2008 and July 2011 on the use of criminal history information in employment decisions at which witnesses representing employers, individuals with criminal records, and other federal agencies testified. The Commission received and reviewed approximately 300 public comments that responded to topics discussed during the July 2011 meeting. Prominent organizational commenters included the NAACP, the U.S. Chamber of Commerce, the Society for Human Resources Management, the Leadership Conference on Civil and Human Rights, the American Insurance Association, the Retail Industry Leaders Association, the Public Defender Service for the District of Columbia, the National Association of Professional Background Screeners, and the D.C. Prisoners' Project.

6. Is the Commission changing its fundamental positions on Title VII and criminal record exclusions with this Enforcement Guidance?

No. The Commission will continue its longstanding policy approach in this area:

- The fact of an arrest does not establish that criminal conduct has occurred. Arrest records are not probative of criminal conduct, as stated in the Commission's 1990 policy statement on Arrest Records. However, an employer may act based on evidence of conduct that disqualifies an individual for a particular position.
- Convictions are considered reliable evidence that the underlying criminal conduct occurred, as noted in the Commission's 1987 policy statement on Conviction Records.
- 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.
- A policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity and therefore will violate Title VII, unless it is required by federal law.

7. How does the Enforcement Guidance differ from the EEOC's earlier policy statements?

The Enforcement Guidance provides more in-depth analysis compared to the 1987 and 1990 policy documents in several respects.

- The Enforcement Guidance discusses disparate treatment analysis in more detail, and gives examples of situations where applicants with the same qualifications and criminal records are treated differently because of their race or national origin in violation of Title VII.
- The Enforcement Guidance explains the legal origin of disparate impact analysis, starting with the 1971
 Supreme Court decision in Griggs v. Duke Power Company, 401 U.S. 424 (1971), continuing to subsequent
 Supreme Court decisions, the Civil Rights Act of 1991 (codifying disparate impact), and the Eighth and Third
 Circuit Court of Appeals' decisions applying disparate impact analysis to criminal record exclusions.
- The Enforcement Guidance explains how the EEOC analyzes the "job related and consistent with business necessity" standard for criminal record exclusions, and provides hypothetical examples interpreting the standard.
 - There are two circumstances in which the Commission believes employers may consistently meet the "job related and consistent with business necessity" defense:
 - The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); 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 factors identified by the court in Green v. Missouri Pacific Railroad, 549 F.2d 1158 (8th Cir. 1977)). The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.).
- The Enforcement Guidance states that federal laws and regulations that restrict or prohibit employing individuals with certain criminal records provide a defense to a Title VII claim.
- The Enforcement Guidance says that state and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7.
- The Enforcement Guidance provides best practices for employers to consider when making employment decisions based on criminal records.

¹ See, e.g., EEOC Decision No. 70-43 (1969) (concluding that an employee's discharge due to the falsification of his arrest record in his employment application did not violate Title VII); EEOC Decision No. 72-1497 (1972)

(challenging a criminal record exclusion policy based on "serious crimes"); EEOC Decision No. 74-89 (1974) (challenging a policy where a felony conviction was considered an adverse factor that would lead to disqualification); EEOC Decision No. 78-03 (1977) (challenging an exclusion policy based on felony or misdemeanor convictions involving moral turpitude or the use of drugs); EEOC Decision No. 78-35 (1978) (concluding that an employee's discharge was reasonable given his pattern of criminal behavior and the severity and recentness of his criminal conduct).

² 479 F.3d 232 (3d Cir. 2007).



U.S. Equal Employment Opportunity Commission

What You Should Know About the EEOC and Arrest and Conviction Records

Background: On April 25, 2012, the Commission, in a 4-1 bi-partisan vote, issued its <u>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. The Guidance updates, consolidates, and supersedes the Commission's 1987 and 1990 policy statements on this issue, as well as the relevant discussion in the EEOC's Race and Color Discrimination Compliance Manual Chapter. The Guidance is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff.</u>

1) Does this Guidance prohibit employers from obtaining and using criminal background reports about job applicants or employees?

No. The EEOC does not have the authority to prohibit employers from obtaining or using arrest or conviction records. The EEOC simply seeks to ensure that such information is not used in a discriminatory way.

2) How could an employer use this information in a discriminatory way?

There are two ways in which an employer's use of criminal history information may be discriminatory. First, the relevant law, Title VII of the Civil Rights Act of 1964, prohibits employers from treating job applicants or employees with the same criminal records differently because of their race, national origin, or another protected characteristic (disparate treatment discrimination).

Second, the law also prohibits disparate impact discrimination. This means that, if criminal record exclusions operate to disproportionately exclude people of a particular race or national origin, the employer has to show that the exclusions are "job related and consistent with business necessity" under Title VII to avoid liability.

3) How would an employer prove "job related and consistent with business necessity"? Is it burdensome?

Proving that an exclusion is "job related and consistent with business necessity" is not burdensome. The employer can make this showing if, in screening applicants for criminal conduct, it (1) considers at least the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question, and (2) gives an applicant who is excluded by the screen the opportunity to show why he should not be excluded.

4) Is the Guidance a new Commission policy?

No. The Guidance follows the text of the law about disparate treatment and disparate impact discrimination. Since at least 1969, the Commission has received, investigated, and resolved discrimination charges involving criminal records exclusions, and federal courts have analyzed the civil rights law as applied to criminal record exclusions since the 1970s. In addition, in 1987 and 1990, the EEOC issued three policy statements on this issue, and it also referenced the topic in its 2006 Race and Color Discrimination Compliance Manual Chapter. Finally, in 2008, the EEOC's E-RACE (Eradicating Racism and Colorism from Employment) Initiative identified criminal record exclusions as one of the employment barriers that are linked to race and color discrimination in the workplace. Thus, applying Title VII to the use of criminal history information in employment decisions is well-established.

5) Why update this policy now?

In the twenty years since the Commission issued its three policy statements, there have been important legal and social changes. In 1991, Congress amended the Civil Rights Act to add Title VII disparate impact analysis, among other things. Since the 1990s, technology has made criminal history information much more accessible to employers. The number of working-aged individuals with criminal records in the population significantly increased

during this period, especially in the African American and Hispanic communities.

The Commission also began to re-evaluate its three policy statements after the Third Circuit Court of Appeals noted in its 2007 *El v. Southeastern Pennsylvania Transportation Authority* decision that the Commission should provide more in-depth legal analysis and updated research on this issue. Therefore, in updating the Guidance, the Commission incorporated social science and criminological research, court decisions, and information about various state and federal laws to help employers better assess the impact of using criminal records in employment decisions.

6) Did the Commission receive input from advocates, the business community and the public on this topic?

Yes. Representatives of employers, individuals with criminal records, and other federal agencies testified at public EEOC meetings in November 2008 and July 2011. The Commission also received and reviewed approximately 300 written comments from members of the general public and stakeholder groups that responded to topics discussed during the July 2011 meeting. The stakeholders that provided statements to express their interests and concerns include prominent organizations such as the NAACP, the U.S. Chamber of Commerce, the Society for Human Resource Management (SHRM), the Leadership Conference on Civil and Human Rights, the American Insurance Association, the Retail Industry Leaders Association, the Public Defender Service for the District of Columbia, the National Association of Professional Background Screeners, and the D.C. Prisoners' Project, among others.

Additionally, throughout the process of drafting the Guidance, individual Commissioners and staff met with representatives from various stakeholder groups to obtain more focused feedback on discrete and complex issues such as the U.S. Chamber of Commerce, SHRM, HR Policy Association, College and University Professional Association for Human Resources, the National Employment Law Project, and the Equal Employment Advisory Council.

More information about the EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, including <u>Questions and Answers about the Guidance</u>, is available at www.eeoc.gov.

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. 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. This Enforcement Guidance supersedes the EEOC's four prior policy statements on the topic from 1987, 1990, and 2007. In short, the updated Guidance stands 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

¹ The 2012 Enforcement Guidance is available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

² Three members of the United States Commission on Civil Rights submitted written comments in their individual capacities.

³ 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), 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; 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.

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,⁴ and continued into the 1980s when the EEOC Commissioners delegated this authority to staff as the number of charges increased.⁵ Federal courts, in turn, issued Title VII opinions assessing such alleged discrimination starting in 1970⁶ and, most recently, in 2007.⁷ 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

4 See e.g. FFOC Decision No. 7

⁴ 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).

⁵ 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).

⁶ 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").

⁷ El v. S.E. Pa. Transp. Auth., 479 F.3d 232 (3d Cir. 2007).

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.*⁸ Second, in 2007, the Third Circuit in *El v. Southeastern Pennsylvania Transportation Authority*⁹ 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, ¹⁰ meaning that substantially more people now face the challenges of entering the workforce after an arrest or conviction than in 1990. Indeed, arrest and incarceration rates are now especially high for African American and Hispanic men. ¹¹ 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. ¹² The 2012 Enforcement Guidance takes account of all of these factors.

BEHIND BARS IN AMERICA 2008, at 3 (2008),

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).

⁸ 401 U.S. 424 (1971). *See* 42 U.S.C. 2000e-2(k)(1)(A); 137 CONG. REC. 15273 (1991) (statement of Sen. Danforth).

⁹ 479 F.3d 232 (3d Cir. 2007).

¹⁰ 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_lin31_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:

¹¹ 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 ("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.").

¹² 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

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)¹³ and, significantly, also when the employer has information from applicants about their actual criminal history (based on self-disclosure on the job application). ¹⁴ In the latter

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 ("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).

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), 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 (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).

¹⁴ 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 ais.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 Seekers, 623 Annals Am. Acad. Pol. Soc. Sci., 199 www.princeton.edu/~pager/annals_sequencingdisadvantage.pdf (finding that among Black and White testers with

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, ¹⁵ 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 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. . . . ¹⁶

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

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).

¹⁵ 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).

¹⁶ 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).

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). ¹⁷

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. 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 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.

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¹⁷ 137 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).

¹⁸ 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).

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. ¹⁹

The Guidance then summarizes Supreme Court precedent²⁰ and focuses on the job-related and consistent with business necessity standard as applied to criminal record exclusions by the Eighth Circuit in *Green v. Missouri Pacific Railroad*²¹ and the Third Circuit in *El v. SEPTA*.²²

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."

¹⁹ 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.

²⁰ 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"); Albermarle 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).

²¹ 523 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.

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." 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." The Third Circuit indicated that empirical data may be relevant to making this assessment, including recidivism data. ²⁵

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. ²⁶
- 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*²⁷), 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.
 - o "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

²² 479 F.3d 232 (3d Cir. 2007).

²³ 549 F.2d 1158, 1160-61.

²⁴ 479 F.3d. at 245.

²⁵ *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").

²⁶ See 29 C.F.R. § 1607.5 (describing the general standards for validity studies).

²⁷ 549 F.2d 1158 (8th Cir. 1977).

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 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.²⁸

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.²⁹ 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 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. 30 This coincides with increased employer reliance on criminal background

²⁸ 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.

²⁹ 42 U.S.C. § 2000e-7.

³⁰ 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 ("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

checks as a screening tool.³¹ 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.³² In the 2012 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.

Conclusion

Thank you again for inviting me here today to testify about this very important issue.

some reform of the criminal justice system, the share of ex-offenders in the working-age population will rise substantially in coming decades").

³¹ 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 [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*.

³² 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 (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 (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").

SUPPLEMENTARY STATEMENT OF CAROL R. MIASKOFF U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO THE U.S. COMMISSION ON CIVIL RIGHTS REGARDING 12/7/2012 BRIEFING AND

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

I. Introduction

This supplementary statement outlines in plain language discrete points about the EEOC's Enforcement Guidance, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, to address issues raised in the December 7, 2012 Briefing. The full written statement submitted on behalf of the EEOC before the Briefing provides context for these basic points. The Guidance itself provides the full legal analysis, factual background, best practices, and references.

II. Background

- On April 25, 2012, the EEOC, in a 4-1 bi-partisan vote, issued the <u>Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964</u>, as amended, 42 U.S.C. § 2000e et seq.
- Neither Title VII nor the Guidance prohibits employers from considering criminal history when they make employment decisions.
- The Guidance describes how employers considering criminal history in a targeted, fact-based way can avoid Title VII liability. It is consistent with how many employers already assess criminal history.
- What is important is that people have an opportunity to apply and be considered for jobs for which they are qualified and for which their criminal records are not relevant or predictive.
- Permanently excluding people from the workforce because of contact with the criminal justice system is inconsistent with Title VII.

III. The Guidance

A. Arrests vs. Convictions

- An arrest is an accusation, not proof that an individual committed a crime. An
 employer should not rely on an arrest, standing alone, as the basis for an
 employment decision.
 - 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.
 - The conduct, not the arrest, is relevant to employment.
- A conviction record will usually serve as sufficient evidence that a person engaged in particular conduct.
 - However, there still may be evidence of an error in the conviction record.
 For example, a database may continue to report a conviction that was later expunged.

B. Disparate Treatment

- Employers should not treat individuals with the same criminal history and qualifications differently based on their race, national origin, or another protected basis. For a discussion of Disparate Treatment, see Guidance at § IV.
- For example, terminating the employment of a qualified African American employee, while retaining a White employee who has been convicted of the same offense, could support an allegation of disparate treatment based on race under Title VII.

C. Disparate Impact

- Title VII prohibits disparate impact discrimination at 42 U.S.C. § 2000e-2(k).
- The Guidance provides a step-by-step legal analysis of each element of a Title VII disparate impact case. See Guidance at § V (Disparate Impact Discrimination and Criminal Records).

- The EEOC encourages employers who consider employees' and applicants'
 criminal background information to develop and use targeted and fact-based
 screens. When this screening identifies an individual as having the targeted
 criminal history, the EEOC encourages employers to consider supplemental
 information provided before rejecting the individual, in order to avoid Title VII
 disparate impact liability.
- How targeted screens and individualized assessment work:
 - A "targeted screen" considers at least the three factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977):
 - the nature and gravity of the crime,
 - the time elapsed, and
 - the nature of the job.
 - "Individualized assessment" generally means that an employer:
 - informs the individual that he may be excluded because of past criminal conduct, based on the nature of the crime, the time elapsed, and the nature of the job;
 - provides the individual an opportunity to demonstrate that the exclusion does not properly apply to him (for example, that he is incorrectly identified in the criminal record, or that the record is otherwise inaccurate), and
 - considers whether additional information shows that the policy as applied is not job related and consistent with business necessity (in other words, that it does not merit excluding the person from this job at this time).
 - Individualized assessment is not always required.
 - An employer may be able to justify a targeted criminal records screen solely under the three *Green* factors (*i.e.*, nature of the crime, time elapsed, nature of the job).

 The screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question.

D. Federal Laws or Regulations That Require Criminal Background Checks and Employment Exclusions

- When an employer rejects an applicant because a federal law prohibits people with his or her criminal background in the position, the employer is shielded from Title VII liability.
- For example, federal law bars people with certain convictions from banking jobs.

E. State or Local Laws That Require Criminal Background Checks and Employment Exclusions

- State or local laws also bar people from jobs when they have certain criminal records.
- Congress stated, in the text of Title VII, that any state and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice." 42 U.S.C. § 2000e-7.
- Title VII does not preempt all state or local laws that require employers to screen criminal records or exclude people with specific criminal records.
 - Example 11 in the Guidance describes an employer's compliance with a state law criminal background exclusion for child care workers; that Title VII challenge fails because the preschool's action is consistent with Title VII.
- An employer defense based on state or local laws will not always succeed, because of this Title VII provision. Title VII was approved by Congress and the President. The EEOC, an administrative agency, cannot change it.

IV. Conclusion

- Qualified individuals with criminal records should have an opportunity to compete for employment when their criminal records are not relevant or predictive.
- A criminal record should not prevent all future employment.
- Employers who consider criminal background information should do so in a targeted and fact-based way, in light of the nature and severity of the crime, the time elapsed, and the nature of the job. The EEOC encourages employers to provide an opportunity for an individualized assessment, but Title VII does not require individualized assessment in all circumstances.

Timeline:

Equal Employment Opportunity Commission Policy Guidances and Public Meetings About Title VII and Consideration of Arrests and Convictions in Employment Decisions

- **February 4, 1987**: The Equal Employment Opportunity Commission (Commission or EEOC) issued *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.*
 - O The first paragraph of this Policy Statement states that the Equal Employment Opportunity Commission actually had approved the legal position set forth in this document more than a year earlier, at a meeting in November 1985:

At the Commission meeting of November 26, 1985, the Commission approved a modification of its existing policy with respect to the manner in which a business necessity is established for denying an individual employment because of a conviction record. The modification, which is set forth below, does not alter the Commission'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 $Blacks^{(1)}$ and $Hispanics^{(2)}$ in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population. Consequently, the Commission has held and continues to hold that such a policy or practice is unlawful under Title VII in the absence of a justifying business necessity. (3) " (Emphasis supplied)

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., at 1 (2/4/87).

- **July 29, 1987**: The Commission issued *EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*
- **September 7, 1990**: The Commission issued *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.*
- **November 20, 2008**: The Commission held a public meeting: *Employment Discrimination Faced by Individuals with Arrest and Convictions Records*.

Panel 1: Barriers Experienced by People with Criminal Records

- o Devah Pager, Professor, Princeton University
- o Diane Williams, President and CEO, Safer Foundation

Panel 2: Stakeholder Perspectives and Litigation Issues

- o Michael Foreman, Professor, Dickinson School of Law
- Donald Livingston, Partner, Akin Gump Strauss Hauer & Feld LLP
- Janet Ginzberg, Senior Attorney, Community Legal Services of Philadelphia

Panel 3: New Research Developments

Shawn Bushway, Professor, State University of New York at Albany

Panel 4: Employer Practices

- o Rae T. Vann, General Counsel, Equal Employment Advisory Council
- Laura Moskowitz, Staff Attorney, Second Chance Labor Project at National Employment
 Law Project
- **July 26, 2011:** The Commission held a public meeting: *Arrest and Conviction Records as a Hiring Barrier*.

Panel 1: Best Practices for Employers

- o Michael F. Curtin, CEO, DC Central Kitchen
- o Victoria Kane, Area Director, Labor Relations & Integration, Portfolio Hotels & Resorts
- o Robert Shriver, Senior Policy Counsel, U.S. Office of Personnel Management

Panel 2: An Overview of Local, State, and Federal Programs and Policies

- Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice
- Professor Stephen Saltzburg, Criminal Justice Section Delegate and Past Chair, American Bar Association
- o Cornell Brooks, Executive Director, New Jersey Institute for Social Justice

<u>Panel 3: Legal Standards Governing Employers' Consideration of Criminal Arrest and Conviction Records</u>

- o Juan Cartagena, President and General Counsel, Latino Justice
- o Barry Hartstein, Shareholder, Littler Mendelson, P.C.
- o Adam Klein, Partner, Outten & Golden LLP

In addition to these panelists, we invited Everett Gillison, who at that time was the Deputy Mayor for Public Safety in Philadelphia. He was unable to attend due to a scheduling conflict.

The Commission held open the record of this meeting for 15 days to receive written public comments. Over 300 public comments were received.

• April 25, 2012: With a 4-1 vote, the Commission adopted and issued *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.*

STATEMENT OF THE HONORABLE VICTORIA A. LIPNIC COMMISSIONER U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

"THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EEOC'S CONVICTION RECORDS POLICY ON THE EMPLOYMENT OF BLACK AND HISPANIC WORKERS"

UNITED STATES COMMISSION ON CIVIL RIGHTS DECMBER 7, 2012

To the Chairman and Members of the United States Commission on Civil Rights ("USCCR"):

In April 2012, the United States Equal Employment Opportunity Commission ("EEOC" or "Commission") approved, on a bipartisan basis, "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.*" (the "Revised Guidance" or "2012 Guidance"). I voted to approve the Revised Guidance, which updated existing Commission policy on the use of criminal history in making employment decisions, and which is the principal topic of today's briefing. I welcome the opportunity to share my reasons for doing so with the USCCR.

As I noted during debate on this issue at the Commission, it is important to note that in approving the 2012 Guidance, the EEOC was not writing on a blank slate. Since 1987, the Commission had published guidance relating to employers' use of both arrest and conviction records. In my opinion, that existing guidance generally had worked well over the last twenty-five years, and when the Commission first began to consider its revision, I made clear to my fellow Commissioners my view that a wholesale revision of our criminal history guidance was unnecessary, and not something that I could support. What I could support was an effort to update and amplify existing guidance in light of the societal, technological, and legal developments of the last two-and-a-half decades. I believe that is what the Revised Guidance does.

As practitioners in this area know, for twenty-five years it has been the EEOC's policy that an employer should avoid blanket, one-size-fits-all criminal record policies, and instead adopt policies tailored to the specific workplaces and job positions at hand. The Revised Guidance builds on and supplements this preexisting policy. Most notably, and as discussed more fully below, the Revised Guidance maintains the long-standing and well-established test for determining whether the specific use of criminal history is "job related and consistent with business necessity," as required by Title VII of the Civil Rights Act of 1964.

By way of brief background, in 1971, the U.S. Supreme Court held in *Griggs v. Dukes Power Co.*, 401 U.S. 424 (1971), that Title VII not only prohibits intentional discrimination, but also "disparate impact" discrimination – that is, discrimination which occurs when the use of a

neutral policy (such as a criminal background check) disproportionately impacts members of a protected class, such as sex or race.

In light of *Griggs*, in 1987, under then-Chairman Clarence Thomas, the EEOC first issued guidance to employers who use criminal history in making employment decisions on how to do so lawfully— that is, how to demonstrate that the use of criminal history in a particular circumstance is "job related and consistent with business necessity" as required under the law.

The 1987 guidance set forth a three-factor test for evaluating whether a particular policy is jobrelated and consistent with business necessity, drawing from a test first articulated in 1975 by the Eighth Circuit in *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975) (the "*Green* factors"). The *Green* factors include the gravity and severity of the crime; the nature of the job at issue; and how long ago a crime was committed. The *Green* factors were, in the 1987 guidance, and remain under the Revised Guidance, the touchstone in examining criminal record use policies. As such – and despite the claims of some critics – the 2012 Guidance does not represent a sea-change in EEOC policy or a bold departure from its existing precedent. Rather, the Revised Guidance simply provides a more robust explanation of existing principles and their legal underpinning, and offers greater examples of their factual application. As such, I believe the Revised Guidance serves to provide increased clarity to employers and employees, while not imposing dramatically new requirements or changes in employer practices.

In the wake of the adoption of the 2012 Guidance, some have asked whether, or why, such revision was necessary. For several reasons, I believe that it was. Foremost, the digital workplace of 2012 is far different from the pen-and-ink workplace of the 1980s – through the explosive growth of online services, industry, and social media, employers have far greater access, at far less cost, to background information on employees and applicants. As you will no doubt hear in the testimony of others offered today, trends suggest that in light of this greater access, employers are using criminal history more frequently in making employment decisions. At the same time, we 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. Finally, the EEOC's prior guidance had not been afforded great deference by courts - indeed, in 2007, the Third Circuit held in El v. Southeastern Pennsylvania Transportation Authority, 479 F.3d 232 (3d Cir. 2007), that then-existing Commission guidance was not entitled to "great deference" insofar as it did "not substantively analyze the statute." In response, the Revised Guidance includes far more detailed and substantive legal analysis, and accordingly should be afforded greater weight by reviewing courts.

I also believe that the Commission's revision of its guidance will, in time, inure to the benefit of all stakeholders, including employers. Prior to the 2012 Guidance, employers had little specific guidance as to how they could lawfully use criminal history, and were subject to lawsuits by both the private bar and the EEOC challenging their use of this information. Recognizing that each case will always be fact-specific, the 2012 Guidance offers a clearer roadmap for employers, building on and amplifying existing guidance. It includes more, and more robust, examples, and sets forth guidance on the interaction of state and federal laws governing the use of criminal history in making employment decisions, requirements for security clearances and licensing, and

similar topics. It, for the first time, includes "best practices" for employers. Finally, the Revised Guidance rejects any "bright line" rule limiting employers' ability to use criminal history to only a certain amount of time in the past, or to a specified list of offenses. Rather, the Revised Guidance favors a fact-specific analysis of any given policy, which allows for consideration of the specific nature of any single employer, policy, occupation, and job setting – in my view, a better choice. To be clear, I fully acknowledge and understand the need of employers to assess and manage the risk of criminal conduct in their workplace – it is exactly the assessment and management of that risk which the "job related and consistent with business necessity" standard contemplates.

The 2012 Guidance is not flawless, and were I its sole author, I might have written some of it differently. For example, the Revised Guidance recommends that as a "best practice," an employer using a criminal history review to screen out applicants and employees should include in its policy a provision for "individualized assessment." In simpler terms, that means that when using a criminal record to screen out a candidate, an employer should, where appropriate, consider providing an opportunity for an individual to address any concerns before being immediately screened out. That may mean, for example, giving Sally Jones the opportunity to explain that the record of a past transgression in the employer's hands is, in fact, an error – it's the record for the wrong Ms. Jones. Alternately, it may mean giving an applicant the opportunity to explain why a disorderly conduct arrest twenty years ago in college has no bearing on his ability to work on the plant floor today.

I think in many instances this is a wise and prudent business practice. However, it is important to make clear that Title VII does not *require* an employer to provide such an individualized assessment in any instance – a fact explicitly recognized in the Revised Guidance, and a point about which I feel very strongly. This means that there can, and will, be times when particular criminal history will be so manifestly relevant to the position in question that an employer can lawfully screen out an applicant without further inquiry. Again, in simpler terms – and a point that bears emphasis – a day care center need not ask an applicant to "explain" a conviction of violence against a child, nor does a drug store have to bend over backward to justify why it excludes convicted drug dealers from working in its pharmaceutical lab. I had hoped that the Revised Guidance would have included clearer examples of such lawful, targeted practices. It does not, but as I made clear during the Commission's debate on this matter, the lack of such examples should not be taken to mean that that they do not in fact exist.

In that light, it is my view that having issued the Revised Guidance, the Commission should now undertake efforts to let employers know, with specificity, what they *can* lawfully do with respect to developing criminal history policies, not merely what we believe they cannot. Since adoption of the Revised Guidance earlier this year, I have championed, and will continue to champion, such an effort, as it is my belief that where any administrative agency is going to hold a stakeholder to a standard, through the investigatory or litigation process, it is incumbent upon the agency to make that standard clear and explicit. In my view, the EEOC should be as much about educating employers about compliance with the law as it is about investigating and litigating charges.

With respect to issues concerning the interaction of federal and state law, I had hoped that the Revised Guidance could have been clearer in providing real-world practical guidance to employers facing potential conflicts between federal and non-federal law. In the wake of its adoption, some have criticized the Revised Guidance for not including a blanket "safe harbor" provision for an employer's use of criminal history at the direction of a state law. While I fully recognize and understand that concern, as a legal matter, it does not appear to me that such a broad blanket exception could be squared with the explicit statutory language of Title VII, which specifically exempts individuals from federal liability for compliance with state law, unless such law "purports to require or permit the doing of any act which would be an unlawful employment practice under [Title VII]." 42 U.S.C. § 2000e-7.

That Title VII standards preempt conflicting non-federal employment law requirements is beyond serious debate; insofar as that raises policy concerns, they are concerns properly brought to Congress. That said, I would make two observations to concerned stakeholders on this point. First, as a practical matter, I am unaware that the Commission has been presented with a state law requirement which it believes would not pass muster under Title VII. Second – and perhaps more important – as a matter of enforcement in the field, and of the Commission's exercise of its investigatory and prosecutorial discretion, I do not reasonably foresee a set of facts under which the EEOC uses its scarce resources to pursue employers whose use of criminal history directly arises out of state law obligations.

Throughout the revision process, a number of stakeholders asked that the agency make public any proposed draft guidance and solicit comments on specific proposals. I think that such a request for greater transparency is valid, and that, in general, any proposed guidance – regulatory or sub-regulatory, from any agency – benefits from the review and input of as broad a range of stakeholders as possible. Indeed, that is what the Office of Management and Budget's "Good Guidance Practices" – adopted by the Bush Administration and maintained in the Obama Administration – expect with respect to significant guidance documents. In this instance, however, because I believe that the Revised Guidance closely tracks well-established Commission policy, because of the public hearings the EEOC has held on this issue in recent years, and because I know that the Members of the Commission fully engaged a range of stakeholders, I was comfortable supporting the Revised Guidance without a full public notice-and-comment process.

I would make one final point, which I expect will be the subject of some discussion at today's hearing. Some critics of the Revised Guidance have argued that certain data suggests that employers that do not use criminal background checks may be less likely to hire certain minority groups, the theory being, presumably, that in the absence of an actual criminal background report, these employers are using race as a proxy for past criminal history. Thus, these critics argue, limitations on the use of criminal history may in fact result in lowering the hiring rates of some minorities.

I cannot say whether this is in fact true or not, and I look forward to reviewing the testimony of the witnesses at today's meeting on the point. What I can say is two things. First, it is not the statutory mandate of Title VII, nor the duty of the Commission, to raise the hiring rate of any particular race, gender, or creed. Rather, it is our sworn obligation to ensure that every

individual is afforded the equal opportunity to seek and obtain employment free from the unlawful consideration of these factors. Second – and perhaps more to the point – where, in fact, in the absence of a criminal background check an employer chooses to use race as a proxy for criminal history, *that employer is patently violating federal civil rights law*. Were such a charge brought to the Commission and found to be true, I would have no difficulty bringing the full force of the agency to bear on such a transgressor.

In closing – and once more, as I stated publicly when I voted to approve the Revised Guidance – I fully recognize the consequences of the Commission's actions – both on a societal front and on an individual front. As a Commissioner of the EEOC, appointed by the President and confirmed by the Senate, I take very seriously our agency's mandate to ensure equal employment opportunity. This may mean, for some employers, a modestly-increased burden in the hiring process, which may seem, in the first instance, unwarranted. I believe, however, that it also means that many individuals who have paid their debt to society, and do not present an undue risk to a workplace, will not be prematurely screened out from all employment opportunity. That is the policy choice contained in the Revised Guidance, which I supported upon its adoption, and which I continue to support today.

Appendix C:

Additional descriptions of outreach and education concerning the use of arrest and conviction records in employment

Small Business - On October 7, 2011, Maria Flores, Milwaukee Program Analyst, conducted a presentation on hiring barriers, focusing on criminal records, to approximately 35 small business representatives, primarily African-American, in Milwaukee, WI. The event was sponsored by the Word of Hope Ministries, a faith-based, nonprofit agency which receives funding from the U.S. Dept. of Labor to provide reintegration services, including employment training, to persons in prerelease and post release from correctional facilities.

SHRM - On November 17, 2011, Maria Flores, Milwaukee Program Analyst, conducted an EEO update to 33 employer representatives, primarily small business, in Kenosha, WI at a meeting of the SHRM Racine & Kenosha Area Chapter. Topics included the ADAAA, GINA, Equal Pay and issues related to race/color in hiring such as arrest/conviction records.

Legal Services - On March 6, 2012, Laurie Vasichek, Minneapolis Senior Trial Attorney, conducted a presentation on "Collateral Consequences of a Conviction" to approximately 50 representatives of organizations that deliver legal services.

Prison Outreach - In an ongoing partnership with the Wisconsin Department of Corrections, Maria Flores, Milwaukee Program Analyst, conducted workshops to incarcerated offenders, an underserved population, participating in job-readiness programs at State correctional facilities. The EEOC workshops focused on hiring issues related to race and color, including criminal records, as well as gender issues such as equal pay and pregnancy. A total of five in-person workshops were conducted during the period October 1, 2011 through March 29, 2012. The workshops were conducted at an institution in Plymouth, WI and were simultaneously video cast to multiple institutions across the state and in geographically underserved areas, reaching a total of 551 male and female offenders, primarily African-American.

Re-Entry Councils - EEOC provided the program during March meeting of the Norfolk Reentry Council at the Norfolk Department of Human Services – Workforce Development Center. The oral presentation entitled Reentry: Arrest, Conviction and Credit Background Checks in the Workplace covered the origin and application of the adverse/disparate impact theory of employment discrimination and highlighted EEOC's guidance on pre-employment inquiries – such as arrest, conviction, and credit histories, the charge processing procedures and an overview of EEOC's laws. The audience was comprised of approximately 60 reentry council members from various community-based agencies, businesses, non-profits, civic groups and faith-based organizations involved in post release services. Marilyn S. Booker, Program Analyst provided the program and is partnering with this local reentry council -- collaborating with the

Employment-Workgroup which meets every-other month prior to the full meeting of the Norfolk Reentry Council.

Small Business ILG - On Thursday February 9, 2012, a workshop entitled "Current EEOC Developments" was provided to the Industry Liaison Group of Hampton Roads during its quarterly meeting. The workshop included an overview of national and local EEOC charge receipt and charge resolution statistics, a review of local and national Fair Pay initiatives under the National Equal Pay Enforcement Task Force, insight into and progress towards the objectives of the Reentry Council – including a summary of the Title VII implications of using arrest and conviction records in employment, as well as, EEOC's efforts to better collaborate with small businesses to ensure compliance with anti-discrimination laws. The conference was held at AMSEC LLC (main conference room) in Virginia Beach, Virginia.

Arrest Records – In line with EEOC's partnership with the FIRC (Federal Interagency Reentry Council), at the outset of the fiscal year outreach has focused on providing technician assistance to the following stakeholders which service reentry individuals:

- Norfolk Reentry Council, Norfolk Department of Human Services Coming Home
- Virginia CURE (Citizens United for Rehabilitation of Errant's Virginia, Inc.)
- Onesimus Ministries, and
- Second Chances Program, a division of STOP (Southern Tidewater Opportunity Program of Hampton Roads)

Outreach has entailed either conducting informational meetings to discuss EEOC's laws, preemployment selection inquiries guidelines and theory-elements of adverse impact discrimination; or providing oral presentations entitled "Responding to Workplace (Adverse Impact) Discrimination: Arrest, Conviction and Credit History Background Inquiries" to first-line staff who counsel/seek employment for ex-offenders

NAACP - On December 19, 2011, Tampa Field Office Director Georgia Marchbanks and Program Analyst Elaine McArthur provided a presentation for the NAACP - Columbia County branch in Lake City FL concerning the laws enforced by EEOC, the Commission's initiative regarding Arrest and Conviction Records, and information about the charge filing process. A lengthy question and answer session followed the presentation.

Outreach to an Organization - On January 10, 2012, Tampa Field Office Program Analyst Elaine McArthur provided a presentation for the Center for Independent Living in Lecanto FL concerning an overview of EEOC laws, with special emphasis on the ADAAA and reasonable accommodation process, and Arrest and Conviction records.

Black Heritage Festival - On January 17, 2012, the Tampa Field Office sponsored an outreach event at the John F. Germany Public Library Auditorium as part of the 2012 Tampa Bay Black Heritage Festival. Director Georgia Marchbanks, Enforcement Manager Edwin Gonzalez-Rodriguez, and Enforcement Supervisor Tracy Smith spoke before an audience of approximately 25 people concerning EEOC initiatives, the Systemic Program, and Arrest and Conviction Records in hiring. Mediator Clyde Lo Chin additionally presented information concerning the Commission's ADR Program.

NELA Winter Conference - On February 10, 2012, Miami District Office Director Malcolm Medley and Tampa Field Office Director Georgia Marchbanks participated in the Florida NELA Winter Conference in Daytona Beach FL. Mr. Medley's presentation to a crowd of 50 attorneys included a discussion of numerous EEOC initiatives, to include ADAAA, GINA, the Systemic program, and Arrest and Conviction records. Additionally, Mr. Medley's discussion of the EEOC's stance on LGBT issues was met with thundering applause. Ms. Marchbanks followed up by provided further information to the gathering regarding recent court filings, Alternative Dispute Resolution, and Outreach programs.

Fee-Based On-Site Training - On February 1, 2012, Tampa Field Office Program Analyst Elaine McArthur conducted a two (2) hour Customer Specified Training session (Job Number 12SMIA11) for 27 human resource managers of Orlando Health in Orlando FL, which included a discussion of Arrest and Conviction Records in Hiring. Orlando Health is one of Florida's most comprehensive private, not-for-profit healthcare networks, and is Central Florida's fifth largest employer, with over 14,000 employees and more than 2,000 affiliated physicians

University Outreach – On 01/30/12, at part of the District's on-going partnership with the University of North Texas, Acting District Director, Janet Elizondo, and Program Analyst, Rodney Klein, guest lectured at two upper division HR courses (Selection and Employment Law). Approximately fifty students attended the two classes. Among the topics covered were unconscious bias, arrest and conviction records, credit reports, caregiver discrimination, religion, retaliation and GINA.

Clergy Roundtable - The New York District Office attended the Bronx Clergy Roundtable a faith based community gathering to discuss crime and credit record issues in minority community. The roundtable proves help to youth in obtaining jobs and assistance. Program Analyst Bryan White represented the agency and provide information about the EEOC training programs and assistance to the community about "Knowing your rights" in an underserved area.

Black Contractors Association - On December 1, 2011, Program Analyst Christine Park-Gonzalez met with Abdur-Rahim Hameed, President of the National Black Contractors Association (NBCA) in San Diego, California. Mr. Hameed and Ms. Park-Gonzalez exchanged

information about their respective organizations and discussed in particular the plight of Black construction workers who have difficulty with hiring onto construction jobs in the San Diego area. While the NBCA represents Black contractors who have difficulty with winning contracts in the construction field, they have since expanded to focus on the hiring of qualified Black construction workers onto projects. They discussed systemic implications as well as the issue of criminal and credit background checks as factors in employment, and agreed to work more closely together with respect to potential training and case referrals in the future.

Criminal Records Roundtable – On October 21, 2011, Seattle, WA, Enforcement Supervisor, Roderick Ustanik, presented an update on the agency's ongoing interest and potential policy development in conviction andarrest records under the statutes enforced by the EEOC. The October meeting of the Criminal Records Roundtable was attended by 15 participants. At that meeting a spokesman from the Seattle Office of Human Rights reported the results of a testing survey that shows widespread disparate treatment of applicants based on race and disability. The survey found that African Americans were uniformly informed that they would be subjected to credit and criminal checks; similarly situated white applicants were not.

Program Analyst, Billy C. Sanders, made an Oral Presentations including a Q & A session with 15 Ex-Convicts enrolled in the Exodus Foundations Ex-Offenders Program. They were educated on the Laws Enforced by EEOC and their rights and responsibilities in the workplace

Underserved Population (Reentry Populace): On November 9, ATDO Deputy Director Manuel Zurita trained attorneys of the Georgia Justice Project (GJP) Coming Home Program on the EEOC and anti-discrimination employment laws, with a focus on the rights of those with arrest and conviction records. Also shared information on interagency efforts to address issues confronting the re-entry population, through the Re-entry Council. The GJP provides free legal services and a full range of social and employment services to the indigent criminally accused and reentry population.

Also, this topic was covered during the following:

- -- In March for outreach and expanded presence in Americus/Sumter County (underserved area), at a NAACP community forum.
- -- In February, Roundtable for Results, a joint outreach with OFCCP and Wage and Hour for employers and CBOs.
- -- In February, stakeholder meeting with plaintiffs' attorneys (GA-NELA)
- -- In January, outreach to a Half-way House in Columbus, GA

Live webcsasts – On 12/15/11, Program Analyst, Rodney Klein, partnered with Joe Bontke and Marty Ebel of the Houston District, along with Katrina Grider, private attorney in delivering two

live webcasts for the State Bar of Texas. The topics were social media and background investigations (arrests and convictions were discussed at length).

ILG- On 1/19/12 - Acting District Director, Janet Elizondo, spoke at a meeting of the North Texas ILG. She spoke about issues currently being considered by the Commission, such as arrest and conviction records, gender stereotyping, and ADAAA and leave. Approximately, 50 people attended. The meeting is part of the District's on-going partnership activities with OFCCP.1. University Outreach – On 02/02/12, Program Analyst, Rodney Klein, spoke with twelve students enrolled in an Employment Law class at the University of Texas at San Antonio. He gave an overview of the EEOC and Title VII, along with discussions about arrest and conviction records, ADR and GINA. This session was part of an on-going partnership between UTSA and the San Antonio Field Office.

Re-Entry Council – On 213/12, Senior Trial Attorney Eduardo Juarez made a presentation on "Criminal Records and the Equal Opportunity to Employment," to the Bexar County Commissioners Court Re-Entry Council – a group of about 20 leaders from various local organizations providing rehabilitative services to the formerly incarcerated. The audience included Bexar County Commissioner Tommy Adkinson. Mr. Juarez's presentation included an overview of the EEOC's policy statements on the use of arrest and conviction records as well as an overview of the law on disparate impact discrimination involving employer criminal record policies. Mr. Juarez provided the audience with copies of the Re-Entry Myth Busters, a series of fact sheets about federal policies affecting formerly incarcerated individuals. These fact sheets were created by the federal Cabinet-level inter-agency Re-Entry Council of which the EEOC is a member.

SHRM – On 2/14/12, Program Analyst, Rodney Klein, spoke with 200 members of SAHRMA, the San Antonio SHRM chapter. Mr. Klein discussed hiring and glass ceiling issues, along with systemic investigations, arrest and conviction records and credit reports.

Farm Workers – On 3/07/12, Program Analyst, Rodney Klein, spoke with 70 outreach workers and intake specialists working for Workforce Solutions in the lower Rio Grande Valley. These workers take complaints directly from farm workers and migrants. Mr. Klein trained the group on systemic issues, arrests and convictions, wage issues, GINA, ADAAA, national origin issues, and sexual harassment.

NAACP – On 03/08/12, Acting Field Director, Travis Hicks, and Program Analyst, Rodney Klein, spoke at a meeting of the San Antonio NAACP chapter. They discussed race discrimination, systemic, arrest and conviction records, credit reports, and ADR. Approximately 15 members attended the meeting.

Workforce Solutions – On 3/09/12, Program Analyst, Rodney Klein, partnered with Workforce Solutions in Uvalde, Texas to provide training to its outreach workers on the civil rights acts. These outreach workers take complaints from the migrant and farm worker communities along the U.S./Texas border. Mr. Klein gave an overview of the statutes. He also discussed systemic investigations, arrests and convictions, sexual harassment, ADAAA and GINA. Approximately 20 outreach workers and one stop managers attended.

Lawfirm Employment Law Update - On 11/0/311 and 11/04/11, Nashville Area Director Sarah Smith, Enforcement Supervisor Sylvia Hall and Trial Attorney Sally Ramsey participated in a two day Employment Law Update sponsored by the law firm of Wimberly Lawson in Knoxville, TN. Both days were panel discussions on EEOC laws, Arrest and Conviction Records, Student Workers, ADAAA, GINA, Systemic Initiative and Legal Issues. Approximately 75 employers were in attendance at both sessions.

Employer Outreach Committee - On 11/2/11, District Resource Manager Edmond Sims addressed the Madison/Chester County Workforce Employer Outreach Committee in Jackson, TN. There were approximately 47 HR professionals, state and local government and attorneys present. This is a partnership with the TN Department of Workforce & Labor. He covered Charge Processing Information and items on the radar at EEOC, including Arrest & Conviction Records, ADAAA and Veterans & Disabilities.

SHRM - On 2/14/12, Program Analyst Deb Moser-Finney addressed the monthly meeting of the Tri-State SHRM in Texarkana, AR-TX. 48 members were present at the meeting. A 45 minute presentation entitled "Seven Mistakes Employers Make When They Receive a Charge of Discrimination" was well received. It generated several questions and comments. There was a brief discussion about "What's New at EEOC" that included information on the Strategic Plan, use of Arrest & Conviction Records and charge statistics relating to GINA and ADA(AA). The 48 members represented private employers, employment agencies, small businesses, colleges and chambers of commerce.

SHRM - On 3/27/12, Program Analyst Deb Moser-Finney was the guest speaker at the monthly meeting of the North Arkansas SHRM group in Harrison, AR. 33 members were present and represented private employers, small businesses and a local community college. Ms. Moser-Finney gave a presentation entitled "What's New at EEOC" and covered topics such as Mediation, Arrest & Conviction Records, the Reentry Council, Strategic Plan, ADAAA, Systemic, Veterans & Disabilities, Human Trafficking and Charge Statistics. She answered questions on charge processing, on-sites, responding to a charge and recordkeeping.

HR Association - On December 7, 2011, Denver Program Analyst Patricia McMahon gave a presentation on the ADAAA to the Colorado Human Resource Association (CHRA). Included in

her presentation was information about background checks and discrimination against individuals with felony convictions.

University Outreach - On March 1, 2012, Denver Program Analyst Patricia McMahon gave a presentation on background checks and discrimination against individuals with felony convictions in two senior-level classes at the University of Colorado-Boulder campus.

Blind Entrepreneurs - On March 17, 2012, Denver Program Analyst Patricia McMahon gave a presentation on background checks and discrimination against individuals with felony convictions at the Blind Entrepreneurs Annual Meeting.

Student Outreach - On January 11, 2012, Seattle, WA, Enforcement Supervisor Rod Ustanik partnered with the Seattle Office for Civil Rights (SOCR) to present at the Seattle Vocational Institute. The session attended by 25 students covered an overview of the EEOC, the charge handling process, and a discussion of criminal records issues. The SOCR also provided an overview of the law their agency enforces and discussed criminal records in relation to housing.

Record Clearance Project – On November 3, 2011, Supervisory Trial Attorney Marcy Mitchell gave a presentation on employment discrimination and criminal convictions for the San Jose State University Record Clearance Project. The target audience was job seekers with criminal convictions.

Statewide Reentry Conference - December 5-6, 2011 - Investigators Adriana Gómez and Malcolm Loungway represented EEOC at a statewide Reentry Conference, where their participation was very much appreciated by county representatives and community organizations from Los Angeles, San Bernardino, Contra Costa, Alameda and San Francisco (about 80 participants). In addition to sharing information about Title VII, particularly race and national origin based discrimination they also contributed to the discussion of ways to effectively respond and integrate individuals who are being released from jail or prison. Gómez suggested that the Coalition (formed at this conference) use the ADA as a model and push for legislation that would require employers to make a conditional job offer prior to inquiring about criminal records. From a law enforcement stand point, this would help isolate the employer's reasons for refusing to hire someone. The EEOC was also invited to participate in the advisory reentry task forces that have recently been formed, particularly in Alameda and Contra Costa County. People also expressed interest in having EEOC provide their organizations with a presentation

Jack Vasquez, Jr., Deputy Director, St. Louis District Office addressed thirty (30) Equal Opportunity officers of the Missouri Department of Economic Development's Workforce Investment act (WIA) program at the quarterly equal opportunity conference on the subjects of equal pay/fair pay, systemic and the use of arrest(s), conviction(s) and credit records in

employment decisions in the governor's office building in Jefferson City, Missouri. The WIA program is under the auspices of the USDOL civil rights center.

Company Outreach - Sylvia Smith, District Resources Manager, gave a best practices in management presentation to ten (10) managers of Mark Lemp Footwear in St. Louis, Missouri which included information on background checks. She also presented another session on an EEOC overview to fifty (50) employees of the same company.

SHRM - Jack Vasquez, Jr., Deputy Director, addressed the Missouri Society for Healthcare Human Resources Administration (a SHRM) on commission developments and trends at the Missouri Hospital Association's 89th annual convention focusing on the subjects of equal pay/fair pay, systemic and the use of arrest(s), conviction(s) and credit records in employment decisions. There were thirty-five (35) HR professionals, attorneys and healthcare executives present. The convention was held at Osage Beach, Missouri.

University Outreach - Jack Vasquez, Jr., Deputy Director, spoke to one hundred fifty (150) students of the 1L (first year) Class at Washington University School of Law on, *Professionalism, Government Service and The Cutting Edge of the Law* inclusive of Equal Pay/Fair Pay, Systemic and the use of arrest(s), conviction(s) and credit records in employment decisions.

State Agency - Jack Vasquez, Jr., Deputy District Director, spoke with managerial and non-managerial employees of the Missouri Secretary of State's Office in Jefferson City, Missouri on the subjects of (a) Fair/Equal Pay, Use of Arrests, Convictions and Credit Histories, (c) Harassment and (d) Retaliation and 3/13/12 and 3/23/12.

On December 19, 2011, Tampa Field Office Director Georgia Marchbanks and Program Analyst Elaine McArthur provided a presentation for the NAACP - Columbia County branch in Lake City FL concerning the laws enforced by EEOC, the Commission's initiative regarding Arrest and Conviction Records, and information about the charge filing process. A lengthy question and answer session followed the presentation.

On February 1, 2012, Tampa Field Office Program Analyst Elaine McArthur conducted a two (2) hour Customer Specified Training session for 27 human resource managers of Orlando Health in Orlando FL, which included a discussion of Arrest and Conviction Records in Hiring. Orlando Health is one of Florida's most comprehensive private, not-for-profit healthcare networks, and is Central Florida's fifth largest employer, with over 14,000 employees and more than 2,000 affiliated physicians.

On February 16, 2012, Miami District Office Chief Administrative Judge Patrick Kokenge partnered with the U.S. Department of Justice, Federal Bureau of Prisons to participate in a meeting with the National Association of Criminal Defense Lawyers' (NACDL) Task Force on the Restoration of Rights and Status after Conviction. The purpose of the task force is to undertake an inquiry into how legal mechanisms for relief from the collateral consequences of conviction are actually working in state and federal systems, and develop comprehensive proposals for reform. Chief Judge Kokenge and the U.S. Department of Justice, Federal Bureau of Prisons are presently working with the wardens in the Miami Federal Bureau of Prisons system and State of Florida Prison systems to begin implementation of an educational program to inform the convicts, who are close in time to their release into society, and employers about their respective rights and responsibilities concerning employment of persons with arrest and conviction records, as part of the Miami District Office's Re-entry Program.

On February 16, 2012, Tampa Field Office Enforcement Supervisor Tracy Smith provided a presentation to 21 members of the National Association of African Americans in Human Resources (NAAAHR) on Arrest and Conviction Records in Hiring.

On March 5, 2012, Miami District Office Trial Attorney Muslima Lewis spoke about the Impact of Credit Checks and Conviction Records in Employment to an audience of 60 people as a part of the Diversity Week program sponsored by Florida International University in Miami FL. Ms. Lewis also distributed information published by the Federal Interagency Reentry Council which clarifies existing federal policies that affect formerly incarcerated individuals and their families.

On March 9, 2012, San Juan Office Director William Sanchez met with Mr. Jerry Martinez, Warden, Metropolitan Detention Center, Guaynabo PR, to discuss Arrest and Conviction Records and the EEOC's participation in the federal interagency Reentry Council.

On March 15, 2012, Tampa Field Office Enforcement Supervisor Tracy Smith spoke to attorneys of the Sarasota County Bar Association, Labor and Employment Section, on Arrest and Conviction Records in Hiring at their monthly meeting in Sarasota FL.

On March 29, 2012, Tampa Field Office Program Analyst Elaine McArthur conducted a four (4) hour Customer Specified Training event for OSI Restaurant Partners, which included a training presentation on Arrest and Conviction Records in Hiring in Tampa FL. OSI Restaurant Partners is one of the largest casual dining restaurant companies in the world, and their portfolio of brands consists of Outback Steakhouse, Carrabba's Italian Grill, Bonefish Grill, Fleming's Prime Steakhouse & Wine Bar, Roy's Hawaiian Fusion Cuisine and A La Carte Pavilion.

July 21: Andrea Okwesa, PA, attended, and made a presentation on "Arrest and Conviction Records" at a special media event for 30 leaders of local faith-based churches and nonprofits,

reps of DC Mayor's Interfaith Council and Interfaith Conference of Metro Washington, hosted by DCTV, to discuss how we could interact/partner with that community, via media and other modalities.

August 3: Andrea Okwesa, PA, attended the monthly meeting of the Re-entry Committee of the Government of the District of Columbia's Criminal Justice Coordinating Council. She addressed the group and distributed EEOC materials on Arrest & Conviction Records. She also established a partnership with the Committee's Employment Workgroup to collaborate on future efforts.

July 18, 2012: Sylvia Smith, District Resources Manager, and Consuela Cantrell, District Resources Management Assistant, St. Louis District Office, gave a presentation covering Arrest and Conviction Records to fifty (50) attendees at Penmac's Staffing's breakfast seminar in conjunction with the Springfield Mayor's Office in Springfield, Missouri.

On August 8, 2012 a meeting/orientation was held with the staff of the H.O.P.E. Village (a facility of the Salvation Army) due to the frequency that employers are denying employment or terminating their clients with criminal records. During the meeting/orientation Marilyn S. Booker, Program Analyst provided an overview of Title VII of the Civil Rights Act, and answered questions about EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII and EEOC's charge processing procedure. H.O.P.E. Village is a transitional housing program that offers a job and supportive services to low and moderate income single women and women with children in need living in a residential style community.

District Director, Janet Elizondo, spoke at a meeting of the North Texas Industry Liaison Group in Dallas. She discussed arrest and conviction records and systemic investigations. Approximately 50 people attended the event.

Program Analyst Rodney Klein provided training to 10 members of the San Antonio NAACP Chapter on disparate treatment, arrest and conviction records, systemic investigations and retaliation claims. This is the second in a series of educational sessions for members of the San Antonio chapter.

On July 26, 2012, the Cleveland Field Office partnered with the Ohio Department of Jobs and Family Services and participated in their state-wide job fair held at the 2012 Ohio State Fair in Columbus. EEOC hosted an exhibit table with materials on the EEOC charge process, Federal Laws Prohibiting Job Discrimination, and the Enforcement Guidance on the Consideration of Arrest and Conviction Records.

On August 14, 2012, PA Eddi Abdulhaqq participated in the Alcorn State University convocation activities in Alcorn (Lorman), MS. Eddi was asked to provide information on the

"Do's and Don'ts of Hiring" to university supervisors and managers. Eddi included information about the EEOC's revised guidance on sex discrimination and the use of arrest and conviction records in the hiring process. Eddi was also able to meet with the vice president of academic affairs to discuss the EEOC's HBCU and Small Business/Employer Compliance initiatives.

Program Analyst Deb Moser-Finney and Enforcement Supervisor Virginia Pollard met with various stakeholders and provided information on EEOC and general information pamphlets to the following; Sacred Heart Community Organization in Walls, MS, WIN Job Center in Tunica, MS, Workforce Development Center in Helena, AR and the Mayor's Office – City of Hughes, AR (Arrest and Convictions). The Mayor had requested information on Arrest and Conviction Guidance and wants to schedule a community meeting in his town for EEOC to present on this topic and answer questions. (Arrest & Convictions, ADAAA, Underserved Geographical Area and Underserved Population and Communities)

On July 17, 2012, Tampa Field Office Enforcement Supervisor Tracy Smith provided the members of the Task Force of Citrus County an overview on the Commission's guidance on Arrest and Conviction Records in Inverness FL. The event was attended by approximately 18 people who had many questions regarding this subject matter.

Atlanta PA spoke at the "Male Empowerment Workshop: Overcoming the Odds, Success Strategies for Black Men" about EEO laws, their rights, and how to exercise those rights in an informed and constructive manner. Also, addressed guidance on arrest and convictions records, the importance of education, training and skills acquisition

Atlanta-spoke to the Henry County SHRM Chapter to provide an EEOC update to include ADA, guidance on arrest and conviction records, and retaliation

Norfolk Local Office Program Analyst, Marilyn S. Booker, was one of several speakers at the Virginia CURE Hampton Roads Chapter general meeting. EEOC's presentation discussed the 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. Reentry Myth Buster on Hiring Policies and Q and A on EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions were distributed. Other speakers were

Natividad Rodriguez, Staff Attorney from the National Employment Law Project (remote), Tracy Velázquez, Executive Director from the Justice Policy Institute, Carolyn LeCroy, Virginia Dept of Corrections, BJ Hice, Sr Parole Examiner. Approximately 43 persons were in attendance.

Dallas District Director Janet Elizondo and CRTIU Supervisor Belinda McCallister attended the Felony/Misdemeanor Friendly Career Fair in Dallas. The event drew approximately 80 attendees, along with State Senator Royce West, Mayor Mike Rawlings, Representative Eric Johnson, and County Commissioner Elba Garcia. Ms. Elizondo and Ms. McCallister discussed the latest EEOC guidance on arrest and conviction records and the EEOC's involvement in the Federal Inter-Agency Re-entry Council.

Consuela Cantrell, DRMA, St. Louis District Office, presented an EEOC Overview at the St. Patrick Center for twenty (20) re-entry individuals in St. Louis, Missouri.

On August 28, 2012 a follow-up conference was held with the GSGG Executive Director and GSGG clients relative to local employers' use of arrest/conviction records as pre-employment screening inquiries to received documentation for potential systemic/class charges against five (5) area employers relative to blanket criminal records pre-employment inquiries/discharges/failure to hires. EEOC charge processing procedures was reviewed with the group and the documentation was categorized and forwarded to EEOC enforcement personnel (i.e. Enforcement Mgr, District and Local Directors and CRTIU Supervisor.

On August 22, 2012, Denver Program Analyst Patricia McMahon gave a presentation at the Colorado Healthcare Source User Group Conference on what employers should know about EEOC and arrest and conviction records. Nine different health care organizations attended the conference with the purpose of learning the most recent guidance on recruitment and best employment practices.

On August 22, 2012, Program Analyst Christine Park-Gonzalez conducted a presentation on the new EEOC guidance on arrest and conviction records for approximately 40 staff for the New Start WorkSource program in Los Angeles. The staff specializes in providing services for exoffenders and was particularly intrigued by the EEOC's position and guidance. This was the third in a series of three training sessions for various WorkSource staff on the topic in conjunction with the program.

Louisville Area Office Investigator Marian Ahl made a presentation to the Center for Accessible Business Advisory Council on September 20, 2012 on the ADA Reasonable Accommodations; the main topic was on Arrest & Convictions and LGBT to an audience of 45 attendees.

Atlanta District Office Program Analyst Terrie Dandy participated, with a host of civic organizations, advocates and CBOs, in the "Ban-the-Box" program at the Atlanta City Hall, in recognition of Mayor Kasem Reid's commitment to ban-the-box for the City of Atlanta. The City of Atlanta is the first employer to ban-the-box in the State. Participating organizations

include 9to5 (lead), NELP, GA Justice Project, NAACP, churches, The Center for Working Families, and others. Local media covered the event.

On April 3 and 10, in partnership with the Center for Working Families, PA Terrie Dandy conducted workshops on the use of arrest and conviction records in employment for exoffenders.

Birmingham District Office Program Analyst Eddi Abdulhaqq made a presentation to approximately 50 inmates scheduled for release from the Pensacola Federal Prison Camp. She provided information about the EEOC's laws, procedures, and guidance on the use and consideration of arrest and conviction records. In addition, she was also one of three presenters at a re-entry workshop for inmates scheduled for release from the St. Clair County Correctional Facility.

On April 17, 2013 the Charlotte District Program Analyst Marilyn Booker provided two oral presentations on EEOC's "Employer Best Practices" as outline in the 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 before the employment committee, as well as, the general membership of the Norfolk Reentry Council. The employment committee met prior to the full Reentry Council. Approximately fifteen Council members attend the committee meeting and about 30 attended the general meeting.

On April 25, 2013, Marilyn S. Booker, Program Analyst provided an oral presentation entitled "Arrest and Conviction Records in Employment Decisions: What YOU Need to Know" before the forty (40) clients of the staff of Virginia CARES, in Fredericksburg, VA. Virginia CARES operates a statewide network of ex-offender reentry programs to provide transitional assistance, financial aid, job readiness training, temporary employment, job search and career development, human relations & self-awareness training, and ongoing support services to prisoners, exoffenders, and their families in Virginia.

On May 7, 2013 EEOC participated as a panelist during the Prisoner Re-entry: Issues and Initiatives workshop which was a part of the 3-day Spring 2013 Joint Conference. Marilyn S. Booker, Program Analyst provided a presentation covering considerations of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964. The BRPO-POSSESS-VASWP is a network of Benefit Program Specialists' and Social Work Practitioners' groups across the Commonwealth of Virginia. Approximately seventy individuals attended the workshop which was held in Williamsburg, Virginia.

On April 30, 2013 EEOC information relative to arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964 (namely the Arrest and Conviction

Records in Employment Best Practices brochure) was distributed to approximately fifty vendors who participated in the Apprenticeship Career Fair.

On April 18, 2013 Carolyn King, Charlotte CRTIU Supervisor disseminated the following handouts to the attendees at the Restoration of Rights Forum: "What you Should Know About the EEOC and Arrest and Conviction Records", "Pre-Employment Inquiries and Arrest & Conviction", and "Facts About Race/Color Discrimination" (Title VII). The event was held at the Six Mount Zion Church in Richmond, VA and approximately 60 persons attended.

On May 21, 2013 the Charlotte District Program Analyst attended the employment committee meeting of the Norfolk Reentry Council. The employment committee met to discuss and work on establishing base-line area/regional statistics of prisoners reentering society, number employed, how long unemployed, etc.

On May 23rd, Charlotte Program Analyst participated in a full day of outreach activities during the Scope Your Future in the World of Registered Apprenticeships Informational packages composed of Arrest and Conviction Records in Employment Best Practices, OFCCP's Criminal Record Restrictions and Discrimination policy guidance to federal contractors and subcontractors, EEOC's Q&A on the Application of Title VII and ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault or Stalking, Pregnancy Discrimination Fact Sheet, Employer's Guide on Veterans with Service-Connected Disabilities and the ADA, etc. were given to each of the +80 Exhibitors. Exhibitors were employers from the shipbuilding and repair, manufacturing, construction and skill trades, services and educational industries. Additionally, an informational booth -- containing fact sheets, brochures, information about arrest and conviction records, domestic or dating violence, pregnancy, and veterans with service-connect disabilities in employment decisions, and bookmarks about the EEOC charge processing procedure and the various types of employment discrimination, was manned. There were many discussions throughout the day with individuals who believed they may have been victimized by employment discrimination.

On June 26, 2013 the Charlotte District Program Analyst participated in the Virginia Beach Reentry Town Hall Meeting. The event included a Resource Fair and Reentry Panel Discussion. Approximately eighty (80) persons attended.

On April 5, 2013, John Hendrickson, Chicago Regional Attorney, participated as a co-presenter at the "Indiana Journal of Law and Social Equality Symposium" held at the Indiana University Maurer School of Law in Bloomington, IN. The EEOC presentation on "Hot Button Issues in EEOC Litigation under the New Strategic Enforcement Plan" covered hiring issues and the EEOC's newer guidance on the use of arrest and conviction records and drew 100 attorney participants, nationwide, from the plaintiff's bar.

In an ongoing partnership with the Wisconsin Department of Corrections, Maria Flores, Program Analyst, Milwaukee Area Office, conducted workshops on May 22, 2013 and June 19, 2013 to incarcerated offenders, an underserved population, participating in job-readiness programs at State correctional facilities. The workshop was conducted at one facility and was simultaneously video cast to multiple institutions across the state and in geographically underserved areas, reaching a total of 257 male and female offenders, including a significant number of African-Americans.

Dallas District Office Enforcement Supervisor Belinda McCallister talked about arrest and conviction records at a, Teens in Crisis, event in Dallas.

Detroit Field Office Director Gail Cober presented to 35 members of the Statewide Re-Entry Group Workgroup on the EEOC Conviction Record Policy Guidance. Ms. Cober reviewed the policy with the group and discussed how the EEOC investigates and analyzes such cases.

Indianapolis-Marion County City Council invited EEOC to conduct a presentation on EEOC's guidelines on the re-entry program on Arrests & Convictions. Indianapolis District Office Program Analyst Phyllis Wells conducted a presentation on EEOC's Best Practices on the reentry program for 43 employers and 25 City Council Members. She also conducted a presentation on Arrests and Convictions for 75 HR members of the chamber and surrounding rural communities at the Richmond Chamber of Commerce in Richmond, Indiana.

Reviving the Heart of Workforce Development: Cincinnati Area Director Wilma Javey conducted a presentation on the proper use of utilizing criminal background checks when past felons and offenders are looking for employment opportunities to a group of 64 employers and the Hamilton County Office of Re-entry and also how to adopt a fair hiring policy.

On May 7, 2013, Los Angeles Enforcement Manager Patricia Kane represented the EEOC at the Jericho Training Center in Los Angeles for a collaborative partners meeting centered on services for the ex-offender community in the greater Los Angeles area.

On June 7, 2013, Los Angeles District Office Investigator Richard Burgamy gave a presentation at the Cal State Reentry Initiative in San Bernardino, California, a community-based organization focused on assisting ex-offenders with re-entry into society. The training was also conducted in conjunction with the DOL WHD West Covina District.

Memphis Investigator Michael Hollis gave a presentation to the Community Outreach Board of the U. S. Bureau of Prisons on background checks and Arrest and Conviction Records of formerly incarcerated individuals to 30 attendees. The meeting was held at the U. S. Federal Prison at Camp Millington, TN

Tampa Field Office Enforcement Supervisor Tracy Smith spoke before an audience of 65 people at the Florida Council for Community Mental Health Human Resource forum on the topic of Arrest and Conviction Records.

On May 22, 2013, Miami District Office District Resource Manager Michael Bethea, Chief Administrative Judge Patrick Kokenge and Investigator Sergio Maldonaldo participated in the quarterly South Unit Re-entry Fair at the South Florida Reception Center in Miami FL. The eight different organizations in attendance, including EEOC, gave presentations about the assistance that could be provided to the soon to be ex-offenders. In total, there were approximately 100 inmates present from different prisons around south Miami-Dade County. Each inmate was given a handout on the laws we enforce and myth busters handouts to assist them in their future endeavors.

Denver Program Analyst Patricia McMahon met with advocates from the Colorado Criminal Justice Reform Coalition to provide an EEOC overview and guidance on criminal records and background check.

Washington Field Office Program Analyst Andrea Okwesa attended the monthly meeting of the DC Criminal Justice Coordinating Council (CJCC), Employment/Training Workgroup, continuing efforts to assist the Reentry Committee in drafting a model, local arrest & conviction policy to provide guidelines for DC employers addressing the hiring of people with criminal records. She also attended the 9th Community Reentry & Expungement Summit in Washington, DC, sponsored by the DC Public Defender Service. It featured presentations & exhibit/resource tables by community based service providers addressing the needs of attendees from DC with criminal records.

REENTRY

MYTH BUSTER!

A Product of the Federal Interagency Reentry Council

MYTH: An employer can get a copy of your criminal history from companies that do background checks without your permission.

FACT: According to the Fair Credit Reporting Act (FCRA), employers must get one's permission, usually in writing, before asking a background screening company for a criminal history report. If one does not give permission or authorization, the application for employment may not get reviewed. If a person does give permission but does not get hired because of information in the report, the potential employer must follow several legal obligations.

Key Employer Obligations in the FCRA

An employer that might use an individual's criminal history report to take an "adverse action" (e.g., to deny an application for employment) must provide a copy of the report and a document called A Summary of Your Rights under the Fair Credit Reporting Act before taking the adverse action.

An employer that takes an adverse action against an individual based on information in a criminal history report must tell the individual – orally, in writing, or electronically:

- the name, address, and telephone number of the company that supplied the criminal history report;
- that the company that supplied the criminal history information did not make the decision to take the adverse action and cannot give specific reasons for it; and
- about one's right to dispute the accuracy or completeness of any information in the report, and one's right to an additional free report from the company that supplied the criminal history report, if requested within 60 days of the adverse action.

A reporting company that gathers negative information from public criminal records, and provides it to an employer in a criminal history report, must inform the individual that it gave the information to the employer or that it is taking precautions to make sure the information is complete and current.

If an employer violation of the FCRA is suspected, it should be reported it to the Federal Trade Commission (FTC). The law allows the FTC, other federal agencies, and states to take legal action against employers who fail to comply with the law's provisions. The FCRA also allows individuals to take legal action against employers in state or federal court for certain violations.

For More Information:

See Credit Reports and Employment Background Checks from the **Federal Trade Commission**

(http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre36.pdf).

The FTC works to protect consumers from violations of the FCRA and from fraudulent, deceptive, and unfair business practices in the marketplace, and to educate them about their rights under the FCRA and other consumer protection laws.

To file a complaint or get free information on consumer issues, visit www.ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261.

Watch a video, How to File a Complaint, at ftc.gov/video to learn more.

What is a REENTRY MYTH BUSTER?

This Myth Buster is one in a series of fact sheets intended to clarify existing federal policies that affect formerly incarcerated individuals and their families. Each year, more than 700,000 individuals are released from state and federal prisons. Another 9 million cycle through local jails. When reentry fails, the social and economic costs are high - more crime, more victims, more family distress, and more pressure on alreadystrained state and municipal budgets.

Because reentry intersects with health and housing, education and employment, family, faith, and community well-being, many federal agencies are focusing on initiatives for the reentry population. Under the auspices of the Cabinet-level Interagency Reentry Council, federal agencies are working together to enhance community safety and well-being, assist those returning from prison and jail in becoming productive citizens, and save taxpayer dollars by lowering the direct and collateral costs of incarceration.

For more information about the Reentry Council, go to: www.nationalreentryresourcecenter.org/reentry-council

On Hiring/Criminal Records Guidance (Revised Oct. 2012)

REENTRY

MYTH BUSTER!

A Product of the Federal Interagency Reentry Council

MYTH: People with criminal records are automatically barred from all employment.

FACT: An arrest or conviction record does NOT automatically bar individuals from all employment

On April 25, 2012, the U.S. Equal Employment Opportunity Commission 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, as amended (Title VII), 42 U.S.C. § 2000e. The Guidance updates, consolidates, and supersedes the Commission's 1987 and 1990 policy statements on this issue, as well as the relevant discussion in the EEOC's 2006 Race and Color Discrimination Compliance Manual Chapter. These rules apply to all employers that have 15 or more employees, including private sector employers, the federal government, and federal contractors. Below are answers to common questions about the Guidance.

- 1) Does this Guidance prohibit employers from obtaining and using criminal background reports about job applicants or employees? No, the Guidance does not prohibit employers from obtaining or using arrest or conviction records to make employment decisions. The EEOC simply seeks to ensure that such information is not used in a discriminatory way.
- 2) How could an employer use criminal history information in a discriminatory way? Two ways -- First, Title VII prohibits disparate treatment discrimination. Employers should not treat job applicants or employees with the same criminal records differently because of their race, national origin, or another protected characteristic (disparate treatment discrimination). Second, Title VII prohibits disparate impact discrimination. Employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will

be a responsible, reliable, or safe employee. In legal terms, it is not "job related and consistent with business necessity."

- 3) How would an employer prove "job related and consistent with business necessity"? Is it burdensome? Proving that a criminal record exclusion is "job related and consistent with business necessity" is not burdensome. The employer can prove this if it (1) considers at least the nature of the crime, time since the criminal conduct occurred, and the nature of the job in question, and (2) gives an individual who may be excluded by the screen an opportunity to show why he or she should not be excluded.
- 4) Why should an arrest record be treated differently than a conviction record?

An arrest record does not establish that a person engaged in criminal conduct. Arrest records may also be inaccurate (e.g., mistakenly identify the arrestee) or incomplete (e.g., do not state whether charges were filed or dismissed against the arrestee). Thus, an arrest record alone should not be used by an employer to take an adverse employment action. But, an arrest may trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action.

For More Information:

EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII: http://www.eeoc.gov/laws/guidance/arrest conviction.cfm

EEOC Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in **Employment Decisions Under Title VII:**

http://www.eeoc.gov/laws/guidance/ga arrest conviction.cfm

What is a REENTRY MYTH BUSTER? This Myth Buster is one in a series of fact sheets intended to clarify existing federal policies that affect formerly incarcerated individuals and their families. Each year, more than 700,000 individuals are released from state and federal prisons. Another 9 million cycle through local jails. When reentry fails, the social and economic costs are high -- more crime, more victims, more family distress, and more pressure on already-strained state and municipal budgets.

Because reentry intersects with health and housing, education and employment, family, faith, and community well-being, many federal agencies are focusing on initiatives for the reentry population. Under the auspices of the Cabinet-level interagency Reentry Council, federal agencies are working together to enhance community safety and well-being, assist those returning from prison and jail in becoming productive citizens, and save taxpayer dollars by lowering the direct and collateral costs of incarceration.

For more information about the Reentry Council, go to: www.nationalreentryresourcecenter.org/reentry-council



EENTRY COUNCIL

The Cabinet-level Reentry Council is working to enhance community safety and well-being, assist those returning from prison and jail becoming productive citizens, and save taxpayers dollars by lowering the direct and collateral costs of incarceration

Employment

Two out of every three men were employed before they were incarcerated, and many were the primary financial contributors in their households. Individuals who have been incarcerated can expect future annual earnings to be reduced by some 40 percent after they return to their communities and the societal and economic impacts are substantial. The Reentry Council is working to reduce barriers to employment, so that people with past criminal involvement – after they have been held accountable and paid their dues – can compete for appropriate work opportunities in order to support themselves and their families, pay their taxes, and contribute to the economy.

Accomplishments to Date

- Reentry Council agencies have published <u>five Reentry MythBusters</u> that tackle both employer obligations and incentives. On the incentives side, for example, the Department of Labor (DOL) offers federal bonding protection for employers who hire people with a criminal record. On the employer obligation side, the Myth Busters focus on how employers may lawfully consider a criminal record in their hiring decisions, and protections for job seekers when it comes to background checks.
- The Equal Employment Opportunity Commission (EEOC) updated <u>enforcement guidance</u> on the use of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964.
- The DOL's Employment and Training Administration (ETA) and Civil Rights Center (CRC) issued a joint <u>guidance</u> for the public workforce system regarding employer job postings that contain hiring exclusions or restrictions based on arrest and conviction history. DOL's Office of Federal Contract Compliance Programs (OFCCP) issued a <u>directive</u> advising federal contractors and subcontractors of their nondiscrimination obligations regarding the use of criminal records as an employment screen.
- The Federal Trade Commission (FTC) announced an enforcement action against a background screening company, alleging that the company failed to ensure that criminal history information it reported was accurate and up to date, as required by the Fair Credit Reporting Act (FCRA). The FTC has also created a number of educational brochures and videos for employers and the public on the use of consumer reports.
- DOL and the Department of Justice awarded REXo and Second Chance Act grants to support job training and placement for individuals returning to their communities after incarceration. In addition, grantees may use these

- federal funds to pay for legal assistance to secure driver's licenses, litigate inappropriate denials of housing or employment and violations of the FCRA, modify child support orders, and expunge criminal records.
- DOL has developed a non Internet-based version of the new electronic career exploration tool, <u>My Next Move</u>.
 The tool is available on CD-ROM and was specifically created for use by inmates in correctional institutions where Internet connectivity is unavailable or prohibited.
- The Small Business Administration (SBA) has posted on its website and shared with its Resource Partners (Small Business Development Centers, Women's Business Centers and SCORE chapters) the recent federal <u>guidance</u> relating to consideration of criminal records in employment, as it applies to small businesses.
- The Federal Bureau of Prisons (BOP) is standardizing materials and resources for institution Career Resource Centers that will be hosted on an inmate LAN system.
 These resources will include keyboarding, computer literacy, simulated Internet navigation, financial literacy, resume writing, and other career development and employment resources.
- The Court Services and Offender Supervision Agency (CSOSA)
 expanded its quarterly Community Resource Day Video Conference Program to reach 18 facilities within the federal
 prison system housing inmates from the District of Columbia.
 During these events, the inmates hear presentations about
 employment readiness, vocational training, and job placement.
- The Office of Personnel Management (OPM) has developed a best practices <u>guide</u> that addresses employment fitness adjudication for federal contractor applicants and their employees.

Snapshot

Agenda Moving Forward

Improve Employment Practices of Public and Private Employers

Reentry Council agencies will continue to monitor and provide guidance to public, federal, and private sector employers and workers, federal contractors, grantees, and entities in the workforce system regarding the use of criminal records in employment to ensure compliance with civil rights laws and other protections. Reentry Council agencies will also, where appropriate, enforce applicable laws. In addition, agencies will explore coordinating joint guidance or publications for the employee, employer, and workforce development communities, and engage in further outreach and technical assistance.

Make the Federal Government a Model Employer

Reentry Council agencies will assess policies and develop best practices with respect to hiring individuals with criminal records. The Reentry Council will also study mechanisms, like certificates of rehabilitation, which can help facilitate the employment of individuals and will consider whether a similar model might be applicable at the federal level.

Review Federal Policies for Excessive Collateral Consequences

Agencies will continue to review federal hiring policies and regulations to determine whether revision to those policies and regulations should be incorporated into the Reentry Council's Collateral Consequences Review and/or the Administration's legislative, regulatory, or policy agenda.

Strengthen Evidence-Based Programmatic Initiatives

Reentry Council agencies will continue their robust commitment to programs and initiatives providing employment-centered reentry services and, wherever possible, link these programs to research partners that can document, measure, and highlight recidivism reductions produced by programmatic work.

Key Resources (Employment)

Reentry Council

http://csgjusticecenter.org/nrrc/projects/firc/

Reentry MythBusters

http://csgjusticecenter.org/nrrc/projects/mythbusters/

National Reentry Resource Center – Employment

http://csgjusticecenter.org/reentry/issue-areas/employment/

EEOC Updated Guidance on Use of Criminal Records in Employment Decisions

http://www.eeoc.gov/laws/guidance/arrest conviction.cfm

DOL Guidance and Directive

http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9230 http://www.dol.gov/ofccp/regs/compliance/directives/Dir306.htm

OPM Contractor Fitness Adjudication Best Practices Guide

http://chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=5585

FTC Consumer Protection Documents: For Employers and Employees

http://business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know http://www.consumer.ftc.gov/sites/default/files/articles/pdf/pdf-0096-fair-credit-reporting-act.pdf



ENTRY COUNCIL

The Cabinet-level Reentry Council is working to enhance community safety and well-being, assist those returning from prison and jail becoming productive citizens, and save taxpayers dollars by lowering the direct and collateral costs of incarceration

Education

In a major federal study of individuals released from state prisons, 94 percent of incarcerated adults nearing release identified education as a key reentry need. Most incarcerated adults did not complete high school, although many have subsequently earned equivalency diplomas. Education is a core resource

for release preparation, and is an evidence-based tool for reducing recidivism among adults and juveniles. For example, empirical research in the federal prison system, where literacy education programming is mandatory for most inmates, has demonstrated that participation in education programming is associated with a 16-percent reduction in recidivism. Education is also a critical building block for increasing employment opportunities.

Accomplishments to Date

- Reentry Council agencies have published two <u>Reentry MythBusters</u> that address access to education post release. One addresses misconceptions about student financial aid eligibility for formerly incarcerated persons. The second addresses barriers to youth educational integration.
- The Department of Education (ED) undertook a
 Department-wide review of reentry-related issues.
 Consensus was reached on broad priorities including
 the prevention of initial criminal justice system contact,
 enhancing in-facility educational opportunities
 (quality and access), and supporting transitions into
 community-based educational programs and services
 for formerly incarcerated youth and adults.
- ED initiated an ongoing process of engagement with external stakeholders (formerly incarcerated individuals, program providers, and the advocacy community) on correctional education and reentry. The engagement provided direction for ongoing strategy development and implementation.
- With the assistance and participation of agency partners, ED engaged subject matter experts in a process to develop a research-based <u>Reentry Education</u> <u>Model.</u>

- With financial support provided though an interagency agreement between ED and the Department of Justice (DOJ), ED awarded grants to two community colleges and one Intermediate School District to test implementation of the Reentry Education Model.
- ED is working with privately funded demonstration projects to amplify findings on strong reentry programs.
 Through coordination with the Vera Institute for Justice, post secondary reentry education programs have been initiated in three states to expand and connect pre- and post-release college programs for state inmates. ED is working with Vera to provide forums for all grantees to share ideas and findings.
- ED developed and has put forward reauthorization proposals for the Workforce Investment Act, calling for greater and more reentry-focused financial support for correctional education from the Title II program for reentry education.
- ED and DOJ worked together to support implementation of a Second Chance Act-funded National Study of Correctional Education. The study will provide a definitive meta-analysis of the recidivism benefit of correctional education, identify trends in correctional education, and provide guidance to the field to improve correctional education services and outcomes.

Agenda Moving Forward

Create Pre- and Post-Release Opportunities for Educational Participation

ED and DOJ are closely coordinating with private foundations to support reentry education model projects, through direct support of demonstration projects, technical assistance, and national evaluations. ED and Reentry Council agencies will support federal, state, and local correctional officials and their partners to expand and improve educational opportunities (including access to high-quality special education and related services) for incarcerated persons. There will be particular emphasis on educational opportunities that span the moment of release and allow incarcerated persons to continue movement toward personal educational goals throughout the release process and upon return to the community. ED is addressing the need for transitional support involving records transfer and cost management.

Engage a Broad Range of Educational Entities about the Service Needs of the Reentry Population

ED will conduct outreach to multiple groups in the educational community to encourage engagement with

correctional entities and expansion and improvement of services to formerly incarcerated individuals. This will especially include the Office of Vocational and Adult Education portfolio of education communities, including Career Technology Education Programs, Adult Education and Family Literacy Act funded programs, and community colleges. ED will identify and utilize bully pulpit opportunities.

Build and Disseminate Research-Based Innovations to Expand Educational Programs and Improve Their Outcomes

Two important elements of this work will include (1) bringing technology to bear on improving access, quality and connectedness of educational opportunities for the incarcerated and formerly incarcerated, and (2) facilitating partnerships that connect academic education, career technology education, industry relevant credentialing, work experiences, and related services to help formerly incarcerated individuals obtain employment within an occupational area and be positioned to advance to higher levels of future education and employment in that area.

Key Resources (Education)

Reentry Council

http://csgjusticecenter.org/nrrc/projects/firc/

Reentry MythBusters

http://csgjusticecenter.org/nrrc/projects/mythbusters/

National Reentry Resource Center

http://csgjusticecenter.org/nrrc/

Office of Vocational and Adult Education

http://www2.ed.gov/about/offices/list/ovae/resource/index.html

Reentry Education Model

http://www2.ed.gov/about/offices/list/ovae/pi/Adult-Ed/reentry-model.pdf

Student Financial Aid Information

http://studentaid.ed.gov/eligibility/criminalconvictions

"Take Charge of Your Future, Get the Education and Training You Need," a guide for incarcerated individuals

http://www.edpubs.gov/document/ed005354p.pdf?ck=131



EENTRY COUNCIL

The Cabinet-level Reentry Council is working to enhance community safety and well-being, assist those returning from prison and jail becoming productive citizens, and save taxpayers dollars by lowering the direct and collateral costs of incarceration

Housing

Stable housing with appropriate supportive services is a key factor for those coming out of incarceration in preventing or ending homelessness and reducing recidivism. Reentry Council agencies are collaborating to advance policies, programs, and models that support

stable housing and reentry services for those with criminal histories so they can successfully reenter their communities, and where appropriate, reunite with their families. Agencies are working together to reduce barriers to public and subsidized housing, and advance promising models that improve outcomes for people who repeatedly use corrections and homeless services.

Accomplishments to Date

- Department of Housing and Urban Development (HUD) Letters - HUD developed a Reentry MythBuster and sent letters to executive directors of public housing authorities (PHAs) and to multi-family home owners across the country, clarifying HUD's position on the limited categories of ex-offenders who are permanently barred from HUD properties. The letters encourage the development of policies and procedures that allow formerly incarcerated individuals to rejoin their families in HUD-assisted housing while maintaining safety for residents, stating, "People who have paid their debt to society deserve the opportunity to become productive citizens and caring parents, to set the past aside and embrace the future. Part of that support means helping ex-offenders gain access to one of the most fundamental building blocks of a stable life – a place to live."
- HUD Training and Outreach An orientation of HUD Regional and Field Office Points of Contact regarding HUD's reentry efforts was conducted and will support consistent responses to inquiries from government partners.
- Promising Strategies Dissemination The U.S.
 Interagency Council on Homelessness (USICH) and the Department of Justice (DOJ) Access to Justice Initiative published "Searching Out Solutions:
 Constructive Alternatives to Criminalization," which includes a focus on effective housing strategies for the reentry population. USICH and Reentry Council staff are working together to reach the field with promising dissemination and education strategies, including through the DOJ guide, "Reducing Homeless Populations' Involvement in the Criminal Justice System."

- Solutions Database USICH launched its online
 "Solutions Database" of proven and promising solutions
 and innovations that will help end homelessness.
 Organized by the objectives of "Opening Doors," the
 federal strategic plan to end homelessness, the
 database includes several promising innovations
 under the "Access to Justice" objective that address
 the needs of justice-involved people experiencing
 homelessness.
- Funding Collaboration HHS awarded \$6 million for Community-Centered Responsible Fatherhood Ex-Prisoner Reentry Pilot Projects to implement comprehensive community-centered services to reentering fathers and their families. These projects will coordinate federal resources from HHS, DOJ, DOL, HUD, and local PHAs, and provide responsible fatherhood and healthy relationship activities, employment services, housing, and other interventions to help stabilize formerly incarcerated individuals and their families.
- Reentry Housing Innovations' Roundtable –
 Reentry Council agencies organized a roundtable
 with organizations that were developing, supporting,
 and researching various housing programs that were
 successfully integrating formerly incarcerated
 individuals into communities.

Snapshot

Agenda Moving Forward

Promote Effective Program Models and Technical Assistance Strategies

Reentry Council agencies will identify proven and promising reentry housing models such as permanent supportive housing. Agencies will also promote technical assistance strategies and align funding opportunities to connect housing to needed health care, treatment, and supportive services, including new opportunities provided by the Affordable Care Act.

Build Knowledge about What Works in Reentry/Housing

Reentry Council agencies will build knowledge about what housing models, interventions, and practices are proven to produce positive outcomes related to recidivism and housing. The agencies will seek opportunities to support research and evaluations that can examine the impact of housing on recidivism, economic stability, family reunification, and other outcomes. In addition,

the agencies will collect, summarize, and disseminate findings from studies currently under way by multiple agencies that involve housing interventions focused on formerly incarcerated people.

Improve Policies to Enhance Reentry/Housing Outcomes

HUD will identify and develop strategies to reduce possible collateral consequences caused by federal housing policy and local housing provider discretion. HUD will take appropriate actions, which may include but are not limited to guidance, notice, training, and/or regulation/statute amendment.

Disseminate Information and Engage Stakeholders

Other efforts under development include an inventory of PHA reentry programs, a cross-training plan, and a webinar targeting HUD field offices, PHAs, and other reentry stakeholders.

Key Resources (Housing)

Reentry Council

http://csgjusticecenter.org/nrrc/projects/firc/

Reentry MythBusters

http://csgjusticecenter.org/nrrc/projects/mythbusters/

National Reentry Resource Center - Housing

http://csgjusticecenter.org/reentry/issue-areas/housing/

HUD Secretary letters on Public and Multi-Family Housing

http://csgjusticecenter.org/nrrc/reentry-councilproducts-resources/

USICH Solutions Database

http://www.usich.gov/usich_resources/solutions/

Searching Out Solutions: Constructive Alternatives to Criminalization

http://www.usich.gov/issue/ alternatives_to_criminalization



REENTRY COUNCIL

The Cabinet-level Reentry Council is working to enhance community safety and well-being, assist those returning from prison and jail becoming productive citizens, and save taxpayers dollars by lowering the direct and collateral costs of incarceration

Reservation Communities

The Reentry Council aims to identify the additional challenges faced by individuals reentering reservation communities due to the increased poverty and isolation often found there and to then identify and develop policies, programs, and services that will support the cultural-social fabric and increase the employment, education, and health and housing opportunities for this population.

Problem Statement

There exist serious public safety challenges in reservation communities in the United States. American Indian people are incarcerated at higher rates than the general population: at midyear 2009, tribal, federal, and state authorities incarcerated American Indian or Alaska Native individuals at a rate 25 percent higher than the overall national incarceration rate. Due to federal criminal jurisdiction on many reservations, juveniles detained in federal facilities are predominantly American Indian males, generally between 17 to 20 years of age, with an extensive history of drug and/or alcohol use/abuse and violent behavior and who have often been sentenced for sex-related offenses.

Of further concern is the rate of violent crime that exists in some reservation communities and the fact that this violence is often directed at the most vulnerable members of the community at rates that far exceed the rates off the reservations. For instance, it is a grim fact that an American Indian female has a one-in-three chance of being sexually assaulted in her lifetime. American Indian women also experience homicide at rates almost 50 percent greater than Caucasian women.

Finally, violence in the form of sexual assault and domestic violence against American Indian women also occurs at heightened rates. The response to the heightened violent crime rates in reservation communities must be multi-pronged and culturally appropriate. Certainly vigorous enforcement of criminal laws by federal law enforcement and federal support for viable

crime prevention programs are key. But the public safety challenges faced by reservation communities are exacerbated by the unique challenges that an American Indian who is returning to his or her home community faces after serving a federal prison sentence for a crime of violence. Indian country unemployment rates reportedly average 49 percent, even in better economic times. High unemployment compounded with a lack of affordable and adequate housing magnifies challenges for returning individuals.

Further, community confinement housing facilities actually located in a reservation community are uncommon, which may be for cultural as well as economic reasons. This too often results in an American Indian spending his or her final months of incarceration in a halfway house facility that is located a great distance from the reservation community to which the individual will eventually return. In addition, their home communities are far from health and employment services that are critical to successful reentry.

Agenda Moving Forward

Expand Data Collection

Much appears to be unknown about the "flow" of American Indians through the federal criminal system. Data needs to be gathered as to the number of American Indians by:

- the reservations where they committed their feberal crimes;
- the Bureau of Prisons facilities in which they serve their sentences; and
- the reservations to which they return and serve their supervision under United States Probation and Pre-trial Services.

Increase Coordination

Because the Department of Justice and the Department of Interior's Bureau of Indian Affairs often have primary criminal jurisdiction over certain serious crimes committed on reservations, they have a broad and deep expertise on the public safety challenges that these communities face. The Reentry Council has expertise in the implementation of successful reentry programs in non-reservation communities. Finally, United States Probation and Pre-trial Services has expertise in the day-to-day supervision of offenders

reentering reservation communities. Increased coordination among these centers of varied expertise is essential to understanding and then positively impacting the issue of reentry in Indian country.

Explore Transition Assistance

Currently too many American Indians who are transitioning out of federal prisons to community confinement settings are doing so in non-reservation communities many miles from the reservation communities to which they will be returning. Enhanced understanding of resource availability and need is required to address this issue.

Focus on Employment, Education, Health and Housing Opportunities

American Indians reentering reservation communities can face employment, education, health, and housing challenges that are unique given the high unemployment rates and isolation of some reservation communities. These challenges need to be further considered by the Reentry Council agencies and efforts redoubled to find creative and effective methods to address these challenges.

Key Resources (Reservation Communities)

Reentry Council

http://csgjusticecenter.org/nrrc/projects/firc/

Reentry MythBusters

http://csgjusticecenter.org/nrrc/projects/mythbusters/

National Reentry Resource Center - Tribal Affairs

http://csgjusticecenter.org/reentry/issue-areas/tribal-affairs/



EENTRY COUNCIL

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Women and Reentry

Justice-involved females, like males, face a host of challenges when they leave jail or prison and return to their communities. However, the current systems do not always address the specific challenges faced by women. For example, while many justice-involved females struggle with both substance abuse and mental health problems – often linked to their history of

physical or sexual abuse beginning in childhood and extending into adulthood – most state and local reentry programs lack a significant trauma-informed behavioral health component. And while a primary consideration for many justice-involved women who are mothers is to determine why and how to successfully reestablish a relationship with their children when they leave prison, most state and local systems are not focused on supporting this important aspect of reentry. These and many other factors point to the need to better identify effective strategies to help women overcome these challenges as they transition to their communities.

Accomplishments to Date

- The Department of Health and Human Services (HHS), in conjunction with other Reentry Council agencies and community partners, sponsored a twoday conference, "Meeting the Reentry Needs of Women: Policies, Programs, and Practices." The conference brought together researchers, practitioners, federal employees, and advocates to discuss how federal, state, and local systems can work to improve reentry outcomes for women.
- In 2012, the Department of Labor (DOL) funded grants to provide employment and support services to justice-involved females using a comprehensive case management strategy. Nine grants were awarded – seven serving adults and two serving youth. Additional grants will be funded in 2013.
- HHS has commissioned a research review on justiceinvolved women to help inform the development of interventions designed to promote healthy relationships and successful reentry for this population. The research review will examine characteristics, pathways, and the evidence base for interventions.
- Reentry Council agencies have convened seven listening sessions across the country to hear from service providers and justice-involved women on the challenges and successes of returning to their communities and families. These listening sessions will provide input for materials being developed for service providers and women reentering the community from prisons and jails.

Agenda Moving Forward

Increase Information and Resources Available to Meet the Needs and Challenges Facing Justice-Involved Women

Reentry Council agencies are working together to identify new opportunities to improve outcomes for justiceinvolved women. In addition to funding opportunities, policy guidance, regional collaboration, and outreach related to access to health care are being pursued.

Identify and Address Barriers to Successful Reentry for Women

Through listening sessions and expert consultations, Reentry Council agencies are identifying barriers that justice-involved women face during the reentry process and are developing topical resource materials for service providers and for women reentering their communities.

Increase Evidence-Based and Research-Informed Program Practices

In addition to the HHS-funded research review on justice-involved women (due to be completed in the fall of 2013), Reentry Council agencies are working together to identify opportunities that would facilitate

the development of evidence-based and researchinformed practices and to ensure that information about such practices is widely disseminated.

Develop a Public-Private, Cross-Discipline Communications Network

Reentry Council agencies are working together to add more community-based programs that serve justice-involved women to the National Institute of Correction (NIC) searchable directory, build a database of intermediary networks that focus on improving outcomes for justice-involved women, and develop a communications network that links the public and private program providers, intermediary networks, and federal partners in order to improve the flow of critical information about policy and practice related to justice-involved women.

Key Resources (Women and Reentry)

Reentry Council

http://csgjusticecenter.org/nrrc/projects/firc/

National Reentry Resource Center

http://csgjusticecenter.org/nrrc/

National Institute of Corrections

http://nicic.gov/WomenOffenders

National Resource Center on Justice-Involved Women

http://cjinvolvedwomen.org/

SAMHSA's Gains Center for Behavioral Health and Justice Transformation

http://gainscenter.samhsa.gov/topical_resources/women.asp



COUNCIL

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Child Support

The Child Support Program serves one in four of all children in the United States and one in two of all poor children and their families, serving those families from a child's birth until adulthood. Child Support is a national program but policies and

practices vary from state to state. Child support is particularly important to reentry because child support obligations typically do not automatically stop during incarceration or unemployment. Realistic child support policies help parents provide for their families and facilitate successful reentry and can provide an on-ramp to many other supportive services.

Accomplishments to Date

- The U.S. Department of Health and Human Services (HHS) Office of Child Support Enforcement (OCSE) published six fact sheets on establishing <u>realistic</u> <u>child support orders</u>, <u>modification practices</u>, <u>state-specific modification policies and programs</u> <u>regarding incarcerated parents</u>, <u>federal prisoners</u> <u>with child support obligations</u>, and <u>access to justice</u> <u>innovations</u>.
- OCSE provided <u>factsheets</u> and guidance to Veterans Affairs (VA) staff members in the Veterans Justice Outreach Program and Health Care for Reentry Veterans Program, to the Bureau of Prisons (BOP) Reentry Affairs Coordinators in each federal prison, and to Reentry Council agencies' contacts.
- OCSE produced policy <u>guidance</u> on the U.S.
 Supreme Court case Turner v. Rogers, including <u>guidance</u> on alternatives to incarceration for nonpayment of child support.

- OCSE wrote items for the Administrative Office of the Courts (AOC) and BOP's newsletters about the fact sheets; provided a guide for the BOP called "Four Basic Facts About Child Support," and provided materials to the National Reentry Resource Center Newsletter about the connection between child support and reentry.
- OCSE staff organized and presented at national conferences on child support and reentry innovations in concert with experts from the states.

Agenda Moving Forward

Disseminate Child Support Information

The Child Support subcommittee intends to create materials about child support and reentry for a variety of audiences, including corrections, child support, and reentry professionals. This includes creating new Reentry MythBusters to highlight the connections between reentry and the core mission of the Child Support Program, especially the relationship between child support and employment. One priority project moving forward is to create a simple, accessible state-by-state guide to child support modification processes. The Child Support subcommittee also intends to create talking points on the importance of child support for reentry caseworkers and case managers.

Improve Court Practice and Improve Access to Justice

The Child Support subcommittee intends to identify ways to improve court practices including creating specialized resources and collaborating with attorneys and judges in the criminal justice area. They will create materials for federal judges, such as a bench card, on the importance of child support to reentry; collaborate

with legal associations and organizations; publicize a variety of models for service delivery, such as specialized courts; and improve access to justice and strengthen *pro se* initiatives. Another strategy is to encourage the identification of child support responsibilities in presentence reports and identify other pre-trial services that could assist federal prisoners with child support services.

Coordinate Communications about Reentry

The Child Support subcommittee intends to identify additional opportunities to promote the intersection of child support and reentry through conference presentations, newsletter articles, and web-based learning. The subcommittee plans to improve materials available to non-child support personnel working with reentry populations by facilitating revisions to federal program and agency operating procedures, manuals, or guides to include current and specifically tailored information on child support. The Child Support subcommittee also intends to identify and promote promising practices in states and promote new grants and new partnerships.

Key Resources (Child Support)

Reentry Council

http://csgjusticecenter.org/nrrc/projects/firc/

Reentry MythBusters

http://csgjusticecenter.org/nrrc/projects/mythbusters/

National Reentry Resource Center

http://csgjusticecenter.org/nrrc/

Office of Child Support Enforcement (OCSE)

http://www.acf.hhs.gov/programs/css

OCSE Fact Sheet on Realistic Orders for Incarcerated Parents and State-By-State Chart

http://www.acf.hhs.gov/programs/css/resource/ realistic-child-support-orders-for-incarcerated-parents

OCSE Facts Sheet on Collaborations with Criminal Justice Agencies

http://www.acf.hhs.gov/programs/css/resource/child-support-collaboration-with-federal-criminal-justice-agencies

OCSE Fact Sheet on Access to Justice Innovations

http://www.acf.hhs.gov/programs/css/resource/access-to-justice-innovations

OCSE Turner v. Rogers Policy Guidance

http://www.acf.hhs.gov/programs/css/ resource/alternatives-to-incarceration and http://www.acf.hhs.gov/programs/css/ resource/turner-v-rogers-guidance



COUNCIL

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Justice-Involved Veterans

Veterans are not overrepresented in the criminal justice system, but their numbers are significant. An estimated one of every ten criminal defendants and inmates has served in the U.S. military. Most justice-involved Veterans are likely eligible for health care and other benefits from the U.S. Department of Veterans Affairs (VA), although their eligibility is suspended or reduced while they are incarcerated.

Accomplishments to Date

- VA has reached more than 100,000 justice-involved Veterans through direct outreach in prisons, jails, and criminal courts – including over 1,000 state and federal prisons, and the estimated 168 Veterans Treatment Courts. The purpose of this outreach is to connect Veterans with needed mental health, substance abuse, and other clinical services, where possible as an alternative to incarceration.
- VA revised its administrative policy that limited VA prison outreach to the six months prior to a Veteran's release. The revised policy allows for assessment and release planning with incarcerated Veterans earlier than six months before release, thus enhancing the odds of successful reentry.
- VA built a web-based system that will allow prison, jail, and court staff to quickly and accurately identify Veterans among their inmate or defendant populations. Called the Veteran Reentry Search Service (VRSS), the system will also prompt VA field staff to conduct outreach to the identified Veterans.

- VA produced a brief outreach video intended for Veteran jail and prison inmates, and distributed it for viewing in all state and federal prisons, as well as more than 500 local jails (and counting). Titled "Suits," the video was directed by an Operation Iraqi Freedom Veteran. It encourages incarcerated Veterans to use their time wisely by taking an active role in the reentry planning process, and informs them how to contact a VA outreach specialist for help.
- VA expanded eligibility for its health care services to include Veterans in halfway houses, work-release centers, or other reentry-focused correctional settings. These Veterans must often waive access to health care from the incarcerating authority to participate in such programs.

Agenda Moving Forward

Support Continued Expansion of Veterans Treatment Courts

The Veterans Treatment Court (VTC) model is an increasingly popular means for communities to come together to deliver needed services to Veterans in crisis. VTCs build on drug courts' demonstrated success at reducing recidivism and saving communities money, adding a peer mentoring component to harness the power of one Veteran helping another. Access to VA health care and other benefits is an integral part of the VTC concept, and VA forms part of the treatment team in all VTCs. As their numbers grow, VA will continue to support VTCs both operationally and at the national level, for example, by collaborating to develop innovative training protocols.

Partner with Criminal Justice Stakeholders to Identify and Assist Justice-Involved Veterans

VA's Veterans Reentry Search Service provides prison, jail, and court staff with a user-friendly online tool to quickly and accurately identify Veterans among their inmate or defendant populations. Widespread use of VRSS will not only inform correctional and court staff's

interactions with Veterans they serve, but will enhance VA's ability to provide efficient, targeted outreach and reentry planning assistance to Veterans in these systems. Working with local and national partners, VA will promote this valuable new resource nationwide.

Access to Legal Services

Veterans, particularly those who are homeless or at risk of homelessness, have a significant and toooften unmet need for legal services. On a recent national VA survey, homeless and formerly homeless Veterans indicated that legal services for eviction or foreclosure proceedings, child support issues, and outstanding warrants or fines accounted for three of their top ten unmet needs. Although VA cannot provide legal services directly, VA medical centers are making space available so that local legal service providers can work with Veterans where they receive health care. To date, 37 providers (including law school clinical programs, legal aid offices, and local pro bono consortia) are serving Veterans in 34 VA medical centers. VA will continue to expand its facilities' role as a place where Veterans can address their unmet legal needs.

Key Resources (Veterans)

Reentry Council

http://csgjusticecenter.org/nrrc/projects/firc/

Reentry MythBusters

http://csgjusticecenter.org/nrrc/projects/mythbusters/

National Reentry Resource Center

http://csgjusticecenter.org/nrrc/

VA Veterans Justice Outreach (VJO) Program

http://www.va.gov/HOMELESS/VJO.asp

VA Health Care for Reentry Veterans (HCRV) Program

http://www.va.gov/HOMELESS/Reentry.asp

Veterans Crisis Line

1-800-273-8255, Press 1; or www.VeteransCrisisLine.net

National Call Center for Homeless Veterans

1-877-4AID-VET (1-877-424-3838); or http://www.va.gov/homeless/nationalcallcenter.asp



COUNCIL

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Public Safety (State/Local Focus)

Approximately two million adults are incarcerated in state prisons and local jails, costing U.S. taxpayers more than \$75 billion each year. The vast majority of these individuals eventually return to their home communities.

In fact, each year nearly 700,000 individuals are released from state prisons; millions more cycle through local jails. Nationally, two out of every three people released from state prisons are rearrested for a new offense and about half are reincarcerated within three years. When reentry fails, the societal and economic costs are high. Reducing recidivism – a central goal of the Reentry Council – is critical for increasing long-term public safety and lowering corrections costs.

Accomplishments to Date

- Since FY09, there have been nearly 500 Second Chance Act (SCA) grant awards that total over \$250 million, supporting reentry efforts in 48 states.
- A national forum on reentry and recidivism reduction was convened in December 2011. Teams of policymakers from all 50 states attended this results-oriented event to set goals and develop strategies for reducing recidivism.
- In FY12, a new Statewide Recidivism Reduction (SRR) grant track was established, funding seven state corrections agencies to plan and implement statewide recidivism reduction strategies.
- The Department of Justice's (DOJ) Bureau of Justice
 Assistance (BJA) also established the SMART Probation
 program, funding nine sites in FY12 to pilot innovative
 evidence-based strategies to reduce recidivism among
 probationers.
- Since its inception, the Justice Reinvestment Initiative's (JRI) bipartisan, interbranch, and data-driven approach has helped policymakers from over 27 states and 18 counties increase public safety and reduce corrections costs.
- The BJA-supported National Reentry Resource Center (NRRC) released a <u>policy brief</u> in September 2012 highlighting seven states that reported significant declines in their three-year recidivism rates.

- A series of "<u>Recidivism Reduction Checklists</u>" were recently released to help state leaders evaluate strengths and weaknesses in their reentry efforts and develop recidivism reduction plans.
- The Office of Community Oriented Policing Services (COPS) and the Council of State Governments Justice Center released <u>Planning and Assessing a Law</u> <u>Enforcement Reentry Strategy</u> to help policing personnel and their partners facilitate successful reentry in their jurisdictions.
- The National Institute of Corrections (NIC) funded intensive technical assistance for seven sites to develop the capacity to implement "Evidence-Based Decision Making in Local Criminal Justice Systems." The delivery of technical assistance and tools have led criminal justice stakeholders to increased use of research and data to guide their criminal justice decisions, resulting in system improvements that include decreased jail and prison bed utilization.
- NIC funded intensive technical assistance to six sites for the Transition from Jail to Community Initiative (TJC).
 The TJC model is designed to advance collaboration between jails and communities to enhance public safety, reduce recidivism, and improve reintegration processes.

Snapshot

Agenda Moving Forward

Ensure that Reentry Efforts Generate Reductions in Recidivism

The BJA-supported NRRC will continue to develop and disseminate tools and resources to help state officials implement recidivism reduction strategies. NRRC staff are working intensively with the seven SRR grantees to help them develop statewide recidivism reduction plans, and will document important lessons learned from those states to help inform the broader field.

Promote Cost-Effective Approaches to Enhancing Public Safety

Americans have made it clear they want a correctional system that holds people accountable and keeps communities safe, and in a way that makes the most of their tax dollars. A primary goal of JRI is ensuring that the millions of dollars in cost savings from justice reinvestment legislative changes are effectively reinvested in programs and policies that strengthen public safety. A new JRI "lessons learned" report can help inform the work in future JRI sites, as well as in the broader corrections field.

Strengthen Community Corrections Policies and Practices

Recognizing that about five million individuals (or one in fifty) are on probation or parole in the U.S., strengthening community corrections is a priority for the DOJ and the NRRC. Grantee work will continue to focus on promoting effective community supervision practices that increase public safety.

Highlight Effective Law Enforcement Reentry Strategies

A new report, <u>Lessons Learned: Planning and Assessing a Law Enforcement Reentry Strategy</u>, developed with support from the COPS Office, describes how four law enforcement agencies used the principles outlined in <u>Planning and Assessing a Law Enforcement Reentry Strategy</u> to engage in local-level reentry partnerships in order to reduce crime and increase public safety. DOJ will continue to assist law enforcement agencies in engaging in reentry efforts in their jurisdictions.

Key Resources (Public Safety)

Reentry Council

http://csgjusticecenter.org/nrrc/projects/firc/

National Reentry Resource Center

http://csgjusticecenter.org/nrrc/

The National Summit on Justice Reinvestment and Public Safety

http://csgjusticecenter.org/justice-reinvestment/
report/

Planning and Assessing a Law Enforcement Reentry Strategy Online Toolkit

http://whatworks.csgjusticecenter.org/law_enforcement_toolkit

Recidivism Reduction Checklist

http://csgjusticecenter.org/reentry/reentry-checklists/

Lessons from the States: Reducing Recidivism and Curbing Corrections Costs through Justice Reinvestment

http://csgjusticecenter.org/jr/publications/lessonsfrom-the-states/

States Report Reductions in Recidivism

http://csgjusticecenter.org/nrrc/publications/ states-report-reductions-in-recidivism-2/

National Institute of Corrections

www.nicic.gov

Appendix B: EmployeeScreenIQ Survey Report 2014



SURVEY 2 14 REPORT 2 14

The Unvarnished Truth:

2014 Top Trends in Employment Background Checks

Conducted and Reported by EmployeeScreenIQ





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Questions & Responses
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Question 2: What types of conviction records would disqualify a candidate from employment at your company? (Select all that apply.)
Question 3: If you were considering hiring a candidate whose background check contained a troubling criminal conviction, which of the following would make your organization more likely to hire him/her? (Select all that apply.)
Question 4: Of your candidates who are found to have criminal convictions, estimate the percentage that you disqualify as a result of those convictions
Question 5: When determining the hiring eligibility of your candidates, how far back in time do you search for criminal convictions?
Question 6: How has the adoption of the EEOC's guidance on employers' use of criminal background checks affected your hiring process? (Select all that apply.)
Question 7: Do you ask candidates to self-disclose past criminal convictions on their job applications?
Question 8: If a candidate self-disclosed a criminal conviction prior to an employment background check:
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ABOUT THE 2014

Once again, we present the findings of EmployeeScreenIQ's annual survey of U.S.-based employers regarding their use of employment background checks. Nearly 600 individuals representing a wide range of companies completed the survey in late 2013 and early 2014. These employers use a variety of national and regional firms to conduct their background checks.

As with the past four surveys, the 2014 survey was designed to provide a reliable snapshot of:

- How participants currently utilize background checks
- How they respond to adverse findings on background checks
- Their paramount screening-related concerns
- Their practices concerning Fair Credit Reporting Act responsibilities, Equal Employment Opportunity Commission (EEOC) guidance and candidates self-disclosing criminal records

Individuals who participated in our survey included C-suite executives (10%), managers (28%), directors (22%) and others.



MAIN 2014 FINDINGS 2014

The 2014 survey results again confirm that employers continue to rely upon background checks to protect themselves, their workforces and their customers. Here are a few high-level findings from this year's survey:



Criminal Convictions Under-Reported?

59% said that criminal convictions are reported on just 5% or less of their background checks. This estimate is significantly lower than the average "hit rate" (23%) of thousands of employers worldwide whom EmployeeScreenIQ serves. We believe this discrepancy is largely due to two possibilities: 1) a lack of thoroughness in the information that some screening providers offer to participants, and 2) the desire by some companies to save money or expedite turnaround time by conducting less exhaustive background searches.



Looking Beyond Criminal Records

Almost half of respondents (45%) said that job candidates with criminal records are not hired due to their indiscretions a mere 5% of the time or less. As in our past surveys, this finding again supports employers' longstanding assertions that they often look beyond an applicant's criminal past and that qualifications, references, and interviewing skills also greatly influence hiring decisions.



Adoption Rates for EEOC Guidance on the Rise

A majority of this year's respondents (88%) have adopted the EEOC's guidance on the use of criminal background checks. This is a significant jump from last year's survey, which found that just 32% of respondents adopted the guidance at that time.





Still Asking for Self-Disclosure

Despite the rise in adoption of the EEOC's guidelines, a majority of respondents (66%) continue to ask candidates to self-disclose past criminal convictions on job applications—and a total of 78% ask at some point during the hiring process. This continues despite the EEOC's recommendation to refrain from asking for self-disclosure on the job application in addition to state and municipal laws that outright ban the practice.



Employers Appreciate Knowing

Just 8% of respondents indicated that job candidates are automatically disqualified when they self-disclose a criminal conviction prior to an employment background check.



Organizations at Risk

Nearly 40% of respondents do not send pre-adverse action notices to candidates who are not hired based in part on a criminal conviction. This is a direct violation of a federal statute—the Fair Credit Reporting Act (FCRA) and puts organizations at risk for class action lawsuits and other legal actions.



Giving Candidates a Chance To Explain

A total of 64% of respondents perform individualized assessments for candidates who have conviction records. While the 36% who do not perform individualized assessments may not be violating the letter of the law, they are at risk for claims of discrimination under title VII according to the EEOC guidance.



Online Snooping Isn't Widespread

A substantial portion of respondents (38%) search online media for information about their candidates as part of the hiring process. It's not an insignificant portion but the vast majority of employers forego this activity. 80% of those who check online sites turn to LinkedIn for information.





Resume Lies Becoming a Deal-Breaker

Half of all respondents reject 90% or more candidates when lies are discovered on their resumes. Another 23% of respondents estimate they hire candidates only 11% to 20% of the time when resume distortions are found. These findings strongly depart from those of last year's survey, which indicated that employers were rather lenient regarding resume distortions.



Pervasive Credit Reports? No Way!

Contrary to the popular belief that employers check the credit history of everyone they hire, only 14% of respondents said they run credit checks on all new hires. A whopping 57% of respondents do not use credit reports as part of their hiring process. There are now 10 states that have enacted regulations curbing the use of credit reports, which could be partly responsible for their less widespread use.

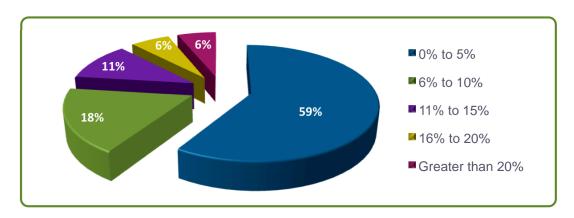


QUESTIONS 2014 &RESPONSES 2014

Question 1: What percentage of your candidates do you estimate have criminal convictions reported on their employment background checks?

As with last year's survey, the vast majority of respondents said that criminal convictions are rarely reported on their job candidates' background checks. Specifically, 59% said that criminal convictions are reported on just 5% or less of their background checks, while 18% said that convictions are reported on 6% to 10% of their checks. These estimates are significantly lower than the "hit rate" of thousands of employers worldwide who work with EmployeeScreenIQ. Collectively, our clients averaged a 23% criminal conviction hit rate in 2013.

Employers who use less-exhaustive background checks could be putting their organizations at serious risk with lower quality results



This discrepancy could be due to less thorough information gathering practices used by some screening providers or employers conducting their own background searches in order to save money or expedite turnaround time. No matter the reason, employers who use less-exhaustive background checks could be putting their organizations at serious risk with lower quality results.



Question 2: What types of conviction records would disqualify a candidate from employment at your company? (Select all that apply.)



There is a significant decrease in concerns related to drug offenses

As we have reported in past years, it's not surprising that respondents expressed greater concern over convictions (particularly felony convictions) related to crimes of violence, theft, and dishonesty. However, there is a significant decrease in concerns related to drug offenses. Based on the findings, the bottom line is that an overwhelming majority of respondents are hesitant to hire candidates who have felony convictions in their past. And while felonies are seemingly of greatest concern, this data also supports the notion that misdemeanor convictions matter to employers. Nearly half of all employers are concerned about misdemeanor convictions related to crimes of violence or theft and dishonesty.

Notably, the percentages in almost every category rose over those of last year's results. This may indicate a generally heightened sense of awareness and/or concern regarding incidents of workplace violence, employee theft, and negligent hiring lawsuits.

An interesting takeaway from the respondents' comments for this question is that many employers desire to be more flexible in their hiring decisions. However, external factors such as federal and state regulations or client contractual obligations sometimes hinder their flexibility. This is somewhat





ironic, as some governmental bodies are going after employers for being inflexible, while others are creating rules for stricter hiring standards.

A selection of respondents' comments:

"We pride ourselves on high integrity in the organization. Safety is paramount. Felony convictions in the above areas could put not only our employees but the public at risk."

"There are no automatic disqualifiers for us. We look at the whole picture to determine whether the candidate is hired. We consider how long ago the convictions were, employment history, relevance of offense to job (in theft instances), etc. First, however, is the issue of whether the candidate discloses the convictions on their employment application."

"Every candidate's record is reviewed on a case-by-case basis as related to the specific job for which they are applying. For example, if they apply for a cashier's position, they cannot have any theft convictions."

"We have a contract with our clients that we will not hire any felons and anyone having misdemeanor dealing with theft, fraud or violence."

"We review each applicant individually. We don't automatically disqualify a candidate for the above—rather, we make individual decisions based on interview, attitude, history, etc. We believe in second chances but are very concerned about the safety of our employees and company too."

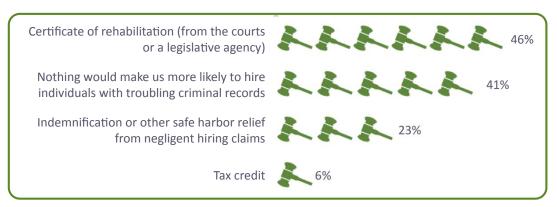
"We are a law enforcement agency, so we do not hire people with felony convictions or convictions of crimes involving violence or dishonesty."

"We have employees who work in close quarters and handle and/or are exposed to dangerous work conditions that require strict compliance with safety standards and reporting. We cannot afford to employ folks whose background indicate a propensity for violence, dishonesty or use of controlled substances that could impair good judgment."

"The candidates we hire will have direct patient care and would have access to various types of drugs including controlled substance drugs. We have to be very selective with candidates that may have been violent and have a history of drug convictions."



Question 3: If you were considering hiring a candidate whose background check contained a troubling criminal conviction, which of the following would make your organization more likely to hire him/her? (Select all that apply.)



Although employers are increasingly concerned about protecting their organizations and not exposing themselves to unnecessary risks, there are programs that make hiring individuals with criminal records a less risky proposition. While these programs exist, it is widely held that they are fairly limited and woefully underutilized.

A selection of respondents' comments:

"We would be more likely to hire someone for their actions after the criminal conviction. Did they change their life around? Are they making better decisions? What were the circumstances surrounding the conviction."

"It really depends. We are a health care organization so we can't take any chances with patient safety, but we do have lots of jobs that do not involve direct patient care, so we may be more lenient on some of those roles."

"We are mandated by State and Federal laws that require us to not hire these individuals."

"As mentioned, it is mandated by state law that certain convictions disqualify a candidate. This answer does depend on the nature of the crime. Some can be hired if rehabilitated."

"We are highly regulated. We cannot hire someone with a felony conviction."

"The need for an employee is not worth the risk of hiring someone with a 'troubling criminal conviction'."





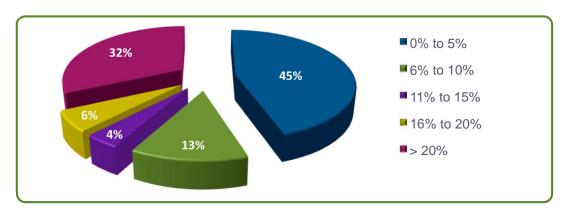
"Too many qualified candidates looking for jobs. Don't need to be involved with people with a troubled legal history."

"If the conviction was deemed a disqualifying event, then we would not hire the person. When potentially disqualifying information is revealed, we do an individual review to consider the offense and its job relatedness and confer with the hiring manager and an attorney in our Law Department."

"There is too high a risk that the person could resort to prior behaviors risking fellow employees and thus presenting considerable liability issues for the Company. We are in a no-win situation with current legislation and litigation risks.

"A certificate or tax credit wouldn't affect us one way or the other. Our main concern is providing a safe working and learning environment, and we take that obligation seriously."

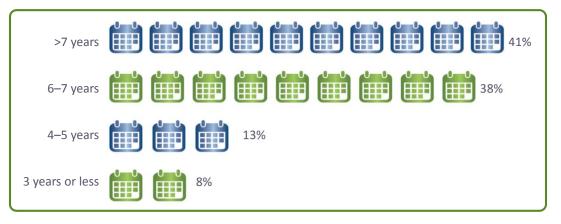
Question 4: Of your candidates who are found to have criminal convictions, estimate the percentage that you disqualify as a result of those convictions.



Employers aren't simply disqualifying vast numbers of job candidates out of hand due to criminal convictions These results reinforce the impression that employers aren't simply disqualifying vast numbers of job candidates out of hand due to criminal convictions. It appears from the vast majority of comments we received in Question 2 that employers are considering other factors, including the severity of the crimes, the crimes' relation to the job applied for, the time passed since the conviction and whether the candidate is a repeat offender. In fact, these are all considerations that the EEOC recommends employers use when making hiring decisions.



Question 5: When determining the hiring eligibility of your candidates, how far back in time do you search for criminal convictions?



These results are extremely similar to those of last year's survey. Almost half of the respondents go beyond seven years in their criminal background checks, an ongoing indication of the heightened care employers are applying to their hiring practices. However, based on the responses to Question 1 of the survey—in which 77% of respondents estimate that they saw convictions for 10% or less of their candidates—we wonder how many of these employers are finding the records they're interested in evaluating. According to our research, 67% of all criminal records that we report have occurred within the past seven years. Twelve percent of all records reported are seven to 10 years old, 18% reported are 11 to 20 years old and the remaining 3% are older than 20 years.

The survey responses make one thing obvious: most employers want to consider as much data as possible to make an informed hiring decision.

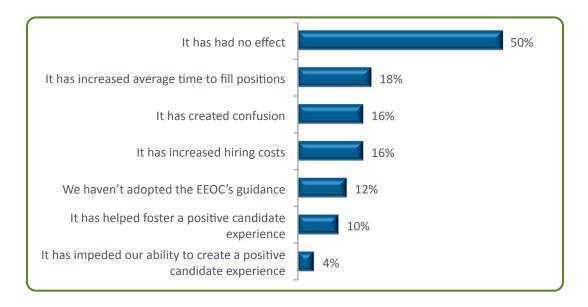
Question 6: How has the adoption of the EEOC's guidance on employers' use of criminal background checks affected your hiring process? (Select all that apply.)

While half of all respondents indicated that the EEOC's guidance has had no impact on their hiring process—and another 12% haven't adopted the guidance—the remainder are pretty clearly split in their assessment of the guidance. Ten percent said it has had a positive impact but 54% said that it has a negative impact on costs, time-to-fill, clarity, or the candidate experience in general.

Most employers want to consider as much data as possible to make an informed hiring decision

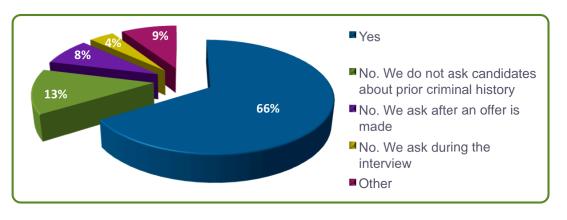






Overall, 88% of respondents this year indicated that they've adopted the EEOC's guidance as opposed to just 32% of respondents at the time of last year's survey.

Question 7: Do you ask candidates to self-disclose past criminal convictions on their job applications?



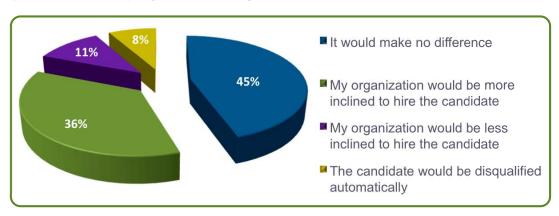
In spite of the EEOC's recommendation to remove the question that asks applicants to self-disclose past criminal convictions and a myriad of similar state and municipal laws, 66% of respondents continue to ask candidates to self-disclose past criminal convictions on job applications—and a total of 78% ask at some point during the hiring process.

It is important to point out that asking about criminal history on a job application is still legal in most jurisdictions—but there are a growing



number of states and cities prohibiting the practice. Our sense is that these so-called ban the box laws will continue to be adopted throughout the country at both the state and city level. And while these laws may force employers to remove the question from the job application, our advice for employers is to ask the question later in the hiring process.

Question 8: If a candidate self-disclosed a criminal conviction prior to an employment background check:



These percentages are fairly similar to those from last year's survey but there are notable variances. "It would make no difference" jumped up by 5% over 2013's survey, while the "more inclined to hire" response fell by 16%. Only 8% of respondents indicated that the candidate would be automatically disqualified. Overall, the majority of employers are indicating that self-disclosure doesn't hurt a candidate's chances of employment—and may, in fact, improve them.

A selection of respondents' comments:

- "We rescind offers for failure to disclose so self-disclosing any criminal conviction is a requirement."
- "We look for honesty in considering candidates. Being up-front and honest about convictions is important."
- "If they do not disclose and background hits, then it is falsifying the application."
- "Although I would appreciate their honesty, if a candidate had a disqualifying conviction, we would not hire."

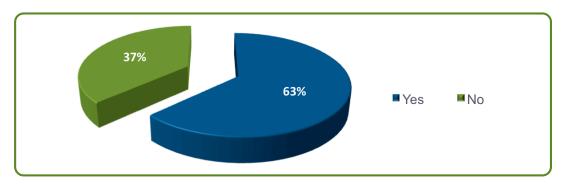




"It raises a 'red-flag' regardless since it's just as easy to be scammed by someone who exhibits an open response. You just cannot be sure the person has been rehabilitated."

"Even with bringing it up before if it is one of the ones we don't allow it will not pass. Letting me know before hand is good but doesn't make you exempt."

Question 9: If you decide not to hire a candidate based in part on a criminal conviction, do you send a pre-adverse action notice to them?



Frankly, we're concerned that nearly 40% of respondents *do not* send a pre-adverse action notice to candidates who are not hired based in part on a criminal conviction. These respondents are, by their own admission, violating the law and putting their organizations at risk for violating a basic principle of the Fair Credit Reporting Act (FCRA). And make no mistake—a significant number of class action lawsuits are related to employers violating this tenet of the FCRA. We spend a considerable amount of time educating employers on this process and our general sense is that those not in compliance do not realize they're executing the process improperly. All employers who do not send pre-adverse action notifications should seek immediate guidance from their background screening partner or in-house legal counsel.

Question 10: Do you perform individualized assessments for candidates with conviction records (so they can explain the circumstances of their records)?

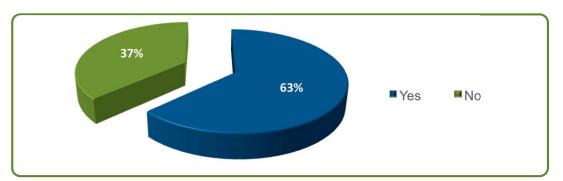
Clearly, employers already had practices in place or are adapting their hiring practices to incorporate the recommendations suggested by the

Those not in compliance with the FCRA do not realize they're executing the process improperly



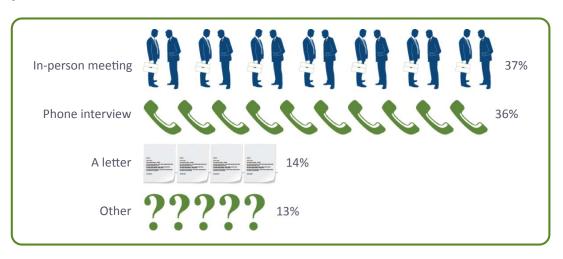


EEOC. We believe the adoption rate will continue to grow in the coming years unless the courts reject the guidance.



Similar to the ban the box issue, the EEOC guidance on individualized assessments was a *recommendation*, not a mandate. Therefore, those who have not developed a process in this regard are not violating any laws. Even so, we would be remiss if we didn't point out that demonstrating compliance with this recommendation is the clearest path to insulating yourself from discrimination claims.

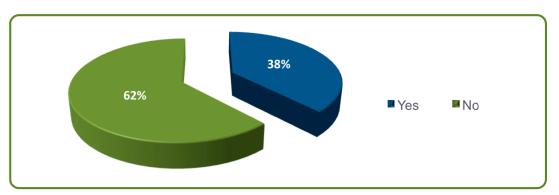
Question 11: If you answered "yes" to question 10, how do you perform the individualized assessment?



While no governmental or legal body has yet clarified how individualized assessments are to be conducted (or what the "preferred" method might be), the majority of respondents are using either in-person or telephone interviews. Regardless of how you conduct these assessments, we suggest that you clearly document your policy and process.



Question 12: Does your organization conduct online media searches for candidates as part of your hiring process?

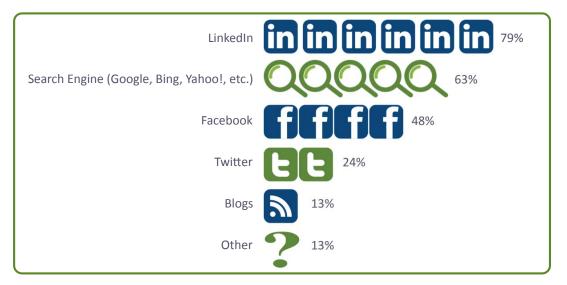


The business world's enthusiastic embrace of online media does not translate to the hiring process

Once again, we see that the business world's enthusiastic embrace of online media does *not* translate to the hiring process. As in last year's survey, nearly two-thirds of respondents say they do not consult online media when researching their candidates. However, 38% of employers—a significant portion—do consult some form of online media.

We must point out that other surveys have shown that employers are checking up on potential employees through Google and other online searches. Whether or not employers consider these searches "background checks," the FTC has ruled that some social media data aggregators are, in fact, subject to the same laws as traditional background checks.

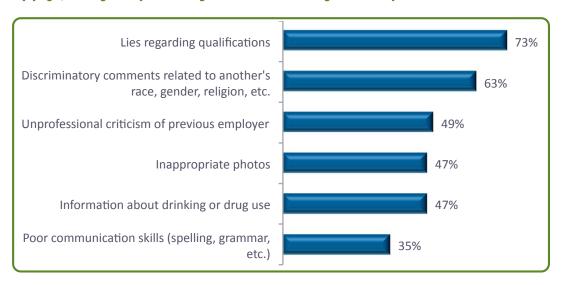
Question 13: If you answered "yes" to question 12, which sites do you use? (Select all that apply.)





As you might expect, LinkedIn is the go-to site for most employers when it comes to screening job candidates, which is understandable when you consider that employers are most concerned about lies regarding qualifications (see Question 14). A vast majority of these employers also turn to search engines such as Google, Bing, and Yahoo! Also noteworthy is the use of both Facebook and Twitter.

Question 14: What information found during an online media search would cause you to disqualify a candidate? (Select all that apply.) Only respond if you answered "yes" to question 12.



The majority would disqualify candidates for discriminatory comments

While lies about qualifications are the most troubling details that respondents find online, the majority would also disqualify candidates for discriminatory comments—and almost half disqualify candidates for unprofessional criticism of past employers, information related to drug and alcohol use, and inappropriate photos. Clearly, employers are looking for clues about negative traits that could cross over into the workplace or tarnish their companies' reputations.

Question 15: What information found in an online media search would help support your decision to hire a candidate? (Select all that apply.)

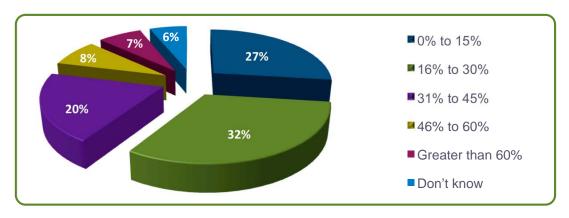
Again, there are no real surprises in these results but they reinforce the notion that qualifications and professionalism are paramount in employers' ultimate selection of job candidates. These results also support the



contention that employers are not using online searches only to disqualify candidates but to help validate their hiring decisions.



Question 16: What percentage of your candidates do you estimate distort information on their resumes?



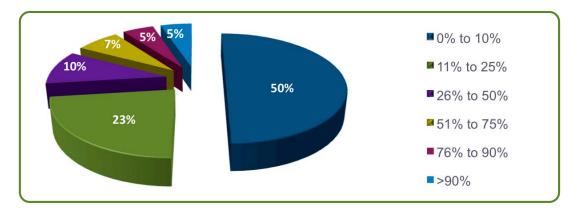
When comparing this year's results to last year's, the largest share of respondents shifted from the first category (0% to 15%) to the second category (16% to 30%), despite the total of both categories remaining almost identical. Perhaps employers are becoming more aware of the widespread problem of job seekers distorting the truth on resumes.

Interestingly, most job seekers are well aware that employers use background checks to review potential new hires. Even so, individuals continue to "tweak" their resumes and hope they won't be caught. Clearly, employers must remain vigilant in their screening practices.



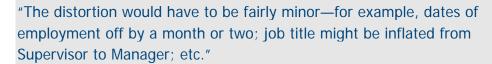


Question 17: What percentage of candidates do you estimate are hired in spite of distortions on their resumes?



This year's findings indicate that employers consider resume distortions as a serious breach of trust and confidence, which directly impacts a candidates' chances of getting hired. In fact, this data suggests employers are more concerned about resume distortions than criminal convictions. According to half of the respondents, only a small percentage (10% or less) of candidates get hired in spite of resume lies. And only 10% of employers hire these candidates with any frequency (76% of the time or more). This data strongly departs from our 2013 findings, in which more than half of all respondents indicated that very few candidates who distorted information on their resumes were not hired. This year's findings show that the situation has reversed dramatically.

A selection of respondents' comments:



"We generally don't hire candidates with major distortions on their resumes. I query minor distortions and verify them."

"If we are aware of a purposeful distortion of resume information, we will likely not proceed with that candidate due to dishonesty."

"If we know of distortions of qualifications or work history, we would likely not hire them. Distortions of skills and knowledge often do not become clear until after a hire."



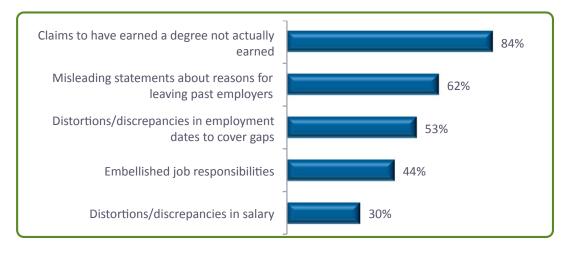


"If someone blatantly misrepresented themselves we would not hire them. Most people attempt to increase their salary."

"If the distortion is relatively immaterial in comparison to the greater sum of their experience/background (such as a date being off by a few months, etc.), it makes little sense to penalize the candidate for what may be a simple oversight."

"We would not hire someone that lies on their resume. Not a good sign of character."

Question 18: What types of resume distortions/discrepancies would cause you not to hire a candidate? (Select all that apply.)



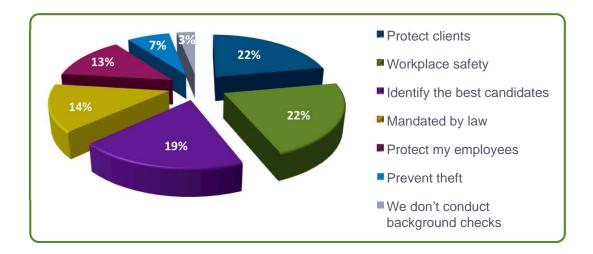
Although lying about earning a degree topped respondents' concerns (84%), our experience shows that only about 8% of candidates actually lie in this way on their resumes. The findings also show that respondents are far less troubled by candidates distorting their salaries or job responsibilities than they are about distorting the reasons for leaving past employers or lying about earning a degree. Covering up gaps in employment dates fell right in the middle of the spectrum.

Question 19: What is the primary reason you conduct employment background checks?

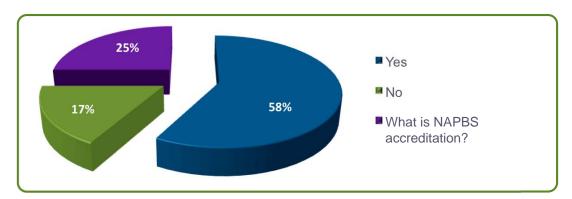
This question revealed that respondents are conducting employment background checks for a number of different reasons—and no single reason is an overwhelming favorite.

Only about 8% of candidates actually lie about their degree on their resumes





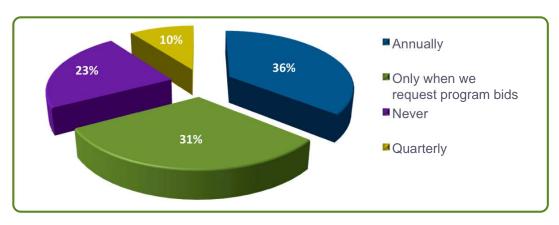
Question 20: Is it important that your employment background screening provider be accredited by the National Association of Professional Background Screeners (NAPBS)?



While the majority of respondents (58%) indicated they consider NAPBS accreditation important for their screening providers, more than 40% of respondents have no idea what this important accreditation is or they don't care about it. For those who do not know, it's a critical "seal of approval" that has been achieved by less than 2% of all background screening providers, and it ensures that these providers are using practices and procedures that comply with industry best practices. You can learn more about the NAPBS and accreditation at the organization's website, www.napbs.com.



Question 21: How often do you evaluate your employment background screening program for quality, compliance, accuracy, etc.?



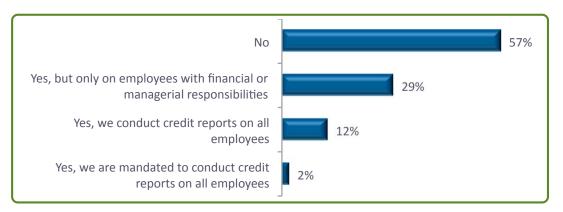
Employers should regularly audit their screening programs to help protect themselves and their people The good news is that a combined 46% of respondents are evaluating their background screening programs on a regular basis—annually (36%) or quarterly (10%). The bad news is that 54% of respondents are not taking this prudent step to protect their organizations, with a startling 23% saying they *never* do so. Employers should regularly audit their screening programs to help protect themselves and their people. Take note: Not long ago, a large and well-known consumer reporting agency was assessed \$2.6 million in penalties by the Federal Trade Commission for failing to use reasonable procedures to assure the accuracy of its criminal background checks—a violation of the Fair Credit Reporting Act. If you'd like suggestions on how to better protect your company, download a copy of our article, *HR's Guide to Effective Evaluation of Background Screening Providers*.

In comparison to last year's survey results, the largest fluctuation was in the percentage of respondents who said "annually" (which rose by 10% this year) and the percentage of respondents who said "never" (which dropped by 9% this year). There was almost no comparative change in the other responses.



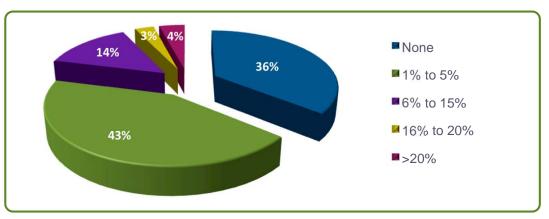


Question 22: Does your organization utilize employment credit reports in your hiring process?



More than half of all respondents indicated that they do not use credit reports as part of their hiring process, and only 14% say that they always use credit reports. These findings are notable because they fly in the face of "common wisdom" and quite a few media reports, which hold that employers everywhere commonly use credit reports when looking into the backgrounds of job candidates. Obviously, this is not the case.

Question 23: If you answered "yes" to question 22, what percentage of candidates do you estimate are denied employment based on the results of credit reports?

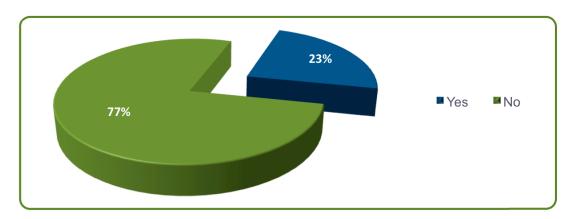


Of the respondents who do utilize credit reports as a hiring tool, a combined 79% frequently do *not* deny employment to candidates because of these checks. Again, this may fly in the face of conventional wisdom. Only 4% of respondents said that they deny employment 20% of the time or more based on credit reports.

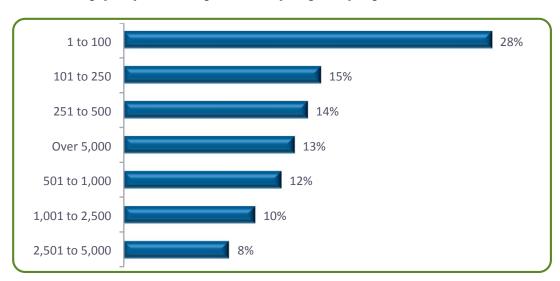


Demographics

Are you an EmployeeScreenIQ client?



How many people does your company employ?





15 YRS
MILLIONS OF CHECKS
COMPLETED

99.5% CLIENT RETENTION

28% CRIMINAL HIT RATE

LESS 2%
THAN 2%
ARE ACCREDITED

With EmployeeScreenIQ, you'll never worry about the quality, accuracy and comprehensiveness of your criminal background searches. And you'll enjoy all of these critical benefits:

- ✓ Strict Oversight and Reporting Accuracy
- ✓ A Better Candidate Experience

✓ Data Protection and Security

- ✓ Flexibility and Customization
- ✓ Rigorous Compliance and Best Practices
- ✓ Award-Winning Client Service

Learn more about **EmployeeScreenIQ**:

See our comprehensive list of SERVICES.

Review our PLANS & PRICING. Discover what makes our **TECHNOLOGY** so unique.

About EmployeeScreenIQ

EmployeeScreenIQ helps employers make smart hiring decisions. The company achieves this through a comprehensive suite of employment background screening services including the industry's most thorough and accurate criminal background checks, resume verification services and substance abuse screening. EmployeeScreenIQ is accredited by the National Association of Professional Background Screeners (NAPBS), a distinction earned by less than two percent of all employment screening companies. For more information, visit www.EmployeeScreen.com.



Appendix C: Court Order in Waldon v Cincinnati Public Schools



941 F.Supp.2d 884, 118 Fair Empl.Prac.Cas. (BNA) 188, 298 Ed. Law Rep. 278 (Cite as: 941 F.Supp.2d 884)

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United States District Court, S.D. Ohio, Western Division. Gregory WALDON, et al., Plaintiffs,

v.

CINCINNATI PUBLIC SCHOOLS, Defendant.

April 24, 2013.

Order Denying Motion to Certify Appeal May 28, 2013.

No. 1:12-CV-00677.

Background: After being discharged pursuant to a state law that required the termination of school employees who had been convicted of specified crimes, former public school employees, who were African-American, filed suit, alleging disparate impact employment discrimination in violation of Title VII. School moved to dismiss for failure to state a claim.

Holdings: The District Court, S. Arthur Spiegel, Senior District Judge, held that:

discharged employees adequately pleaded a case of disparate impact employment discrimination, and
 school failed to show that its practice was job related and consistent with business necessity.

Motion denied.

West Headnotes

[1] Civil Rights 78 🖘 1140

78 Civil Rights

78II Employment Practices

78k1140 k. Disparate impact. Most Cited

Cases

"Disparate impact," a type of Title VII employment discrimination, results from facially neutral employment practices that have a disproportionately negative effect on certain protected groups and which cannot be justified by business necessity; disparate impact does not require a showing of discriminatory motive, since the claim is based on statistical evidence of systematic discrimination. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(k)(1)(A)(i).

[2] Civil Rights 78 🖘 1140

78 Civil Rights

78II Employment Practices

78k1140 k. Disparate impact. Most Cited

Cases

Former public school employees, who were discharged as a result of public school's implementation of state law requiring termination of school employees who had been convicted of specified crimes, adequately pleaded a case of disparate impact employment discrimination in violation of Title VII; of the 10 employees terminated, nine, including the plaintiffs, were African-American. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(k)(1)(A)(i).

[3] Civil Rights 78 \$\infty\$ 1140

78 Civil Rights

78II Employment Practices

78k1140 k. Disparate impact. Most Cited

Cases

Where facially neutral employment practice allegedly has a disparate impact under Title VII, then plaintiffs have alleged a prima facie case. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(k)(1)(A)(i).

[4] Civil Rights 78 🖘 1703

78 Civil Rights

78V State and Local Remedies

78k1703 k. Federal preemption. Most Cited

Cases

States 360 @== 18.49

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.45 Labor and Employment

360k18.49 k. Discrimination; retaliat-

ory discharge. Most Cited Cases

State law need not "purport" to discriminate in order to be trumped by Title VII. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(k)(1)(A)(i).

[5] Civil Rights 78 \$\infty\$ 1140

78 Civil Rights

78II Employment Practices

78k1140 k. Disparate impact. Most Cited

Cases

Civil Rights 78 € 1529

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1529 k. Defenses in general. Most Cited Cases

Public school failed to show that its implementation of state law requiring termination of school employees who had been convicted of specified crimes was job related and consistent with a business necessity defense after African-American employees made a prima facie showing of disparate impact employment discrimination under Title VII; policy operated to bar employment when plaintiffs' offenses were remote in time and they had demonstrated decades of good performance, plaintiffs posed no obvious risk due to their past convictions and were valuable and respected employees, and school could have raised questions with the state board of education regarding the stark disparity it confronted. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(k)(1)(A)(i)

[6] Civil Rights 78 \$\infty\$ 1529

78 Civil Rights

78IV Remedies Under Federal Employment Dis-

crimination Statutes

78k1529 k. Defenses in general. Most Cited Cases

"Business necessity," as a defense against a prima facie showing of disparate impact employment discrimination, is a narrow concept, and normally an employment practice must have a manifest relationship to the employment in question. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(k)(1)(A)(i).

[7] Federal Courts 170B € 3373

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(C) Decisions Reviewable

170BXVII(C)4 Certification and Leave to

Appeal

170Bk3372 Particular Actions and

Rulings

170Bk3373 k. In general. Most

Cited Cases

(Formerly 170Bk660.5)

Order denying public school's motion to dismiss former African-American employees' Title VII disparate impact claim based on their discharge under state law that required the termination of school employees who had been convicted of specified crimes would not be certified for interlocutory review; there was no significant difference of legal opinion as to whether Title VII liability extended to implementation of facially neutral state mandates, and an interlocutory appeal was as likely to cause material delay as it is to cause material advancement of the termination of the litigation. 28 U.S.C.A. § 1292(b); Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

*885 David Scott Mann, Michael T. Mann, Cincinnati, OH, for Plaintiffs.

Mark Joseph Stepaniak, Ryan Michael Martin, Taft Stettinius & Hollister, Cincinnati, OH, Daniel Joseph Hoying, Cincinnati Public Schools, Cincinnati, OH, for Defendant.

OPINION AND ORDER

S. ARTHUR SPIEGEL, Senior District Judge.

This matter is before the Court on Defendant Cincinnati Public Schools' Motion to Dismiss (doc. 6), Plaintiffs' Response in Opposition (doc. 7), and Defendants' Reply (doc. 8). For the reasons indicated herein, the Court DENIES Defendant's motion.

*886 I. Background

The state of Ohio enacted legislation, H.B. 190, effective November 14, 2007, which amended Ohio law to require criminal background checks of current school employees, even those whose duties did not involve the care, custody, or control of children (doc. 1). If an employee had been convicted of any of a number of specified crimes, no matter how far in the past they occurred, nor how little they related to the employee's present qualifications, the legislation required the employee to be terminated (*Id.*).

Plaintiffs Gregory Waldon and Eartha Britton both worked for many years and provided Defendant Cincinnati Public Schools with excellent service (*Id.*). In late 2008, Defendant discharged Plaintiffs pursuant to the new law, based on criminal matters that were decades old (*Id.*). Both Plaintiffs are African–American (*Id.*). At the time of Plaintiffs' discharge there was no exception allowing for Plaintiffs to demonstrate rehabilitation so as to preserve their employment (*Id.*). Defendant terminated a total of ten employees, nine of whom were African–American.

FN1. In 1977, Plaintiff Gregory Waldon was found guilty of felonious assault and incarcerated for two years (doc. 1). Defendant's civil service office supported Waldon in proceedings before the Ohio Parole Board, indicating it would be happy to offer Waldon employment, which it did in early 1980 (*Id.*). Waldon worked for nearly thirty years for Defendant, most recently as a "systems monitor," with no contact with school children (*Id.*). Waldon's performance was excellent and of value to Defendant and to the public (*Id.*).

Plaintiff Eartha Britton was convicted in 1983 of acting as a go-between in the purchase and sale of \$5.00 of marijuana (*Id.*). She worked for Defendant for eighteen years as an instructional assistant (*Id.*).

FN2. However, after their termination the rule was amended so as to allow those in Plaintiffs' shoes to demonstrate rehabilitation. O.A.C. 3301–20–03. In fact, Plaintiffs were both eligible to apply for reemployment, but did not.

Plaintiffs bring claims for racial discrimination in violation of federal and state law, contending their terminations were based on state legislation that had a racially discriminatory impact (doc. 1). Defendant filed the instant motion to dismiss, contending Plaintiffs have failed to state a claim for which relief can be granted, essentially because it was merely complying with a state mandate (doc. 6). Plaintiffs have responded, and Defendant has replied (docs. 7, 8) such that this matter is ripe for decision.

II. Applicable Legal Standard

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) requires the Court to determine whether a cognizable claim has been pled in the complaint. The basic federal pleading requirement is contained in Fed.R.Civ.P. 8(a), which requires that a pleading "contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir.1976); Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007). In its scrutiny of the complaint, the Court must construe all well-pleaded facts liberally in favor of the party opposing the motion. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). A complaint survives a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Courie v. Alcoa Wheel & Forged Products, 577 F.3d 625, 629-30 (6th

Cir.2009), *quoting Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

*887 A motion to dismiss is therefore a vehicle to screen out those cases that are impossible as well as those that are implausible. *Courie*, 577 F.3d at 629–30, citing Robert G. Bone, *Twombly*, *Pleading Rules*, and the Regulation of Court Access, 94 IOWA L. REV. 873, 887–90 (2009). A claim is facially plausible when the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant is liable for the conduct alleged. *Iqbal*, 129 S.Ct. at 1949. Plausibility falls somewhere between probability and possibility. *Id.*, citing *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955. As the Supreme Court explained,

"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 1950.

The admonishment to construe the plaintiff's claim liberally when evaluating a motion to dismiss does not relieve a plaintiff of his obligation to satisfy federal notice pleading requirements and allege more than bare assertions of legal conclusions. Wright, Miller & Cooper, Federal Practice and Procedure: § 1357 at 596 (1969). "In practice, a complaint ... must contain either direct or inferential allegations respecting all of the material elements [in order] to sustain a recovery under some viable legal theory." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir.1984), quoting *In Re: Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir.1981); Wright, Miller & Cooper, Federal Practice and Procedure, § 1216 at 121–23 (1969). The

United States Court of Appeals for the Sixth Circuit clarified the threshold set for a Rule 12(b)(6) dismissal:

[W]e are not holding the pleader to an impossibly high standard; we recognize the policies behind Rule 8 and the concept of notice pleading. A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.

Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 437 (6th Cir.1988).

III. Discussion

Defendant contends the Court should dismiss Plaintiffs' Complaint because it simply followed Ohio law when it terminated Plaintiffs' employment (doc. 6). Defendant contends it maintained no particular employment practice that caused a disparate impact, and that it was a business necessity for it to follow Ohio law (Id.). Defendant further argues should this case proceed, it will be in the position of defending a criminal records policy it had no role in creating (Id.). Moreover, Defendant argues it had no way of knowing whether the facially-neutral criminal records requirement resulted in a statewide disparate impact (Id.). Finally, Defendant indicates its efforts in assisting Waldon with his release on parole some thirty years ago, shows it harbored no animus toward him, and that but for the state mandate, Waldon would not have been let go (Id.).

Plaintiffs respond that Title VII trumps state law, such that their terminations amount to "unlawful employment practices" based on disparate impact (doc. 7). Compliance with a state law, according to Plaintiffs, is no defense, because a violation is a violation (*Id.*). In plaintiffs' view, *888 whether Defendant was complying in good faith to state law goes to the remedy the Court should ultimately craft, and not to whether the terminations were in violation of Title VII (*Id.*).

The parties devote substantial argument in their briefing as to the question of whether it is even possible to attack a facially-neutral policy based on a state mandate. In Defendant's view, Title VII does not require preemption of a facially neutral state law unless such law "purports" to discriminate (doc. 6, citing 42 U.S.C. § 2000e-7). Plaintiff responds that such interpretation ignores language regarding "the doing of any act ... which would be an unlawful employment practice," and is inconsistent with the purposes of Title VII (Id. citing 42 U.S.C. § 2000h-4). Moreover, Plaintiff cites Ridinger v. General Motors Corp., 325 F.Supp. 1089 at 1094 (S.D.Ohio, 1971) in which the Court noted that Congress "intended to supersede all provisions of State law" which are inconsistent with Title VII.

The Supreme Court has recognized two distinct types of Title VII employment discrimination: "disparate treatment," and "disparate impact." Disparate treatment is not alleged in this matter, as it is based on proof of discriminatory motive. Plaintiffs do not contend Defendant intentionally fired them because of their race; Defendant indicates Plaintiffs were good employees and it only fired them due to the state mandate.

[1] Disparate impact results from facially neutral employment practices that have a disproportionately negative effect on certain protected groups and which cannot be justified by business necessity. International Bhd. of Teamsters, 431 U.S. at 335-36 n. 15, 97 S.Ct. 1843 (1977). Unlike disparate treatment, disparate impact does not require a showing of discriminatory motive, since the claim is based on statistical evidence of systematic discrimination. Id. The classic example of such a claim arose in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), in which the Defendant required employees to have high school diplomas and pass intelligence tests as a condition of employment in or transfer to certain jobs. Although the practice appeared neutral on its face, its effect was to freeze the status quo such that African-American employees were disqualified at a higher rate and the practice had no real relationship to successful job performance.

[2][3][4] The Court finds no question that Plaintiffs have adequately plead a case of disparate impact. Although there appears to be no question that Defendant did not intend to discriminate, intent is irrelevant and the practice that it implemented allegedly had a greater impact on African-Americans than others. The Court rejects Defendant's view that the state law must "purport" to discriminate in order to be trumped by Title VII. Such a view would gut the purpose of Title VII, and would run contrary to Griggs, as well as subsequent authorities in which state mandates were challenged. Palmer v. General Mills, 513 F.2d 1040 (6th Cir.1975), Gulino v. New York State Educ. Dept., 460 F.3d 361, 380 (2d Cir.2006). Where, as alleged here, a facially-neutral employment practice has a disparate impact, then Plaintiffs have alleged a prima facie case.

[5][6] An employer may defend against a prima facie showing of disparate impact only by showing that the challenged practice is "job related for the position in question and consistent with U.S.C. business necessity." 42 2000e-2(k)(1)(A)(i). Plaintiff correctly signals that "business necessity" is a narrow concept, and that normally an employment practice must have a manifest relationship to the employment in question (doc. 7, citing Griggs, 401 U.S. 424, 431-432, 91 S.Ct. 849). However, here the employment practice did not *889 seek to measure technical aptitude or ability but served as an ultimate bar to employment due to some prior unlawful act committed by the employees. Courts have viewed this sort of exclusion differently. Douglas El v. Southeastern Pennsylvania Transportation Authority, 479 F.3d 232, 242-45 (3d Cir.2007) (criminal conviction hiring policies concern the management of risk, a policy making distinctions among crimes upheld); Ahmed v. Kmart, Sears, No. 08-CV-10454, 2008 WL 4683440, at *4-5, 2008 U.S. Dist. LEXIS 114937, fn. 1 *6 (E.D.Mich., October 2, 2008)

(noting business necessity defense could apply to criminal conviction policy since it appears to distinguish between applicants that pose an unacceptable level of risk and those that do not); *EEOC v. Carolina Freight Carriers Co.*, 723 F.Supp. 734 (S.D.Fla.1989) (upholding policy barring those with prior theft records from truck driver position; decided under definition of "business necessity" *abrogated by statute* as explained in *Douglas El*, 479 F.3d 232, 241); and *Buck Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir.1975) (Defendant enjoined from using criminal convictions as an absolute bar to employment).

The Court finds instructive the analysis of the Eighth Circuit in *Buck Green*, 523 F.2d 1290, 1296. The *Buck Green* court examined the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), noting that the high court made a distinction between the *Griggs* sort of neutral testing requirements that had a disparate impact and the case where the applicant had engaged in a seriously disruptive act. Justice Powell's opinion for a unanimous court added a caveat to its holding with these words:

Petitioner [McDonnell Douglas] does not seek his [Green's] exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some *sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to the applicants's personal qualifications as an employee.* 411 U.S. at 806, 93 S.Ct. 1817 (emphasis added).

The *Buck Green* decision perceived such comment "to suggest that a sweeping disqualification for employment resting on solely past behavior can violate Title VII where that employment practice has a disproportionate racial impact and rests upon a tenuous or insubstantial basis." 523 F.2d at 1296.

The Court finds the policy at issue in this case a close call. Obviously the policy as applied to seri-

ous recent crimes addressed a level of risk the Defendant was justified in managing due to the nature of its employees' proximity to children. However, in relation to the two Plaintiffs in this case, the policy operated to bar employment when their offenses were remote in time, when Plaintiff Britton's offense was insubstantial, and when both had demonstrated decades of good performance. These Plaintiffs posed no obvious risk due to their past convictions, but rather, were valuable and respected employees, who merited a second chance. "To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden." Buck Green, 523 F.2d at 1298. FN3 Under these circumstances, the *890 Court cannot conclude as a matter of law that Defendant's policy constituted a business necessity.

FN3. The Court further notes that though the Equal Employment Opportunity Commission Guidelines are not entitled to great deference, Section 605 of its Compliance Manual addresses the issue of arrest and conviction records. It states that an applicant may be disqualified from a job based on a previous conviction only where the employer takes into consideration the nature of the job, the nature and the seriousness of the offense, and the length of time since it occurred.

Moreover, the Court cannot conclude that Defendant was compelled to implement the policy, when it saw that nine of the ten it was terminating were African–American. As stated above, Title VII trumps state mandates, and Defendant could have raised questions with the state board of education regarding the stark disparity it confronted.

IV. Conclusion

Having reviewed this matter, the Court concludes that Plaintiffs' Complaint raises plausible allegations of disparate impact discrimination. Defendant's implementation of the state mandate, as

alleged, could very well amount to a violation of Title VII. Accordingly, the Court DENIES Defendant Cincinnati Public Schools' Motion to Dismiss (doc. 6).

SO ORDERED.

OPINION AND ORDER

This matter is before the Court on Defendant Cincinnati Public Schools' Motion to Certify Order for Immediate Appeal (doc. 18), Plaintiffs' Memorandum in Opposition (doc. 21), and Defendant's Reply (doc. 22). For the reasons indicated herein, the Court DENIES Defendant's motion.

I. Background

The Court recently issued an Order denying Defendant's Motion to Dismiss (doc. 16), and in the instant motion, Defendant seeks an immediate interlocutory appeal of such decision (doc. 21). In its Order the Court found Plaintiffs had adequately pleaded a case for disparate impact employment discrimination where Defendant implemented a policy requiring the termination of employees with particular criminal records (doc. 16). The Court noted that nine of the ten employees that Defendant discharged pursuant to the policy were African-American (Id.). The Court further found questionable any legitimate business justification where Plaintiffs' offenses were extremely remote in time, where Plaintiff Britton's offense was insubstantial, and where both had demonstrated decades of good performance (*Id.*).

Defendant contends the Court should certify its Order for immediate appeal pursuant to 28 U.S.C. 1292(b) because its termination of Plaintiffs was compelled by a facially neutral state statute (doc. 22). It contends it will argue on appeal that it cannot be held liable under Title VII when it was merely complying with a state mandate (*Id.*). Plaintiffs respond that in their view Defendants meet none of the statutory requirements for interlocutory review, and as such, the Court should deny Defendant's motion (doc. 21).

II. The Applicable Standard

Section 1292(b) provides in pertinent part:

When a district judge, in making in a civil action an order not otherwise appealable ... shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall state so.

28 U.S.C. § 1292(b). The Supreme Court has stated, "[r]outine resort to § 1292(b) requests would hardly comport with Congress' design to reserve interlocutory review for 'exceptional' cases while generally *891 retaining for federal courts a firm final judgment rule." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996). In the Sixth Circuit, "[r]eview under § 1292(b) is granted sparingly and only in exceptional circumstances." *In re City of Memphis*, 293 F.3d 345 at 350 (6th Cir.2002).

III. Discussion

[7] Defendant argues the Court's Order involves a controlling question of law, that is, the question of whether an employer can be held liable for disparate impact litigation where it was compelled to terminate employees by a facially neutral state statute (doc. 18). Plaintiffs respond this is not a pure question of law, because there are facts to be discovered that could affect Defendant's liability: whether Defendant took note of the disparity it confronted, whether it communicated with the state board of education, what actions it took after the rules were changed so Plaintiffs could demonstrate rehabilitation, and whether Plaintiffs applied or were considered for re-employment (doc. 21).

The second prong of the statute requires that there be substantial grounds for a difference of opinion regarding the relevant legal issue. Defendant cites to the fact that the Solicitor General from the last presidential administration filed a brief criticizing the decision in *Gulino v. New York State*

Educ. Dept., 460 F.3d 361 (2nd Cir.2006), the only relevant authority holding that compliance with state law was not a defense to Title VII liability (docs. 18, 22). Plaintiffs respond that the Solicitor General conceded the *Gulino* decision did not conflict with any Supreme Court or court of appeals decision (doc. 21). Plaintiffs further argue that Defendants contend this is an issue of first impression in the Sixth Circuit, and that the fact an issue is one of first impression "does nothing to demonstrate a difference of opinion as to the correctness of the ruling" (*Id. quoting U.S. v. Atlas Lederer Co.*, 174 F.Supp.2d 666 at 669 (S.D.Ohio, 2001)).

The final statutory requirement is that an interlocutory appeal would materially advance the termination of the litigation. Plaintiffs essentially concede that, as in any case, an appeal could cut both ways depending on the outcome of any appeal—but that if the Court's Order were affirmed, the main impact would be a delay in justice (doc. 21). Defendant contends Plaintiffs concerns about delay are "disingenuous," because Plaintiffs filed this lawsuit in 2012 after being terminated in 2008, and they were eligible for re-employment since September 2009 (doc. 22).

Having reviewed this matter, the Court does not find this case one of such exceptional circumstances so as to merit interlocutory review. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996), *In re City of Memphis*, 293 F.3d 345 at 350 (6th Cir.2002). If anything, the exceptional circumstances of this case are that Plaintiffs, long-serving good employees, were among the nine out of ten African–American employees Defendant terminated under the policy.

Although it may be a close question whether there is a controlling question of law at issue, the Court simply finds no significant difference of legal opinion as to whether Title VII liability extends to implementation of facially neutral state mandates. The only relevant legal authority answers in the affirmative, and the fact this is an issue of first impression does not constitute grounds for inter-

locutory appeal. *Gulino*, 460 F.3d 361, *Atlas Lederer Co.*, 174 F.Supp.2d at 669. Moreover, as noted in its Order, the Court's conclusion is consistent with the language of Justice Powell in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), as explained by the Eighth Circuit in *892Buck Green v. *Missouri Pacific Railroad Co.*, 523 F.2d 1290 at 1296 (8th Cir.1975) ("a sweeping disqualification for employment resting on solely past behavior can violate Title VII where that employment practice has a disproportionate racial impact and rests on a tenuous or insubstantial basis.")

Finally the Court finds well-taken Plaintiffs' position that an interlocutory appeal is as likely to cause material delay as it is to cause material advancement of the termination of the litigation. The Court rejects Defendant's characterization of Plaintiffs' concerns about delay as "disingenuous." The record does not show Plaintiffs have slept on their rights, but to the contrary that they have made repeated efforts in other judicial fora to address their terminations. There is no record evidence that Defendant ever alerted Plaintiffs they were reeligible for rehire, or that Plaintiffs knew of such possibility to demonstrate rehabilitation as of September 2009.

Accordingly, the Court does not find that Defendant has established a basis for interlocutory review pursuant to 28 U.S.C. § 1292(b), and therefore it DENIES Defendant Cincinnati Public Schools' Motion to Certify Order for Immediate Appeal (doc. 18).

SO ORDERED.

S.D.Ohio,2013.

Waldon v. Cincinnati Public Schools 941 F.Supp.2d 884, 118 Fair Empl.Prac.Cas. (BNA) 188, 298 Ed. Law Rep. 278

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