

April 18, 2012

The Honorable Jacqueline A. Berrien  
Chair, United States Equal Employment Opportunity Commission  
131 M Street, N.E.  
Washington, D.C. 20507

**Re: Pending EEOC Guidance on Criminal-Background Checks**

Dear Chair Berrien:

The undersigned entities represent for-profit and non-profit employers, including those who work with vulnerable populations, and other entities concerned about the critical need to protect the safety of people and property in workplaces across the United States. These organizations and their members believe that criminal background checks are an important tool in efforts to help protect employees, customers and the public at-large from workplace violence, fraud and theft.

We are writing to express our concerns over any forthcoming changes to the long-standing and appropriate Equal Employment Opportunity Commission (“EEOC” or “Commission”) guidance<sup>1</sup> that would impede the ability of employers to continue to use criminal-background checks to make informed hiring decisions. We highlight several points:

First and foremost, we are writing to request greater transparency in the guidance drafting process. The Commission’s July 26, 2011 meeting would have benefited from additional input from those that use and study the use of criminal background checks to safeguard their workplaces. The record lacked full input from responsible users of criminal background checks, including employers, volunteer organizations, background screening companies, as well as victims’ rights organizations, law enforcement, and criminologists. Representatives of these groups can contribute significantly to the EEOC’s deliberations and decision-making if given greater opportunities. In addition, many state and federal statutes and rules require many industries and government entities to conduct background checks, and to consider particular kinds of convictions in different ways. To the extent that this guidance will affect businesses and government bodies, the Commission can only benefit from hearing from additional user perspectives on how its guidance will affect market reality.

We recognize that EEOC guidance is not subject to the formal notice and comment requirements of the Administrative Procedure Act. Nonetheless, we believe that a public comment period will go a long way to giving the public confidence that the EEOC has investigated this critical issue in a comprehensive and balanced fashion and had the benefit of all relevant views. We also note that the Office of Management and Budget (“OMB”) has

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<sup>1</sup> EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1982). (2/4/87), [www.eeoc.gov/policy/docs/convict1.html](http://www.eeoc.gov/policy/docs/convict1.html).

mandated review of “significant regulatory action,” including agency guidance.<sup>2</sup> Given more than two decades of reliance of diverse industries on the EEOC’s interpretation of the law, the potential health, safety, and liability issues that can arise for employers, and a legal environment in which certain employers are *required* to perform such checks and consider their results in different ways, the EEOC’s issuance of guidance without broader input could lead to confusion in the marketplace as well as unintended and adverse consequences. We therefore respectfully request that the EEOC make a draft of the guidance available to the public and subject it to public comment *prior* to its formal adoption.

Second, as the Commission knows, any revisions to the existing guidance must not exceed the EEOC’s statutory authority. The existing guidance has been in successful effect for twenty-five years. As the diversity of signatories below indicates, that guidance affects a wide variety of professions and occupations, all of which have successfully and responsibly used criminal background checks to protect their customers, property, and the public. Since the 1987 guidance serves as a *de facto* national regulation that covers a wide and significant swath of economic activity, it is critically important that any revised guidance be fully consistent with the Commission’s existing statutory authority.

Third, the impact of new practical restrictions on the use of criminal background checks would be immediate and widespread. For example, existing law does not require the use of validation studies, which typically cost \$80,000-\$100,000 or more, to defend against a charge of disparate impact.<sup>3</sup> Guidance that requires employers to conduct validation studies could effectively prohibit the use of criminal checks due to the fact that most employers would lack the financial means to employ such studies. If employers curtail their reliance on checks, they will be denied critical information and could well face a negligent hiring suit if an ill-vetted applicant engages in criminal behavior on the job. A reduction in criminal background checks is a threat to public safety.

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<sup>2</sup> OMB Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, Guidance for Regulatory Review, M-09-13 (March 4 2009), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_fy2009/m09-13.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf). A 2007 OMB bulletin noted that

Pre-adoption notice-and-comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial. Agencies also are encouraged to consider notice-and-comment procedures for interpretive significant guidance documents that effectively would extend the scope of the jurisdiction the agency will exercise, alter the obligations or liabilities of private parties, or modify the terms under which the agency will grant entitlements.

Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438 (Jan. 25, 2007).

<sup>3</sup> *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991-92, 998-99 (1988) (“Our cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal “validation studies” showing that particular criteria predict actual on-the-job performance....”); *see also Employment Discrimination Law* (BNA) at 116-117.

In short, the opportunity for additional public comment serves both the EEOC's and the public's interest. As the Commission reexamines the use of criminal-background checks for existing or prospective employees, we respectfully urge a broader inclusion of relevant and helpful viewpoints before the EEOC reaches any conclusions and/or takes any final action.

Sincerely,

Agricultural Retailers Association

Electronic Security Association

American Apparel & Footwear Association

Fashion Accessories Shippers Association

American Bankers Association

Food Marketing Institute

American Boiler Manufacturers Association

Heating, Air-Conditioning & Refrigeration  
Distributors International

American Foundry Society

HR Policy Association

American Hotel & Lodging Association

Institute for a Drug-Free Workplace

American Staffing Association

International Association of Amusement  
Parks and Attractions

American Supply Association

American Trucking Associations

International Public Management  
Association for Human Resources

ASIS International

International Warehouse Logistics  
Association

Assisted Living Federation of America

Associated Builders and Contractors, Inc.

National Armored Car Association

Associated General Contractors of America

National Association of Convenience Stores

Automotive Aftermarket Industry  
Association

National Association of Professional  
Background Screeners

Building Owners and Managers Association  
International

National Association of Security Companies

College and University Professional  
Association for Human Resources

National Council of Chain Restaurants

Consumer Data Industry Association

National Council of Investigation and  
Security Services

Council for Employment Law Equity

National Federation of Independent  
Businesses

National Public Employer Labor Relations Association

Outdoor Amusement Business Association, Inc.

National Restaurant Association

Prevent Child Abuse America

National Retail Federation

Retail Industry Leaders Association

National Ski Areas Association

Society for Human Resource Management

National Small Business Association

Society of Independent Gasoline Marketers of America

North American Equipment Dealers Association

Travel Goods Association

U.S. Chamber of Commerce

cc: The Honorable Constance S. Barker, Commissioner  
The Honorable Chai Feldblum, Commissioner  
The Honorable Stuart J. Ishimaru, Commissioner  
The Honorable Victoria A. Lipnic, Commissioner