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TO:
Commission Meeting
EEOC Executive Officer
131 M Street, N.E.
Washington, D.C. 20507

RE: Equal Employment Opportunity Commission (EEOC) Meeting on July 26, 2011

Dear Member of the EEOC:

I am writing a comment in connection with the Meeting of July 26, 2011 held by the EEOC on the issue of Arrest and Conviction Records as a Hiring Barrier.

I am an attorney and founder and president of a background screening firm, Employment Screening Resources (ESR). I am also the author of 'The Safe Hiring Manual,' a guide to employment background checks. I was also the first co-chair of the National Association of Professional Background Screeners (NAPBS). All opinions expressed in this letter are solely that of the writer of this letter.

In reviewing of some of the comments and testimony from the hearing on July 26, it appears there are some important considerations that the EEOC should consider that may not have been sufficiently addressed at the meeting.

Of course, the pre-employment screening industry recognizes that unless ex-offenders receive a second chance, we stand the risk as a society of creating a class of permanently unemployed and employable individuals. The results are not only devastating to the ex-offenders and their families, but it also places a substantial strain on societal resources.

However, it is just as important to understand that innocent people have the right to be safe in their workplaces and everyday lives.

The use of criminal records is a difficult issue because it involves important American values that can seem to conflict. On one hand, we value public safety and a safe workspace with honest and qualified employees. All Americans have a right to be safe and secure in their workplace. On the other hand, as a society we believe in second chances, and that a person's past should not hold him or her back forever, particularly for more minor offenses. The issue is how to draw lines that both protect innocent people and, at the same time, does not burden the taxpayers by creating a permanent class of unemployed people. Unless an ex-offender can get a job, they cannot become a taxpaying

and law abiding citizen and the taxpayers end up building more prisons than they do schools or hospitals, so it is a matter of finding a good balance.

In seeking to balance these competing interests, I am hopeful that the EEOC will recognize that there are some “real world” issues that need to be considered. These include:

1. Employers face significant risk if a person that is dangerous, unfit, unqualified or dishonest is hired.
2. A professional background screening firm – also known as a Consumer Reporting Agency or CRA – operating under the federal Fair Credit Reporting Act (FCRA) is an entirely different industry than the cheap and instant online database searches that can result in inaccurate data. A CRA performs screenings under the strict standards of the FCRA based upon the applicant’s written consent, as opposed to data aggregators that sell data to anyone with a credit card.
3. Background screening firms are NOT the employment police, but professionals that gather relevant information so employers can make intelligent decisions. Background check reports provided by a Consumer Reporting Agency protects both employers and job applicants by providing employers with reports with much greater accuracy that filter out information that cannot be used, and providing job applicants with an immediate avenue to contest any information in the report.
4. The background screening industry as a whole has been the primary reason why employers have become aware of the EEOC position on the overly board or automatic use of criminal records, since background screening firms deal with a high percentage of U.S. employers and typically include client education on how to properly consider the use of criminal records.
5. The issue of inaccurate records comes primarily from the data aggregator firms. A simple solution is to require any employer to only utilize information that has been confirmed as accurate and up to date from a primary source, such as a courthouse search.
6. Over 140 background screening firms have joined an industry group called “Concerned CRAs” (<http://www.concernedcras.com>) that opposes the use of databases provided by data aggregators for employment purposes, without first reconfirming that the information is currently complete, accurate and up-to-date.

The following is a more detailed discussion of the “real world” issues mentioned above:

1. Employers face significant risk if a person that is dangerous, unfit, unqualified or dishonest is hired.

For a private employer, each hiring decision can create a great risk if the person hired is detrimental to the business. An employer that hires a worker that is dangerous, unqualified or dishonest can create a legal and financial nightmare. It has been observed by some that lawsuits for negligent hiring are among the fastest growing tort causes of action in America today. Anytime an employee or contractor does something that harms

anyone else, it is likely that the business will also be sued for negligent hiring. As a result, employers are under an obligation to exercise due diligence in hiring in order to avoid negligent hiring lawsuits as well as other potential consequences of a bad hire, such as workplace violence, theft, embezzlements, unqualified workers, lawsuits and the time wasted recruiting and hiring the wrong person.

I have been retained as an expert in a number of cases where employers either did no background screening or inadequate screening, resulting in horrendous consequences for innocent members of the public and co-workers, stemming from murders in the workplace or the homes of consumers, to child molestation and sexual assaults, to embezzlement. In each of these cases, an adequate background check would have saved a life or prevented a horrible tragedy.

For example, one case involved a carpet cleaning firm that hired a person recently released from a 15 year prison term for violent offenses, and who was not the subject of a background check. The carpet cleaner entered the home of a woman who was a much respected pediatric physician. As a result of a disagreement over a spot in the carpet, the ex-offender resorted to violence and engaged in the cold blood strangulation murder of the homemaker/physician. This was a case where an individual with an inappropriate criminal record was placed in a position of going inside a person's home, which inherently carried a greater risk, without a proper background check. A simple background check would have saved the woman's life. Another example is found at a website for the Sue Weaver Cause (<http://sueweavercause.org/>), named after a woman who was brutally raped and murdered as a result of an ex-offender being sent to her home to clean air ducts by a well-known firm.

These are not simply isolated emotional anecdotes. The courts are full of cases alleging negligent hiring by employers that failed to conduct adequate background checks. As a person that has served the capacity of an expert witness on safe hiring, I am contacted on a regular basis by attorneys throughout the United States to discuss lawsuits emanating from their negligent hiring claims. There is a clear and present danger that a government agency needs to take into account when balancing the needs for a second chance with public safety. Certainly no one is suggesting that an ex-offender can never be hired. However, the rights of consumers and businesses to avoid violence and other harms need to be taken into account as well.

2. A professional background screening firm – also known as a Consumer Reporting Agency or CRA – operating under the federal Fair Credit Reporting Act (FCRA) is an entirely different industry than the cheap and instant online database searches that can result in inaccurate data. A CRA performs screenings under the strict standards of the FCRA based upon the applicant's written consent, as opposed to data aggregators that sell data to anyone with a credit card.

In reviewing the Commission's hearing, it is critical to understand that a professional background screening firm operating under the federal Fair Credit Reporting Act (FCRA) is not a data aggregator. The FCRA, along the laws in many states that also regulate

background screening firms, lays out a complex set of rules to ensure that background check reports are accurate. A background screening firm prepares each report pursuant to a written consent and disclosure by an applicant. The report is prepared only after an employer makes the request. At that point, a CRA then goes through various processes to obtain the most accurate, complete and up to date information available. This is far cry from cheap online data sites that sell data to anyone with a credit card.

A more detailed discussion of why data aggregator sites should not be used for employment is found in a white paper that I co-authored with Kerstin Bagus, Director Global Compliance at LexisNexis® Screening Solutions. The white paper “Background Check Mobile Phone Apps and Instant Background Check Web sites: Fast and Easy, But Are They Accurate?” is available at:

<http://www.esrcheck.com/Download/?action=download&token=2AUExEEmdhSWLldBMT37mWSr4vhiS8GHA2fQDyPcOD8o27kxxN>.

In fact, the professional trade organization for the background screening industry, the National Association of Professional background Screeners (<http://www.napbs.com>) has issued an intensive accreditation program that sets industry best practices. For more information, see: <http://www.esrcheck.com/wordpress/2011/07/29/accreditation-program-for-employment-background-screening-agencies-helps-promote-consumer-protection-and-client-education/>.

Governed by a strict set of professional standards, the accreditation program recognizes a commitment to excellence, accountability, high professional standards, and continued institutional improvement. To become accredited, background screening firms must pass a rigorous audit of policies and procedures related to six critical areas:

- Consumer protection,
 - Legal compliance,
 - Client education,
 - Product standards,
 - Service standards, and
 - General business practices.
3. Background screening firms are NOT the employment police, but professionals that gather relevant information so employers can make intelligent decisions. Background check reports provided by a Consumer Reporting Agency protects both employers and job applicants by providing employers with reports with much greater accuracy that filter out information that cannot be used, and providing job applicants with an immediate avenue to contest any information in the report.

Another critical point that the Commission needs to understand is that a CRA is NOT the employment police. A CRA under no circumstances tells an employer who they should or should not hire. The mission of a CRA is to provide legally permissible and accurate information to employers so they can make intelligent hiring decisions. The process of obtaining legally compliant and accurate information can be very complex and requires

specialized resources, skill and knowledge. Without the assistance of the background screening industry, employers may either hire blind, or hire based on inaccurate or impermissible information. The background screening industry provides an immensely valuable service to employers by relieving employers of a difficult task. In addition, the background screening industry also allows a process by which consumers can object to a report and to have matters set straight.

4. The background screening industry as a whole has been the primary reason why employers have become aware of the EEOC position on the overly board or automatic use of criminal records, since background screening firms deal with a high percentage of U.S. employers and typically include client education on how to properly consider the use of criminal records.

One aspect of this issue that the EEOC may not fully appreciate is that the background screening industry has been a primary source of information to employers across the United States as to the current rules concerning the need for a “business justification” to unitize a criminal record. The background screening industry as a whole has direct contact with a large percentage of employers throughout the U.S., and particularly those who are engaged in hiring decisions.

Background screening firms not only provide reports but client education as well, and the screening industry has been proactively engaged in educating employers about the fact that past criminal records cannot be the basis to automatically deny employment. In order to effectively raise the awareness of millions of employers, an effective strategy on the part of the EEOC would be to partner with the background screening industry since screening firms are in contact constantly with the individuals that are actually making the employment decisions.

5. The issue of inaccurate records comes primarily from the data aggregator firms. A simple solution is to require any employer to only utilize information that has been confirmed as accurate and up to date from a primary source, such as a courthouse search.

The EEOC is rightfully concerned with inaccurate criminal reports. However, the EEOC needs to identify the source of these inaccuracies. In my experience, inaccurate criminal records come primarily from data aggregators that sell data over the Internet directly to businesses. These records are unfiltered by a professional CRA that has an obligation under the FCRA to provide accurate data. One state, California, has a rule that requires that any public record reported to an employer must be complete and up to date at the time the record is reported. See California Civil Code section:

1786.28. (b) A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles, collects, assembles, evaluates, reports, transmits, transfers, or communicates items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall in addition maintain strict procedures designed to insure that whenever public record

information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

This is normally done in California by reconfirming any database information at the courthouse to ensure that it is accurate.

One method that EEOC may consider is a requirement that all criminal data from databases is to be re-verified at the courthouse level prior to being provided to an employer. Under FCRA section 613(a)(1), a CRA has what is generally referred to as a “notice” option. However, in this modern day and age of aggregated criminal records, courthouse verification would be an effective way to prevent the dissemination of inaccurate or outdated criminal records.

6. Over 140 background screening firms have joined an industry group called “Concerned CRAs” (<http://www.concernedcras.com>) that opposes the use of databases provided by data aggregators for employment purposes, without first reconfirming that the information is currently complete, accurate and up-to-date.

The importance of reporting accurate information is underscored by the existence of an organization called “Concerned CRAs” that opposes the use of database information as a primary or direct tool for decision making. A CRA may certainly utilize a database as part of its research.

However, when used by a CRA that is a member of Concerned CRAs, a database is ONLY a “lead generator” or “pointer” tool that helps the CRA identify additional courts to research. A member of Concerned CRAs is committed to never reporting the results of a criminal record directly without first reconfirming the details at the appropriate courthouse. For more information, visit <http://www.concernedcras.com/>.

According to the website for Concerned CRAs:

“A CRA that chooses to display the ‘Responsible Criminal Databases’ seal is self-certifying that they subscribe to the following standards when using criminal records in databases in the context of employment-related screening, exclusive of the screening of volunteers, tenants, and other non-employment relationships:

- Criminal records databases compiled by non-government entities will only be used as indicators of possible records. Prior to making any report about a potential or current employee to an employer about a criminal record from a database, the CRA will verify the information directly with the reporting jurisdiction. This ensures that employers make decisions based on accurate and up-to-date information.

- When using these databases it is important that current or prospective employer clients are provided information about the limited nature of criminal records databases and the importance of researching each applicant's criminal history in the jurisdictions in which the applicant currently or previously has lived or worked."

Summary:

It is certainly critically important to our society that everyone have a second chance. However, citizens also have a right to be free of violence and fraud in their everyday dealing, either as a member of the public, an employee or employer. In reaching these difficult decisions, it is critical that the EEOC have a full understanding of all of the facts that surround background checks and criminal records.

To my knowledge, the EEOC has not hired on its own behalf in any of its offices an applicant with a criminal record (beyond low level matters) and had to deal with the complex issues involved in considering and ultimately employing persons with criminal records. It places a substantial burden on employers to bring an individual into the workplace that represents a potential threat to co-workers, clients and the public. It is easy to support giving ex-offenders a second chance, and in fact our industry's goal is to help employers place their applicants in positions that are appropriate for them based on both their experience and background, not to exclude them from the workplace. However, if the EEOC will not even bring ex-offenders into its own workplaces, how can the Commission expect private employers to take on a risk that the EEOC will not take on its own?

I am hopeful that EEOC will undertake a fair and well-reasoned evaluation of all the issues and how its rulemaking in this area would impact all stakeholders, and not act solely on its power to make rules or to commence litigation.

Thank you for your consideration.

Sincerely yours,

A handwritten signature in black ink that reads "Lester S. Rosen". The signature is written in a cursive, flowing style.

Lester S. Rosen
Attorney at Law and President
Employment Screening Resources (ESR)
<http://www.ESRcheck.com>