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Commission Meeting

EEOC Executive Officer

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Dear Commission:

I am submitting a public comment on the April 25, 2012 meeting where the U.S. Equal Employment Opportunity Commission (EEOC) issued its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

I believe I have a unique perspective on the issues involved. I am the founder and CEO of a nationwide background check firm, Employment Screening Resources (ESR), an accredited Consumer Reporting Agency. I was the chairperson of the committee that founded the National Association for Professional Background Screeners (NAPBS), and served as its first co-chair. I am also the author of the first comprehensive book on background checks, 'The Safe Hiring Manual.' I have qualified and testified as an expert witness on safe hiring in California, Arkansas, and Florida and I have spoken at numerous national and regional human resources and security conferences. This letter, however, is written strictly in my capacity as a business owner and is not intended to represent the view of any other organization.

Before entering the background screening industry, I retired from a career as a criminal trial attorney. I spent nearly 20 years practicing criminal law, the majority of time as a defense lawyer, and approximately four years as a deputy District Attorney. For a number of years I was recognized by the State Bar of California as a certified specialist in criminal law. In my capacity as a defense attorney, I have represented a large number of people accused of criminal acts, ranging from misdemeanors such as driving under the influence and petty theft all the way to homicide, serious sexual assaults, child

molestation and crimes of violence. My jury trials have also included complex federal drug cases, sex crimes, murder and death penalty cases and a wide variety of other cases associated with a criminal practice. I have had the opportunity to work with numerous offenders and their families very closely and often assisted offenders in gaining employment as part of an effort to present the best case at sentencing.

I fully embrace the EEOC objective of ensuring that ex-offenders are not the subject of unfair treatment. In my career, this is not an abstract concept but a goal that involves large numbers of people I have known and worked with personally and closely. America is a country of second chances, and if a person has committed a crime and done the time, he or she needs need a job in order to become a law abiding and a tax-paying citizen. As a society, we cannot afford to build more prisons then schools or hospitals. In fact, I have written a widely distributed article titled *'Criminal Records and Getting Back into the Workforce: Six Critical Steps for Ex-offenders Trying to Get Back into the Workforce'* which is available at http://www.esrcheck.com/articles/Criminal-Records-and-Getting-Back-into-the-Workforce.php.

However, I have also seen the devastating results first hand when the wrong person is put in the wrong job. I have been involved in cases, both as an attorney and an expert witness, where children have been molested, woman subjected to serious sexual assaults in their own homes, and people murdered in their own homes, all because appropriate due diligence was not exercised. I am a firm believer that there should be a job for everyone, but not everyone is entitled to every job.

For those reasons, I believe the recently updated EEOC Enforcement Guidance is very troubling. In my view, the Guidance has the unintended consequences of hurting ex-offenders, while at the same time, making it harder for millions for employers to provide jobs during this period of economic recovery. To the extent that the Commission hinders job creation, everyone is impacted, including members of groups protected under Title VII. Below are the reasons that I would urge the Commission to withdraw or modify the Guidance.

1. **The statistics cited in the EEOC Guidance to show the number of Americans involved in the criminal justice system are overstated and inflated.**

The EEOC quotes figures showing a dramatic number of individuals in this country are the subject of the criminal justice system:

- By the end of 2007, 3.2% of all adults in the United States (1 in every 31) were under some form of correctional control involving probation, parole, prison, or jail.
- In a footnote 8, the EEOC quotes a study that notes that "when all of the individuals who are probationers, parolees, prisoners or jail inmates are added up, the total is more than 7.3 million adults; this is more than the populations of Chicago, Philadelphia, San Diego, and Dallas combined, and larger than the populations of 38 states and the District of Columbia."

The difficulty with the figures cited by the EEOC is that they include "probationers." That means the statistics cited by the EEOC for the proposition that an alarming number of Americans are involved in

the criminal justice system are seriously overstated and inflated because it includes practically all misdemeanor convictions.

For example, every person convicted of driving under the influence (DUI) would be a person that falls into the statistic quoted by the EEOC since the vast majority of all misdemeanor convictions for DUI result in a period of probation. It is elementary that in state courts, where misdemeanors can be typically be punished by up to one year in jail, a Judge will normally impose just a portion of the sentence and place the person on probation, and leave the remainder of the sentence pending the persons successful completion of probation. A misdemeanor sentence will typically include either formal probation (meaning there is an assigned probation officer) or informal (sometimes called Court probation) where there is no probation officer, but the Court's file says active and the defendant is placed under Court orders appropriate to the case. A misdemeanor defendant, for example, may be ordered to obey all laws, attend a program, or not to possess or consume drugs or alcohol, or other conditions related to the conviction. If the defendant fails to satisfy these conditions, a Court has the option to impose the jail time not previously imposed.

This illustrates why statistics can be deceiving and underscores the need for the EEOC to develop a better understanding of the criminal justice system. It also demonstrates that the EEOC's use and understanding of criminal statistics would have benefited by a comment period where the statistics could be analyzed.

2. **The EEOC Guidance gives ex-offenders the status of a "protected group" similar to groups based on race, religion, or national origin.**

The EEOC Guidance appears to have the impact of conferring upon ex-offenders the status of a protected group, similar to protections given on the basis of race, color, religion, sex or national origin through Title VII of the Civil rights Act, or other laws that provide protection based upon such facts as age or physical disability. With the very complex procedures outlined by the EEOC for consideration of criminal records, it can be argued that ex-offenders may even have more rights than groups protected by Title VII, even though such status was not approved by Congress.

3. **The recidivism studies cited in the EEOC Guidance are still in the early stage and should <u>not</u> be the basis of social policy.**

The EEOC cites studies that an ex-offender's criminal past becomes irrelevant over time, and even suggests employers consider recidivism studies when applying the "Green factors" (from *Green v. Missouri Pacific Railroad, 549 F.2d 1158 (8th Cir. 1977)*, in which the court found a complete bar on employment based on most criminal activity unlawful under Title VII) revolving around the offense:

- The nature and gravity of the criminal offense(s);
- The time that has passed since the conviction and/or completion of the sentence; and
- The nature of the job held or sought.

In addition to the Green factors, where arrest records show no conviction, the EEOC's 1990 Guidance requires the employer to evaluate whether the arrest record reflects the applicant's conduct. The problem?

First, it seems the EEOC is taking contradictory positions within the same guidance. On one hand, when discussing validation studies, the EEOC notes:

> *Although there may be social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications, and thereby provide a framework for validating some employment exclusions, such studies are rare at the time of this drafting.*

However, the EEOC then goes on to suggest when discussing the Green factors that:

> *Whether the duration of exclusion will be sufficiently tailored to satisfy the business necessity standard will depend on the particular facts and circumstances of each case. Relevant and available information to make this assessment includes, for example, studies demonstrating how much the risk of recidivism declines over a specified time.*

The problem is that studies relating crime to future conduct are just the reverse side of the question as to the risk of recidivism. The bottom line is that the inquiries still revolve around predicting future dangerousness from current offenses. In other words, an employer must determine if a person's past is the prologue for future conduct. If an employer gets it wrong, they have substantial exposure for negligent hiring if a person is dangerous, unfit, dishonest, or unqualified if employed, and causes harm.

The studies cited by the EEOC concerning recidivism, although useful and a good place to start, are in the very early stages of research and have not developed to the point where such studies can form the basis of a social policy. The science of judging rehabilitation over time is in its infancy. Even the authors of one of the most often cited studies from Carnegie Mellon University concluded that much more study was needed and that there are substantial issues still to be addressed. The authors' characterization that the study represents a "significant step forward in area where so little is known empirically" is well-taken. Yet the EEOC seems to not only have based the April 25, 2012 Guidance on such a flimsy scientific foundation, but has urged millions of employers to consider them. It raises the question as to how small and medium businesses are supposed to deal with detailed scientific and statistical studies and draw any conclusions.

4. **The new EEOC Guidance will create brand new industries of "professional litigants" and advisors on complex new rules.**

Another concern that had been voiced is the sheer complexity of the new standards will create brand new industries of "professional litigants" consisting of ex-offenders assisted by plaintiffs lawyers who can simply apply to any possible employer just to try to set up a lawsuit and seek damages, as well as vast new opportunities for lawyers and experts in statistics, industrial organizations, and related topics, to advise employer's on how to deal with this complex web of new rules.

5. **The EEOC Guidance limiting criminal inquiries only to "relevant criminal matters" to a job is nearly impossible for employers to carry out.**

Another practical issue is the near impossibility of an employment process that limits criminal inquires to relevant criminal matters as suggested by the EEOC. The EEOC suggested some best practices such as employers having a policy or limiting inquires or questions about past criminal acts that are relevant to the job in question. Yet the commission has not provided any examples of how to carry that out.

The problem is that there are thousands of crimes in each state. It is exceedingly burdensome to try to analyze every job in terms of what criminal behavior is impacted. It is possible to create broad categories such as "crimes against persons" or "crimes against property," but those titles are extremely wide and encompass a large range of conduct and behavior stemming from the insignificant to exceedingly relevant.

In addition, the EEOC Guidance does not take into account the realities of state criminal laws when it comes to judging the seriousness of a crime based upon the level of conviction. For example, the Guidance suggests that: *"With respect to the gravity of the crime, offenses identified as misdemeanors may be less severe than those identified as felonies."*

However, as the old saying goes, the devil is in the details. Many crimes can be classified as a "wobbler" or hybrid crime that can be either a felony or a misdemeanor. For example, there can be felony or misdemeanor grand theft, or crimes of violence. For a number of real world reasons, the eventual status of a hybrid crime as a felony or misdemeanor can have little or nothing to do with the seriousness of the crime, but instead relate to a number of unpredictable variables in the criminal justice system. Very serious conduct may end up as a misdemeanor because of court over overcrowding resulting in plea bargains, critical evidence being excluded pursuant to a motion to suppress, a critical witness may be reluctant to testify, unskilled attorneys can impact the outcome, or a jury may reach a compromise verdict. The only time that an employer can assume with some level of confidence that a misdemeanor is a less serious offense is where the crime charged can only be charged as a misdemeanor offense, which means that the legislature has made a determination that in all case, the highest punishment can only be at a misdemeanor level.

6. **The EEOC Guidance of employers limiting inquiries can have the unintended consequence of working against ex-offenders trying to get jobs.**

Even assuming that an employer were to analyze thousands of state crimes (not to mention federal crimes) to determine which crimes may be relevant to a particular job, the next issue is trying to have job applicants review what could well be very large listing of possible crimes. There are a number of real world drawbacks with following the EEOC suggestion of only asking about relevant crimes. It can be argued that in fact the section of the EEOC Guidance that suggests employers attempt to limit their inquiries can actually have the unintended consequences in the real world of working against ex-offenders trying to get jobs:

- Even if only relevant crimes were determined and then listed, the crimes can have a wide range of possible seriousness, making it impossible for an employer to only ask about serious crimes that could impact a job decision.
- Even if the crimes are filtered by age with the idea that older crimes are less serious, employers need to determine whether to use the date of occurrence, the date of conviction, or the date of release from custody. Due to the workings of the criminal justice system and based in part on the past record of the offender and a number of intangible factors related to the operation of the criminal justice system, it is entirely possible that two offenders that commit the same crime on the same date, can have widely different dates of conviction and release.
- Given the complexities of the criminal justice system, job applicants historically have a difficult time recalling the exact details of a criminal disposition. An applicant may not recall exactly what he or she was charged with or the details of the eventual outcome. An applicant may not have understood that terms and conditions of his or her sentence, or their lawyers instructions in terms of the collateral consequences of a conviction.
- If the applicant is asked a question that calls for a subjective answer or a judgment call, such as, "Have you ever been convicted of a serious theft crime," then the applicant is being put into a position of having to make a very complicated legal and factual judgment of what is serious.
- If the applicant answers any questions about past criminal conduct inaccurately due to a lack of recollection or understanding of past events, or based upon information they believed was given by their attorney or based upon some subjective response that the employer finds unreasonable, the applicant is placed in a position where it may appear her or she is deceptive and dishonest. For example, any Human Resources professional involved in hiring has likely heard on at least one occasion an applicant with a criminal record explaining incorrect or false statements about their criminal record by saying they thought their attorney was going to take care of it, or the attorney said not to worry because it will go away. Since an employer is never under an obligation to hire someone who lies during the hiring process, the new EEOC guidance potentially works against the interest of ex-offender seeking a second chance. If the applicant claims an incorrect statement about past criminal questions was a mistake or misunderstanding that puts the employer in the difficult position of trying to determine if the ex-offender made a mistake or genuinely misunderstood was being intentionally dishonest and deceitful.

7. The EEOC Guidance of limiting inquiries on criminal records means employers cannot make informed decisions if they do not view actual court case files.

It is also important to understand that there is no way for an employer to even make an informed judgment as to the nature and gravity of an offense unless the employer obtains some information from the actual court file. If an employer is prevented from asking a board based criminal question at some point during the hiring process, an employer cannot exercise due diligence or ensure that it has the information to determine which counties should be searched for criminal records. When a court researcher goes to the courthouse, on behalf of either a background screening firm or employers, there is no mechanism to only identity "serious crimes." Court indexes do not contain the information needed to make those sorts of judgments. In some counties, court clerks do the actual search, and there are no

mechanisms for a court clerk to make any determinations. The bottom line is that a court case must be reviewed first.

Essentially, the whole concept that an employer needs to somehow limit the criminal inquiry when made based upon on the job, ends up in the real world being harmful and detrimental to ex-offenders. This is an example of "the law of unintended consequences."

The EEOC has not provided concrete examples of the types of questions it recommends employers ask when attempting to only ask bout relevant criminal matters. Based upon Court decisions in the EEOC case currently pending against Kaplan Higher Education Corporation, where the Court ordered the EEOC to produce information about how the Commission itself uses credit reports in hiring, it would seem that the EEOC will shortly be ordered to turn over its own hiring procedures if they challenge what private employers are doing. At that point, the EEOC will be able to see the difficulties involved first hand in implementing its own guidance.

I hope this information is useful. I am available to the Commission and its staff to provide any assistance on these complex matters.

Sincerely,

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Founder and CEO

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