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U.S. Commission on Civil Rights
1331 Pennsylvania Ave., NW, Suite 1150
Washington, DC 20425
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Dear Commissioners:

These comments are submitted to supplement the views previously stated by the National Association of Professional Background Screeners (“NAPBS”) to the U.S. Commission on Civil Rights (“USCCR”) at the December 7, 2012 briefing on the impact of criminal background checks and the Equal Employment Opportunity Commission’s (“EEOC”) conviction records policy on employment of black and Hispanic workers. Our company, Employment Screening Resources (ESR), is a member of NAPBS, but we also provide these comments both as an employer who conducts background screenings of our employees and a background screening firm that educates large numbers of employers nationally on the need to carefully consider the use of criminal records in light of Title VII of the Civil Rights Act.

I believe I bring a unique perspective on the issue of the use of criminal records and employment. I am the founder and CEO of a nationwide background check firm, Employment Screening Resources (ESR), an accredited Consumer Reporting Agency (CRA). I was the chairperson of the committee that founded the 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 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 the time as a criminal 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 also served as an adjunct professor at a major California law school teaching Criminal Procedure and Criminal Law.

I have had the opportunity to work with numerous accused offenders and their families very closely and often assisted ex-offenders in gaining employment as part of an effort to present the best case at sentencing. I have also worked closely with crime victims and their families and have witnessed firsthand the lifetime devastation that can result from being a victim of a criminal act.

As a professional background screener, 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 closely and personally. America is a country of second chances, and if a person has committed a crime and done the time, he or she needs a job in order to become a law abiding and a tax-paying citizen. As a society, we cannot afford to build more prisons than 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>.

My firm has endorsed and conducted employer education nationwide on a number of best practices to ensure fairness in the use of criminal records and EEOC compliance, including eliminating any mention of criminal records in a job announcement, the use of the "ban the box" approach on employment applications by private employers, delaying any questions about past criminal records until at or after an interview, limiting any inquiry on criminal questions so it does not elicit information that is old or irrelevant, the use of a targeted screen in analyzing the relevancy of a criminal record, and the use of an individualized assessment approach suggested in the 2012 EEOC Guidance as well as the consideration of other factors.

My hope is that agencies involved in issues concerning criminal records and hiring will take a broad and balanced approach to these issues in two significant ways:

1. It is important to recognize that although the prevention of unfair discrimination is vitally important to our society, there is also an equally compelling need to protect innocent people from harm, and to enable employers to operate profitable businesses with safe, honest, and qualified employees.

2. It is important to recognize that the background screening industry is an indispensable partner in the effort to educate employers about compliance with Title VII and the EEOC Guidance. In fact, the screening industry has been and will continue to be the primary means by which American employers have become educated on the EEOC approach to criminal records, given that screening firms touch the vast majority of American employers.

Discussion:

1. It is important to recognize that although the prevention of unfair discrimination is vitally important to our society, there is also an equally compelling need to protect innocent people from harm, and to enable employers to operate profitable business with safe, honest, and qualified employees.

Everyone agrees that ex-offenders need a fair shot at employment. However, it is also important to keep in mind that criminal records can also play a vital role in protecting innocent people and businesses. I have also seen the devastating results firsthand 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.

Negligent hiring lawsuits are filed constantly against employers for failure to perform adequate background checks or perform checks at all. As an attorney and published author on the subject, I have been qualified as an expert witness in a number of these cases. I have been involved in cases involving innocent people murdered and other horrific events that resulted from a failure to exercise due diligence in hiring, including not obtaining criminal records.

No one disputes that the discriminatory use of a criminal costing a job has a terrible and profound impact on a person's life and is detrimental to our society as a whole. Eliminating unfair barriers to employment is a critical societal goal.

However, where discrimination does occur, that injustice can be corrected and the victim can have the opportunity to move on. Where the injustice causes measurable harm, they can also seek monetary damages through the courts.

But how does a society undo the impact and scars of a murder, rape, child molestation, or other sexual assaults or violent crimes that can result from a failure to perform criminal background checks? The victim of a crime cannot so easily move forward with their lives. I have seen over and over the lifetime devastation that occurs when a person is a victim of a criminal act, or businesses impacted by embezzlement or disrupted by criminal acts. It impacts not only the victim but ripples much more broadly into the lives of family members as well.

The use of criminal records is a difficult issue because it occurs at the intersection of two important American values. On one hand, we value public safety and a safe workspace with honest and qualified employees. All American workers have a right to be safe and secure in their workplace and employers need the ability to focus on conducting business and not be sidetracked.

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, do not burden the families as well as 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 a tremendous burden is placed on society.

It is my hope that the U.S. Commission on Civil Rights as well as the EEOC recognizes that the need to promote fairness and equality in hiring must be appropriately balanced with an equally compelling need to protect innocent people from harm.

2. It is important to recognize that the background screening industry is an indispensable partner in the effort to educate employers about compliance with Title VII and the EEOC Guidance. In fact, the screening industry has been and will continue to be the primary means by which American employers have become educated on the EEOC approach to criminal records, given that screening firms touch the vast majority of American employers.

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 utilize 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 actionable data for employers to utilize but client education as well. 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.

It should be noted that working under the strict guidelines of the federal Fair Credit Reporting Act (FCRA) and numerous state laws, a background firm is a Consumer Reporting Agency (CRA) that gathers information for employers to use. A screening firm does not in any way make a recommendation as to hiring. A screening firm typically has very limited contact if any with an applicant and is not involved in critical parts of the hiring process such as interviews. As a result, background screening firms are not in any way, shape, or form the "employment police."

In the role of providing professional services to employers, screening firms also educate businesses about the proper uses and limitations of information provided. By partnering with the screening industry to promote education and awareness, the goal of the fair and non-discriminatory use of data can be advanced substantially.

Thank you for this opportunity to provide public comments.

Regards,

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Attorney at Law
Founder and CEO
Employment Screening Resources (ESR)