

Memorandum

Date: April 24, 2012

Re: EEOC Action on Criminal Background Checks for Employment

On Wednesday, April 25th, the U.S. Equal Employment Opportunity Commission (EEOC) is scheduled to vote on a proposal to update its 25-year-old guidance on the use of criminal background checks for employment under Title VII of the Civil Rights Act of 1964. As we describe below, this action by the EEOC is a timely and important response to the new realities of criminal background checks, one that will protect workers and promote safety and security on the job.

1. Action by the EEOC on its dated guidance is overdue and compelled by the new realities of criminal background checks for employment: The landscape and impact of criminal background checks has changed significantly since 1987, when the EEOC issued its initial guidance under its then-Chair (now-Supreme Court Justice) Clarence Thomas.¹

When the EEOC published its guidance in 1987, the use of criminal background checks was still in a fairly nascent stage. Since then, the incidence of criminal background checks has grown enormously, as has the industry that conducts them.² Today more than 90 percent of employers conduct criminal background checks, according to the Society of Human Resources Management.³ The number has increased significantly from 51 percent in 1996 to 80 percent in 2004.⁴ This vast expansion of criminal background checks to screen for employment dictates an updated and informed EEOC response to ensure the process is fair to workers, while promoting confidence in the integrity of the screening process and protecting safety and security at the workplace.

2. Criminal background checks have a major impact on a vast segment of U.S. workers, especially workers of color: An estimated 65 million people in the U.S. – or one in four adults – now have an arrest or conviction record that can show up on a routine criminal background check for employment.⁵ Thus, a vast segment of the labor force faces added challenges to finding work—

¹ The U.S. Equal Employment Opportunity Commission, *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). (Feb. 4, 1987). Available at <http://www.eeoc.gov/policy/docs/convict1.html>.

² SEARCH, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information*, (2005). Available at <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>.

³ Society for Human Resource Management, *Background Checking: Conducting Criminal Background Checks* (Jan. 22, 2010), at 3. Available at <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx>.

⁴ Society for Human Resource Management, *SHRM Workplace Violence Study* (Jan. 2004), at 19. Available at <http://www.shrm.org/Research/SurveyFindings/Documents/Workplace%20Violence%20Survey.pdf>.

⁵ The National Employment Law Project, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment* (March 2011), at 1. Available at http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1.

challenges exacerbated in today's tight economy—due to the proliferation of criminal background checks for employment.

But the problem is especially severe for workers of color. For example, African Americans are arrested at a rate that is more than double their share of the U.S. population, while whites are arrested at a rate that's about half their share of the U.S. population.⁶ According to a recent study the total number of African Americans adults who have a felony conviction expanded from 7.6 percent in 1980 to over 25 percent in 2010.⁷ Thus, criminal background checks for employment have a disproportionate impact on people of color. In today's struggling economy, where African American unemployment is already double the rate of whites (the average unemployment rate for African Americans in 2011 was 15.8 percent, compared to 7.9 percent for whites⁸), the added challenge of finding work in the new era of criminal background checks for employment cannot be overstated.

3. EEOC guidance on criminal background checks in employment is based on established precedent embraced by both Republicans and Democrats: In addition to balancing and protecting the interests of both employers and workers, EEOC action is firmly grounded in established judicial and legislative precedent. As the Supreme Court held in a unanimous 1971 decision authored by then-Chief Justice Warren Burger, in order to justify the use of a hiring policy that has a "disparate impact" along racial or ethnic lines,⁹ an employer must show that the screening practice is "job related" and serves a "business necessity." The "disparate impact" standard was subsequently affirmed and strengthened by Congress in bills signed by Presidents Nixon and George H.W. Bush. The EEOC's 1987 guidance applied these standards, requiring employers to consider the age of an individual's offense, its seriousness, and its relation to the job being filled. In addition, the EEOC guidance strongly disfavors blanket criminal record restrictions by employers (e.g., "Must have no previous misdemeanors or felonies").

4. EEOC action will provide the clarity employers need to navigate the new realities of criminal background checks while responding to major violations of the current guidelines: Updating the current EEOC standards will further clarify requirements under the civil rights laws to help the vast majority of employers who want to do the right thing but are unaware of the law. Unfortunately, many employers, including major companies like Pepsi,¹⁰ continue to violate the law by imposing blanket restrictions against hiring people with criminal records. A 2011 NELP report documented these violations based on an analysis of job ads posted on Craigslist by small and large employers

⁶ Id. at 5, 28 fn 14-16.

⁷ Sarah Shannon, et al., "Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010, page 7. Available at <http://paa2011.princeton.edu/download.aspx?submissionId=111687>.

⁸ U.S. Department of Labor, *The African-American Labor Force in the Recovery*, (Feb. 29, 2012), at 2. Available at <http://www.dol.gov/sec/media/reports/BlackLaborForce/BlackLaborForce.pdf>.

⁹ Title VII prohibits practices that by design or effect treat applicants or employees differently by race, gender, color, religion or national origin.

¹⁰ U.S. Equal Employment Opportunity Commission, *Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans*, (Jan. 11, 2012). Available at <http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>.

across the U.S.¹¹ Updated EEOC guidelines will provide a renewed emphasis on education and enforcement to address these and other basic violations of the law.

5. The EEOC's deliberative process was fair and broadly inclusive of the employer community, the background check industry and worker interests: The EEOC has engaged in an open, transparent and deliberative process in considering an update to its existing criminal records guidance. In addition to individual meetings with key stakeholders and EEOC participation in events across the U.S.,¹² the EEOC held two hearings on the issue, one in November 2008 and another in July 2011.¹³ The EEOC also invited public comments on the issue as a follow-up to the 2011 hearing. That request generated more than 300 responses, which--by a two-to-one ratio—supported the need for updating the guidelines, to better reflect changes in the economy, workplace, and world of criminal records screening since issuance of the initial guidance 25 years ago.

¹¹ The National Employment Law Project, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment* (March 2011), at 1. Available at http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1.

¹² On December 8, 2011, EEOC General Counsel David Lopez presented information at Cornell University IRL School Richard Netter Conference on Criminal Records and Employment (<http://www.ilr.cornell.edu/law/events/Conference-on-Criminal-Records-and-Employment.html>).

On March 13, 2012, Commissioner Lipnic presented "A View from the EEOC" at the U.S. Chamber of Commerce conference Due Diligence, Background Checks and Employment: Protecting the Safety of Employees, Customers and At-Risk Populations (<http://www.regonline.com/builder/site/Default.aspx?EventId=1061707>).

On March 23, 2012, Commissioner Ishimaru participated in a panel "Between a Rock and a Hard Place: Workplace Issues Relating to People with Criminal Convictions in the Digital Age" as part of the American Bar Association National Conference on Equal Employment Opportunity Law (http://www.americanbar.org/content/dam/aba/events/labor_law/2012/03/national_conference_on_equal_employment_opportunity_law/2011_eo_brochure.authcheckdam.pdf).

¹³ U.S. Equal Employment Opportunity Commission, Meetings of the Commission, (available at <http://eoc.gov/eoc/meetings/index.cfm>).