July 25, 2011

Jacqueline A. Berrien, Chair  
Stuart J. Ishimaru, Commissioner  
Constance S. Barker, Commissioner  
Chai Feldblum, Commissioner  
Victoria A. Lipnic, Commissioner  
U.S. Equal Employment Opportunity Commission  
131 M Street, N.E.  
Washington, DC 20507

Re: Commission’s July 26, 2011 Meeting Regarding Arrest and Conviction Records as Barriers to Employment

Dear Chair Berrien and Commissioners Ishimaru, Barker, Feldblum, and Lipnic:

The NAACP Legal Defense & Educational Fund, Inc. (“LDF”) writes to encourage the Equal Employment Opportunity Commission (“EEOC” or “Commission”), in light of the Commission’s July 26, 2011 convening regarding arrest and conviction records as a barrier to employment, to update its policy statements on the use of arrest and criminal records in employment screening under Title VII of the Civil Rights Act of 1964.1 The EEOC’s policy statements were issued over two decades ago; in the ensuing twenty years, the need to ensure that employers comply with Title VII in their consideration of job-seekers’ arrest and/or criminal records has grown only more urgent, especially given (a) the disproportionately high unemployment rates among African Americans, in particular African-American men;2 (b) employers’ increasing reliance on criminal background checks in the employment application process, and (c) the growing consensus among elected officials and policymakers that greater attention needs to be devoted to the challenges faced by individuals with criminal records, so that this growing segment of the population can successfully reintegrate into civic life and society.3

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2 While the national unemployment rate was 9.6% last year, the rate for young black men (ages 16-24) was 34%; double the rate for young white men. For young black men without a high school diploma, the unemployment rate in New York was over 50% through the middle of 2010. David R. Jones, Hot, Jobless Summer for NYC’s Young People of Color, CMTY. SERV. SOC’Y, June 3, 2011, http://www.cssny.org/userimages/downloads/CSS%20Statement6.3.11HotJoblessSumme%20f%20NYCY oungPeople%20Color.pdf.

LDF, the nation's oldest civil rights firm, has long worked to eliminate racial bias from the nation's criminal justice system and to create a more just and fair criminal justice system. Similarly, LDF has worked aggressively in the employment context to ensure that African Americans and other racial minorities are not unlawfully and improperly denied equal opportunity. As such, LDF strongly supports reentry policies that help individuals with prior arrest and conviction records to successfully reintegrate into society.

Racial minorities are now overwhelmingly represented in the criminal justice system, and the prevalence of arrest rates and criminal convictions are far higher among African Americans and Latinos than for whites. As a result, employers' refusal to hire persons with arrest and/or criminal convictions has a profound disparate impact on people of color, and creates potentially insurmountable barriers to racial equality. The EEOC should revise its policy statements to clarify Title VII's requirements and prohibitions in the criminal records context and to eliminate the racially disparate impact of employers' "no-convictions" policies where such policies are not job-related or other less discriminatory alternatives exist.

The EEOC's current policy statements set forth the Commission's views on (1) the proof required to show that an employer's policy of screening out applications with arrest and/or conviction records has a disparate impact on African Americans and Latinos, and on (2) the showing that an employer must make to demonstrate that its rejection of an application based on his or her arrest and/or conviction record is consistent with business necessity. Although the current guidance documents still accurately reflect the application of basic Title VII principles in the criminal records context, they need to incorporate updated legal standards and more current statistics regarding the disproportionate arrest and conviction rates of African Americans and Latinos.

We recommend, first, that the EEOC continue its presumption that an employer's no-conviction policy has a disparate impact on African Americans and Latinos. Second, based on this presumption, disparate impact should be found where an African-American or Latino job-seeker has been denied a job based on an employer's no-convictions policy, unless the employer shows that the presumption of disparate impact is inappropriate. Third, to show that a policy of excluding those with criminal records is justified by business necessity, an employer should be required to demonstrate that its policy accurately screens for recidivism risk. Finally, we recommend that the EEOC provide additional guidance to employers concerning the way in which criminal background checks can be used in the employment application and screening process without running afoul of Title VII. We discuss these recommendations in greater detail below.

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4 This overrepresentation is due at least in part to racial profiling and discriminatory criminal justice policies. See, e.g., Marc Mauer, Mass Imprisonment and the Disappearing Voters, in Invisible Punishment 53 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing war on drugs).

5 As used in this letter, "no-conviction" policies include employers' policies that bar applicants on the basis of arrest and/or criminal conviction records.
I. Recommendation: The EEOC should maintain its presumption that an employer’s blanket policy of excluding those with arrest and/or criminal convictions from employment has a disparate impact on African Americans and Latinos.

A facially neutral employment practice is illegal under Title VII if it has a race-based disparate impact and is not shown by the employer to be job-related and consistent with business necessity or other less discriminatory alternatives exist. In several published decisions federal courts have applied the disparate impact standard to employer policies that bar the hiring of applicants with arrest and/or conviction records; the U.S. Court of Appeals for the Third Circuit handed down such a decision in El v. SEPTA, 479 F.3d 232 (3d Cir. 2007). In each of those cases, the plaintiff relied on evidence of disparate arrest and/or conviction rates to show that the employer’s no-convictions policy “select[ed] applicants for hire in a significantly discriminatory pattern.” Similarly, the EEOC’s current guidance documents contain a rebuttable presumption that the practice of excluding applicants with arrests and/or convictions has a disparate racial impact on African Americans and Latinos. This presumption is even more justified now than it was when the guidance was issued over twenty years ago, given that disparities in the prevalence of arrest and conviction records among minorities have greatly increased since then.

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8 Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); see also El v. SEPTA, 418 F. Supp. 2d 659, 668-69 (E.D. Pa. 2005), aff’d, 479 F.3d 232 (3d Cir. 2007); Green, 523 F.2d at 1294-95; Richardson, 332 F. Supp. at 520.
9 EEOC, Policy Statement on the Use of Statistics, at ¶ 2. The EEOC’s current guidance documents state that the EEOC position is “that an employer’s policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population.” This presumption can be rebutted by evidence that specific employment restrictions—based on a particular type of crime, local geographic area, or actual applicant pool—do not in fact disproportionately affect minorities. Id. The EEOC’s current guidance employs a similar analysis in the context of an employer’s use of arrest records as a basis for excluding individuals from employment. See EEOC, Policy Guidance on the Consideration of Arrest Records, at ¶¶ 1, 9.
10 See, e.g., Bureau of Justice Statistics, U.S. Dep’t of Justice, Prevalence of Imprisonment in the U.S. Population, 1974-2001, at tbl. 5 (2003) (in 1986, 5.2% of all black adults and 2.0% of all Latino adults had ever been imprisoned, versus 0.9% of white adults; by 2001, 8.9% of all black adults and 4.3% of all Latino adults had ever been imprisoned, versus 1.4% of white adults).
A. All readily available data on criminal charges and convictions shows that African Americans and Latinos are far more likely to carry an arrest and/or conviction record than whites, across crime type and region of the United States.

All available figures show that the prevalence of a past arrest and conviction record among racial minorities, and particularly among minority men, is extremely disproportionate relative to whites. Recent statistics from the FBI show that African Americans accounted for more than 3 million arrests in 2009 (28.3% of total arrests), even though they represented just 12.9% of the general population; whites, who formed 75.6% of the general population, accounted for fewer than 7.4 million arrests (69.1% of total arrests). Among persons arrested on felony charges in 2006, 29% were white, while 45% were black and 24% were Latino. The racial disparities in arrest rates are not explained by disproportionate rates of criminal activity: one study found that in 2005, African Americans represented 14% of current drug users, yet they constituted 33.9% of persons arrested for drug offenses.

Similar disparities are seen in conviction rates as well. One recent estimate found that nearly one-fourth of the black adult male population (23.3%) has at least one felony conviction, but is not currently under any form of criminal justice supervision, while that figure is only 9.2% for the adult male population as a whole. The share of adult males that has ever been imprisoned is 16.6% for blacks, 7.7% for Latinos, and 2.6% for whites. Conviction rates also show wide racial disparities within particular categories of crimes, indicating that an employer’s practice of rejecting applicants based only on

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16 In 2004, although African Americans were only about 12% of the U.S. population, they made up 34% of those convicted of property offenses, 46% of those convicted of drug offenses, and 27% of those convicted of other offenses. U.S. Census Bureau, The American Community—Blacks: 2004, at 2 tbl. 1 (2007); Bureau of Justice Statistics, U.S. Dep’t of Justice, State Courts Sentencing of Convicted Felons, 2004, tbl. 2.1 (2007). Examining previous years show that these patterns are long-standing (see table below). Thus, although the conviction rate for a particular year does not tell us what share of the total population has ever been convicted of that type of crime, we can extrapolate over time, these racial disparities in annual conviction rates have likely caused large aggregate racial disparities within the total population ever convicted of these types of crimes.

| African Americans’ Percentage Share of Felony Convictions in State Courts |
|--------------------------------|---|---|---|---|---|---|
| Property    | 33   | 39   | 38   | 39   | 40   | 41   |
| Drug        | 43   | 53   | 53   | 53   | 59   | 55   |
| Other       | 27   | 32   | 32   | 29   | 31   | 34   |
certain specific crimes will also have a disparate impact. While regional statistics regarding racial disparities in conviction rates are not generally available, data on the race of criminal defendants in the nation’s most populous counties suggests similar racial disparities in conviction rates across regions.\textsuperscript{17}

B. It is not feasible or necessary in most instances to identify relative arrest and conviction rates narrowed by specific job category, industry, or trade.

For entry-level jobs and jobs where the necessary skills are readily acquired, courts have recognized that general population statistics may be used as a basis for comparison in Title VII cases. For instance, the Supreme Court has explained that a comparison of the percentage of blacks in the defendant company’s workforce to the percentage of blacks in the general population “was highly probative, because the job skill . . . involved—the ability to drive a truck—is one that many persons possess or can fairly readily acquire.”\textsuperscript{18} As to more specialized occupations, data showing arrest and conviction rates within particular occupations, by race, is simply not generally available. Further, it is unrealistic to think that the extreme racial disparities in arrest and conviction rates disappear among individuals seeking more skilled areas of work. In most cases, general population statistics will be an accurate indicator of impact.

C. Data on relative arrest and conviction rates is a more reliable gauge of impact than applicant flow data in this context.

Although courts generally examine the effect of an employment practice on actual applicants, the Supreme Court has recognized that where a challenged employment practice operates as a basic criterion for hiring, the composition of the applicant pool will be misleading: “[O]therwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.”\textsuperscript{19} An employer’s refusal to hire people with arrest records and/or criminal convictions operates precisely as the Court described: such a policy is readily


\textsuperscript{17} See Bureau of Justice Statistics, U.S. Dep’t of Justice, \textit{Felony Defendants in Large Urban Counties}, 2006, app. tbl. 18 (2010); see also Bureau of Justice Statistics, U.S. Dep’t of Justice, \textit{Felony Defendants in Large Urban Counties}, 2004-Statistical Tables, app. tbl. D. (2008), and similar data in the Appendix, table D of each previous year of this publication.


\textsuperscript{19} Dothard, 433 U.S. at 330; see also Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 482 (9th Cir. 1983) (stating that “in discriminatory hiring cases where the employment practice in question is in the nature of an ‘entrance requirement’ . . . persons who lack the challenged requirements will self-select themselves out of the pool of applicants.”).
communicated, whether by explicit notice from the employer, by obvious hiring patterns, or by word-of-mouth. People with arrest records and/or criminal convictions will learn of it and avoid wasting their time in applying. As a result, the true impact of the hiring policy will not be reflected in the applicant pool. The most accurate way to gauge the rates at which different races are affected by a no-convictions policy is to look at relative arrest and/or conviction rates for the general workforce.20

II. Recommendation: Based on the above presumption, the EEOC should find disparate impact where: (1) an African-American or Latino job-seeker applied for the job in question and otherwise met the job’s minimum qualifications, and (2) he or she was turned down for the job due to an employer policy against employing persons with arrest and/or conviction records—unless the employer has shown that the presumption of disparate impact is not justified in that particular case.

The courts consider a prima facie case of disparate impact to be shown where there is "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs . . . because of their membership in a protected group."21 In this case, statistics regarding both relative arrest and conviction rates by race (whether viewed nationally, by crime type, or by region) show that an employer policy that precludes hiring applicants with convictions will generally have a discriminatory effect on African Americans and Latinos. Once it is found that an African-American or Latino individual was rejected for employment or fired based on such a policy, this should initially be sufficient to show that the employer "uses a particular employment practice that causes a disparate impact on the basis of race" pursuant to 42 U.S.C. § 2000e-2(k)(1)(A)(i).

Where it has been shown that a no-convictions policy led to the rejection or firing of an African American or Latino employee, employers may challenge the presumption of disparate impact by showing that it is not appropriate given the specific details of the employment context.22 For example, where an employer presents evidence that there is no racial disparity in arrest and/or convictions rates among local residents, the presumption could be dispelled, and a fact-finder would have to determine the impact based on all the evidence.

20 See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971) (citing relative high school graduation rates for black and white males within the state); Dothard, 433 U.S. at 329-30 (examining height and weight statistics by gender for the population as a whole).
22 See id. at 996-97.
III. Recommendation: When employers seek to show that their rejection of an applicant based on his or her arrest and/or conviction record is consistent with business necessity, the EEOC should require them to demonstrate that their hiring policies accurately identified “applicants that pose an unacceptable level of risk.”

Once disparate impact has been shown, the employer may still prove that a no-convictions policy is lawful by demonstrating that it “is job related for the position in question and consistent with business necessity.” An employment screening device is consistent with business necessity where it has been “shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.” This standard requires “some level of empirical proof that [the] challenged hiring criteria accurately predict[] job performance.” Thus, employers cannot justify a refusal to hire people with arrests and/or convictions simply by showing that the policy has intuitive appeal or even a minimally rational connection to lowering the risk of crime in the workplace.

Current EEOC guidance states that an employer’s rejection of an applicant is justified by business necessity if the employer shows that it considered three factors: (a) the nature and gravity of the offense or offenses; (b) the time that has passed since the arrest, conviction, and/or completion of the sentence; and (c) the nature of the job held or sought. We believe that the mandate that employers should consider the age and job-relatedness of the arrest and/or conviction should be retained; however, the guidance should be updated to be made consistent with the Third Circuit’s sound interpretation of the business necessity standard in *El v. SEPTA* (describing more fully below), and to explicitly incorporate criminal evidence regarding recidivism risks.

A. In a careful and detailed analysis, the Third Circuit appropriately held that an employer policy of screening for criminal convictions should accurately measure the risk that the criminal behavior will be repeated on the job.

In *El v. SEPTA*, the Third Circuit applied the business necessity standard to a regional transit authority’s policy prohibiting employment of individuals with violent felony convictions as paratransit bus drivers. Noting that criminal records cannot be perfectly analogized to hiring criteria that focus on aptitude for the job, the Third Circuit held that, to satisfy the business necessity standard, an employer must calibrate its hiring policy so that it “accurately distinguish[es] between applicants that pose an unacceptable

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23 42 U.S.C. § 2000e-2(k)(1)(A)(i). However, even where the employer shows business necessity, if there is a less discriminatory alternative policy available, the employer must adopt the less discriminatory alternative. *Id.* at § 2000e-2(k)(1)(A)(ii).
24 *Griggs*, 401 U.S. at 431; see also *El*, 479 F.3d at 240 (“[E]mployers cannot rely on rough-cut measures of employment-related qualities; rather they must tailor their criteria to measure those qualities accurately and directly for each applicant.”).
25 *El*, 479 F.3d at 240.
27 *El*, 479 F.3d at 240.
level of risk and those that do not.”

This requires both that the employer rely on empirical evidence of recidivism risks, and carefully differentiate between convictions, indentifying with reasonable precision the specific sorts of risk that particular convictions represent for th[at] workplace.”

As the EEO court itself noted, the risk of crime in the workplace cannot be eliminated—hiring people without criminal convictions still presents a risk that they will engage in criminal behavior. Nor can recidivism be perfectly predicted. Therefore, employers cannot reasonably attempt or be expected to reduce their risk of workplace crime to zero; instead, they should simply ensure that their practices are carefully tailored to accurately identify and screen out high-risk employees.

B. Employers should look to empirical evidence concerning recidivism risk in evaluating applicants with arrest and/or criminal records.

Criminologists have long studied the likelihood that a person with an arrest and/or conviction record will commit a future criminal offense, and have found that risk declines with age, time since the arrest or offense, and time since release. The number and nature of prior arrests or offenses also clearly affects an individual’s recidivism risk. Finally, factors associated with personal rehabilitation and stability—such as work history, family and community ties, and recovery from substance abuse—all indicate a decreased risk of recidivism. Therefore, these factors are all legitimate elements in an employer policy designed to accurately screen for risks in the workplace. The EEOC should explicitly identify these factors and their appropriate use within their revised guidance documents. The EEOC should also highlight that current research suggests that there is a point in time at which old arrest and/or conviction records bear little value in

28 Id. at 245.
29 See id. at 248 (“If the [defendant employer’s] policy were developed with anything approaching the level of care that Griggs, Albemarle, and Dothard seem to contemplate, then we would expect that someone . . . would be able to explain how [the defendant] decided which crimes to place into each category, how the seven-year number was selected [as a limit on the ban for some crimes], and why [the defendant] thought a lifetime ban was appropriate for a crime like simple assault.”).
30 Id. at 244-45 & n. 1.
31 Id. at 244-45 & nn. 12-13.
predicting recidivism, and thus providing a limited basis for distinguishing between someone with an old arrest and/or conviction record and someone with no such record at all.\(^\text{37}\)

To the extent an employer wishes to adopt rules governing applicants with specific types of arrests and/or convictions, it should ensure that the policy is reasonably based on empirical evidence of the recidivism risk for such crimes. By providing individualized review to applicants, an employer is more likely to be able to show that its policy will “accurately distinguish between applicants that pose an unacceptable level of risk and those that do not” particularly to the extent that it takes into account as many of the above-discussed (and any other relevant) factors as possible.\(^\text{38}\)

**IV. Recommendation:** The EEOC, in light of the disparate impact that reliance on arrest and/or criminal records in employment screening can and does have on African Americans and Latinos, should update its policy statements to provide greater guidance and regulation concerning the use of criminal background checks.

In the years since the EEOC issued its policy statements and guidance regarding the use of arrest and conviction records, employers’ reliance on criminal background checks, within the application process, have increased exponentially. A recent report by the American Bar Association found that there are now hundreds, if not thousands, of companies comprising the criminal background screening industry; that report indicates that these companies process and provide more than 14 million background checks each year.\(^\text{39}\) One study of human resource managers found that while only 51% of employers used criminal background checks to screen applicants in 1996, over 90% of employers were using them in 2003.\(^\text{40}\)

The trend of increased reliance by employers on criminal background screens raises concerns in light of the EEOC’s current guidance. Not only has the Commission, as noted above, already established that over reliance on arrest and criminal records in the employment process can have a disparate impact on African Americans and Latinos, but also the EEOC has acknowledged that pre-employment inquiries into applicants’ criminal backgrounds can raise concerns under Title VII.\(^\text{41}\) The Commission’s recently filed lawsuit against Freeman (also known as TFC Holding Co.), which alleges that Freeman engages in an ongoing, nationwide pattern and practice of using criminal background

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\(^\text{38}\) In the context of employers’ policies that exclude applicants on the basis of arrest records, employers must not only “consider the relationship of the [arrest] charges to the position sought, but also the likelihood that the applicant actually committed the conduct alleged in the charges.” EEOC, *Policy Guidance on the Consideration of Arrest Records*, at ¶ 5.

\(^\text{39}\) AMERICAN BAR ASSOCIATION, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 38 n.4 (2007).


\(^\text{41}\) EEOC, *Policy Guidance on the Consideration of Arrest Records*, at ¶ 8.
checks as a selection criterion in hiring, in violation of Title VII’s disparate impact provisions, *EEOC v. Freeman*, No. 09-02573 (D. Md., filed Sept. 30, 2009), provides further evidence of the risks associated with criminal background checks. Updated policy statements from the EEOC could provide employers with guidance about the proper role of criminal background checks in the employment process and ensure that the rights of the country’s workforce are protected. Additional guidance from the EEOC is especially vital given that the criminal background check industry is largely unregulated, and recent research has indicated that there are very few—if any—mechanisms in place to prevent the spread of false, misleading, or otherwise inaccurate information.42

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The above recommendations provide a tailored application of Title VII law to employer policies barring hiring of people with arrest and/or criminal convictions. The recommendations also balance minority job-seekers’ equal employment rights with appropriate employer concerns. We encourage the EEOC to revise its policy statements with these recommendations in mind, and to further clarify and strengthen the application of Title VII in this uniquely important context.

Sincerely,

[Signature]

Johnathan J. Smith
Assistant Counsel

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42 See, e.g., Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L. J. 753, 774 (2011) (“Quality control of public records systems is notoriously poor, and mistakes are common.”).