

October 14, 2014

Via First Class and Electronic Mail

Donna McLeod
Federal Investigative Services
U.S. Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

RE: Comments on the Declaration for Federal Employment Form

Dear Ms. McLeod:

The NAACP Legal Defense and Educational Fund, Inc. (LDF) submits this letter in response to the Office of Personnel Management's (OPM) request for comments on the Declaration for Federal Employment Form, Optional Form 306 (OF 306). *See*, 79 Fed. Reg. 47694 (Aug. 14, 2014). For the reasons stated below, LDF urges OPM to either delete questions 9 through 11 of OF 306 or require completion of the form at the end of the hiring process, to ensure that qualified applicants with criminal records, particularly people of color, have equal opportunities to compete for and obtain federal employment.

Founded by Thurgood Marshall in 1940, LDF is the nation's oldest civil rights law organization. For almost 75 years, it has relied on the U.S. Constitution and federal and state civil rights laws to pursue equity and justice for African Americans and other people of color. For example, since the enactment of the Civil Rights Act of 1964, LDF has litigated many of the seminal cases that interpreted Title VII of the Act,¹ which prohibits employment discrimination on the basis of race, national origin and other protected classes.² Most recently, LDF filed several cases on behalf of African Americans with criminal records who were excluded from employment as a result of old, irrelevant criminal convictions in violation of Title VII and other federal statutes.³

LDF has also monitored the U.S. Equal Employment Opportunity Commission's (EEOC) enforcement activities under Title VII. At the urging of LDF and other civil rights organizations, in 2012, the EEOC updated its guidance on the use of arrest and conviction records in employment decisions.⁴ The EEOC recognized that in

¹ *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

² 42 U.S.C. §§ 2000e, *et seq.*

³ *See Little, et al. v. Washington Metropolitan Area Transit Authority, et al.*, Case No. 1:14-cv-01289-RMC (D. DC July 30, 2014); *See also Waldon v. Cincinnati Public Schools*, Case No. 1:12 CV 00677 (S.D. Ohio Oct. 15, 2013).

⁴ *See EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, No. 915.002 (Apr. 25, 2012) (EEOC Guidance). This year, LDF testified before Congress about the EEOC's guidance. *See* <http://www.naacpldf.org/press-release/ldf-testifies-congress-about-criminal-background-checks>. Additionally, LDF moved to intervene in a lawsuit challenging the guidance. *See Texas v. EEOC*, Case No.5:13-CV-255 (N.D. Tex. May 22, 2014) <http://www.naacpldf.org/case-issue/texas-v-eeoc>. A federal court recently dismissed the case. *See* <http://www.workplaceclassaction.com/files/2014/08/Texas-v.-EEOC.pdf>.

the past several decades, the number of working-age individuals with criminal records has increased significantly, with African-American and Latino residents experiencing the highest arrests and incarceration rates.⁵ If incarceration trends continue, the EEOC predicts that 1 in 3 African-American men will serve time in prison in their lifetimes, compared to 1 in 6 Latino men, and 1 in 17 White men.⁶ Yet, research shows that racial disparities in arrests and convictions for marijuana possession are not due to higher rates of use among African Americans, but explicit or implicit racial biases held by decision makers within the criminal justice system.⁷

Accordingly, the EEOC's guidance warns that employers' use of arrest or conviction records could violate Title VII, and recommends that employers not ask about criminal histories on job applications unless the questions are "limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity."⁸ This guidance applies to federal employers.⁹

Therefore, Questions 9, 10 and 11 of OF 306 are inconsistent with the EEOC guidance and could exclude a disproportionate number of African Americans and other people of color from federal employment. Specifically, question 9 asks whether applicants have been convicted, imprisoned, or placed on probation or parole for any "felonies, firearms or explosive violations, misdemeanors, and all other offenses" in the past seven years. Question 10 inquires about military court martial convictions. The types of prior convictions and the time frame included in these questions are overbroad. Research shows that the reoffending risk of people with prior convictions declines as their "time clean" increases; and, this risk falls below that of the general population after approximately: four years for people with prior drug convictions; three to four years for people with prior property convictions; and four to seven years for people with violent crime convictions.¹⁰ Questions 9 and 10 fail to take into account specific types of prior convictions and years of "time clean" that best predict an applicant's risk of reoffending.

Also, the term "imprisoned" in question 9 could be interpreted to include "jailed" as a result of an arrest, thereby compelling applicants to disclose arrests that did not result in convictions. The EEOC guidance clearly states that an arrest does not prove criminal conduct, and therefore employment exclusions based on an arrest alone could violate Title VII. Likewise, question 11, which asks whether applicants are currently under charges for any violation of law, suggests that the applicant must report arrests and pre-conviction charges. Such an inquiry could be highly prejudicial and may exclude qualified applicants who ultimately are never convicted or against whom pending charges are dropped. For example, several of LDF's clients were charged with criminal trespass as they visited relatives and friends who live in New York City public housing.¹¹ Although the charges were dismissed, they are still concerned about the possibility of being asked about their arrests by prospective employers. To ensure compliance with the EEOC guidance, we urge OPM to delete questions 9, 10 and 11.

Alternatively, OPM could ask questions 9 through 11 only after qualified applicants have completed the hiring process. This would be consistent with the Obama Administration's pledge to remove employment barriers

⁵ *EEOC Guidance, supra* at 3.

⁶ *Id.*

⁷ See, e.g., American Civil Liberties Union, *The War on Marijuana in Black and White* (June 2013), <https://www.aclu.org/files/assets/1114413-mj-report-rfs-re11.pdf>.

⁸ *EEOC Guidance, supra* at 13-14.

⁹ *Id.* at 23.

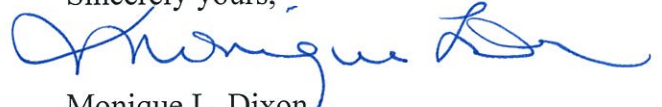
¹⁰ See, e.g., Alfred Blumstein and Kiminori Nakamura, *Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences*, Final Report Submitted to the National Institute of Justice, 89 (Oct. 2012) <https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf> (last visited Oct. 14, 2014).

¹¹ See *Davis v. City of New York*, 10 Civ. 0699 (SAS) (S.D. NY May 27, 2011).

faced by boys and men of color with criminal records. The Administration urges large employers, including the federal government, to ban the box on job applications that inquires about criminal histories, which would give “applicants a fair chance and allow employers the opportunity to judge individual job candidates on their merits as they reenter the workforce.”¹² Therefore, OPM should state in the OF 306 instructions that the applicant will be asked to complete the form at the end of the hiring process, and criminal convictions will be considered only if they are job related and consistent with business necessity.

Thank you for considering these comments. If you have any questions or concerns, please do not hesitate to contact me at 202-216-5564 or mdixon@naacpldf.org.

Sincerely yours,



Monique L. Dixon
Senior Policy Counsel

¹² See *My Brother's Keeper Task Force Report to the President*, 10 (May 2014)
http://www.whitehouse.gov/sites/default/files/docs/053014_mbk_report.pdf.