

**Statement of Laura Moskowitz, Staff Attorney,  
National Employment Law Project’s Second Chance Labor Project**

Madam Chair and Commissioners, thank you for the opportunity to participate in this important meeting on employment discrimination faced by the growing numbers of individuals with criminal records in this country. My name is Laura Moskowitz, and I am a Staff Attorney with the National Employment Law Project. Our organization has a Second Chance Labor Project that works to reduce unfair barriers to employment of people with arrest and conviction histories. We partner with formerly incarcerated people, unions, policymakers, and other advocates in this work.

We have been asked to comment on employer practices today. I will start by reviewing the current landscape for employment criminal background checks, and then discuss our views on best practices in terms of employer consideration of arrest and conviction histories, and how the Commission could provide more guidance to employers in these areas. I will also highlight the “Ban the Box” movement, where public employers are leading the way toward less discriminatory hiring policies, and I will note some of the assistance available for employers in hiring people with criminal records.

**The Current Landscape for Employment Criminal Background Checks**

The context in which both workers and employers are grappling with issues surrounding employment of people with criminal records has changed dramatically in the decades since the Commission adopted the existing guidances on employer consideration of arrests and convictions.<sup>1</sup> This is due primarily to the exponential growth in the number of people who have had contact with the criminal justice system, and in the number of employers conducting criminal background checks, especially since September 11, 2001.

An estimated one out of five adults in the United States now has a criminal record that will show up on a routine employment background check.<sup>2</sup> These records

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<sup>1</sup> The existing policy statements date back to 1990 for arrests (“Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964” (Sept. 7, 1990) [hereinafter “Arrest Guidance”]) and 1987 for convictions (“Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964” (Feb. 4, 1987) [hereinafter “Conviction Guidance”]). The Commission also issued a policy statement on conviction statistics in 1987 (“EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment” (July 29, 1987)). All are available at <http://www.eeoc.gov/policy/guidance.html>.

<sup>2</sup> Maurice Emsellem & Debbie A. Mukamal, “The New Challenge of Employment in the Era of Criminal Background Checks,” in *The Gloves Off Economy: Workplace Standards at the Bottom of America’s Labor Market*, at 193 & n.1 (Annette Bernhardt et al. eds., Labor & Employment Relations Association 2008). This figure is based on U.S. Bureau of Justice Statistics data showing that 71 million people have criminal records on file with the states, including arrests. Because a number of these individuals may have records in multiple states, the authors reduced that number by 30% to arrive at a conservative national estimate of 49.7 million. As a percentage of the U.S. population over the age of 18 (209 million according to the 2000 Census), the authors thus estimate that 23.8% of the U.S. population has a criminal record on file with the states.

overwhelmingly involve non-violent crime,<sup>3</sup> and often consist solely of an arrest that did not lead to conviction<sup>4</sup> or a conviction for a minor, non-serious offense.<sup>5</sup> Many of these individuals have never served time in prison,<sup>6</sup> and have successfully completed terms of probation and paid off fines.

Incarceration rates, which are tracked more consistently than data involving arrests that do not lead to conviction and sentencing for minor offenses, are a barometer for measuring Americans' involvement in the criminal justice system. Incarceration rates have increased seven-fold since 1974.<sup>7</sup> Approximately one in 100 American adults are incarcerated,<sup>8</sup> and 650,000 people return home from state or federal prison each year.<sup>9</sup>

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<sup>3</sup> Of the total arrests in the United States in 2006, less than 5% were for violent crimes. U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 2007*, Table 29 (2008), available at [http://www.fbi.gov/ucr/cius2007/data/table\\_29.html](http://www.fbi.gov/ucr/cius2007/data/table_29.html).

<sup>4</sup> According to the most recent federal criminal case data, there were 140,755 individuals arrested and 74,782 individuals convicted in 2004. U.S. Department of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2004*, NCJ 213476, at 1 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs04.pdf>. Although a percentage cannot be derived from this because case processing times mean that the number of people convicted does not correlate exactly to the number of people arrested, in that year, the number of convictions was only 53% of the number arrested. Of those prosecuted, the conviction rate was 92% for felonies and 71% for misdemeanors. *Id.* at 59. Of felony defendants in state court, 68% were convicted in a one-year period. Tracey Kyckelhahn & Thomas H. Cohen, *Felony Defendants in Large Urban Counties, 2004*, NCJ 221152, at 3 (U.S. Department of Justice, Bureau of Justice Statistics 2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc04.pdf>. Studies have shown that the conviction rate is much lower for non-serious offenses, with 20-30% conviction rates. Council on Crime and Justice, *Low Level Offenses in Minneapolis: An Analysis of Arrests and their Outcomes*, at 25 (2004), available at <http://www.crimeandjustice.org/researchReports/Low%20Level%20Offenses%20in%20Minneapolis%20An%20Analysis%20of%20Arrests%20and%20their%20Outcomes.pdf>.

<sup>5</sup> About 13% of all arrests are for non-serious offenses such as vagrancy, drunkenness, disorderly conduct, loitering, runaways, and vandalism. Federal Bureau of Investigation, *Crime in the United States, 2007* at Table 29. Misdemeanors make up 12% of federal criminal cases; 40% of misdemeanor charges involve traffic violations. Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2004* at 59.

<sup>6</sup> For example, 28% of state felony defendants were not sentenced to prison, Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2004*, NCJ 215646, at 2 (Bureau of Justice Statistics 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf>, and 22% of federal defendants were not sentenced to prison, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2004* at 69. The percentage of defendants not sentenced to confinement is presumably lower for non-felony defendants in state court.

<sup>7</sup> Compare Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, NCJ 197976, at 1 (Bureau of Justice Statistics 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf> (216,000 prisoners in 1974) with William J. Sabol & Heather Couture, *Prison Inmates at Midyear 2007*, NCJ 221944, at 1 (Bureau of Justice Statistics 2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf> (1,595,034 prisoners in June 2007). The Pew Center on the States estimates that between 1987, the year the Commission adopted the most recent conviction policy guidance, and 2007, the incarceration rate nearly tripled. Pew Center on the States, *One in 100: Behind Bars in America 2008*, at 5 (2008).

<sup>8</sup> Pew Center on the States, *One in 100*, at 5 (totaling the number of adults in state or federal prison and local jails).

<sup>9</sup> U.S. Department of Justice, Office of Justice Programs, *Reentry*, available at <http://www.reentry.gov/> (visited Nov. 3, 2008).

Nearly two-thirds of those released from incarceration each year have served time for non-violent property or drug offenses.<sup>10</sup>

In addition, the percentage of large employers conducting criminal background checks has risen from 51% in 1996 to 80% in 2003.<sup>11</sup> Many states make criminal record information widely available to the public on the Internet,<sup>12</sup> and the private background check industry conducts millions of background checks for employers each year.<sup>13</sup> One commercial data provider has even started listing 50-state criminal record information online for free, despite complaints about the accuracy of these records.<sup>14</sup> Employers are often bombarded with information about their potential liability for negligent hiring,<sup>15</sup> but they receive little guidance on how to make sound and fair hiring decisions that comply with Title VII.<sup>16</sup>

### **Why the EEOC Plays a Critical Role in Providing Guidance to Employers and Workers Regarding Criminal Record Issues: Racial Disparity in the Criminal Justice System Means Employer Screening Policies Have a Disparate Racial Impact**

Why does this concern the EEOC, and why does the Commission have such a critical role to play in these issues? As the Commission recognized in its existing guidances on employer consideration of arrests and convictions, the stark racial disparities in our criminal justice system mean that hiring policies that screen for criminal records will have a disparate impact on African Americans and Latinos, classes of workers that the Commission is charged with protecting under Title VII of the Civil Rights Act of 1964.<sup>17</sup>

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<sup>10</sup> Lauren E. Glaze & Thomas P. Bonczar, *Probation and Parole in the United States, 2006*, NCJ 220218, at 7 (Bureau of Justice Statistics 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus06.pdf>.

<sup>11</sup> Society for Human Resource Management, *Workplace Violations Survey* (2004).

<sup>12</sup> Keith Finlay, *Effect of Employer Access to Criminal History Data on the Labor Outcomes of Ex-Offenders and Non-Offenders*, Working Paper 13935, at 7 (National Bureau of Economic Research 2008), available at <http://www.nber.org/papers/w13935>.

<sup>13</sup> SEARCH: The National Consortium for Justice Information and Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information*, at 7-9 (2005), available at <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>.

<sup>14</sup> Brad Stone, *If You Run a Red Light, Will Everyone Know?*, N.Y. Times, Aug. 3, 2008 (<http://www.nytimes.com/2008/08/03/technology/03essay.html?th&emc=th>).

<sup>15</sup> A Google search on employment background checks will typically turn up numerous private screening firm sites warning about potential negligent hiring liability and the need to conduct background checks, but no information about potential Title VII liability when screening for criminal records. See, e.g., <http://www.absscreening.com/info/negligenthiring.html>.

<sup>16</sup> Anecdotally, advocates on behalf of workers with criminal records frequently find that employers are unaware of the EEOC's policies regarding employer consideration of arrest and conviction histories. Over 60% of employers in major metropolitan areas indicate that they would definitely or probably not hire an applicant with a criminal history. Harry J. Holzer et al., *Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and Their Determinants*, Institute for Research on Poverty, Discussion Paper No. 1243-02, at 7 (2002), available at <http://www.irlp.wisc.edu/publications/dps/pdfs/dp124302.pdf>.

<sup>17</sup> 42 U.S.C. § 2000e et seq. The Commission's stated 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. Consequently, the Commission has held and continues to hold that such a policy or practice is unlawful under Title VII in the absence of a justifying business necessity." Conviction Guidance at 1-2 (footnotes omitted).

The Commission's recently launched E-RACE Initiative has further identified that facially neutral employment screening on the basis of arrest and conviction records may "significantly disadvantage applicants and employees on the basis of race."<sup>18</sup>

Current racial disparity statistics reflect the ongoing and amplified nature of this problem. Although African Americans make up about 12% of the U.S. population,<sup>19</sup> they account for about 28% of all those arrested,<sup>20</sup> and 39% of prison and jail inmates.<sup>21</sup> According to a major study in Minneapolis, African Americans are 15 times more likely than whites to be arrested for low-level offenses.<sup>22</sup> Overall, African Americans are incarcerated at a rate six times that of whites.<sup>23</sup>

Latinos are incarcerated at a rate more than twice that of whites.<sup>24</sup> Latinos constitute close to 15% of the overall population,<sup>25</sup> and almost 20% of the prison and jail population.<sup>26</sup> It is estimated that Latinos are three times more likely to be arrested than whites.<sup>27</sup>

Native Americans (a minority group not mentioned in the current policy guidances)<sup>28</sup> are also disproportionately affected by the criminal justice system. American Indians and Alaskan Natives only constitute .8% of the U.S. population,<sup>29</sup> but they are 1.3% of those arrested.<sup>30</sup> The incarceration rate of Native Americans is 38% higher than the national rate.<sup>31</sup>

Based on current incarceration rates, Black males have a 32% chance of serving time in prison during their lifetime, Latino males have a 17% chance, and white males

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<sup>18</sup> EEOC, E-RACE (Eradicating Racism and Colorism in Employment) Initiative, *Why Do We Need E-RACE?* available at [http://www.eeoc.gov/initiatives/e-race/why\\_e-race.html](http://www.eeoc.gov/initiatives/e-race/why_e-race.html).

<sup>19</sup> U.S. Census Bureau, *2006 American Community Survey Fact Sheet*, available at <http://www.census.gov/acs/www/index.html>.

<sup>20</sup> Federal Bureau of Investigation, *Crime in the United States, 2007* at Table 43, available at [http://www.fbi.gov/ucr/cius2007/data/table\\_43.html](http://www.fbi.gov/ucr/cius2007/data/table_43.html).

<sup>21</sup> Sabol & Couture, *Prison Inmates at Midyear 2007* at 7, Table 9.

<sup>22</sup> Council on Crime and Justice, *Low Level Offenses in Minneapolis* at 4.

<sup>23</sup> Pew Center on the States, *One in 100* at 34, Table A-6.

<sup>24</sup> *Id.*

<sup>25</sup> U.S. Census Bureau, *2006 American Community Survey Fact Sheet*.

<sup>26</sup> Sabol & Couture, *Prison Inmates at Midyear 2007* at 7, Table 9.

<sup>27</sup> Jared Taylor & Glayde Whitney, "Crime and Racial Profiling by U.S. Police: Is There An Empirical Basis?" in *Race, Crime, and Justice: A Reader*, 221-23 (Shaun L. Gabbidon & Helen Taylor Greene, eds., Routledge 2004) (discussing inconsistent treatment of "Hispanics" by federal data collection agencies which makes it difficult to fully measure these crime rates).

<sup>28</sup> Asians and Pacific Islanders are similarly not mentioned in the current EEOC policy guidances, but national statistics do not indicate that these groups are disproportionately affected by the criminal justice system. Asians or Pacific Islanders constitute 4.5% of the population, U.S. Census Bureau, *2006 American Community Survey Fact Sheet*, but only account for .8% of all arrests, Federal Bureau of Investigation, *Crime in the United States, 2007* at Table 43. Local or regional statistics might reflect racial disparities for Asians and Pacific Islanders, however.

<sup>29</sup> U.S. Census Bureau, *2006 American Community Survey Fact Sheet*.

<sup>30</sup> Federal Bureau of Investigation, *Crime in the United States, 2007* at Table 43.

<sup>31</sup> Death Penalty Information Center, *Native Americans and the Death Penalty*, available at <http://www.deathpenaltyinfo.org/native-americans-and-death-penalty>.

have a 6% chance.<sup>32</sup> The Pew Center on the States recently reported some of the starkest figures, showing that one in nine African American men between the ages of 20 and 34 are incarcerated.<sup>33</sup> These racial disparities are largely rooted in law enforcement practices that disproportionately target people of color, such as the war on drugs, causing higher arrest and conviction rates in some minority communities.<sup>34</sup> President-elect Obama has expressed concern over these racial disparities, and has included the need to improve employment outcomes for people with criminal records in his civil rights agenda.<sup>35</sup>

The Commission has also heard from two of the leading researchers looking at the intersection of criminal records and employment, Devah Pager and Shawn Bushway. Their research has been groundbreaking in showing both the severity of the “mark of a criminal record” for applicants seeking employment,<sup>36</sup> and the serious limitations of using a prior conviction as a predictor of future criminal activity.<sup>37</sup> Their research helps inform policy decisions in this area with respect to EEOC guidance for employers.

We believe that the confluence of these factors – increased numbers of Americans with criminal records, the racial disparities in the criminal justice system, and employer practices that screen out applicants with a criminal record – disproportionately exclude minority applicants from employment. Thus, it is critical that the EEOC continue to provide guidance to employers and applicants regarding Title VII’s mandates in this new era of employment criminal background checks. In light of the dramatic changes since the adoption of the most recent guidances, and the view of one federal appellate court that the current guidelines do not adequately analyze the statute,<sup>38</sup> we strongly encourage the EEOC to issue updated guidelines that establish fair and reasonable standards for employer

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<sup>32</sup> Bonczar, *Prevalence of Imprisonment in the U.S. Population* at 8.

<sup>33</sup> Pew Center on the States, *One in 100* at 34, Table A-6.

<sup>34</sup> See, e.g., The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System*, at 5-9 (2008) (discussing commonly identified causes of racial disparity in the criminal justice system). Researchers report that although Blacks constitute about 13% of all drug users, Blacks are 35% of those arrested for drug offenses, and about 53% of those sent to prison for drug convictions. Human Rights Watch, *Targeting Blacks: Drug Law Enforcement and Race in the United States*, at 44-48 (2008).

<sup>35</sup> See Change.Gov Office of the President-Elect, *Plan to Strengthen Civil Rights*, at <http://change.gov/agenda/civilrights/> (visited Nov. 7, 2008).

<sup>36</sup> Devah Pager, *The Mark of a Criminal Record*, 108 *American Journal of Sociology* 5, 937-75 (2003). Pager used matched pairs of white and Black entry-level job applicants to test the consequences of incarceration on employment outcomes of Black and white job seekers. Whites with a criminal record were half as likely to receive a callback (17% vs. 34%), and Blacks with a criminal record were about a third as likely to receive a callback (5% vs. 14%). A disturbing finding was that whites with a criminal record were more likely than Blacks *without* a criminal record to receive a callback (17% vs. 14%). The effect of having a criminal record was 40% worse for Blacks, as Pager noted, “the employment barriers of minority status and criminal record are compounded, intensifying the stigma toward this group.” *Id.* at 959.

<sup>37</sup> See Megan C. Kurlychek, Robert Brame, & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminology & Public Policy* 3, 483-504 (2006) and *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, 53 *Crime & Delinquency*, 64-83 (2007). Using two different cohorts, the authors concluded that a person who committed an offense six or seven years ago is no more likely to re-offend than someone who has never committed an offense. This was even true for violent offenders. *Scarlet Letters and Recidivism* at 13 & Figure 5. These studies actually show a dramatic drop-off rate one to two years after release as well.

<sup>38</sup> *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232, 244 (3d Cir. 2007).

consideration of arrest and conviction histories and uphold the commitment embodied in Title VII to eliminate race discrimination in the workplace.

### **Employer Consideration of Arrests That Have Not Led to Conviction**

The Commission has already recognized that “since the use of arrest records as an absolute bar to employment has a disparate impact on some protected groups, such records alone cannot be used to routinely exclude persons from employment.”<sup>39</sup> We believe the Commission should adopt the view of a substantial number of states that arrest records are not permissible lines of inquiry, both because of the disparate racial impact and because of the difficulty and confusion involved in employer consideration of arrest records.

The Commission has noted that arrest records, unlike conviction records, are not reliable evidence that a person actually committed a crime.<sup>40</sup> An arrest is an allegation, not conduct that has been proven to have occurred “beyond a reasonable doubt” as required in the criminal justice system. As the Commission observed in the examples provided in the current arrest guidance, arrests are often the result of mistaken identity or the complaining party’s false accusations.

As mentioned earlier, arrests often do not lead to conviction.<sup>41</sup> Civil rights groups have further noted particular law enforcement practices that have resulted in racially disparate arrest rates, including the war on drugs’ focus on enforcement in some minority neighborhoods and the racial profiling involved in traffic stops.<sup>42</sup> Moreover, arrest records present significant challenges for employers to interpret because disposition information, such as the fact that the charges have been dropped or the individual has been convicted of a much lesser offense, is frequently missing.<sup>43</sup>

The Commission further observed in the current arrest guidance that twenty “states have specifically prohibited or advised against pre-employment [arrest] inquiries in their

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<sup>39</sup> Arrest Guidance at 1-2.

<sup>40</sup> Arrest Guidance at 2 (citing *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957) (“[t]he mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in misconduct.”)).

<sup>41</sup> *Supra* note 4.

<sup>42</sup> Ryan S. King, *Disparity by Geography: The War on Drugs in America’s Cities*, at 10 (The Sentencing Project 2008) (between 1980 and 2003, the rate at which African Americans were arrested for drug offenses grew to be 238% higher than for whites), available at [http://www.sentencingproject.org/Admin/Documents/publications/dp\\_drugarrestreport.pdf](http://www.sentencingproject.org/Admin/Documents/publications/dp_drugarrestreport.pdf); American Civil Liberties Union, “Landmark Settlement Reached With Maryland State Police in ‘Driving While Black’ Case” (Press Release April 2, 2008), available at <http://www.aclu.org/racialjustice/racialprofiling/34753prs20080402.html>); Council on Crime and Justice, *Minnesota Racial Profiling Study* (2003), available at <http://www.crimeandjustice.org>.

<sup>43</sup> The Bureau of Justice Statistics reports that “in nearly every State, a proportion of criminal history records lack a final disposition, which indicates the outcome of an arrest.” Peter Brien, *Reporting by Prosecutors’ Offices to Repositories of Criminal History Records*, at 1 (Bureau of Justice Statistics 2005). According to the U.S. Attorney General, the FBI’s rap sheets are “still missing final disposition information for approximately 50% of its records.” U.S. Attorney General, *The Attorney General’s Report on Criminal History Background Checks*, at 3 (June 2006), available at [http://www.usdoj.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.usdoj.gov/olp/ag_bgchecks_report.pdf).

fair employment laws due to the possible misuse of this information.”<sup>44</sup> This has created a disjointed approach, where the EEOC policy may permit greater consideration of arrests than the laws of many states. For example, when meeting with EEOC offices in states like California, we have encouraged agency staff to view employer arrest inquiries as impermissible because such inquiries are generally illegal under state law.

We respect that the EEOC’s current arrest guidance attempted to craft a fair policy by requiring employers to determine not only whether the arrest is job-related and recent, but also whether the individual actually engaged in the criminal conduct alleged. However, we know of no employers that undertake the kind of inquiry envisioned in the guidance, and we know that far too many employers continue to be misled by arrest records and unfairly deny employment as a result. Thus, we encourage the EEOC to follow the states’ lead in creating a “bright line” policy excluding consideration of arrests that have not led to conviction, perhaps with exceptions for the types of “security sensitive” positions discussed in the current guidance.

### **Employer Consideration of Conviction Histories**

We believe that the Commission’s current policy statement on convictions contains the essential elements for fair consideration within the framework of a Title VII disparate impact case: (1) the presumption that an employer’s policy excluding people with criminal records has a disparate impact on African Americans and Latinos; (2) the rule that blanket policies barring employment based on criminal records are unlawful absent a justifying business necessity; and (3) the requirement that the employer justify its hiring decisions by conducting an individualized assessment of each applicant, taking into consideration job-relatedness factors such as the nature and severity of the offense and the nature of the job held or sought, as well whether the conviction is still determinative, given the time that has passed since the conviction or completion of the sentence.<sup>45</sup>

We believe these baselines should be retained and re-emphasized as part of any updated policy guidance. We also encourage the Commission to adopt the following additional guidelines for employers:

- (1) Convictions should not be considered if the person has not re-offended within seven years after conviction or, if the person was incarcerated, after his or her release.** Many employers still have blanket lifetime bans on hiring workers with conviction histories. As discussed earlier, the most recent criminological research has demonstrated that permanent disqualifications present unwarranted

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<sup>44</sup> Arrest Guidance at 6 & n.10 (listing the states: NY, HI, OR, WI, NJ, OH, VA, DC, CA, MD, MN, UT, WA, WV, AZ, CO, ID, MA, MI, and MS). According to the Legal Action Center, ten states completely prohibit employers from considering arrests that never led to conviction. See Legal Action Center, *Advocacy Toolkits to Combat Legal Barriers Facing Individuals With Criminal Records*, “Prohibit Inquiries About Arrests That Never Led to Conviction,” available at [http://www.lac.org/toolkits/arrests/arrest\\_inquiries.htm#unfair](http://www.lac.org/toolkits/arrests/arrest_inquiries.htm#unfair).

<sup>45</sup> Conviction Guidance.

and unfair barriers to employment.<sup>46</sup> The presumption that convictions more than seven years old should not be considered is consistent with recent studies finding that after six or seven years without re-offending, a person with a criminal record presents no more risk than a non-offender.<sup>47</sup> Moreover, it is consistent with the seven-year time period after which arrests and most other information is considered “obsolete” under the Fair Credit Reporting Act (FCRA), the statute which applies to criminal background screeners.<sup>48</sup>

**(2) Minor offenses for which prosecution is highly discretionary should not be considered absent compelling circumstances.** Examples include disorderly conduct, loitering, and low-level traffic offenses which are typically so minor that it is difficult to see how they would be predictive of fitness for a job. For example, a certified nursing assistant who recently contacted our office was denied employment due to a misdemeanor conviction for driving with a suspended license, despite her years of experience in the field.

**(3) Employers should weigh additional factors in all situations where a person’s criminal record can be considered.** In addition to the factors listed in the current conviction guidance, the Commission should identify the following factors that bear upon risk<sup>49</sup> and are useful tools for analyzing the employer’s business necessity:

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<sup>46</sup> Shawn D. Bushway & Gary Sweeten, *Abolish Lifetime Bans for Ex-Felons*, 6 *Criminology & Public Policy* 4 (2007) at 703 (“Blanket lifetime bans of ex-felons . . . are not supported by criminological research and should be abolished.”).

<sup>47</sup> See, e.g., *id.* & supra note 37. Some states, including Arkansas, Minnesota, and New Mexico, presume rehabilitation after a specified number of years has passed since completion of a sentence if there has been no further involvement with the criminal justice system. See Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide*, at 67 (William S. Hein & Co., Inc. 2006). In addition, other countries have enacted legislation to limit the stigma individuals with criminal histories may face as a result of a conviction. In the United Kingdom, the Rehabilitation of Offenders Act of 1974 was passed to enable convictions to become “spent,” or ignored, after a “rehabilitation period.” After this period, with certain exceptions, a person with a conviction is not normally obliged to mention it when applying for a job. Rehabilitation periods vary between 6 months, 3 years, 5 years, 7 years and 10 years, depending upon the sentencing attached to the offense(s). See Chartered Institute of Personnel and Development, *Employing Ex-Offenders: A Practical Guide*, at 12 (2004), available at: <http://www.cipd.co.uk/subjects/dvsequ/exoffenders/empexoffendguide.htm?IsSrchRes=1>. All of Us or None, an advocacy group which aims to reduce discrimination based on conviction history, strongly encourages employers to institute a presumption of rehabilitation whenever an applicant has completed a sentence, including completion of parole or probation. It is also important to note that if the Commission adopts or suggests a seven-year rule, this time frame should be characterized as a maximum period, not the minimum number of years an individual would have to wait before obtaining gainful employment, because some employers may interpret this as the Commission’s definitive statement on risk. As part of the business necessity defense, employers should always consider the multiple relevant factors, rather than creating a seven-year waiting period.

<sup>48</sup> 15 U.S.C. § 1681c(a)(5). For many years, the seven-year limit also applied to reporting of convictions. However, this seven-year limit on convictions in FCRA was eliminated by Congress in the Consumer Reporting Employment Clarification Act of 1998, P.L. 105-347, Sec. 5.

<sup>49</sup> We note that risk of recidivism is not equivalent to the risk of someone committing a job-related offense or an offense in the workplace. The research cited herein pertains to recidivism risk in general, but the risk of a job-related or workplace-based offense (for which an employer could be held liable) is actually much

- (a) Age of the person at the time of offense;<sup>50</sup>
- (b) The length and consistency of the person’s work history, including whether the person has recently been employed;<sup>51</sup>
- (c) Evidence of rehabilitation, whether for substance abuse or personal rehabilitation;<sup>52</sup> and
- (d) Educational attainment.<sup>53</sup>

In addition, based on our work with individuals with criminal records, government agencies performing risk determinations, and public employers, as well as our experiences with employers responding to charges that their hiring policies constitute disparate impact race discrimination, we suggest that the Commission address the following in any forthcoming guidance:

- **Consider as models existing frameworks for evaluating the risks created by persons with criminal records and the opportunities for presenting evidence of rehabilitation in order to maintain or obtain employment.** For example, the standards applied by the Transportation Security Administration (TSA) to screen for terrorism security risks in the transportation industry (including port workers and “hazmat” drivers) are narrowly tailored with respect to the severity of the disqualifying offenses (limited to selected felonies) and the age of the offenses (usually limited to seven years).<sup>54</sup> Permanent disqualifications, without time limits

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lower. See Chartered Institute of Personnel and Development, *HR Professionals Positive About Ex-Offenders’ Performance in the Workplace* (Press Release Oct. 23, 2002) (“ex-offenders who re-offend in the workplace are vastly outnumbered by those who go on to be successful in the workplace”), available at <http://www.cipd.co.uk/pressoffice/articles/23102002130100.htm?IsSrchRes=1>.

<sup>50</sup> See, e.g., Alex R. Piquero et al., *Assessing the Impact of Exposure Time and Incapacitation on Longitudinal Trajectories of Criminal Offending*, 16 *Journal of Adolescent Research* 1, 54-74 (2001). The authors followed the trajectories of a cohort of men from ages 18 through 33, and found that the likelihood of re-arrest diminished to almost zero for 72 percent of the cohort as they approached their late 20s and early 30s. See also Megan C. Kurlychek et al., *Scarlet Letters and Recidivism*, at 6 (noting that “the majority of people with a criminal justice contact at some point early in life pose little or no risk of active, long-term criminal careers”).

<sup>51</sup> Studies have shown a strong relationship between employment and decreases in crime and recidivism. See Emsellem & Mukamal, “The New Challenge of Employment in the Era of Criminal Background Checks,” in *The Gloves Off Economy* at 202-04 (reviewing research). Thus, the EEOC’s guidance in this area, which could lead to greater employment of people with criminal records, will contribute to public safety as well.

<sup>52</sup> Prior to the 1987 Conviction Guidance, which was revised to adopt the business necessity factors enumerated in *Green v. Missouri Pacific Railroad Co.*, 549 F.2d 1158 (8<sup>th</sup> Cir. 1977), the Commission explicitly included the individual’s efforts at rehabilitation as one of the factors an employer must consider. See Conviction Guidance n.4. Rehabilitation continues to be a salient factor that should be part of any employer’s consideration of an applicant’s conviction history.

<sup>53</sup> Wendy Erisman & Jeanne Bayer Contardo, *Learning to Reduce Recidivism: A 50-State Analysis of Postsecondary Correctional Education* (The Institute for Higher Education Policy 2005), at 5 (“Data suggest that better educated inmates are less likely to relapse into criminal behavior after release from prison.”)

<sup>54</sup> See 46 U.S.C. § 70105 (port workers); 49 U.S.C. § 5103a (hazmat drivers); 49 C.F.R. § 1572.103 (offenses that apply to both programs).

or waivers, are limited to the crimes that are most closely connected to the terrorism risk at issue, such as espionage.<sup>55</sup>

In addition, the law gives workers with disqualifying offenses the opportunity to seek a “waiver” of the disqualification so that they can continue working, upon a showing that the person is rehabilitated and not a security risk.<sup>56</sup> The waiver process gives workers a critical opportunity to explain the circumstances of the offense and what they have done since then to turn their lives around, as well as the opportunity to submit reference letters from employers, colleagues, community members, friends, and family who can attest to the applicant’s rehabilitation. TSA has granted the vast majority of waiver requests it has received, proving how valuable this procedure is for keeping qualified workers on the job.<sup>57</sup> Other useful examples of waivers can be found in Illinois’s Health Care Worker Background Check Act<sup>58</sup> and California’s community care “exemptions.”<sup>59</sup>

- **Limit background checks to the final stages of hiring by “banning the box.”** Cities and counties around the country are taking the lead as model employers by developing effective new hiring practices that both reduce unintentional discrimination against applicants with records and help employers hire the best applicant for the job. As Mayor Richard Daley explained when he announced Chicago’s new hiring policy, “We cannot ask private employers to consider hiring former prisoners unless the City practices what it preaches.” In addition to Chicago, cities and counties that have instituted these hiring practices include Boston, Minneapolis, St. Paul, San Francisco, Baltimore, Battle Creek (MI), Alameda (Oakland, CA area) County, Multnomah (Portland, OR area) County, and Travis (Austin, TX area) County. Initiatives have also been proposed in Los Angeles, Philadelphia, Newark, New Haven, Oakland, Seattle, and San Antonio.

These policies are often referred to as “Ban the Box,” a term coined by All of Us or None, an advocacy group run by and for formerly incarcerated people that supports

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<sup>55</sup> See 46 U.S.C. § 70105(c)(1)(A) and 49 C.F.R. § 1572.103(a) (permanent disqualifying offenses); § 1515.7(a)(i)(waiver eligibility).

<sup>56</sup> 49 C.F.R. § 1515.1, 1515.7.

<sup>57</sup> Transportation Security Administration, Transportation Worker Identification Credential (TWIC) “Dashboard,” available at [http://www.tsa.gov/assets/pdf/twic\\_dashboard.pdf](http://www.tsa.gov/assets/pdf/twic_dashboard.pdf).

<sup>58</sup> See 77 Ill. Admin. Code § 270.2250(m). The waiver may be granted based on: 1) the age of the individual at which the crime was committed; 2) the circumstances surrounding the crime; 3) the length of time since the conviction; 4) the applicant’s or employee’s criminal history since the conviction; 5) the applicant’s or employee’s work history; 6) the applicant’s or employee’s current employment references; 7) the applicant’s or employee’s character references; 8) Nurse Aide Registry records; and 9) any other evidence demonstrating “ability to perform the employment responsibilities competently and evidence that the applicant or employee does not pose a threat to the health or safety of residents.” *Id.* § 270.2250(o).

<sup>59</sup> Exemptions for individuals with conviction histories are granted by the Community Care Licensing Division, taking into account nonviolent offenses, the age of the crime and other mitigating factors. California Department of Social Services, Caregiver Background Check Bureau, *Evaluator Manual: Background Check Procedures* (04RM-04) (July 2004). See Sections 7-1700 to 7-1736, describing the waiver process and the levels of exemptions based on the seriousness of the offense (including “simplified,” “standard,” and “non-exempt” offenses).

these practices as a way to reduce conviction-based discrimination. Under these policies, the “box” on a job application that asks whether the applicant has a criminal history record is removed, and the criminal background check is conducted later in the process, when the applicant is a final candidate for the position. At that time, any job-related convictions are considered, and evidence of rehabilitation may be submitted. This critical protection ensures that everyone is first considered for employment based on their actual skills and experience before consideration of any prior arrest or conviction. The process is similar to the application and inquiry process regarding disabilities,<sup>60</sup> and aims to reduce the chilling effect that the “box” has on applicants’ willingness to apply for jobs and immunize against the possibility that an employer will simply refuse to consider an applicant who self-discloses a criminal history record. It also allows government employers to access a broad applicant pool of workers best qualified for the job.

Initial data tracking the outcomes of the new initiatives are favorable. For example, Minneapolis reports that fewer applicants are being rejected due to a criminal conviction, more than half of the applicants with a criminal conviction of “concern” are being hired, and the staff’s workload has decreased because they are only considering criminal conviction information at the time of a job offer.<sup>61</sup>

Some cities, such as Boston, have required background checks only for positions that involve unsupervised contact with vulnerable populations (children, elderly, disabled) or involving finances, and have also applied these rules to vendors contracting with the city. Another model practice is that of Alameda County, which has specialized human resources staff trained in determining how a conviction may or may not be job-related, and conviction history information will not be seen by anyone except these staff members unless the conviction is considered job-related. Hawaii’s state law also prohibits inquiry into an applicant’s criminal record until a conditional job offer is made.<sup>62</sup>

While all aspects of “ban the box” initiatives may not be implemented easily by private employers, the Commission should encourage employers to remove this question from their job applications and defer consideration of conviction history to a later stage of the hiring process.

- **Explain *Connecticut v. Teal*’s<sup>63</sup> holding that “bottom line” staff composition is not relevant.** Employers frequently respond to charges filed by persons with criminal records by arguing that they are not liable because their workforce composition is comparable to (or better than) the representation of African Americans and Hispanics in the geographic region or the labor market. Some Commission staff have been known to have found that reasoning at least initially

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<sup>60</sup> See EEOC, *Job Applicants and the Americans With Disabilities Act*, available at <http://www.eeoc.gov/facts/jobapplicant.html>.

<sup>61</sup> City of Minneapolis Conviction Information Summary, 2004-2008 YTD (on file with NELP).

<sup>62</sup> Hawaii Revised Statutes § 378-2.5(b).

<sup>63</sup> *Connecticut v. Teal*, 457 U.S. 440 (1982).

persuasive. The Commission should make clear that where a criminal background screen is a “pass/fail barrier” to further consideration of an applicant or employee, the “bottom line” that the employer’s workforce consists predominantly of African Americans and/or Hispanics is not a defense. Title VII ensures that individual applicants, rather than minority groups, receive fair consideration.

- **Highlight the Third Circuit’s *El*<sup>64</sup> decision’s holding that employers must carefully craft policies in order to avoid violating Title VII.** In this most recent appellate decision on the application of Title VII to people with criminal records, the court concluded that criminal record policies must “accurately distinguish between applicants that pose an unacceptable level of risk and those that do not.”<sup>65</sup> It indicated that the business necessity case law requires “some level of empirical proof that [the] challenged hiring criteria accurately predicted job performance.”<sup>66</sup> Even though the employer’s policy had seven-year exclusions rather than lifetime bars for many offenses, the court indicated that it would have expected the employer to explain how it decided which offenses were in which category, why the seven-year period had been chosen, and why a crime like simple assault was in the lifetime ban category.<sup>67</sup> *El*’s guidance is useful for putting employers on notice that a poorly articulated reason for a decision, or even for a policy, is insufficient under Title VII. Employers must narrowly and thoughtfully create policies that realistically measure the risk that leads them to consider criminal background information.

### **Bonding and Tax Credits Facilitate Hiring of People with Criminal Records**

Employers should also be made aware of a number of incentives that make it easier to hire people with criminal records. First, the Department of Labor offers a **free bonding program** for “at-risk” job applicants, including people with criminal records, indemnifying employers for loss of money or property due to an employee’s dishonesty or theft.<sup>68</sup> The bond insurance terminates after six months, and continued coverage can be purchased under the program’s bond.<sup>69</sup> The coverage is usually between \$5,000 and \$25,000, with no deductible.<sup>70</sup> The Department of Labor reports that “bonding services as a job placement tool can be considered to have a 99% success rate,” with over 42,000 job placements made for “at-risk job seekers who were automatically made bondable.”<sup>71</sup>

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<sup>64</sup> *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232 (3d Cir. 2007).

<sup>65</sup> *Id.* at 245.

<sup>66</sup> *Id.* at 240.

<sup>67</sup> *Id.* at 248.

<sup>68</sup> U.S. Department of Labor, *Highlights of the Federal Bonding Program*, available at <http://www.bonds4jobs.com/highlights.html>; see also 42 U.S.C. § 13725.

<sup>69</sup> U.S. Department of Labor, *Highlights of the Federal Bonding Program*.

<sup>70</sup> *Id.*

<sup>71</sup> U.S. Department of Labor, *Federal Bonding Program Background*, available at <http://www.bonds4jobs.com/program-background.html>.

Employers seeking bonding may call 1.877.US2.JOBS (1.877.872.5627) to locate the State Bonding Coordinator.<sup>72</sup>

Employers can also take advantage of the federal **Work Opportunity Tax Credit**, which allows a company to claim up to a \$2,400 tax credit for hiring an employee with a felony conviction within one year of the date of his or her conviction or release from incarceration.<sup>73</sup> Employers can apply for the tax credit by sending the required forms to the state workforce agency within 28 days of the employee's start date.<sup>74</sup> Employers who are willing to train and provide work experience to people with criminal records may also qualify for Workforce Investment Act (WIA) assistance.<sup>75</sup>

Finally, **state and local tax credits** provide even more financial incentives for employers to hire workers with arrest and conviction histories. The National H.I.R.E. Network reports that six states (CA, IL, IA, LA, MD and TX) provide state income tax credits for employers to hire people with criminal records.<sup>76</sup> Cities such as Philadelphia<sup>77</sup> and San Francisco<sup>78</sup> also offer tax credits for employers hiring qualified workers with criminal records. Thus, employers can bolster compliance with Title VII with bonding and tax credit opportunities that further reduce the barriers to hiring people with criminal records. Surveys have shown that only 5% of employers have a negative experience when hiring applicants with criminal records, and many employers report that employees with prior records were motivated to succeed and performed well.<sup>79</sup>

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Again, thank you for the opportunity to participate in this meeting. We appreciate the Commission's interest in this important issue. We commend the Commission for playing a critical role in establishing fair and sound employment criminal background screening standards to reduce criminal record barriers to employment affecting millions of Americans, and in particular, disparately impacting African Americans, Latinos, and Native Americans.

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<sup>72</sup> U.S. Department of Labor, *Individuals Seeking Bonding*, available at <http://www.bonds4jobs.com/individual-seeking-bonding.html>.

<sup>73</sup> 26 U.S.C. § 51. See also U.S. Department of Labor, *Work Opportunity Tax Credit*, <http://www.doleta.gov/business/incentives/opptax/> (visited Nov. 3, 2008).

<sup>74</sup> U.S. Department of Labor, *Work Opportunity Tax Credit*.

<sup>75</sup> The Legal Action Center and the Urban Institute, *Individuals With Criminal Histories: A Potential Untapped Resource* at 2, available at [http://hirenetwork.org/pdfs/SS\\_Ex-offenders1.pdf](http://hirenetwork.org/pdfs/SS_Ex-offenders1.pdf).

<sup>76</sup> The National H.I.R.E. Network, *State Tax Incentives to Benefit Employers Who Hire People With Criminal Records* (2007), available at [http://hirenetwork.org/state\\_tax\\_credits.htm](http://hirenetwork.org/state_tax_credits.htm).

<sup>77</sup> The Philadelphia tax credit offers \$10,000 for hiring an employee with a prior conviction and was specifically created to encourage job opportunities and economic development for ex-offenders. See [http://www.phila.gov/Revenue/pdfs/PREP\\_Application.pdf](http://www.phila.gov/Revenue/pdfs/PREP_Application.pdf).

<sup>78</sup> The San Francisco tax credit is available to employers located in certain enterprise zones who hire workers eligible for the Work Opportunity Tax Credit. See [http://www.sfgov.org/site/uploadedfiles/tax/business\\_zone/entzone.pdf](http://www.sfgov.org/site/uploadedfiles/tax/business_zone/entzone.pdf).

<sup>79</sup> Chartered Institute of Personnel and Development, *Employing Ex-Offenders to Capture Talent*, at 3 (2007), available at: <http://www.cipd.co.uk/subjects/dvsequel/exoffenders/empexoffdr.htm?IsSrchRes=1>.