



Testimony of

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Before the

U.S. Commission on Civil Rights

Regarding

Criminal Background Screening

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My name is Todd McCracken. I am President of the National Small Business Association (NSBA). We are pleased to provide our perspective on criminal background screening in general and the recent initiatives in this area by the Equal Employment Opportunity Commission (EEOC) in particular. We appreciate your interest in our views.

NSBA was founded in 1937 to advocate for the interests of small businesses in the U.S. It is the oldest small business organization in the U.S. The NSBA represents more than 65,000 small businesses throughout the country in virtually all industries and of widely varying sizes.

### *The Missions of the EEOC and the U.S. Commission on Civil Rights are Important*

The EEOC and the Commission have important missions.

The EEOC enforces Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin; the Age Discrimination in Employment Act of 1967 which prohibits employment discrimination against individuals 40 years of age and older; the Equal Pay Act of 1963 which prohibits discrimination on the basis of sex regarding compensation, section 501 of the Rehabilitation Act of 1973 which prohibits employment discrimination against federal employees and applicants with disabilities; the Americans with Disabilities Act of 1990 which prohibits employment discrimination on the basis of disability; and the Genetic Information Non-Discrimination Act of 2008 which prohibits employment discrimination based on genetic information.

The Commission's mandate is broader than the EEOC's and it examines civil rights issues in all walks of life, not only in employment.

NSBA welcomes strong protection of the civil rights and liberties of all Americans and supports the mission of both agencies.

### *Background Screening Enhances the Safety of Employees and Customers of Small Businesses*

It is an unfortunate fact of life that not everyone is law abiding. It is also a fact of life that not everyone should be employed in certain types of jobs. We do not want rapists entering people's homes. We do not want child molesters working in day care centers. And we do not want embezzlers handling large sums of cash.

Employers want to provide a safe place for their employees to work and to do their best to prevent workplace crime. They want to do their best to ensure that the employees that they send to customers' homes as technicians, repair people or sales people do not inflict harm on their customers. They need to take steps to prevent theft, fraud and embezzlement. Criminal background screening is an important tool – very nearly the only tool – that employers have to protect their customers, their employees and themselves from criminal behavior.

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Very, very few employers are using criminal background screening for illegitimate, discriminatory purposes. And there is little to no evidence that employers are doing so.

### *Small Businesses Need to Know and Government Has the Obligation to Explain the Rules*

That said, small businesses are willing to comply with reasonable rules designed to ensure that criminal background screening is not having a disproportionate impact on minorities provided that those rules do not endanger their employees or customers, do not substantially increase their risk of being victims of property crimes or do not increase their risk of being found liable for the tort of negligent hiring.

Government, however, has an obligation to articulate rules that are comprehensible and can actually be implemented. It is fundamentally unfair and, in practice, counterproductive for the rules to be so opaque that nobody can understand them. It leads to a situation where enforceable is starkly arbitrary and the rules, since they cannot be understood, are effectively ignored.

As I will discuss in detail later, the EEOC guidance is not guidance at all. It provides no meaningful rules about how to proceed. It is really just a threat that the EEOC may proceed against employers if, in hindsight, it decides it wants to do so.

### *Small Businesses are Often Caught Between Competing Government Priorities*

Small businesses are caught between competing government priorities and perspectives among different federal agencies, the courts and the state and federal governments. The recent EEOC guidance, for example, explicitly stated that the fact that a small business was complying with a state legal requirement to conduct a criminal background check or to bar a felon from a particular position would not prevent an EEOC enforcement action. With respect, it is ridiculous that a small business is forced to choose between two conflicting government requirements. If the EEOC has a problem with a state statute, it should challenge the statute, not launch an enforcement action against a small business who complied with state law. Unlike the federal government, small businesses have limited resources and defending such a lawsuit will damage the financial health of the business.

Similarly, state and federal courts will allow potentially devastating tort lawsuits against businesses that hire felons who commit crimes at the workplace or in customers' homes. Yet the EEOC is threatening to launch lawsuits if they do not hire those same felons.

Small businesses really want to know what the rules are so they can comply with those rules and get on with running their businesses. They want the state and federal governments, including the courts, the legislative branch and the executive branch to set forth consistent and comprehensible rules. That does not seem like it is asking for too much. The rules applying to small businesses should not be that they are at substantial legal risk no matter what they do.

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### *The EEOC Should Focus on Areas Where Discrimination is an Important Problem*

The EEOC should focus its enforcement efforts where unlawful discrimination is an important problem. A corollary of that proposition is that it should not expend its resources in areas where it is not an important problem. It should be particularly careful about focusing resources in areas that are not a demonstrated problem and where there are strong countervailing policy reasons for employers to engage in the activities that result in the alleged disparate impact.

One such area is criminal background screening.

NSBA has conducted a review of the legal and economics literature on these issues. We have discussed this with our members. We have found no evidence that criminal background screening is a significant civil rights problem.

On the other hand preventing workplace violence, protecting customers and preventing property crime is a continuing and serious problem. Moreover, in the absence of criminal background screening, our members are subject to substantial risk of being successfully sued for the tort of negligent hiring.

### *The EEOC Needs to Seriously Rethink the Complexity of Its Guidance*

Neither the small business community nor the EEOC countenances discrimination. We, like the this body and the EEOC, oppose bigotry. But the issues that I am discussing today do not involve attempted bigotry. Virtually no small businesses are conducting background checks for the purposes of excluding minorities. They are trying to hire qualified employees. They are trying to prevent their employees, their customers and, in the case of family-owned businesses, their own families, from becoming victims of crime. They are trying to avoid liability for crimes committed by employees. And they are trying to limit theft, fraud, embezzlement and other property crimes.

The vast majority of small firms are also trying to comply with the law and with EEOC guidance. In the current situation, they are unable to do so.

I can assure you that virtually no small business owner is going to be able to read, absorb and apply the 55 page, 167 footnote “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964” issued by the EEOC on April 25, 2012. More importantly, we have had many discussions with sophisticated attorneys who grapple with these issues for a living , including those that work for large law firms advising large corporations. They do not know how to advise their clients either. If they are at a loss, then small firms and their generalist attorneys will fare no better.

In the real world, small firms and their advisors are not going to be able to understand what the EEOC regards as permissible with respect to the use of criminal background checks. The reason

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is fairly straight forward. The EEOC has not **clearly** stated what it expects from the small business community. All the EEOC has done is indicate that it expects small firms to conduct a complex individualized assessment weighing numerous factors regarding the use of conviction records in each hiring decision. How that is to be done in practice is anybody's guess.

Presumably, the goal of the EEOC is to prevent discrimination. To do so, it must enunciate a coherent, intelligible policy that businesses, large and small, can actually understand and implement. The EEOC needs to do better.

At the very least, the EEOC needs to give a large number of actual examples of what it regards as lawful and unlawful. The EEOC, for example, has not even had the courage to state that a 20 year old conviction for marijuana possession would not be a legitimate reason to fail to hire a laborer or conversely that it is legitimate to not hire someone just released from prison for child molestation as a day care provider. And they need to get a lot more specific than that for these rules to have any practical effect.

The rules that business owners have to grapple with now are so opaque and complex that they will, in practice, have to be ignored. The clear and quite understandable concerns about tort liability and worker, customer and family safety will take precedence over amorphous and ill-defined EEOC guidance. In short, the EEOC guidance not achieve its objective.

NSBA would be happy to work with the Commission and the EEOC to develop a new and better policy that meets our mutual objectives. So far, however, the EEOC has sought very little input from employers.

### *Workplace Violence is a Significant Problem*

We do not believe that criminal background checks are being misused to any significant degree for an unlawful discriminatory purpose.

Workplace violence, on the other hand, is a significant problem. Workplace theft and embezzlement are also major problems. Both can be reduced through proper background screening. According to the Bureau of Justice Statistics, approximately 572,000 nonfatal violent crimes (rape, sexual assault, robbery, and aggravated and simple assault) occurred against persons age 16 or older while they were at work in 2009.<sup>1</sup> Workplace violence accounted for 15% of nonfatal violent crime against persons age 16 or older. In short, workplace violence remains a very serious problem even though it has declined over the past 15 years.

A Westlaw search of the law reviews regarding negligent hiring indicate that the trial bar is quite busy filing negligent hiring lawsuits. Businesses have to take that risk into account when making

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<sup>1</sup> Workplace Violence, 1993-2009 National Crime Victimization Survey and the Census of Fatal Occupational Injuries, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, March, 2011. <http://bjs.ojp.usdoj.gov/content/pub/pdf/wv09.pdf>

hiring decisions. The EEOC needs to consider the tort law in its guidance and, based on its discussion in the guidance, does not appear to have done so. It is not right that complying with EEOC guidance (such as it is) can lead to substantial and potentially devastating tort liability for a business that does so.

It is not in an employer's interest to fail to hire an otherwise qualified applicant because they smoked some marijuana 20 years earlier and got caught. It is not in their interest to fail to hire someone that perhaps got in an altercation years ago and has otherwise had no problems with the law and a good employment record. It does not take a major enforcement effort to achieve these results.

The true issue is whether minority applicants are being unfairly affected by criminal background checks. In other words, are minority applicants that *should* be hired not being hired (because their criminal background is minor or not relevant). There is no evidence that this is the case. Certainly, there is no evidence that this is a major problem. This should give the EEOC or this body some pause about prioritizing this area.

### *Conclusion*

We urge the Commission to not prioritize enforcement against firms with educational attainment requirements or that conduct criminal background checks unless there is a substantial, factual basis to believe that they have an unlawful purpose.

We also strongly urge the Commission to clarify its guidance with respect to criminal background checks so that the Commission's expectations are made clear and so businesses can effectively meet those expectations.