February 10, 2012

The Honorable Jacqueline A. Berrien
Chair
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Dear Ms. Berrien:

The National Small Business Association (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 150,000 small businesses throughout the country in virtually all industries and of widely varying sizes.

We are deeply concerned about the EEOC's recent efforts to make employer requirements that prospective employees have a high school diploma unlawful under the Americans with Disabilities Act and the Civil Rights Act. This will lead to needless, expensive and damaging litigation, have an adverse impact on small businesses and employment levels and have other adverse effects. We urge you to reconsider this policy. Going down this path is a mistake.

On November 17, 2011, Aaron Konopasky of the EEOC Office of Legal Counsel issued an "informal discussion letter" stating that an employer requiring high school diplomas may be unlawful under the Americans with Disabilities Act for having a disparate impact on the learning disabled unless the employer can demonstrate that the diploma requirement is job related and consistent with business necessity.

Thus, if an employer adopts a high school diploma requirement for a job, and that requirement screens out an individual who is unable to graduate because of a learning disability that meets the ADA's definition of "disability," the employer may not apply the standard unless it can demonstrate that the diploma requirement is job related and consistent with business necessity. The letter states that an employer will not be able to make this showing, for example, if the functions in question can easily be performed by someone who does not have a diploma.

The letter also states that if an employer screens out an individual on the basis of disability, an employer must also demonstrate that the standard or criterion cannot be met, and the job cannot be performed, with a reasonable accommodation citing 42 U.S.C. § 12112(b)(6), namely the Americans with Disabilities Act.

Around January 31, 2012, the EEOC posted to its web site a document entitled "Employment Rights of Immigrants Under Federal Anti-Discrimination Laws" [http://www.eeoc.gov/eeoc/publications/immigrants-facts.cfm]. That document states:

> Another policy that may determinate (sic) against certain national origin group members would be a high school diploma requirement, which may not be job related for certain positions such as laborers.

This implies that the basis for the provision would be the Civil Rights Act of 1964 (42 USC § 2000e) which prohibits discrimination in employment on the basis of national origin (not disability).

In any event, the EEOC appears to have adopted the position that either, or both, the Americans with Disabilities Act and the Civil Rights Act of 1964 prohibit employers from requiring a high school diploma in many, if not most, circumstances. NSBA believes this interpretation of the Americans with Disabilities Act and the Civil Rights Act of 1964 is both unwarranted as a matter of law and bad policy.

Most jobs in a modern economy require the ability to do arithmetic, to read and understand instructions and to solve problems. This is usually true even of jobs that a highly educated person (such as the lawyers that comprise the Commission or who drafted the EEOC letter) might regard as being merely that of a laborer. Workers, nonetheless, often have to use math to calculate proper fits or the proper equipment, material or part to use. They often have to read and understand instructions to properly and safely use equipment or chemicals. They have to be able to solve problems in the field without management input. A high school diploma is a reasonable indicator that a person possesses these qualities. Usually, a person who has earned a high school diploma will perform these tasks better than a person without one. A high school diploma is also an indicator of the person's ability to stay on task, complete projects and accept instructions.

There is no credible evidence that small businesses discriminate against those without high school diplomas when the skills that high school graduates possess are not relevant to the job. Doing so would deprive an employer of many good potential hires and raise their costs. Businesses should be left free to decide what level of educational achievement is necessary for their employees to discharge their job requirements.

What the new EEOC policy will do, however, is enrich trial lawyers at the expense of small businesses and lead to a new wave of litigation. Litigation is expensive and wasteful and will harm the ability of small firms to hire new workers.

The new EEOC policy will also make it more difficult to identify qualified personnel. Given the risk of expensive litigation, employers will drop high school diploma requirements unless it is patently obvious and objectively provable that a diploma is required. Moreover, given the logic of the EEOC position, they may also be forced to drop requirements that prospective employees have college degrees.

It is, after all, patently unclear what would constitute proof that a high school, or college, diploma "requirement is job related and consistent with business necessity." Thus, businesses that need people who can do math, read and solve problems will be forced to try to figure this out

some other way. It will undoubtedly spawn an army of new consultants helping businesses figure out who has these skills without requiring a high school diploma and force them to spend time and money demonstrating to the satisfaction of the EEOC and some prospective jury that the job actually did require these skills. Those businesses that don't spend the time and money to hire consultants, consult their attorneys and put a nice "diploma requirement compliance notebook" on their shelf documenting the math, reading and problem solving requirements of every job will be putting themselves at risk of losing a lawsuit. This would include a large proportion of small businesses trying to run their businesses in a difficult economy.

Business will need to expend resources to familiarize themselves with yet another regulation of their hiring practices and, eventually, the case law that develops around the new interpretation. They would have to expend funds retaining counsel and drafting new human resources directives. They would have to expend funds training their managers.

Litigation is very expensive. Allegations that a learning disabled person was discriminated against will become commonplace, particularly if the job happened to go to a more qualified person with a high school diploma. Businesses will often be forced to settle unfounded claims rather than litigate because the cost of litigation is so high.

The new EEOC policy will exacerbate unemployment by substantially increasing the cost of employing people and reducing the resources that employers have to hire people.

Once this policy has been fully implemented and the first successful judgments are recovered, the high school diploma requirement will virtually disappear. If the logic of the EEOC position is extended to college degrees, then in many cases that requirement will disappear as well.[1] This will discourage people from finishing high school or college since it will become widely known that employers cannot generally require diplomas. Thus, the policy can be counted on to discourage education.

The fundamental principle underlying anti-discrimination statutes is to prevent irrational discrimination on the basis of inherent or immutable characteristics such as race, color, sex or national origin. Discrimination on the basis of religion is contrary to the fundamental concept of freedom of religion. Educational attainment is not an inherent or immutable characteristic. It is something that someone works at and achieves to learn and to earn a credential. It is something we want to encourage, not discourage. It is something we should wish to reward. This new EEOC policy is at odds with the fundamental purpose of the Civil Rights Act of 1964. And it is certainly at odds with what virtually all policy-makers outside of the EEOC wish to accomplish, namely encouraging our young people to graduate from high school and making it worth their while to do so.

[1] The logic of the EEOC position regarding high school diplomas is equally applicable to college diplomas. There are undoubtedly some employers that require college degrees for positions that could arguably be filled by learning disabled persons that because of their learning disability could only achieve a high school diploma or some college. Similarly, a learning disability may prevent someone with a college degree from successfully achieving a graduate degree.

This policy is directed at solving a problem of minimal scope (if it exists at all as a practical matter). It will, however, have a very large detrimental impact. It will be costly and lead to major difficulties for employers trying to identify quality employees. It will reduce the incentive for young people to graduate from high school and to learn. The policy should be reversed.

Sincerely,

Todd McCracken
President

cc: Stuart J. Ishimaru, Commissioner
Constance S. Barker, Commissioner
Chai Feldblum, Commissioner
Victoria A. Lipnic, Commissioner
P. David Lopez, General Counsel