U.S. COMMISSION ON CIVIL RIGHTS

BRIEFING

FRIDAY, DECEMBER 7, 2012

The Commission convened in Suite 1150 at 1331 Pennsylvania Avenue, Northwest, Washington, D.C. at 9:00 a.m., Martin R. Castro, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman

ABIGAIL THERNSTROM, Vice Chair

ROBERTA ACHTENBERG, Commissioner

TODD F. GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner

DAVID Kladney, Commissioner

MICHAEL YAKI, Commissioner

VANESSA EISMANN, Parliamentarian
STAFF PRESENT:
MARGARET BUTLER, Acting Director, OCRE
PAMELA DUNSTON, Chief, ASCD
YASMIN ELHADY
ALFREDA GREENE
JENNIFER CRON HEPLER
DAVID MUSSATT, Director, MWRO
LENORE OSTROWSKY, Acting Chief, PAU
ELOISE PLATER
MICHELE YORKMAN
JOHN RATCLIFFE, Chief, BFD

COMMISSIONER ASSISTANTS PRESENT:
NICHOLAS COLTEN
ALEC DEULL
TIM FAY
JOHN MARTIN
CARISSA MULDER
MARLENE SALLO
ALISON SOMIN
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I. INTRODUCTORY REMARKS BY CHAIRMAN

CHAIRMAN CASTRO: Good morning. I'm calling this meeting to order. I'm Marty Castro, Chair of the U.S. Commission on Civil Rights and I want to welcome everyone this morning to our briefing on assessing the impact of criminal background checks and the Equal Employment Opportunity Commission's Guidance on the consideration of arrest and conviction records in enforcement decisions under Title VII and its impact on the employment of black and Hispanic workers.

It is now 9:04 a.m. on December 7, 2012. The purpose of this briefing is to look at the Guidance policy and the use of criminal background checks and determine whether it encourages or discourages the reentry by former offenders into the job market.

And this is, in my estimation, not a stand-alone issue. It relates, actually, to some of the issues that the Commission has looked at in the past.

One of those, most recently, is the issue of school discipline. And we have noticed in
much of the literature that school discipline, to the extent that it disproportionally treats or impacts students of color, is likely to result in those students leaving school.

Those students that leave school are more likely to interact with the criminal justice system. Those students who then interact with the criminal justice system, other studies have found, are more likely if they are black and Latino to have disparate treatment or disparate impact in the sentencing of their alleged violations.

And then we see when they come out of prison there's challenges that they face in the job market. And the Guidance that we're going to look at today is something that on both sides of our aisles here, on the Conservative side as well as on the Democratic and Progressive side, we care very much about.

And we're very pleased to bring together a group of bi-partisan panelists from different points of view to help educate us on the impact of these issues, so that we can then present, hopefully to the President and Congress, a report and recommendations on the views of the Civil Rights Commission.
Today's briefing brings to us 17 distinguished speakers who are going to provide us with a diverse array of points of view and perspectives. The speakers have been divided between three panels. Panel I consists of government officials and scholars. Panel II will consist of advocacy and business spokespersons. Panel 3 will consist of presenters from trade associations and employee screening groups.

During each panel the briefing panelists will have seven minutes to speak. After all the panelists have made their presentations, Commissioners will then have the opportunity to ask them questions within an allotted period of time.

I will recognize Commissioners to speak based on their indication of a willingness to do so and I will attempt to make sure that the questioning by the Commissioners is balanced.

In order to maximize the amount of time and the opportunity for discussion between our Commissioners and our panelists, I want to ensure also that the afternoon panelists have their fair share of time, I will be strictly enforcing the time allotments given to both panelists as well as to the Commissioners.
Panelists, you'll notice there's a series of warning lights here that we've set up. These are like traffic lights. So when you see green that means go. When you see yellow that means speed up, like it does, unfortunately when we're driving. And then when you see red we ask you to stop.

I will be mindful, again, that we have limited time so I don't want to have to cut off any panelists mid-sentence. There will be opportunity to continue the conversation when the Commissioners have the opportunity to question you.

Again, I'll ask my fellow Commissioners, as they have been in every one of our briefings, to be considerate of the panelists and one another and keep our questions concise. Try to please only ask one question at a time, although I understand that some questions require follow-up. But if we all abide by this arrangement we'll be able to hear from the panelists and be able to conclude each panel in a timely manner.

So with those housekeeping matters out of the way I'd like to now proceed with our first panel. I will briefly introduce the panelists in the order in which they're going to speak and then we'll swear them in.
PANEL I: GOVERNMENT AND SCHOLARS PANEL

Our first panelist this morning is Carol Miaskoff from the EEOC where she is the Acting Associate Legal Counsel in the Office of the Legal Counsel of the EEOC.

Our second panelist is Don Livingston, a partner in the Washington, DC Office of Akin Gump Strauss Hauer & Feld, and a former EEOC General Counsel.

Our third panelist is Harry Holzer, Professor of Public Policy at Georgetown University and the former Chief Economist of the U.S. Department of Labor.

Our fourth panelist is Alfred Blumstein, Professor of Urban Systems and Operations Research at the Carnegie Mellon University.

And our fifth panelist is Jeffrey Sedgwick with Keswick Advisors and a former Director of the U.S. Department of Justice, Bureau of Justice Statistics.

I'll now ask each panelist to swear or affirm that the information that you're about to provide to us is true and accurate to the best of your knowledge, information and belief, is that true?

(Chorus of ayes.)
CHAIRMAN CASTRO: Thank you. Ms. Miaskoff, please proceed.

MS. MIASKOFF: Good morning, Chairman Castro, distinguished members of the Commission, thank you for the opportunity to appear today.

I am Carol Miaskoff, acting associate legal counsel at the U.S. Equal Employment Opportunity Commission. The EEOC, as you know, is a bi-partisan Commission of five presidentially appointed, and Senate confirmed commissioners. The EEOC's mandate from Congress is to enforce Title VII of the Civil Rights Act of 1964.

Title VII prohibits employment discrimination on the basis of race, color, religion, sex or national origin. It has applied now for almost 50 years.

The EEOC enforces Title VII first by investigating charges of discrimination brought to us by job applicants, or employees, who assert that covered employers violated the law, either by treating them differently because of their race, for example, or by applying to them a seemingly neutral policy that nonetheless operates to disproportionately exclude people of their race, but is not job related and consistent with business
necessity.

When the EEOC investigates a Title VII charge, it gathers the facts necessary to decide if there is reasonable cause to find a violation.

My statement today will summarize the EEOC's recent enforcement guidance on the consideration of arrest and conviction records and employment decisions under Title VII. The substance of this Guidance is not a major departure from existing precedent from the courts and from the EEOC.

In short, Title VII does not stop employers from meaningfully considering criminal history information when they make employment decisions. As a Federal Court said when interpreting Title VII for a hiring race discrimination case in the 1970s, and as the EEOC's policy statements reiterated in 1987 and 1990, “Criminal history may be used to screen applicants by considering the nature of the crime, the time elapsed and the nature of the job.”

However, under Title VII, the mere fact of having a criminal record should not automatically, and without consideration, bar a person from all future employment.

The 2012 Guidance recognizes that
reentry is a complicated issue, and that employment discrimination is one piece of the puzzle, albeit a real piece. The Guidance looks at the different kinds of criminal history, that are now available online, and some of the problems with its accuracy and completeness.

The Guidance recognizes the other legal duties faced by employers at the federal, state and local levels and the concerns they have about workplace safety and reducing theft. In this context the Guidance reviews recent statistics about arrests and incarceration in America and then breaks those numbers down by race and national origin.

The Guidance is obviously about the Title VII piece of this puzzle. It begins by discussing disparate treatment, which occurs when similarly qualified job applicants who disclose or are found to have equivalent criminal records are nonetheless given different employment opportunities because of their race.

The Guidance then turns to disparate impact, which was the focus of the EEOC's 1987 and 1990 policies. The new Guidance analyzes disparate impact in the same fundamental way, but in greater depth and in light of the 1991 Civil Rights Act,
which formally added disparate impact to Title VII.

The 2012 Guidance gives a step-by-step analysis to disparate impact. The first step is to identify the particular policy or practice at issue. In other words, the policy of excluding people from employment if they have a criminal record or if they have a record of a particular conviction and are seeking a particular job.

The second step is to determine if there is evidence that the policy or practice caused a disparate impact. The EEOC's starting point, as the national enforcement agency, is national criminal justice data demonstrating that blacks and Hispanics are arrested and incarcerated in numbers greatly disproportionate to their representation in the population.

This is not a legal conclusion in itself. The employer is welcome to provide evidence to demonstrate that its policy or practice does not have a disparate impact. The EEOC also may gather data itself that is unique to the particular case.

If disparate impact is found, the third step is the employer defense of job-related and consistent with business necessity. If that is satisfied the final step is determining if there is
an effective less discriminatory alternative the 
employer refused to adopt.

Understanding business necessity is the 
heart of the Guidance. The Commission states that 
employers can reliably meet the standard in two ways. 
The first involves validating the policy under the 
Uniform Guidelines on Employee Selection Procedures.

The second way involves the basic test I 
discussed above using a targeted screen to consider 
at least the nature of the crime, the time elapsed 
and the nature of the job and providing an 
opportunity for individualized assessment.

Individualized assessment is not 
burdensome and it is not complicated. Simply put, it 
means that the employer tells an applicant or 
employee that he may be excluded from employment 
because of past criminal conduct. And then it gives 
him an opportunity to explain or submit information 
to put his criminal record into context so that the 
employer can factually judge its relevance to the 
employment situation.

The individual could provide 
documentation of error in the record or information 
about work experience, personal references, training, 
bonding or other related factors. The goal of the
Guidance here is to alert employers about the kinds of information that may be relevant, not to mandate a checklist of factors.

I will conclude there. There is more in my written testimony that everyone is more than welcome to read. Thank you.

CHAIRMAN CASTRO: Thank you, Ms. Miaskoff. Mr. Livingston, please proceed.

MR. LIVINGSTON: Good morning. I'm Don Livingston. I'll comment on what the Guidance says, what the Guidance is, and the educational and transformation consequences of the Guidance, some perplexing issues and the failure of the Guidance to recognize trust and reliability as important linkages between lawbreaking and work. And I'll try to do this all in under seven minutes.

The EEOC Guidance on the consideration of arrest and conviction records in employment decisions is presented in a lengthy document; but the rule it establishes is simple: Employers commit race discrimination if they choose law abiding applicants over applicants with criminal convictions unless the employer goes through a highly subjective decision making process that involves the collection of information and weighing of multiple factors,
including the individual's particular circumstances, education and training post-conviction, length and consistency of employment history, and character references.

If the applicant is rejected after consideration of these factors, presumptively no race discrimination occurs.

An analytical flaw in the Guidance is that it does not explain whether or why it is race discrimination to reject the applicant without individualized assessment but it is not race discrimination to reject the same applicant with the individualized assessment.

The Guidance is not authoritative in the way a law is authoritative. The Guidance is not a regulation. Indeed, the EEOC has no authority under Title VII to issue substantive regulations under Title VII. The Guidance is not binding, even on the EEOC, which is free to take inconsistent positions during its own investigations or in litigation when it sues employers.

As a general matter the Supreme Court gives little deference to the EEOC's non-regulation interpretations of Title VII. This is thoroughly discussed in a study by Melissa Hart, called
"Skepticism and Expertise." It was published in the Fordham Law Review in 2006. The EEOC's Title VII Guidance is followed by the courts to the extent the courts finds the Guidance persuasive based on thoroughness, logic and fit with prior interpretations and any others sources of weight. That means simply that the court will consider the EEOC's Guidance as it would any other argument.

The EEOC's Guidance already has played a significant educational role. As result of the Guidance, there has been greater awareness by employers that their policies may be unnecessarily restrictive. The Guidance has also been transformational. From the heightened awareness from education has come liberalization, a loosening if you will, on the restrictions on the hiring of persons with criminal records.

And because the Guidance implies an expectation that the outcome of EEOC charge investigation will hinge upon whether the employer has weighed the multiple factors stated in the EEOC Guidance, employers have changed practices to conform with the EEOC's Guidance solely to avoid entanglements with the EEOC, including litigation.

The Guidance, though, remains perplexing
to employers. For example, employers do not understand the EEOC's position that they commit race discrimination if they reject an applicant with a criminal history of violence unless the rejection follows an individualized assessment.

Employers also do not understand why they are at risk for an EEOC sex discrimination lawsuit if they chose to hire a law abiding female applicant over a convicted felon, who is male.

In addition, employers expect that the individual assessment that they are being asked to undertake will result in second guessing of their decisions by the EEOC. Employers have been given no guidance on how the individual decisions should be made as, for example, how they should weigh the various factors. They are rightly concerned that if they follow the EEOC's approach and make subjective case-by-case assessments of applicants' suitability for work, as, for example, hiring some applicants who have felony violence convictions but rejecting others with similar convictions, they will face an increase in the number of discrimination lawsuits by rejected applicants.

Finally, by placing so much emphasis on the issue of recidivism, discussions about law
breaking and work have de-emphasized two important traits, trust and reliability, or conscientiousness.

Prior to the EEOC's Guidance, these characteristics were considered important linkages between law-abiding behavior and employment. Both trust and reliability have been emphasized by the EEOC, the U.S. Office of Personnel Management and the United States Supreme Court as overriding interest shared by employers, employees and consumers.

For example, the EEOC's Suitability and Security Program Handbook, which the EEOC uses to make its own hiring decisions for its own employees, states that a history or pattern of practice of criminal activity creates doubt about a person's judgment, honesty, reliability and trustworthiness.

The U.S. Office of Personnel Management's Introduction to Credentialing, Suitability and Security Clearance Decision Making Guide, states that criminal activity creates doubts about an individual's judgment, reliability and trustworthiness and calls into question an individual's ability or willingness to comply with laws, rules and regulations.

The EEOC's new Guidance seeks to reject the common-sense notion that continues to hold sway
when the EEOC itself is hiring, that the willingness to follow society's rules is relevant to whether the employer can depend on the individual to faithfully and honestly perform his or her job duties.

When an employer decides that a lawbreaker cannot be trusted to faithfully perform on the job, the employer should not be branded by the EEOC with the allegation of race or sex discrimination.

Thank you for your attention.

CHAIRMAN CASTRO: Thank you, Mr. Livingston. Mr. Holzer, you may proceed.

DR. HOLZER: Thank you very much. Good morning and thank you for inviting me today.

I'd like to very briefly make four points about the Enforcement Guidance by the EEOC and the broader issues of criminal records for employment.

First point, the prevalence of arrests and convictions among less educated men substantially reduces employer willingness to hire them later in life and worsens their employment outcomes more generally, in a way that generates clear disparate impacts on minority, and especially black men.

Now it's true that many young men enter
and then exit prison with the very poor basic skills and low levels of education, but their time in prison further reduces their work experience and their marketable skills. But on top of that the great reluctance of most employers to hire men with criminal records, regardless of their individual characteristics, further worsens their employment outcomes.

The large negative effects of incarceration on post-release employment appears to be a major reason for the continuing deterioration of employment among young black men over the past few decades. And, by the way, this is not because young black men have an innately greater proclivity towards crime, but instead because they have been the most disadvantaged by economic changes in the labor market that have reduced their legal opportunities.

Point number two. The use of criminal background checks by employers can have both positive effects on the employment of some minority men and negative effects on others. And I believe both the usefulness and the limitations of the information should be considered when policies are made about their use.

Now it is true that background checks
almost certainly reduce employment for black men and
others with criminal records. It is also true that
employer background checks seem to raise employment
for black men overall; presumably by reducing
statistical discrimination against men whom employers
suspect of such activity but who turn out to have
clean records.

Background checks can therefore play a
very useful role for some groups of workers and for
employers. But there are important limitations to
the positive effects of criminal background checks
that should be also noted. For one thing, there
appear to be many errors in these data. For
instance, the private provision of these records
often do not carefully distinguish arrests from
convictions.

And there appear to be many false
positives among apparent offenders, as well as false
negatives among non-offenders, suggesting that the
observed differences of criminal activity between the
two groups are really not as great as they seem to
be.

Furthermore, and I know Dr. Blumstein
will talk about this, the ability of criminal records
to predict future contact with the police diminishes
greatly after the first five to seven years in which a past offender does not commit another crime. And again, I'll defer to Dr. Blumstein more on that record.

But importantly, these studies mostly focus on the general probability of new arrests rather than the commission of specific new felony offenses. In most cases, the studies do not tell us whether or not the arrest results in a conviction or what type of offense occurred.

Accordingly, it is hard to ascertain the risks of poor job performance, property damage, theft or injury to coworker or customers associated with any such re-arrest. Since so many offenders are in fact convicted of non-violent felony drug conviction or sales it is hard to know the extent to which the risks that employers fear from these applicants are really well founded.

Point number three. The very high costs of previous criminal histories on employment are borne not only by the offenders themselves, but also by their families and their children, their communities and the U.S. economy more broadly.

Accordingly, having some positive policy efforts to improve employment outcomes for this group...
are in the national interest. Now, low employment after prison release appears to be quite highly correlated with recidivism, and a number of very prominent scholars believe that's a causal effect.

But the negative effects of low employment and recidivism extend far beyond the offender himself or herself. For instance, the children of offenders are much more likely to engage in negative behaviors and ultimately become incarcerated themselves than similar children of non-offenders. And it is likely that the low employment and repeat arrests and re-incarceration among parents help to generate these worse outcomes among the children.

A lack of employment among offenders almost certainly makes it harder for low-income, non-custodial fathers with a child support order to make their payments on time, thus, thus denying their families and children an important source of household income.

Children and youth growing up in low-income neighborhoods where very few adult men work seem to have worse outcomes in life themselves, because of the absence of role models for work and labor market contacts and connections.
And, finally, the overall U.S. economy appears to suffer when so many adult men do not work. Their lost earnings represent lost output and lost productivity for the economy overall. And the magnitudes of these effects are not trivial.

Finally, my last point. The EEOC Guidance should be viewed as one of several potentially effective legal and policy efforts to reduce the barriers for employment among men with criminal records and thus to improve their employment outcomes.

Now, since employer reluctance to hire men with criminal records appears to be a major reason for why employment rates of offenders are so low, attempts to limit the disparate impacts associated with criminal records should be welcome as long as they do not impose undue risks and burdens on employers.

Now, in my opinion, the EEOC Guidance does not seek to discourage employers, in any way, from doing background checks. It simply tries to encourage a more judicious use of the information so gained.

Furthermore, the EEOC Guidance does not seek to significantly raise the risks employers bear
from hiring offenders, it simply tries to encourage a
more accurate assessment of what those risks really
are.

As the courts have argued for decades,
the length of times since an offense is committed,
the nature of the offense and the nature of the job
should be taken into account when assessing the risk
of recurrence of any offense and what it implies for
job performance.

The mere existence of a prior record,
conviction or incarceration in and of itself may tell
us very little about such risks. Furthermore, a
range of individual factors, such as participation
and completion of employment and training program has
been shown to lower the risk of re-incarceration
quite dramatically. And so this individual
consideration should be taken into account.

Now there are a range of other policies
and programs that should be used to address the
employment barriers of former offenders. These
include the efforts of states to review statutory
limits on felony offender employment. Limiting
recidivism due to technical parole violations. Re-
entry programs, fatherhood programs and the like.

But I consider all of those efforts to
be compliments to the EEOC Guidance and it should not be viewed as a substitute for them.

Thank you.

CHAIRMAN CASTRO: Thank you, Mr. Holzer.

Dr. Blumstein.

DR. BLUMSTEIN: Mr. Chairman, members of the Commission, thank you very much for the opportunity to report to you on some of the research that I've been doing over the past number of years.

It's clear that most public policy issues involve some complex trade-offs, often between one set of private interests and another set of public interests. And there's an issue that's involved here in terms of the use of background check information in an environment where, number one, the prevalence of positive background events, criminal events, is not at all appreciated.

And second, because of the difficulty of understanding where the risks are at any particular point. The research I want to talk about is research that Kuminori Nakamura and I started about five/six years ago in recognition of the fact that many people had some minor infraction, a crime, particularly when they were young and stupid. Then, twenty or thirty years later, they still can't get a job because of
that record in their background.

And it's that situation that impelled the research, and that links to the issue of the timeliness in the EEOC Regulations, the timeliness that says if somebody did something stupid when he was young, that should not hang over him for the rest of his life.

So it's clear that there is tension between those who feel that all information should be available to an employer so that the employer can make whatever wise decision he chooses to make, on one hand, and the opportunity to limit the collateral consequences of that event.

We started the research with 88,000 criminal-history records from New York of first-time arrestees in New York State. We then drove down to those who were convicted. We then looked at the risk of a new event as a function of the time clean, since that first event in 1980. It turns out that very shortly after that first crime, there's a reasonably high risk of recidivism, of committing a new crime, shortly after that event.

But that risk declines. And so our challenge was finding the nature of that decline and when it got low enough to be considered negligible.
One measure of low enough was when it became less than that of the general population of the same age. The second measure was when it got close enough to the risk of people who had no prior records.

And so that was the basis for doing the analysis. We had full criminal records and so we could see the nature of the declining risk. It turns out that most recidivism occurs within the first three years after a previous event, so that the risk falls off rather sharply after that. It gets down under ten percent after that and becomes less than the general population within four to seven years, and somewhat longer if the comparison is to those with no prior records.

One might challenge the contemporary usefulness of what happened in New York in 1980. So we got similar first-arrestees data from New York in 1985 and 1990. We also went to Florida and Illinois and that enabled us to test the robustness of our findings over time and state. And there was a reasonable amount of variation over those first five years.

But after that, the pattern becomes much closer, because we're now dealing with a population that avoided the high risk of recidivism in those
first few years.

Our first analyses were re-arrests for any crime type. We then wanted to look at re-arrests for crime types to which employers might be particularly sensitive. So we looked at violent crime type or property crime type. And those were quite different.

So that we now have the basis for sorting out what we call the redemption time, which is when they get below the general population or close enough within some small risk-tolerance of the people who have no records.

And we found that of these 88,000 people, 40 percent had no subsequent arrests in New York. It was their first and only arrest. Now about ten of those 40 percent had an arrest in another state, so that we were able to adjust our estimates of redemption times, times when the risk was low enough, to account for that variation.

We looked at individuals who were convicted, but I can tell you that the risk pattern of those who were convicted compared to those who were merely arrested was not very much different. You have a much smaller population, but conviction is usually attributable not to innocence but something
associated with evidentiary possibility.

One particular target that I think we want to talk about is the wide variety of the forever rules that are present in statute and in corporate policies. If you have ever done X, you cannot be hired. And that totally precludes the possibility of redemption, the possibility of people surviving what they did wrong.

And arrest ubiquity is a particularly important issue. There have been recent estimates of arrest prevalence. We made an estimate about 40 years ago that the chance that a male would be arrested some time in his life was 50 percent. We were sure that there was an arithmetic error, missed the decimal point. That estimate is now higher because we hardly had arrests for drugs or domestic violence then. So the ubiquity of arrest is an important consideration in terms of what employers view to be meaningful.

CHAIRMAN CASTRO: And we're going to try to, before we go to the last speaker in this panel we're going to dial in our Vice Chair, is that right? Madame Vice Chair are you on? Okay, well we'll proceed, the phone's working so she can log on when she's available.
Then we'll move ahead. Mr. Sedgwick, please continue.

DR. SEDGWICK: Okay. Chairman Castro, distinguished Commissioners, thank you for the invitation to appear today. I'll try to keep this brief and move quickly.

I want to start by asking you to think about three numbers: 11,521, 7,739 and 4,685. The significance in these numbers is there are 11,521 published articles on criminal careers, many of them done by my colleague here, Al Blumstein.

There are 7,739 published articles on predicting crime or criminality. And there are 4,685 published articles on recidivism. These are crucial topics in understanding the risks involved in hiring those with, or even without, criminal histories; because, indeed, people who have no criminal history still have a risk of committing an offense.

The question I would ask you is, does the updated EEOC Guidance reflect an awareness or a nuanced understanding of this available body of knowledge? Also, does the EEOC updated Guidance reflect awareness or nuanced understanding of the multiple factors that contribute to problems encountered by ex-offenders in the job market?
I'm referring here to such factors as substance abuse or dependency, poor job skills and employment history, and difficulties with interpersonal relationships. Does the updated Guidance address these issues in a constructive manner, or acknowledge their presence in order to enhance employment prospects for the ex-offender in aiding successful re-entry -- a goal that we all share?

Does the updated EEOC Guidance reflect awareness of or a nuanced understanding of the available body of social science research on statistical discrimination and the benefits of criminal history background checks Professor Holzer spoke to so eloquently and his research documents quite concisely?

Does the Guidance reflect an understanding that background checks do not inhibit positive employment outcomes across the board? And they in fact, as he noted, actually lead to an overall improvement in minority hiring.

Also, does the EEOC Guidance reflect an awareness or nuanced understanding of research by scholars such as Devah Pager, who's done some very good work identifying the actual sequencing of events that leads to the way in which the presence or
absence of a criminal event in one's background
effects one's employment prospects?

Does the updated EEOC Guidance reflect
awareness or nuanced understanding of the available
body of social science research on redemption that
Professor Blumstein has been working on so diligently
these years including the limitations of its, its
preliminary status, its potential for informing
employer assessment of job applicants, but also its
unsuitability for guiding an administrative or
regulatory bright line or uniform guidance?

Does the EEOC updated Guidance reflect
awareness or nuanced understanding of the way in
which employers use criminal history background
checks? SHRM has provided a great deal of survey
information on how and why employers use background
check information.

Oddly, in many cases, employers
demonstrate what seems to me to be a quite
sophisticated understanding of how to use this
information; and, in fact, they seem to be using it
in ways that, quite frankly, the EEOC Guidance
doesn't.

And finally, does the updated EEOC
Guidance reflect awareness or nuanced understanding
of the insubstantial foundation of disparate impact and social frameworks as justification for adverse action by EEOC? In my written statement, I noted a very long tradition and body of research on the disparate prevalence of criminal records in the United States, some of which--

VICE CHAIR THERNSTROM: I've been listening to whoever's talking.

DR. SEDGWICK: I beg your pardon?

VICE CHAIR THERNSTROM: Oh.

CHAIRMAN CASTRO: It's Commissioner Thernstrom.

DR. SEDGWICK: Oh, okay. Some of which was done by Professor Blumstein, and research done by other scholars such as Hindelang, Langan, and Sampson and Lauritsen, concluding that the disparate impact of criminal records reflects differential involvement in imprisonable or arrestable crimes, not discriminatory treatment of protected classes.

It also seems to me interesting that the EEOC Guidance fails to recognize, engage and respond to some of the questions that Professor Amy Wax asks about disparate impact analysis, particularly looking at the Griggs Decision and the standard in the Griggs Decision, and the way in which continuing social
science research has undermined the foundations of
the court standard in the Griggs case.

And, finally, again, I'd ask whether or
not the EEOC Guidance takes account of the work of
Professor John Monahan at the University of Virginia
Law School that was mentioned in the Dukes v. Wal-
Mart case, questioning the use of social frameworks
like disparate impact analysis in a litigation
affecting racial discrimination.

As you can tell by the questions that
I've asked, my primary interest is that I want to see
social science research used. The scholars that we
have here have done some excellent work. What
concerns me is that I don't see that work, or an
understanding of that work, reflected in a
sophisticated and nuanced sort of way in the EEOC
Guidance.

And I would hope we all share an
agreement that we have 2.2 million incarcerated
people in the United States; 95 percent of them are
coming back to their communities. We have a vested
interest in making sure they come back prepared to
succeed in their re-entry into legitimate society.

My concern is I don't see social
science, and what it has to offer to that challenge,
being used appropriately, or used in a sufficiently sophisticated sort of way, in the EEOC Guidance.

I'll cede the rest of my 20 seconds back to Al. I'll cover your debt.

(Laughter.)

CHAIRMAN CASTRO: Thank you. At this point I want to open it up to our Commissioners. Commissioner Kirsanow, please proceed.

COMMISSIONER KIRSANOW: Thank you, Mr. Chairman. I also want to thank the panelists, this was very informative. I want to thank the staff for again putting together a great briefing. If, based on what we've heard in the first panel, is any indication of subsequent panels, this is going to be an outstanding briefing that will inform us.

Professor Holzer, good to see you again. You're becoming a regular. I live in inner-city Cleveland and see the profound effects of failure of re-entry into the workplace of ex-offenders. We have a lot of people who probably could contribute to society but because of the problem of failure of re-entry. The problems of criminality is exacerbated and with all the downstream effects talked about by Mr. Blumstein.

However, I also have profound concerns
about this particular Guidance from a number of perspectives. One is that I don't see --

CHAIRMAN CASTRO: Commissioner, could you speak up a little? The other Commissioners over here can't hear you.

COMMISSIONER KIRSANOW: Yes. One is I don't see any safe harbors in the Guidance whatsoever. I don't see any safe harbors in the Guidance in two perspectives. One is, you know, if there's a negligent hire lawsuit brought, what does an employer do?

Number two, I understand the general counsel of EEOC has said that this supersedes state laws to the contrary. So if you got state laws out there that say you've got to have criminal background checks for certain industries, you comply with it in good faith. And then you get slapped with a disparate impact lawsuit.

That brings me to number three. I don't see a judicious application of disparate impact theory in this particular case. That is a subject for a whole different hearing on the Constitutionality.

But I guess most importantly here is I know the EEOC maintains that this is not burdensome
or complicated, which would give surprise to a lot of small employers that are arrayed here. It's not complicated to me, necessarily; I practiced in this area for 35 years. But to a mom and pop corporation, company, they don't know what to do with this thing. They do think it's ambiguous. They suspect it's ambiguous for a reason so that there's more expansive application of this particular policy. And I guess one of the questions I would have is to Ms. Miaskoff. What evidence, if any, did the EEOC adduce during the hearing process to address whether or not this was going to be burdensome or complicated to smaller employers, or any employers whatsoever?

MS. MIASKOFF: Right. We heard during the hearing process and through written comments that the basic factors that we have enunciated here were familiar to employers. And indeed that a lot of employers already were following a process whereby they would look at the basics, which are the three factors.

And often, would give an opportunity to an individual to explain the situation. And in fact I think there is something in a recent SHRM publication that also asserts that fact. So we got the feedback that indeed a lot of employees already,
almost on a common sense level, were following some of these processes.

CHAIRMAN CASTRO: Commissioner Kladney, then Commissioner Gaziano.

COMMISSIONER Kladney: I know you've said it twice already but a number of our panelists, not necessarily on this panel, but panels to follow, have indicated that the EEOC Guidance prohibits employers in some fashion from doing criminal background checks. That's not the case, right? I mean I'm just asking you to absolutely state that again.

MS. MIASKOFF: No. It does not prohibit criminal background checks.

COMMISSIONER Kladney: Right. I mean they say that quite a bit. And so based on what you said about the Guidance, if an employer is running a business in which employees spend a lot of time one-on-one with customers or other employees, and you receive an application from someone who has a criminal background that reveals the person was convicted of a violent crime, a crime against a person, and was only recently released from prison, using the Green factors an employer could safely tell that applicant, I'm sorry, you're not employable at
my place of business, is that correct?

MS. MIASKOFF: Yes, that's correct.

COMMISSIONER KLADNEY: I mean you would base the application and the Green factors with risk. I'm mean it's not rocket science?

MS. MIASKOFF: No, I don't see it as rocket science. The Green factors I think were discussed in the later decision in El v. SEPTA, and there the court came out and said that really what we're talking about is assessing risk. And what the Green factors do is they give a common-sense way to start approaching that.

What's the crime? How long ago did it happen? What's the job?

COMMISSIONER KLADNEY: Dr. Blumstein, that's exactly what you talked about in your article isn't it?

DR. BLUMSTEIN: Very much so. Specifically focusing on the duration issue. We didn't try in any way to assess the applicability of a prior crime to the employer's needs. That is clearly relevant. But ours was specifically recognizing that lots of people get hung for a long time, without any empirical basis for knowing when long enough had occurred, that this individual should
no longer be seen as a threat.

COMMISSIONER KLANDNEY: Thank you.

CHAIRMAN CASTRO: Commissioner Gaziano.

COMMISSIONER GAZIANO: Thank you. And thank you all, I appreciated all the work that went into your testimony and your appearance today.

I just want to state a little bit of my background, and maybe even disagree to one thing the Chairman said in his opening remarks. My day job is at the Heritage Foundation where I help direct a legal center. And on Monday our legal center is sponsoring a program trying to expand the President's pardon power. Co-sponsored with some ideological people across the aisle.

And my colleague, Ed Meese, has helped me appreciate the importance of re-entry programs that help prisoners reenter and reentry programs afterwards. This has been a great interest to me for a number of years.

But the disparate impact overuse, the overuse of disparate impact under Title VII, is a very complicated and tricky area to get at this problem. The federal government, state governments, private individuals can do a lot more I think to help prisoners reentry. And the disparate impact, as I've
seen used for the federal government in other situations doesn't even exist.

But at least in the one point that I'll disagree with our Chairman, is he noted our recent examination of disparate impact in the school discipline context, he said that we made certain findings that disproportionate discipline by race causes certain criminal pathways.

Honestly we found no such thing. We collectively found no such thing. The Chairman and some others may have found some. Some of us found that the misguided attempt to require teachers to discipline by race will probably backfire and have some rather devastating effects for some of the students who need more discipline. And for some of the students who are in classrooms who are disrupted by kids who are misbehaving where the teachers are afraid that they can't discipline except to get the numbers right.

Well I think this is another area where going to heavy handed with the disparate impact approach may backfire. Of course there is some literature that suggests that if employers are discouraged, even if they can go through some hoops and consider criminal background checks, if the
threat of a private or EEOC litigation will subject them to liability, that instead of employing -- not conducting background checks and employing more of certain type of minorities that the guideline is supposed to help, they'll employ less.

And my final question I think is to Mr. Livingston. It also troubles me that the EEOC could go two ways with the disparate impact under the Title VII. First of all, I certainly agree they have no authority to issue regulations. So the Guidance in the guise in interpretive regulations is questionable to me.

But the other is the two ways they could go, Constitutionally, is to try to interpret the disparate impact approach in a way that lessens the Constitutional risk, that of requiring disparate treatment that would violate the protection clause.

Or to expand their power to the almost maximum extent possible. And that's generally the bureaucratic temptation. To aggrandize power, to increase leverage, to increase agency staff. In my view have you studied the Constitutional implications of this moth to the flame that EEOC may eliminate any use of disparate impact if they cross the threshold into an unconstitutional territory?
MR. LIVINGSTON: That's a big question. What we do know is, for example, in a lawsuit that EEOC has filed alleging disparate impact, that the EEOC is asserting that men, white men, black men, Hispanic men, are entitled to a remedy when they're denied employment because of a criminal conviction but that white women are not.

And that does raise some questions about whether the statute is being applied in a way which is consistent with the requirements of the Equal Protection Clause.

Looking at it in my mind I want to rephrase the question so it's easier --

COMMISSIONER GAZIANO: Please do.

MR. LIVINGSTON: -- I’ll give you a different sort of answer. And it deals with the Green case, and the Green factors, and the discussion about, “Well nothing has really changed; the Green factors are common sense factors that employers ought to take into account when they make hiring decisions.”

A great deal has changed with the EEOC's Policy Guidance with respect to application of the Green factors. The Green factors, according to the
Third Circuit Court of Appeals in a recent case, El v. SEPTA, do not require individualized assessments: the employer can look at particular crimes and particular jobs and form bright line rules.

For example, "We won't hire someone who has been convicted of theft for a cashier position if the conviction occurred within the last five years.” And that takes into account the nature of the job. The nature of the offense, and when the offense occurred. Bright line factors.

The EEOC has rejected that and is requiring employers to look at each person who committed a theft individually. And that requires subjective, individualized assessments of the type that employers have been trying to work out of their hiring systems for years out of concerns that when hiring managers treat similarly situated persons differently minorities may be disadvantaged; and create disparate treatment litigation risk for the employer resulting from the exclusion of women and minorities from positions.

So I'd say that the Policy Guidance, by requiring the individualized assessments and preventing employers from establishing bright line rules that would treat similarly situation persons
the same, has an unintended consequence which is opposite from what is intended by the EEOC's policy.

CHAIRMAN CASTRO: Would you like to respond?

MS. MIASKOFF: Yes, I'd like to respond. The Guidance does not require individualized assessment. Period. Indeed, Mr. Livingston has been telling you how we don't have rulemaking authority, so we can't require it. But we don't require it in the Guidance.

What we do is say is that it is at times an important supplement to the Green factors. And the Guidance does say that there will be situations in which a bright line rule without the individualized assessment will be fine under Title VII.

CHAIRMAN CASTRO: Before I move on to Commissioner Achtenberg I want to thank Commissioner Gaziano for only disagreeing with one of the things I said. So I think we're moving ahead.

(Laughter.)

Commissioner Achtenberg.

COMMISSIONER ACHTENBERG: Dr. Holzer, you state in your testimony that the EEOC Guidance should be viewed as one of several potentially
effective legal and policy efforts to reduce the
cbarriers to employment among men, I would imagine as
well as women, with criminal records. And thereby
improves their employment outcomes.

You also stated that in your view the
EEOC Guidance does not seek to discourage employers
in any way from doing background checks of
applicants. That seems to be in stark distinction
from the critique offered by Mr. Sedgwick and I'm
wondering if he would comment on the acuity of my
observation to that effect.

DR. HOLZER: Well, Mr. Sedgwick and I
agree that it's important to use social science
research, and I appreciate the plug you made for
that.

I very, very strongly disagree with Mr.
Sedgwick's reading of that evidence. And I read over
his testimony several times and I was, frankly, quite
troubled by some of the logical leaps that Mr.
Sedgwick makes, some of the inferences he draws.

Mr. Sedgwick, for instance, mentioned a
paper by Devah Pager and Bruce Western. And then he
infers exactly the opposite from that paper of what
the paper really shows that clearly what the authors
believe. And then he attacks the EEOC for not citing
that paper and accuses them essentially of dishonesty in his written statement, which I found quite amazing.

In many, many other places Mr. Sedgwick reviews the evidence Al Blumstein has now generated a body of work on how duration affects the probability of re-arrest. There are other papers in the body of research. There's several papers by the trio of Kurleychek, Brame, and Bushway. Mr. Sedgwick cites one paper, though there are several of them. All of the papers except that one Mr. Sedgwick cites in fact find after some number of years there is no remaining difference in the probability of re-arrest.

Separate from the whole issue of the re-arrest are the issues of for what crime and did a conviction occur. So I have a very strong disagreement with Mr. Sedgwick on how this research should be read.

I'm not a lawyer and I won't pretend to be. And one might have qualms about the EEOC from legal grounds and Commissioner Kirsanow mentioned some of those qualms and I'm not prepared to comment on that. When I read the document from my vantage point as an economist and social scientist, it seemed to me to be a relatively sensible application of the
Green factors plus other individual factors, which this literature shows do matter - like having completed an employment training program dramatically reduces the likelihood of re-offense.

I don't think this imposes an enormous burden on small businesses to check into these kinds of personal backgrounds. I mean, they're readily available if people choose to look at them. And we know, we know that there are many employers, small and medium size especially, that have blanket refusals to hire people with a felony conviction who don't look at the Green factors.

Now they may not state that publicly, but thousands of these employers early in my career. And many of them simply say that, they will not hire anyone with a felony conviction.

Given that, none of us are arguing about the Green factors, we all seem to agree on those. It just seems to me that trying to clarify the issues that should be taken into account is a potential positive, though again I'll leave legal qualms to other people.

And the other thing I'll say is the status quo does enormous damage. Social and economic damage, not only to these individuals but to their
families and their communities and the American economy. The risks that we're now considering imposing on employers are hypothetical and do not seem to me to be very high.

So an honest assessment, an accurate assessment of all of the costs and all the benefits certainly leads me to believe that if we're erring in a certain direction right now we're erring too much in the direction of keeping these men and women from employment and that maybe we should at least reconsider some of these factors.

CHAIRMAN CASTRO: Okay. Next is Commissioner Kladney followed by Commissioner Yaki, Commissioner Heriot, Commissioner Kirsanow.

COMMISSIONER KLADNEY: Dr. Holzer, Mr. Sedgwick cited that Amy Wax, and I think she's a lawyer not a social scientist, I think that was the social science you were referring to in his -- Do you remember?

DR. HOLZER: No, not that one. I referred to other ones.

COMMISSIONER KLADNEY: What I'd like to ask you is, as you've said, I've surveyed thousands of people early in my career. I think that's when you got most of the information for the article that
you're here for. And one of your co-authors, Stolz, wrote a subsequent article using a lot of that same information.

And I was struck by when they said that people who don't do criminal background checks, employers who don't do criminal background checks, hire white ex-offenders at a higher rate than people of color. Do you recall that in Stolz's article?

DR. HOLZER: I do recall that. I believe he is actually citing a result from Devah Pager's doctoral dissertation, which is distinct from the piece Mr. Sedgwick cited. And what that shows is that race per se plays a very important factor in these hiring decisions. Criminal records also play an important factor in these hiring decisions.

Mr. Sedgwick tries to argue that these papers show that's really race and not criminal records. I don't read the evidence at all that way, because it means that both of them matter. It's certainly possible for multiple factors to be important in determining the outcomes we care about and this one of those cases.

So yes, race matters. White men who do have criminal records seem to either have comparable or slightly higher or slightly lower, depending on
the study, odds of being hired than a black man without a criminal record. But when you look at all of the data, all of the evidence, it's clear that both of them matter very importantly and interact in important ways.

COMMISSIONER KLANDNEY: Dr. Blumstein, I think again, and I'm not picking on you Mr. Sedgwick honestly, I think Mr. Sedgwick said that --

DR. SEDGWICK: I'm comfortable with what I said.

COMMISSIONER KLANDNEY: I think he that you cited that 80 percent of people recidivate after college. I did recidivate back to school actually. But 80 percent of people recidivate after their first conviction. Does that go down with time, I mean that's basically what we're talking about.

DR. BLUMSTEIN: In our study 40 percent did not recidivate at all. So that 60 percent did. So recidivism is widespread. But it's widespread for a wide variety of crimes, many of which are of minor concern to an employer or otherwise.

But from a research strength viewpoint we chose to take this cohort of first-time arrestees in 1980 and follow them through. We then tracked how many of them had out of state arrests. Of those who
had no further arrests in New York we tracked those who had out of state arrests, and so we were able to find those.

But recidivism is reasonably high. And recognize we took people who we thought had no prior record in New York. And even among them recidivism was high. And then obviously offending is going to be high among lots of people who never had a prior record, because we're all at risk, to the criminal justice system in part. To our own misbehaviors as well.

So 80 percent recidivating sounds high and the studies of people released from prison that came from BJS said that about two-thirds get re-arrested for something. That means one-third didn't get re-arrested, at least in the five years they tracked them.

Whereas half of them went back to prison. So that the recidivism studies are fairly consistent but people look at different measures of recidivism in different ways. Because the police will look at re-arrest. The corrections people look at re-incarceration. And those two may be totally consistent, but they will then argue about whether it's two-thirds or 50 percent.
COMMISSIONER KLADNEY: Mr. Sedgwick, would you agree that the passage of time reduces the ability to recidivate?

DR. SEDGWICK: Oh absolutely. Oh, that's a well-known fact in social science that there is an age/crime curve. As people get older the likelihood of them committing a crime declines.

COMMISSIONER KLADNEY: So it would be important for employers to look at that?

DR. SEDGWICK: Absolutely. Absolutely. Could I just, one other thing that I think is an important point because the research that Al has done on redemption so far, I think it's important to understand that that is for first time arrestees.

His next wave of research is going to look at people who have multiple prior offenses and look at redemption times. It will be interesting to see whether those redemption times are longer or shorter. So one of the things here that I appreciate in Al's research on redemption is that it fits nicely with a body of literature on criminal careers that I think is very interesting and ought to be taken account of by employers; this research looks at what are the markers of the beginning of a criminal career that's going to be long and
relatively intense. What are the markers of a criminal career that's going to be serious as opposed to not very serious.

I remember back in 1984 when I was the deputy director of BJS, we were testing the FBI's system for keeping and making accessible records. So we asked the FBI to run us the longest rap sheet they had, just to see what it was. It turned out it a young man who was a turnstile jumper in New York City, right? So, okay, there would be an example of someone who has a very high volume criminal history for a trivial offense, Okay?

So I guess the bottom line that I would stress with the redemption research is it strikes me as valuable. But it's much more valuable for an employer in terms of assessing the risk of a particular individual in the context of a variety of other personal and familial and social characteristics than it is to be cited by EEOC to form a standard of how long a window, you know, of look back an employer should have.

COMMISSIONER KLADNEY: The EEOC doesn't do that in their Guidance, obviously.

MS. MIASKOFF: Correct.

DR. SEDGWICK: Although they keep
citing, “Well, it could be four to seven years.” And Al in his New York Times opinion essay in January said, “Well, it's ten to 13.”

DR. BLUMSTEIN: That's the harsher standard.

DR. SEDGWICK: True. Although I wouldn't call it harsher, because in a sense you're saying there's two standards. One standard is when does the risk of hiring this individual, given a lapse of time from his last offense, match the general population of the same age.

DR. BLUMSTEIN: Drop below.

COMMISSIONER KLABENY: That's not what he says.

DR. BLUMSTEIN: Dropped below.

DR. SEDGWICK: Okay. All right, so it equals or falls below?

DR. BLUMSTEIN: Yes.

CHAIRMAN CASTRO: Commissioner Harriet, please proceed.

COMMISSIONER HERIOT: Thank you. I'd like to thank the panelists. And I've got a question for Ms. Miaskoff. Something that Mr. Livingston said that I thought was interesting, he suggested that a rule that discourages reference to criminal
backgrounds can have a disparate impact on females. And we could draw that out and say that it has a disparate impact on elderly Asian females if you like.

And that makes me wonder, given that lots of things have disparate impact, how does the EEOC prioritize the disparate impact issues that are out there? I guess maybe what I'm leading to here is, is the idea here that Title VII requires you to take some special interest in the interest of African American's or is what's really driving this an interest in ex-offenders generally?

I mean what, is race driving this or something else driving this? And if race is driving this policy then how do you prioritize which disparate issues are going to get the EEOC's attention?

MS. MIASKOFF: Right. Okay, two points in response. And your question is about prioritizing, which does acknowledge that the disparate impact provision in Title VII now prohibits disparate impact on any of the protected basis listed in the statue. So that includes all of the different qualities you just spoke of.

That said, when the EEOC does policy we
look at the research that these gentlemen have been
talking about. We look at the data. And the data
that would overlap in terms of race and criminal
records is both, I guess, voluminous and stark and so
that drove our focus on those issues of --

COMMISSIONER HERIOT: It runs both ways.
I mean the elderly Asian female if employers who wish
to look at criminal background aren't able to. So is
this really a Title VII issue or is this an issue
where you're concerned about criminal background as
an issue by itself. The notion of integrating ex-
offenders into the economy. Or is this a special
concern that Title VII requires for African Americans
or Hispanics. What's going on here?

MS. MIASKOFF: Title VII is not an
affirmative action statute. So let's get that off
the table. As I think someone on the panel said --

COMMISSIONER HERIOT: What do you mean
it's not an affirmative action statute?

MS. MIASKOFF: It doesn't require
special consideration of race, I think with some of
the terminology we're using. So I wanted to step
back from that. I think as some people on the panel
were saying, because we all have gender, we all have
race, we all have national origin, et cetera.
Religion, some of us have.

Everyone, as you said, can be protected by Title VII. In making the decisions about what to do policy on, we are not denying anyone their rights. We are, as a national agency, we are trying to focus on issues which have a big impact on American society, recognizing, yes, that it's very complicated. And yes, that technically everyone is protected by this law. I am, you are, we all are.

So we recognize that, but we look at the national issues based on the research.

COMMISSIONER HERIOT: What do you mean by the national issues? I mean, again, if it's true that elderly Asian females are worse off under Guidance, why does it work in one direction and not the other?

MS. MIASKOFF: I'm not saying it doesn't work. An elderly Asian woman could go forward and bring a case to court if she so decided to do so under Title VII. What I am saying is that with the overlap of where the EEOC invests its resources to do a policy statement.

We obviously watch the research and therefore issues such as the overlap of race and criminal exclusions that we're discussing here today
have been documented to be a major issue in the American society.

COMMISSIONER HERIOT: In the sense that it has a disparate impact on particular groups. But there are always mirror images --

MS. MIASKOFF: I understand that.

COMMISSIONER HERIOT: Because then you're not answering the question.

MS. MIASKOFF: I guess I'm not sure. I'd ask you a question. How does one enforce Title VII then? If there's always a mirror image, which would stop one --

COMMISSIONER HERIOT: For intentional discrimination. That's an easy question.

MS. MIASKOFF: I'm sorry?

COMMISSIONER HERIOT: By looking for intentional discrimination.

MS. MIASKOFF: But Title VII itself includes disparate impact now as well as intentional discrimination. That is the law of the land now.

COMMISSIONER HERIOT: Can you name something for me now that doesn't have disparate impact? Any job qualification that doesn't have disparate impact?

MS. MIASKOFF: Job qualification? Now a
job qualification, by saying that you're implying that it is a rule or a policy that the employer is going to apply across the board. That is the kind of situation that raises disparate impact concerns.

COMMISSIONER HERIOT: Is there any job qualification that you can think of that wouldn't have a disparate impact?

MS. MIASKOFF: Well I'm thinking out loud. And if you had an individualized job qualification, for example, I decided that I simply was not going to hire anyone who's shorter than five feet because I don't want to hurt my neck looking down. You know, a very kind of individualized factor, that would not be impact. That would be treatment.

CHAIRMAN CASTRO: Mr. Holzer wanted to respond. And then I'm going to let Commissioner Yaki ask questions. We're running out of time and I want to make sure all Commissioners have had an opportunity to speak.

COMMISSIONER GAZIANO: I think Mr. Livingston was looking to be recognized on this as well.

CHAIRMAN CASTRO: Well, Mr. Holzer?

DR. HOLZER: So I want to make two quick
comments in response to Commissioner Heriot's question. I don't see anything in the EEOC Guidance that requires the employer to hire the black man with the criminal record over the elderly Asian woman that doesn't. The Guidance simply says be careful how you use the information about that applicant's history.

It does not require anyone to discriminate against the elderly Asian applicant. It simply says do not put undue emphasis on that one factor. So I don't see that it creates a disparate impact on anybody else.

COMMISSIONER HERIOT: I didn't say they'd be hired or not hired and that's the thing. In the end either you get the job or you don't get the job.

DR. HOLZER: It says do not use that one characteristic of the black male applicant without considering other factors. It does not require that he be hired or that there be any discrimination against the other applicant.

But I want to make a second point, again going back to the evidence. Every study that I'm aware of that's ever looked at this, finds that black men are at the end of the hiring queue of employers; that of all the demographic groups black men face
very substantial discrimination. Every audit study, rigorous studies where they send out matched pairs of applicants, find that employers are reluctant to hire black men.

For many different reasons. Perhaps some legitimate, perhaps not. And we know that the fear of criminal records almost certainly is part of that. And again, the work done by Bruce Western and Devah Pager, our work and others, suggests that's an important part of that fear. I know of no body of evidence that says elderly women from Asia face substantial discrimination in this market.

So the evidence clearly suggests there is a large problem in this one area. Not these other hypothetical examples. And the EEOC I believe has made an attempt correctly or incorrectly, to address these issues. But the notion that it requires discrimination against these other applicants, I didn't see that anywhere in the document.

CHAIRMAN CASTRO: Commissioner Yaki.

COMMISSIONER HERIOT: Ms. Miaskoff was nodding, I just want to establish, you were agreeing with him, right?

MS. MIASKOFF: Correct.

CHAIRMAN CASTRO: I'm going to let
Commissioner Yaki proceed. He's been patiently waiting for his opportunity. So, Commissioner.

COMMISSIONER YAKI: Thank you very much. It strikes me there are sort of two things that I'm listening to here. One is, as referenced by the last interchange, there's this confusion about what this Guidance really does. To me what the Guidance does is it opens up the pool for everyone to jump in a little bit better than what's currently out there right now.

It lowers the bar for exclusions of people who formerly were sort of never allowed in to the hiring pool to begin with. I mean part of the problem that we have in this country for people who have a criminal background. And who predominately, in this case, are African American or Latino, is that they can't even get in the door to begin with to even get the interview.

I mean that to me is part of the big problem. As someone who worked on this in local government and understands how working with employers who came to me about this regulation or that regulation, part of the biggest hurdle was trying to educate them about the fact that there's something about giving someone the chance. But if you never
even give them the chance to explain themselves in the first place by enacting a hard and fast rule about a criminal conviction, you never get that opportunity.

I mean am I right, Ms. Miaskoff, that in many ways this is about -- this isn't a hiring mandate as it is broadening the pool of prospects that employers should be able to choose from in many ways.

MS. MIASKOFF: Well it's not a hiring mandate. And I think Dr. Holzer made that point clearly also. It is cautioning against discrimination.

COMMISSIONER YAKI: This to me, the irony of this discussion, being in Washington, D.C. is I think not lost on me. Because the underlying tone of what you've talked about Mr. Sedgwick, Mr. Blumstein and others has been redemption. About the idea that someone can experience the conversion on the Road to Damascus, give up their life of whatever it was that they had before and become a productive citizen.

We have that model in San Francisco, it's called Delancey Street, where we have diversion of drug other hardcore offenders within mainstream
back into normal life. And they create sort of their own record through this program to graduate into real work.

But nothing to me, what I don't understand from an employer's perspective and perhaps you can illuminate me on this, is why you would object to what is really, by its own nature, guidance. By its own nature it's not mandatory. It is a requirement, it is imposed by law by Congress for them to look into this. This is not something that they just invented on their own. This stems from a law enacted by Congress, signed into law by the first President Bush in 1991.

But we sit here and we talk about, I mean, there's something ironic about employers sitting here talking about how we have to have these requirements and this flexibility to do what we want to do. To screen out who we don't want to do, when we live in a city where you can break the laws of God and still be re-elected to national office.

I mean, where people who stray, do things all the time that are foolish, silly, arguably outside the law, even get convicted of it and still return to public life. It means all the time you, and others, are making judgments all the time about
whether or not what someone did relates to what it is you want them to do.

And why you can't extend that in very possibility and every case, and in the interest of African Americans and Latinos especially, that you give that person the same kind of benefit of the doubt in some ways to enter your work ranks is quite frankly puzzling to me. And when we get to the second panel what I'm going to ask is going to be even tougher on this particular question.

But to me, explain to me why. It goes back to the Bible, you know, those who are in glass houses should not throw stones. And for all of us, in all of our ranks, in all of our employment have someone who may have done stupid. Something that they aren't proud of. Maybe they got caught, maybe they didn't. Maybe they had a friend who was a DA who got them off so they didn't have to do it. So it never appears.

A lot of these kids don't. They have a bad public defender who just want to churn and burn a case. You know, plead it out, get it out, it's on their record. They don't have those kind of benefits. So why isn't it logical and why doesn't it make sense for EEOC to say to you just can't say no;
you've got to give everyone a second chance to prove themselves.

And to do that you can't automatically bar them from entering your doors.

CHAIRMAN CASTRO: To whom do you direct that question, is that Mr. Sedgwick?

COMMISSIONER YAKI: Sedgwick or Mr. Livingston or whoever.

CHAIRMAN CASTRO: I'm happy --

(Simultaneous speaking.)

CHAIRMAN CASTRO: So go ahead. Then I'm going to have Commissioner Kirsanow do the last question.

MR. LIVINGSTON: I'm happy to prove the adage that fools rush in where wise men fear to tread, by volunteering to answer your question.

The issue of employment for persons who come out of prison is a very significant issue that needs to be addressed in a very thoughtful way. And we can't have a society where if you commit a crime and go to jail you can never work. That's unacceptable to everybody in the room and should not happen in this country.

The question though is who decides what the rules will be? Will it be the people, through
their elected representatives in Congress? Or will it be an agency, using discrimination laws, that is not answerable to the electorate.

And so it's not a question of whether the rules are good. It's not --

COMMISSIONER YAKI: Excuse me.

MR. LIVINGSTON: You asked me to answer and I'll give you my --

COMMISSIONER YAKI: No, no, I'm going to ask you that. But you set up an immediate bifurcation which I don't understand. These laws were enacted by people elected to a body, delegated those authorities to that body. That body is responsible and there is oversight done by both Executive and Legislative branches on it. So I don't want there to be --

MR. LIVINGSTON: Well there you go. You just answered my question. This body was delegated authority for that body. We have a Congress and they should deal with this issue in a very thoughtful way, with input and opportunities for people to express their opinions.

The EEOC Guidance was issued without the opportunity to comment. And then the rest of us are told that these will be the rules the EEOC will
follow and it flows right back to the conversation which you just heard. Is EEOC using this as an opportunity to step into a space where Congress won't act and generally try to formulate rules that will apply to everybody? Or is it enforcing discrimination laws?

And to tell you the truth I don't know which it is. So EEOC policy guidance says that the use of criminal records by employers will result in disparate impact on Hispanics and Blacks. But, the EEOC has a lawsuit pending where EEOC is alleging that it discriminates against men, including white men, and that's the claim the EEOC is pursuing.

So I'm not arguing with you about whether there should be rules or whether we ought to be more thoughtful in the way we address this issue of jobs for persons with criminal convictions. We should, I agree. It's whether EEOC is the agency that should be doing that.

CHAIRMAN CASTRO: Mr. Kirsanow you have the last question. If it could be brief so we could conclude on time.

COMMISSIONER KIRSANOW: Thanks very much, Mr. Chairman. One quick observation, I keep hearing that this is only guidance, but when you're
on the receiving end of an EEOC Guidance that is the functional equivalence of even a statute, if not a regulation.

And I keep hearing it's not a hiring mandate but in Ricci v. DiStefano, we saw that it transforms into a hiring mandate. When you're concerned that you may have liability on a disparate impact claim you may have to put a thumb on the scale in terms of disparate treatment. And that is not theoretical. That happens in practice all the time.

So again, another lack of a safe harbor. Three safe harbors that aren't being provided. But this goes to I think, the job relating and business necessity, I'm going to go back to the law. Under disparate impact claim the employer must establish that the particular device, test, rule, policy that is facially neutral is job related and consistent with business necessity.

I think it was Don Livingston who said that criminal convictions are such a device test that are perhaps different from other device or tests, like you have in Griggs v. Duke Power where you had this facially neutral requirement that you have a high school diploma or pass a certain test. That's not job related, or not even consistent with business
necessity.

Here you've got a criminal conviction that says more than somebody was convicted of embezzlement so he should be barred from being a bank teller. Somebody was convicted of rape so he shouldn't be working in a assisted living center.

But it goes beyond that in terms of reliability, trustworthiness, it's an indication of a number of things that have been shown pursuant to possibly the highest standard we have jurors prudence and that is beyond a reasonable doubt.

So to what extent is this actually consistent with, disparate impact in terms of job necessity? And do we have any data that show whether or not those individuals who have criminal convictions perform worse or better than those who've been hired without criminal convictions? Because it seems to me that's what goes directly to the job necessity.

Are these people qualified, do they perform the job without any kinds of problems? Are they there every single day? Do they perform as well as those without criminal convictions? That's the true inquiry here when it comes to the law.

MS. MIASKOFF: Well, thank you for that
question. And I actually couldn't agree with you more, that is the data that we need. And we would love it.

COMMISSIONER KIRSANOW:  Hold it, hold it! Data that we need? We don't have this and yet we're issuing guidances?

CHAIRMAN CASTRO:  Commissioner, please. Let's --

COMMISSIONER KIRSANOW:  I'm astonished by this. We don't have data that goes to the exact issue here. We don't have any data on this? Is that what people are telling me?

MS. MIASKOFF:  What I'm saying to you is that is why in the Commission's Guidance you see two factors. The first factor is that, for job relatedness, is the uniform guidelines on employee selection procedures. Ideally, the kind of data that would be meaningful for that pool would be studies that used a criminal record and correlated that with subsequent workplace behaviors.

We did a lot of research. We found one study to that effect. Therefore, that is why the courts have turned to working with the basic framework that Green court set out in the 70s. Now I think it's also a very important question that you
That yes, the original disparate impact, the Supreme Court cases, they deal with job qualifications, like high school diploma, like scores on a skills test, et cetera. And clearly having a criminal record or not is a different beast.

I think the Third Circuit in Philadelphia gave a very thoughtful opinion in El where it really dove in and tackled the issues presented by that. That we're looking at assessing risk in this situation, not necessarily determining someone's level of arithmetic or reading.

And, indeed, I think that that tension has been recognized throughout the development of the law in this area, was very fully addressed by the Third Circuit. And indeed, that is the task that is pursued, I guess, by the second way we talk about establishing job related consistent with business necessity. Assessing the risk of the crime to the job. Looking at the time that has elapsed and looking at any other facts that can be enlightening.

COMMISSIONER KIRSANOW: I respectfully submit --

CHAIRMAN CASTRO: Excuse me, Ms. Miaskoff, we're actually going to conclude this
panel, Commissioner, since we've got Panel II. So --

COMMISSIONER KIRSANOW: This is very important. I'd respectfully submit that risk is only one aspect to look at. You have to look at not just the risk, that's maybe what the EEOC is looking at because it's focused on the criminality of this. But it's also for the employer, is this guy going to be a good employee.

(Chorus of voices.)

COMMISSIONER YAKI: Would you do that for any single person that comes in? That's ridiculous, Peter, that's to put a standard on anyone walking in the door about whether or not you think they're going to go, but that's regardless of what their background is. Regardless.

(Chorus of voices.)

CHAIRMAN CASTRO: I want to thank this panel for the opportunity to share your information with us. As you can see it's a very passionate issue for all of us. So I'm sure we'll continue this conversation with Panel II. Thank you again for the time and the information. I'll ask Panel II to begin to come forward, don't be afraid.

(Laughter.)

CHAIRMAN CASTRO: And we'll ask staff to
begin to change the nameplates. Commissioners, don't stray too far away.

   (Whereupon, the hearing in the aforementioned matter went off the record at 10:34 a.m. and went back on the record at 10:40 a.m.)

PANEL II. BUSINESS AND ADVOCACY GROUPS PANEL

CHAIRMAN CASTRO: All right, we'll get started with Panel II. I know that Gaziano will be in shortly. First of all I'd like to briefly introduce you to the panelists. And I'll do that again, as I did earlier, in the order in which they will be speaking.

Our first panelist is Roberta Meyers, director of the Legal Action Center's National H.I.R.E. Network.

Our second panelist is Glenn Martin, vice president of Development and Public Affairs and director of the David Rothenberg Center for Public Policy at the Fortune Society, Inc.

Our third panelist is Lucia Bone, founder of the Sue Weaver CAUSE, that's for Consumer Awareness of Unsafe Service Employment.

Our fourth panelist is Julie Payne, general counsel for G4S Secure Solutions, USA Inc.

Our fifth panelist is Richard Larson,
president and owner of Winning Works Team, Inc., and former vice president of HR at Universal Studios resort.

And our sixth panelist is Garen Dodge, partner in the Washington, D.C. Region Office of Jackson Lewis, LLP and general counsel for the Council for Employment Law Equity.

I think you were all here earlier and you know the system of warning lights. Seven minutes turns yellow, start wrapping up. And red, we'll move on.

Okay, I'd like everyone to please, now I'll ask you to swear or affirm that the information that you're about to provide to us today is true and accurate to the best of your knowledge and belief, is that correct?

(Chorus of ayes.)

CHAIRMAN CASTRO: Okay, thank you. Ms. Meyers, please proceed.

MS. MEYERS: Thank you, Commissioners, for hosting this briefing to discuss the impact of criminal record checks on Black and Latino job seekers in the labor market.

I'm Roberta Meyers, director of Legal Action Center's National Helping Individuals with
Criminal Records Reenter Through Employment Network, which is also known as H.I.R.E. The Legal Action Center is the only non-profit law and policy organization whose sole mission is to fight discrimination against people with criminal records, histories of addiction or HIV and AIDS. And to advocate for sound public policies in these areas.

H.I.R.E., which is a project of the Legal Action Center, aims to increase the number and quality of job opportunities available to people with criminal records by changing public policies, employment practices and public opinion.

Since 2001 my project has provided leadership on public policy advocacy and technical assistance and training all across the country to private and public agencies on strategies to eliminate or reduce the number of criminal record barriers faced by job seekers in the labor market.

And just for the record, we've also been working with a number states to create safe harbor protections for employers, which we know is a big issue.

As a proponent of the EEOC Guidance and Policy, and I think for other proponents that support it, I am not arguing for the elimination of
background checks in hiring decisions. I'm a consumer, I'm a mother, I'm a grand-daughter. I am arguing for logical and responsible policies and procedures that allow all qualified job seekers a fair opportunity to compete for jobs.

And I am arguing against the allowance of indiscriminate uses of criminal background checks and screening policies that overtly and covertly limit opportunities for people of color.

For the past decade we have used the EEOC Guidance as a policy model that states could adopt as a fair employment standard to give more qualified individuals with criminal histories a fair opportunity for employment and qualify for occupational licensing.

We have also used it to educate employers on the use of criminal records in hiring decisions. While conducting these educational activities over the years we have also worked with other legal and policy groups to encourage the EEOC to strengthen its position on employer's use of records, criminal record screenings, as well as urged them to become more rigorous in its investigation of criminal record-based claims of discrimination.

Therefore, we considered it a tremendous
victory when the EEOC released this update of the
Guidance it had released nearly 30 years ago that
discouraged employers from establishing blanket bans
against hiring people with arrest and conviction
records.

The update of the EEOC Guidance includes
provisions that we were really excited about that put
employers on notice that categorical exclusions for
people with certain arrest and conviction records may
violate Title VII.

It emphasized the earlier recommendation
that job applications not ask about criminal records.
And if they do ask that they limit inquiries to
conviction records for which exclusion would be job
related with business necessity, offered a series of
examples of common policies and practices that may
violate Title VII and informed local and state
governments that barring people with certain criminal
records from jobs or occupational licenses could
violate Title VII.

This issue has become of greatest
importance because as the National Employment Law
Project reported there are over 65 million
individuals with criminal records in this country.
Two, a criminal record is usually the number one
automatic disqualifier for employment. And we know that many employers, public and private, will go as far as noting on job postings such a thing.

And we cannot ignore that criminal records serve as a double stigma for people of color. In 2006, H.I.R.E. partnered with the Center for Community Alternatives in New York to conduct a project that we called Unchaining Civil Rights, which identified, documented and described the institutional and structural exclusions in what we called the Four E's. Employment, Education, Enfranchisement and Equality, and the ways that these exclusions result in de facto discrimination of racial minorities.

We concluded that structural and institutional barriers to employment, education and enfranchisement for people with criminal records are more than collateral consequences. They are an abrogation of fundamental civil rights.

The release of Michelle Alexander's book in 2011, the New Jim Crow, catapulted this issue into mainstream media and has really forced the country to take note and acknowledge that people of color are significantly and disproportionately represented in the criminal justice system.
And that a criminal record has become a surrogate for race-based discrimination throughout the U.S. Employment statistics for blacks and Latinos, particularly males, continue to be worse than any other demographic.

The experimental audit studies of Devah Pager out of Princeton University encapsulates the real challenges faced by black and Latino males with or without criminal histories in the labor market.

In the last study she and Bruce Western conducted in 2004 in New York City they concluded that a black male without a criminal record was less likely to get a job than a white male with a criminal record. And my colleague Glenn here will talk a little bit more about that study.

Needless to say a black man with a criminal record barely stood a chance of getting a callback for a job. Race discrimination and race bias is pervasive in the job market and we have to attack it from every angle to which it exists.

We respectfully ask that the members of the Commission on Civil Rights consider supporting the EEOC's position on limiting the use of criminal background checks in employment decisions, as well as work with H.I.R.E. to promote criminal record
barriers as civil and human rights issues as they are.

Here are a few additional thoughts. Few states, only 14, have laws prohibiting discrimination against individuals with criminal records in public and/or private employment and/or for occupational licensing. And as you know there is no federal law.

Therefore, we need federal enforcement agencies to commit to ensuring that qualified individuals with criminal histories are given a fair chance and opportunity to work and not face discrimination.

Most states give unfettered access to criminal record information indefinitely, which perpetuates the lifelong stigma suffered by millions of individuals with criminal records who are disproportionately people of color.

Until now, the employer community was not very concerned about being challenged on their discriminatory hiring practices because the threat of a criminal record-based, or even a race-based discrimination lawsuit, seemed more unlikely and remote than the negligent hiring liability suit.

Employers must continue to be encouraged to not consider arrests that did not result in a
conviction as well as old or minor convictions that really cannot justifiably be considered relevant to the ability or the potential behavior of an applicant.

I have a series of other recommendations that's in my written testimony and I hope that you will consider them. Thank you.

CHAIRMAN CASTRO: We will. Mr. Martin.

MR. MARTIN: Thank you. Good morning, Mr. Chairman and members of the Commission. Thank you for holding this important briefing on the EEOC Reissuance of Arrest and Criminal Record Guidance, which was originally issued under the leadership of Clarence Thomas at the time.

I think personally, and my colleagues do, that the Guidance is reasonable, fair and flexible. I'm pleased to see that it enjoyed bi-partisan support for its passage.

I represent an organization called the Fortune Society, we've been around for over 46 years serving people who have been involved in the criminal justice system. Either helping them to reintegrate on the back-end, about 2,500 people. Or running alternatives to incarceration programs, keeping people out of jail and prison on the front end and
meeting their needs in the community where it doesn't jeopardize public safety.

Some of the services we offer include an array of programs, education, employment (We place 600 people with criminal records in jobs each year), housing, drug and alcohol treatment, mental health services, fatherhood initiatives. And we're an advocacy organization.

And I'd also like to mention that our 185 staff, half of them are people who have done time in prison. Half of them are people who have some sort of involvement in the criminal justice system. As well as a third of our board, by way of our by-laws. It's very deliberate. We put value in the cultural competency that our staff, our professional staff, brings to the table.

It's also made us a bit of experts on the hiring of people with criminal records. So much so that we worked with the Department of Justice to create a tool kit just two years ago, which was helped launched by the Attorney General Eric Holder, on how to successfully hire people who were formerly incarcerated who also have the professional credentials to do the job.

Today my written testimony focuses on
the Devah Pager, Western Study because I served as the project manager on that study when I was the co-director of the National H.I.R.E. Network at the Legal Action Center.

As you might know, it was the largest audit study ever conducted in the United States. It was a replication of an original study that was done in Milwaukee, where the main criticism was that Milwaukee is not a very diverse labor market, hence the replication in New York, a much more diverse labor market.

And the major findings, which has been stated a number of times this morning, is that a white person with a criminal record just out of prison has a better chance of getting a job from an employer than their equally qualified black counterpart who has never been arrested.

And then when you attribute the criminal records of the black job seeker his call backs are reduced another 50 percent. Very stark findings. The study was housed at the New York City Commission on Human Rights, one of the agencies in New York State which is charged with enforcing our anti-discrimination law, which I should say is over 40 years old. It applies to employers with ten or more
employees, so that includes small Mom and Pop shops.

It's much more prescriptive than the EEOC regulations. There's many more mechanisms for relief under our anti-discrimination law. And the bill was originally sponsored by a very conservative Republican in Long Island New York.

Just before I came here to this testimony I checked in with colleagues at the New York City Commission on Human Rights. Last year there were only 14 meritorious complaints filed by people with criminal records that they moved forward on.

So contrary to the rumor the sky is not falling as a result of having these sort of anti-discrimination laws on the books.

So I'd like for you to indulge me for a minute because I took the opportunity to read the testimony of some my colleagues on the way here on the train yesterday evening and I was somewhat disturbed by some of the things that I read, which is what encouraged me to deviate a bit from the presentation that was specifically about the study.

Maybe it's because I was involved in helping the EEOC Guidance to move forward as an advocate. Maybe it's because I did six years in
prison myself before I started doing this work 11 years ago. Maybe it's because I'm a black man. But definitely because I'm an American.

With all due respect to my fellow presenters, first, curtailing the legitimate use of background check is not my intention or the intention of the agency I work for. I think Pandora's Box is wide open on background checks in the United States, we're not going to close it. I wouldn’t ask employers to stop using background checks where appropriate any more than I would say that credit card companies should stop using credit checks to make decisions about who should get a credit card.

I do have issues with the accuracy, how the information is used and if the subject has an opportunity to respond to what's contained in the background check. But when I was at the National H.I.R.E. Network, we worked with the National Association for Professional Background Screeners eight years ago.

And we agreed that there was need for additional rigor, we agreed, we both acknowledged that the field needed to respond or that somewhere down the line there may be a strengthening of the Fair Credit Reporting Act.
At the Fortune Society, where we hire a number of people with criminal records, we do background checks on all qualified applicants to make decisions because we have legitimate liability concerns ourselves.

So the Background Check company response to the new EEOC Guidance was a bit surprising to me. These agencies are conduits of information, as they should be, not necessarily experts in the interpretation of civil law and surely not suggesting that Title VII applies to them.

Secondly, the argument that Black and Latinos have a predisposition for being criminals is just categorically false, not supported by evidence and irresponsible. I look no further than the Bureau of Justice Statistics, crime statistics.

Thirdly, some of the research findings suggest that the expansion of the utilization of background checks can have a positive effect for black men without criminal records. That obviously is in response to employer liability and legitimate, and sometimes not so legitimate liability concerns, but we all know at this point criminal record-based discrimination easily serves as a surrogate for race-based discrimination. Whether it's intentional,
deliberate or unintentional.

So the idea of parsing out black applicants, which some of the other presenters are going to suggest, to find the good black applicants from the bad black applicants feels very un-American to me, especially when I think back to the 2004 State of the Union Address where it was President Bush who suggested that when the gates of the prison open we need to give people a second chance and that it should be a road to a better life. And how do you get a better life if you don't have access to the labor market?

Finally, looking at the time, based on much of testimony that will be given -- oh, I have one other thing to say.

In response to this concept that we need to be doing more background checks to parse people out, surely allowing more disparate impact discrimination to reduce disparate treatment discrimination, where Title VII makes both illegal, is not something we should be doing.

We should be moving forward full throttle in the enforcement of the prohibitions on both. Anything less than that would be assault on the Rule of Law.
And finally, if we listen to some of the testimony that will be presented here today, I myself would probably not be sitting here in front of you. I myself would probably have been categorically excluded from the $16,000 a year job I first took 11 years ago. Yet today I run a $20 million agency, I'm in charge of fund-raising, communications and advocacy.

I hire a number of people who have been involved in the criminal justice system. I hire a number of people who have not been involved in the criminal justice system. But anything that categorically denies people a job opportunity based solely on their criminal record would have had a huge impact on me.

And again, I would hate to think of where I would be sitting as opposed to sitting here today. Thank you for the opportunity.

CHAIRMAN CASTRO: Thank you, Mr. Martin. Ms. Bone, you may proceed.

MS. BONE: It's a great privilege to appear before the United States Commission on Civil Rights in honor and in memory of my sister, Sue Weaver. And for other innocent victims whose tragic deaths could have been prevented had an employer done
a proper criminal background check before hiring that individual.

My name is Lucia Bone, and I'm the Founder of Sue Weaver CAUSE. CAUSE is Consumer Awareness of Unsafe Service Employment. It's a non-profit organization proactively keeping you and your families safe, one service worker at a time.

We promote the important of proper annual criminal background checks on anyone working in our home or with a vulnerable population. We educate you, the consumer, on the importance of knowing who you hire to work in or near your home or your family.

At one time or another we all need to invite a stranger into our home for maintenance or delivery. We trust the companies we hire to send safe workers into our homes. But how do we know that that trust is well placed. My sister, Sue Weaver, thought it was. She was wrong.

Sue hired a very reputable Florida department store, Burdine's, to have her air ducts cleaned. No background checks were done on the workers they sent into the client's homes. The work was subcontracted out and two convicted felons were sent into Sue's home to do the service work.
A single woman, home alone, two convicted felons. Six months later one of the workers, Jeffrey Hefling, a twice convicted sex offender on parole returned. He raped Sue, he murdered her, he set her body and her home on fire in an attempt to destroy the DNA evidence.

Had Burdine's done a criminal background check they would have found both men were not suitable to be working in their client's homes. And my sister might still be alive today. A criminal background would have saved Sue's life.

Since Sue's death I have campaigned tirelessly to educate and bring awareness to the importance of proper background investigations and the importance of knowing who you hire. We need federal legislation requiring national background checks on individuals entering consumer's homes or working with vulnerable populations.

This type of consumer safety legislation would better protect unsuspecting individuals like my sister. Not only do background checks make good business sense, they save lives. It is absurd that a person with multiple convictions for violent sexual assaults would be engaged as a home repairman. Yet it happens over and over again.
Everyone has the right to work, but not every job is right for everyone. Criminal background investigations provide employers an invaluable tool to help them place employees in job appropriate positions, better protecting co-workers and clients. Background checks prevent tragedies.

I believe the EEOC focused its recently updated policy on helping minority ex-offenders seek employment without paying regard to any victims. Everyone deserves a second chance, but not at the expense of innocents, such as my sister. Sue did not commit the heinous crimes that Hefling committed. Burdine’s should have known about his criminal past and not send him into consumer’s homes.

Is it too much to ask that employers take appropriate steps to ensure the safety of their clients from their employees? Unfortunately, my sister paid the ultimate price because a background check was not conducted that would have alerted Burdines to who Hefling was.

That doesn't mean that Helfing couldn't have been hired, just that armed with the knowledge of his criminal history, Burdine's shouldn't have sent him into my sister's, or anyone's, home. I'm gravely disappointed that no victims were represented.
at the July 2011 meeting of EEOC. The Commission did not consider victim's side but solely focused their attention on the plight of ex-offenders.

Unfortunately, it appears they singled out background checks as the leading cause of why ex-offenders fail to find a job. Ignoring other difficulties such as drug and alcohol addictions, lack of education or vocational training. Or lack of family structure. And ignored the beneficial side of screening.

Rather than take steps to engage employers to rely on criminal background checks, their actions will cause employers to conduct less, not more screening. No attention was paid to such critical issues as why employers rely on background checks to ensure safer workforce. How its new policy would discourage the use of background checks. And how victims advocacy groups felt about any change in policy.

I personally attended the 2011 hearing and was insulted that the EEOC showed no interest in hearing from any victims. It was apparent that the hearing was only a formality. Their focus was on protecting ex-offenders.

In addition, they made a serious error
by failing to allow the public to view and comment on the Guidance before it was issued. They need to suspend the Guidance and listen to victims and their families and victims right organizations and others representing vulnerable populations. And not ignore their comments and letters as has been done in the past. All views need to be heard and considered before a new policy goes into effect.

The Guidance must balance the safety of public and innocent consumers against the employment concerns of ex-offenders. While sadly it is too late for my sister, it is not too late for others. Without background checks used to qualify individuals that work or care for our families, or do service work in our home, we are knowingly risking the safety of our loved ones.

Under these guidelines the EEOC is actually forcing employers to make decisions on job applicants without the proper use of the resources that would allow an applicant to be placed in an appropriate position for their skill and their character.

When the EEOC weighed the risk and benefits of the proposed policy Guidance, it should have balanced the safety of innocent consumers and
ex-offenders. It did not. Its Guidance is unacceptable and it should be revoked. Thank you.

CHAIRMAN CASTRO: We're sorry for your loss.

MS. BONE: Thank you.

CHAIRMAN CASTRO: Thank you for sharing that with us. Ms. Payne.

MS. PAYNE: Chairman Castro and members of the Commission, thank you so much for this opportunity to speak to you today. My name is Julie Payne and I am the senior vice president and general counsel of G4S Secure Solutions USA.

We are a leading security company in the United States. We employ over 33,000 security officers, nearly 8,000 of whom are armed. G4S provides security services to nearly every sector of our country's critical infrastructure, including nuclear power plants, government buildings and facilities, chemical plants and refineries, ports, airports, railways, public transit facilities, detention facilities and financial institutions.

G4S has clients and responds to the public - who expect us to deploy security officers who are professional, well trained and trustworthy. In order to meet this expectation, to comply with our
contracts and to comply with law, our screening process is one of the most thorough in the industry.

Our clients expect, and most require, that G4S supplies security officers that have passed an extensive criminal background check. I am here today to cast light on the EEOC's targeting of companies, including my own, over legitimate and necessary business practices.

In April of 2010, David Coleman, an individual with two prior convictions for theft, applied for a position with G4S in Pennsylvania. G4S did not hire Mr. Coleman as a result of his convictions. He filed a charge of discrimination, claiming that our refusal to hire him was based on his race and that use of criminal background checks adversely impacts African Americans.

The EEOC Philadelphia Office expanded the agency investigation beyond the charging party, to include G4S applicants and employees across the United States. The EEOC sent a series of requests for information that were incredibly extensive and burdensome and sought vast amount of information related to our hiring policies.

They requested information about every employee and applicant of G4S, its parent companies,
its subsidiaries, its affiliates, its successors, its predecessors, agents and assigns. It sought the information for a period of time dating back to the date when G4S first implemented its policy regarding criminal convictions to the present.

G4S, formerly known as Wackenhut in the United States, was founded in 1958 and has relied on criminal background screening from the beginning. As a result of this inquiry, we have hired multiple lawyers, statisticians, experts, to assist us with complying with the onerous requests. We have spent hundreds of thousands of dollars to an uncertain result.

The EEOC Guidance and its application in the Coleman case demonstrate that the EEOC is focused on using individual cases for expanding claims to national prominence. This not only dilutes the claims filed by individuals who have turned to the EEOC for specific redress, but it also puts employers on the defensive as class claims are extremely costly and highly unpredictable.

In our case, because we would fail to hire an individual who has two previous convictions for theft, we are now being asked to defend the use of criminal background checks in every hiring
decision we have made over a period of decades.

The EEOC also ignores the significant risk to G4S and other employers if they fail to do background checks. We have a duty to perform a reasonable investigation on potential employees. And this standard of care can be higher in industries, such as my own, where we serve, transport and protect the public.

Litigation against employers in the area of negligent hiring and negligent retention makes the EEOC Guidelines and enforcement plan a very difficult no-win situation for employers.

Another no-win situation for security companies is that most states, with very few exceptions, require that a background check be done before security officers can be licensed to work. Those with felony convictions, or certain misdemeanor convictions, are not authorized to work as security officers in most states.

The EEOC is aware of the statutory scheme but counters that state and local laws are preempted by Title VII. Therefore, by simply complying with state and local licensing laws, private security companies are put in an untenable position.
Congress has also sought to expand access to FBI criminal background checks for private security companies. G4S is a member of and has worked with the National Association of Security Companies in support of the Private Security Officer Employment Authorization Act, which was passed in 2004.

The enactment of this legislation was a clear public policy decision by Congress in support of more expansive and stringent criminal background checks for security officers. Within the law it states that “The American public deserves the employment of qualified well trained private security personnel as an adjunct to sworn law enforcement officers; and private security officers and applicants for private security officer positions should be thoroughly screened and trained.”

Criminal background checks draw upon the most rigorous standard of our U.S. Criminal Justice system that is: proof beyond a reasonable doubt. Regardless, the EEOC has determined that in certain circumstances there are reasons for the employer not to rely on a conviction record when making an employment decision.

The EEOC is requiring that employers
substitute its judgment for that of our criminal justice system. This is illogical. Given the burden that must be met for a conviction to occur, employer reliance upon a criminal background check is far less likely to lead to individual discrimination.

G4S should not have to bear the legal, financial and reputational risk of hiring persons who have been convicted of theft into positions where the opportunity for theft is great. And where our customers have entrusted us to protect their assets.

We cannot give guns and badges, keys and combinations, pass codes and access to servers containing personal and sensitive information, and our trust to those who are at high risk of abusing it or offending again.

I thank you for this opportunity.

CHAIRMAN CASTRO: Mr. Larson.

MR. LARSON: Good morning, everyone. Holiday wishes to you and your families, your loved ones. The city looks beautiful this time of year. Thank you for the opportunity to participate in this very important conversation regarding the use of criminal histories during the employment process.

As reflected in my executive summary, I have managed the hiring of thousands of men and women
from using large scale job fairs to senior level executive searches. In each instance the goal has been simply to identify the most suitable candidates for the organization.

Some of the best people I have hired did not have a strong first impression, or make one, or attend a ranked U.S. News and World Report Top 50 University. Beyond the immediate assessment as to whether the candidate can perform the tasks identified in a job description, there are other crucial variables such as interpersonal skills, critical thinking skills, leadership potential, brand awareness, work ethic, problem solving capabilities, positive attitude, teamwork and demonstrated judgment to make good, solid decisions.

Reasonable people often disagree as to who the best candidate for a job may be. I have seen hiring managers strongly at odds with the HR manager as to which candidate is the right fit for the particular job.

I believe obtaining an accurate criminal history is an important component in any disciplined hiring process. Indeed, a thorough background check with a detailed criminal history is the single most effective tool that employers can use to mitigate
their risk, which leads me to the April 25th, EEOC Guidance document. I make two key points.

First, my impression is the rationale behind the Guidance does not yet resonate with small business whose HR managers do not have ready access to the educational training awareness offerings of major industry groups and to outside legal counsel.

I draw this observation as I present classes on employment law and practices to HR managers. I would venture to say that if we were to conduct focus groups with HR managers from smaller companies nationwide we would often find a lack of understanding as to the issues raised in the guidance document.

HR managers view themselves in a gatekeeping role to prevent negligent hiring claims and the thought that their company could be sued by an ex-offender for not being hired is counter-intuitive.

When I announced to my Rotary Club this week that I would be participating in today’s discussion, I was immediately approached by many small business owners who knew nothing of this issue and were concerned.

Accordingly, I believe governmental
agencies as well as private sector industry groups have an obligation to provide educational awareness on the Guidance so that all employers have an equal opportunity to understand the EEOC’s current focus on this issue.

My second observation is that companies that do understand the rules, have often moved forward to create an interactive process to thoroughly vet concerns raised by the disclosure of the criminal history to determine whether the conviction relates to the open position under consideration.

I have worked with companies that have been engaged in this process long before the April Guidance document was issued. The interactive process allows the ex-offender to provide court records, often required by the company. Some companies also want to see the affidavit supporting the arrest to get a better understanding as to what actually took place at the time.

The ex-offender is given the opportunity to make a statement and to address concerns. A helpful tool in this process can be a comprehensive set of questions that need to be addressed. Another tool may be a matrix of data points weighting the
various factors for a review.

Such tools provide scrutiny as to the nature of the event, when it took place, age of the offender at the time, intervening work history and recommendations of previous employers and other key factors to be considered.

When all of the relevant factors have been gathered the stakeholders, such as the hiring manager, the HR manager and the risk manager, make a business decision as to whether or not the behaviors underlying the criminal conviction correlate to the open job.

A person convicted of possession of stolen property may not be deemed suitable for a warehouse position but may be deemed suitable for a landscape gardening position. And sometimes the decision not to offer any position is necessary to serve the best interest of the company and to prevent downside risks.

Whatever the outcome of this step-by-step, case-by-case individualized interactive process, documentation of the thorough measures the company took to vet and debate these issues will provide the basis for a defense against both a negligent hiring charge and a failure to hire charge.
In conclusion, even when a criminal history is not a factor there will be many close calls as to who gets hired. And when criminal histories are a factor there will often be many close calls as to who gets hired. But who better to make these decisions than the employer who knows its own business operations far better than any third party?

Thank you.

CHAIRMAN CASTRO: Mr. Dodge.

MR. DODGE: Good morning, Mr. Castro and distinguished members of the Commission. Thank you very much for the opportunity to speak today. As you can tell my voice is going, so I apologize in advance.

I appear today on behalf of my law firm, Jackson Lewis, as well as the Council for Employment Law Equity.

Both Jackson Lewis and the Council for Employment Law Equity strongly support the appropriate use of criminal background checks in employment. Such record checks before the commencement of employment are highly effective and vital tools to prevent criminal recidivism in the most harmful contexts, protect at-risk populations and assist employers in making fully informed hiring
decisions as well as protecting employees, their clients and customers, their assets and the public at large.

As background, the Council for Employment Law Equity is a non-profit coalition of major employers committed to the highest standards of fair, effective and appropriate employment policies. Jackson Lewis is a national law firm of more than 730 lawyers in 49 offices, all of whom are dedicated to the representation of management in labor and employment issues. I’m a partner at Jackson Lewis and serve as co-chair of the government relations practice group.

Larry Bossidy, the former chairman for Honeywell, once said: “Nothing we do is more important than hiring and developing people. At the end of the day you bet on people, not on strategies.”

Mr. Bossidy was right. Nothing is more important to a company than who it hires. However, betting on people we hire means more than simply accepting the first candidate and blindly hoping for the best.

Instead, the employer’s recruitment and hiring process is its biggest and best opportunity to shape not only its workforce but its future. But as
employers, we face a dilemma, as you've heard from some of the other panelists, which is only exacerbated by the EEOC's new rule.

As those of you who are lawyers understand, we live in a litigation happy environment. Civil lawsuits alleging an employer's vicarious liability for torts committed by employees or claims such as negligent hiring or retention give little quarter for missed steps in hiring.

In addition, the EEOC, as you've heard before, is now with this Guidance taking aim squarely at employers, second guessing their decisions and undertaking high-profile, class action type litigation.

So stuck between this “rock” of tort liability and the “hard place” of statistical second guessing for those not hired, employers are faced with near impossible choices in how and whether to screen perspective workers.

But as a matter of policy, employers should not be forced to bet in the dark. Society should actually encourage employers to utilize criminal background checks when appropriate in their estimation and judgment as part of the hiring process.
Risk in inherent in many aspects of the world we live in but we should not force employers to risk employee hiring decisions when the tools exist right now to aid them.

So why should employers use criminal background checks? Let me just give you a few examples, and others are cited in my testimony.

Back in 2010, Amy Bishop, a biology professor, walked into a meeting and shot and killed three of her colleagues, wounding three others. A background check at the time of her hiring would have revealed that eight years earlier she had pled guilty to and had a misdemeanor conviction for assault and disorderly conduct for punching a woman in the head at a restaurant.

Another example: Lisa Keebler, a mother of three young children, arrived home to find a meter reader waiting for her. When she left her vehicle and went into the house, the man approached. He asked about reading the meter. Keebler demanded that the guy leave but then he began to attack her. He beat her; he raped her. A background check came back the day after his arrest for this assault, revealing several convictions for arson, criminal mischief, burglary, theft and other crimes.
Another example: Edwin Harber, an over the road truck driver, picked up a 17-year-old hitchhiker at an Indiana toll plaza. In the sleeping compartment of the truck, he repeatedly assaulted, beat and raped her, even threatening to kill her. Had his employer done a complete criminal background check in addition to the one performed for the vehicle infractions, the company would have learned that in the year before they hired him he had been arrested for doing similar bad things. In fact, he had a long history of violent sexual crimes.

Another example involves George Augustine's employer who failed to do a criminal background check before they hired him as an elevator operator. Had the company done so it would have learned that he had a lengthy criminal history. Indeed, he was a registered sex offender. But in 2003, he assaulted and attempted to rape a woman while at work.

At the time of his hiring in 1994, as a custodian for a community center, Anthony Moore was not subject to a criminal background check. He began working in the community center, and in 1997 he took one of the young girls in his charge into a weight room and committed various heinous acts. Had the
center done a criminal background check, it would have discovered an expansive criminal record including crimes of violence.

There are many, many, many other examples cited in my written testimony. So contrary to an earlier panelist, these concerns are not theoretical. They are real. And they're of grave concern to employers and others you've heard on this panel.

So these examples are things that all employers want to avoid. And in fact, as Ms. Payne noted, it's our obligation as employers to safeguard our workers and customers as well as the general public.

These risks are not only physical. For example, the U.S. Department of Commerce noted that 30 percent of business failures are due to poor hiring practices. Annual losses generated by poor hires, absenteeism, drug abuse and employee theft, amount to $75 billion a year. There are other statistics cited in my testimony.

But all of this real risk is lost in much of the EEOC's Guidance. Rather than focusing on job relatedness, business necessity, the kinds of things that employers typically take into

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consideration when they factor all this in, the
EEOC's Guidance largely is based on statistical
analysis, the front-end if you will, of the disparate
impact theory.

    Employers must be given the opportunity
and the discretion to make their own informed
decisions as to whether a perspective prospective
employee is an acceptable risk. They need to have
available, relevant and appropriate information.

    Thank you very much.

    CHAIRMAN CASTRO: Okay, Mr. Dodge, I
also want to thank your firm for the public service
you do. One of your partners, James Botana, is a
member of the Illinois State Advisory Committee. So
we appreciate your supporting that.

    Let me open by asking you a question and
then I'll open it up to my colleagues. Each of the
cases that you outlined there, there was not a
criminal background check that was conducted. And I
think what we've gathered from this morning's panel
and from other panelists here today is that the EEOC
is not saying don't do criminal background checks.
They're setting forth guidelines to ensure that those
background checks are not done in a way that violate
Title VII.
So had those folks that you just outlined in your presentation done a criminal background check, as the EEOC says they should have, these instances would not have occurred. So I don't understand why those are relevant to the EEOC Guidance. And if anyone else wants to respond after that.

MR. DODGE: I understand your question, thank you. The point is criminal background checks are important and critical. And what is lost in the discussion of the EEOC Guidance is the effect that this Guidance is actually having out there in the real world.

For example, the EEOC indicated in the middle of its Guidance document that one of its “best practices” was for employers to take the question off the application form, “have you ever been convicted of felony say in the last, let’s say seven years.”... They want to ban the box, if you will, through an administrative process generated at the EEOC.

The message that sends to employers is okay, we better take this question off our application form and if we don't do it at least some regions of the EEOC have indicated that they are
going to take a special, hard look at those employers who leave that on.

So you're right the EEOC Guidance doesn't flat out prohibit the use of criminal background checks. But what I'm saying is out in the real world it's sending the message to companies, like Ms. Payne's and others, that you do so at your own risk. At great risk. Think of the expense and the aggravation in compliance simply with the request for information related to one individual involving the example cited by Ms. Payne.

What we're hearing from medium and small sized employers in particular is because of the complexity of the Guidance, because of the risk that is poses to them, that in fact it is chilling behavior. And some employers are reporting back to us - and we operate nationally so we hear stories anecdotally that in fact it has been having the consequence where employers are really second guessing do we even do criminal background checks at all.

CHAIRMAN CASTRO: And is that the case in the examples you gave us? Did the ban the box chill those particular employers from doing the background checks?
MR. DODGE: Those were cases several years ago, prior to the Guidance. So no, those --

CHAIRMAN CASTRO: They don't relate to the Guidance at all, in this particular instance.

MR. DODGE: I'm not familiar with reported decisions after the issuance of the April 2012 EEOC Guidance. I haven't heard of any cases since then.

CHAIRMAN CASTRO: Mr. Martin have --

MR. MARTIN: I would just like to add for the record that the ban the box doesn't tell employees to never consider the criminal record. What it suggests is that if job seekers with criminal records had an opportunity to get their foot through the door and make the case that they're the most qualified candidate that, if I can use a sports analogy, that if you get everyone up to the start line it's better chance for them to compete for the job.

And the criminal record should be taken into account. And you should do a background check, just not on the initial applications. I just want to clarify that. And 30 jurisdictions have done it and about --

MS. MEYERS: Forty-three.
MR. MARTIN: Forty-three jurisdictions have already done it around the country, including states. Entire states.

CHAIRMAN CASTRO: Commissioner Kirsanow and then Commissioner Kladney.

COMMISSIONER KIRSANOW: Thank you, Chairman. I'm going to go back to the law again, sorry for burdening everybody. This is to Mr. Dodge, I apologize for asking you a question given -- this goes to the issue of job necessity again and job relatedness.

I was listening to some of the scenarios that you described. And when you talk about job-relatedness typically what we talked about is when somebody has been convicted of embezzlement that bars him from being a bank teller, that shouldn't bar him from being say a laborer.

But in a couple of the examples you cited, for example I think it was the meter reader example, I didn't hear anything about breaking and entering, for example, which would seem to me for a meter reader probably to be the most specific job related criterion under the EEOC Guidance.

To what extent do you find from what you hear from clients that the Guidance might bar them
from considering criminal convictions as a indicator
of a broader host of issues related to job
relatedness?

MR. DODGE: That's a good question. So
if you're literally looking at the EEOC Guidance you
might come away from that thinking that the only way
I can exclude somebody from a job currently is if
they've committed a similar type of crime related to
this job. So bank teller, embezzlement.

But sometimes, I think folks will bear
me out on this who do this a lot, there may be
related crimes that also effect whether or not that
person is a trustworthy person and you can trust them
with money. So it shouldn't necessarily be for the
exact same crime, it could be for a related band of
crimes, if you will.

COMMISSIONER KIRSANOW: Just a follow-
up, with the exception of Ms. Bone, I haven't heard
anybody ask for the wholesale rescission of the
Guidance. I would ask for anybody would like to
contribute, perhaps Ms. Payne, if you were going to
suggest just one way of improving the Guidance,
presuming that it's not going to go away -- and by
the way have you heard of the PeopleMark case by any
chance?
MS. PAYNE: I'm sorry?

COMMISSIONER KIRSANOW: The PeopleMark Case?

MS. PAYNE: I'm not familiar with it.

COMMISSIONER KIRSANOW: You may want to take a look at it in relation to the EEOC. But in any event --

CHAIRMAN CASTRO: That is not a solicitation for her --

COMMISSIONER KIRSANOW: It's not legal advice either. But to what extent would you suggest just one improvement, among many perhaps, to the EEOC Guidance?

MS. PAYNE: Well you're boxing me in a little bit asking when you ask about just one improvement. Certainly from my perspective, because of the industry in which I operate, the issue with state law where Title VII preempts state law and the fact that state law requires us to do background checks and requires us to not employ people who have been convicted of felonies or certain misdemeanors. That's just an untenable position for us.

COMMISSIONER KIRSANOW: Does in fact, given that this is a Guidance, and I understand the GC supposedly said it that it preempts or supersedes
state law, does anyone have an opinion as to whether
or not that is, frankly, an accurate opinion? Does
it in fact preempt state law in your Guidance of
EEOC?

CHAIRMAN CASTRO: After that I'm going
to have Commissioner Kladney.

COMMISSIONER Kladney: What was the
question Commissioner, these microphones are not --

COMMISSIONER KIRSANOW: Does the EEOC
Guidance preempt state law, does it supersede state
law? Is there some kind of federal supremacy here
with respect with EEOC Guidance. I keep hearing it's
merely a Guidance but then there is a suggestion that
it preempts state law.

MS. PAYNE: Well what I can tell you
from my real experience is that when we received the
EEOC charge and when the discovery in that case began
to take place, in our position statement we were very
clear that we are required to do these background
checks by state law. Actually in Pennsylvania it
happens to be more locally controlled in the
jurisdictions within Pennsylvania.

And the EEOC proceeded with its
investigation to the tune of, again like I said we've
spent hundreds of thousands of dollars. So they are
not appreciating the fact that in Pennsylvania we were actually required to do this background check.

CHAIRMAN CASTRO: Commissioner Kladney.

MS. MEYERS: Pennsylvania also has its own state anti-discrimination law that probably was part of that action that's also being considered as well, right?

MS. PAYNE: Correct.

CHAIRMAN CASTRO: Commissioner Kladney.

COMMISSIONER KLADNEY: Mr. Larson, I noticed in your statement, how difficult is it to implement this type of program have you found, to implement this type of program into a hiring process as compared to any other kind of requirement you're required to by government, say ADA or something like that?

MR. LARSON: It's another component to consider in the employment matrix. But once there's clear understanding as to what the requirements are then companies can, I think, quite readily put together a list of questions or some other vetting process to make a reasonable determination.

For example, an applicant or an employee comes forward and says, my back's hurting. I think I might need some sort of reasonable accommodation,
given my chronic back issues. Companies today are well versed in this. They have a vetting process to understand the nature of the request. The current job duties, very often we'll send that off to the doctor for his or her opinion and a determination can be made.

So in my experience once the groundwork is laid there's foundational education and training as a component to this. Then determinations will be made on a case-by-case basis and not be too burdensome.

I think the point where we are now is there's a lack of awareness as to the Guidance. How to set up the framework to deal with this issue, you know, make wise decisions but avoid the risk that the EEOC is concerned about as a practical matter I think once the framework is understood.

But I think we're in a time right now where there's a lot of uncertainty as to how to do this.

COMMISSIONER KLADNEY: Mr. Dodge, in that regard, your company or law firm puts on seminars, is that right?

MR. DODGE: That's right.

COMMISSIONER KLADNEY: Have you put
seminars on about this?

MR. DODGE: Yes, we have. I've done probably ten webinars myself. Some for different groups and clients, as well as our firm has put an analysis up on our website as well as webinars and seminars on what we think employers should be doing based on this Guidance.

COMMISSIONER KLADNEY: I mean I want to thank you for clarifying Commissioner Kirsanow's position on the burglary versus, I think the meter reader person was a sexual assault person, is that correct?

MR. DODGE: I think that's right.

COMMISSIONER KLADNEY: I mean that's kind of like committing burglary when you do that as well, you break and you enter and you do bad stuff. So these types of things like when Mr. Larson talks about a matrix of jobs versus crimes, you would agree with that?

MR. DODGE: Well I know some employers have done that. I know some CRAs have put that together as well. I think it's probably an individualized determination based on the company if that matrix scenario makes sense in your situation. I know certainly things in the Guidance we've taken
away as a law firm and have made recommendations to
our clients. I think overall it's sort of encouraged
employers to dust off their criminal policies and to
take a look and to more closely monitor whether what
they're looking for accurately is what they need to
do.

COMMISSIONER KLADNEY: I mean I did
notice in your statement, I mean I was sitting there
going left, right, left, right. I mean I just kept
getting hit in the jaw, you know. I mean it was
pretty strong about the criminal background.

And you were very strong about drugs and
alcohol, at least that was my impression. And I was
just wondering, okay people get convicted of using
drugs. They get convicted of using alcohol and it's
bad. People who get convicted of DUI usually have
drive DUI quite a few times before they wind up in
the felony prison sentence.

What about the people in AAA, NA, say in
your firm you have over 1,000 employees with lawyers
and stuff like that. I'm not casting any aspersions,
but I bet you that there's somebody in there going to
AA or NA or something like that. Is that something
you should consider as an employer?

MR. DODGE: No, I mean --
COMMISSIONER Kladney: Let me finish. Because a lot of those people have issues along the way.

Mr. Dodge: Sure. So obviously it interplays with the Americans With Disabilities Act, if somebody is a recovering alcoholic or recovering addict, obviously there are ADA considerations. But if somebody is driving a company vehicle and they've got DWIs, clearly that is a relevant consideration.

So in simply practicing law, if somebody is a recovering alcoholic, I would say probably not. But in some industries it is going to be a relevant consideration.

COMMISSIONER Kladney: So what you're saying is --

Chairman Castro: I'm sorry, Commissioner Kladney, I'm going to have to move on.

COMMISSIONER Kladney: One more question, Mr. Chairman. So what you're saying is that you bring a focus to this Guidance and you use it to help you put people in positions where they can help you as opposed to cause you liability? Is that fair?

Mr. Dodge: That's fair.

COMMISSIONER Kladney: Thank you.
CHAIRMAN CASTRO: Commissioner Gaziano, and then we'll follow up with Commissioners Yaki and Achtenberg.

COMMISSIONER GAZIANO: I want to thank this panel as well, but especially I'd like Ms. Payne to bring, if you would convey my thanks, or at least mine, or at least mine, I hope all of our thanks to all of your colleagues. There are some federal agencies that are vindictive when people publicly challenge what they perceive as an abuse.

I've seen that before and I've it possibly with the EEOC. So it's doing great service to this Commission that you give such concrete testimony. And it would be very harmful to this Commission were we not to try to follow up and watch what happens to your company's case.

But I've also appreciated, the last two panels have helped crystallize where there's agreement and disagreement. I'd like to maybe state that so that we can really join where there are differences. I think we at least all in this room, and almost everyone agrees that criminal background checks shouldn't be used as automatic, definitive. That it's important for people to consider employing those with criminal records when possible.
I think we also will concede that the EEOC Guidance doesn't automatically say that someone will have liability in an enforceable way, since they can't issue regulations at all. But the state of the world, as I understand it is, prior to these guidelines some companies were probably engaging in criminal background checks too automatically, reflectively using them too heavy handedly.

Some weren't using them enough in situations like Ms. Bone's unfortunate loss occurred. And as I understand it from the last panel with the exchange with Commissioner Kirsanow, the EEOC had a hunch and it decided that overall too many companies were using it too loosely but without data. And that's what bothers me.

Without data they acted on their hunch and they designed a Guidance that was designed, and I'd like any disagreement with this, they designed a Guidance that increased the costs of using criminal background checks to discourage it. And increased the liability for those who acted on a prior felony.

In their wisdom or hunch that would improve America. But without data. And by the way, it has certainly had the effect of increasing the cost of companies to use criminal background, that
was its intent. It was meant to chill and meant to
increase, because they wanted to effect behavior.

Does anyone disagree with that kind of summary? Some of you may think that's great and
that's good, other people may be concerned. But does
anyone disagree with that characterization of where
we are?

MS. MEYERS: I will say I don't
completely agree. I think the EEOC, and I agree and
I can see that yes there is definitely a lot more
data that is needed. However, organizations like
mine who help people every day, we get the calls
every day from individuals who are struggling in the
labor market, who are struggling to deal with their
criminal history.

Whether it's one case or a slew of cases
where they're attempting to enter or re-enter the
labor market and are blatantly being told no we're
not hiring you because you have criminal history.

We do agree that more data needs to be
collected. The EEOC has accepted letters from
organizations like ours talking about and sharing the
stories of the many thousands of clients who have
come through our doors. Many of which we have helped
get jobs without having to litigate. Where we've
advocated on their behalf.

So there's a lot of cases that didn't need to be filed because these individuals found non-profit organizations like ours that are able to meet with employers and advocate on behalf of that individual. Discuss what's on their history, make sure that that person has had the opportunity to present the evidence of rehabilitation that they had obtained up to that point and then for the employer to then consider actually hiring that person.

And so they've taken some of that information and also used it, we believe, in their decision. But I do agree that part of the work and what organizations like ours have been pushing for them to do is to bring some light to this issue and to get more businesses to think about the way that they're conducting their hiring practices so that we can make sure there's a fair opportunity.

COMMISSIONER GAZIANO: -- se the levers they have to put pressure on them.

MS. MEYERS: I think all enforcement agencies do that. I think all employment agencies have that ability to do that.

MR. MARTIN: I'd like to respond to your question. First I have a hard time with the fact
that we're talking about the Guidance as if it hasn't existed for many, many years. This is a re-issuance of the Guidance, it's not that much of a departure from the original Guidance.

COMMISSIONER GAZIANO: Yes, but the EEOC is very proud of it. And why go to the trouble if it wouldn't have some effect?

CHAIRMAN CASTRO: Let him finish his answer.

MR. MARTIN: Maybe, let me finish my answer and then I’ll respond to that as a second question. So I wanted to respond to the question you asked about additional costs. I mean every time I've talked to employers, I've done focus groups with employers. A big part of my job is engaging employers, hearing what they have to say.

It always starts with liability. Everything is liability, I'm going to face liability. I'm going to be sued. I'm going to have to spend a lot of money to respond to that. Clearly that happens in real life. So idea of the EEOC giving Guidance to employers to avoid that liability down the line, and by virtue of a small investment up front, I mean the background check companies, with the proliferation of them, the cost has gone down
considerably.

So to me there's a financial savings. And is there not a financial savings in finding the most qualified candidate up front? Whether that job seeker is someone who'd been involved in the criminal justice system or not. If I'm an employer to me it's all about the bottom line. And if the bottom line means I'm better able to sort through candidates to find the most qualified candidate, that sounds like a win/win in my opinion.

CHAIRMAN CASTRO: We'll move on to Commissioner Yaki and then Commissioner Achtenberg after that.

COMMISSIONER YAKI: Thank you very much, Mr. Chair. Ms. Payne, your quote was “we cannot give guns and badges, keys and combinations, pass words” -

CHAIRMAN CASTRO: Can you speak up a little bit, Commissioner Yaki, I can't hear you.

COMMISSIONER YAKI: This thing doesn't work. Your statement was “we cannot give guns and badges, keys and combinations, passwords et cetera to convicted felons” or something like that, right?

MS. PAYNE: Something like that, yes.

COMMISSIONER YAKI: Okay. And the
reason why is because you're concerned about their ability to perform their jobs in a way for the security operations that you have, private, public, whatever, around the country and the world that G4S has, correct?

MS. PAYNE: Correct.

COMMISSIONER YAKI: Do you give your employees psychological tests?

MS. PAYNE: Not in all cases. We do where they're located at certain facilities where clients require it and where they're armed.

COMMISSIONER YAKI: Do you know if the employees in the Jimmy Mubenga case were given psychological tests?

MS. PAYNE: That case does not emanate from my particular area of responsibilities.

COMMISSIONER YAKI: Have you heard of Jimmy Mubenga?

MS. PAYNE: I've heard the name, but I'm not familiar with the case.

COMMISSIONER YAKI: It involved a G4S employees at a detention center at Gatwick where an asylum seeker was asphyxiated during deportation. There's a concept called "carpet karaoke" that's on the YouTube video.
MS. PAYNE: Sir, I'm sorry you're talking about a case that emanated from an affiliate company in Europe and the UK and I'm just--

COMMISSIONER YAKI: Well is it owned by G4S?

MS. PAYNE: It is owned by G4S, but that is not my area of responsibility. So I'm not --

COMMISSIONER YAKI: So let's talk about the U.S., are you familiar with the Coke County Juvenile Detention Center in Texas? I mean it's just cases of sexual assault by guards on juveniles were alleged in that instance by one of the other companies that you acquired, Wackenhut GEO, for example. I mean do you know if all, have you done retroactive background checks on all the employees where the companies have been acquired like GEO, that Wackenhut, Cornell --

MS. PAYNE: Sir, we did not acquire the GEO Company, we divested ourselves of the GEO Company in 2002.

COMMISSIONER YAKI: Was Wackenhut not part of your --

MS. PAYNE: Wackenhut is the predecessor, well excuse me. Wackenhut was the name of the company trading in the U.S. before it was
purchased by a predecessor of G4S. But at the time
Wackenhut was purchased it divested itself of its
correction business, which became GEO. So we have
not owned GEO or it's --

COMMISSIONER YAKI: You're not involved
any more in the lawsuits, so let me just ask you
this. Do you know whether or not how long your
prohibition on hiring people with felonies goes back
in terms in your refusal to give anyone, I mean how
far does it go?

MS. PAYNE: We have not been able to
establish the exact date that our policy went into
place. We do know that as far as the Wackenhut
Corporation is concerned it came into existence over
50 years ago. And some form of background screening
has been used since the beginning.

COMMISSIONER YAKI: Then let's go back
to things that are G4S. Do you know about Cell 36?

MS. PAYNE: No, sir.

COMMISSIONER YAKI: Cell 36 is a
detention cell in Gaza that the Children Defense
International has claimed that the children are being
tortured in there. And whether they're true or not
it just asks me the question, the allegations against
G4S employees are, I assume, that you, subsidiaries,
affiliates, whatever you want to call them.

To me it begs the question of you sit here and you talk about how we're not going to give anyone with this kind of record a chance in our organization, but your organization has a number of different lawsuits, complaints, allegations, whatever by its own employees dealing with violent acts. Deliberate acts, cruelty acts.

And I'm just trying to figure out how is it that in your rigorous screening process these kinds of individuals somehow get through? I mean is there something else going on there? Are you not administering the kind of tests, I guess it goes to my point of how do you really know who it is that you're getting unless you conduct, I assume you conduct a reasonable inquiry into the background into each of these people to determine whether or not they're qualified to serve the security needs of your customers around the world.

MS. PAYNE: Sir, I cannot speak to the screening practices or policies of some affiliated companies that exist in other parts of the world, that's not my area of responsibility.

COMMISSIONER YAKI: Maybe I'm mistaken, it says G4S,—
MS PAYNE: I understand --

COMMISSIONER YAKI; -- the British Defense Minister calls it the G4S Company. Other company is called the G4S. How can you sit here and, well I mean are you saying that you're like McDonald's, you franchise it out to people and you only have some of the standards?

CHAIRMAN CASTRO: Can we let her complete her answer and then we do need to move on to Commissioner Achtenberg.

MS. PAYNE: Thank you. My responsibility lies here in the United States for a very specific affiliate of G4S. And I'm not aware of many of the things of which you're bringing up today.

COMMISSIONER YAKI: It's too bad. You should, because it is your company and you're here talking about how you need this for your hiring and yet you have allegations of how your employees may be performing acts that may or may not be legal in other places as well. Many of the same acts that you're condemning out a whole group of people for without doing a real inquiry about it.

CHAIRMAN CASTRO: Thank you, Commissioner Yaki. Commissioner Achtenberg and then the last question will go to Commissioner Kirsanow.
COMMISSIONER ACHTENBERG: Thank you, Mr. Chairman. Thank you, Mr. Martin, for pointing out something that I had wanted to comment on. Namely that the EEOC Guidance is built upon EEOC Guidance that promulgated in the past. I would also point out that providing Guidance is a tried and true function of various enforcement and regulatory agencies.

There's nothing that is a departure from standard practice by issuing guidance, far from it. The EEOC Guidance, at least in my view, is an important update responding to both new practices. New public, new policy research that has been promulgated. New court decisions that mean that employers benefit got, aren't harmed by, the EEOC giving further elucidation of ways in which they might view particular actions being taken by particular employees.

So I was very glad that you point that out, Mr. Martin. I'm wondering whether or not, given your specific expertise in the development of hiring practices that relate to this area, if there's anything about the EEOC Guidance that you think can be improved upon? Or anything that you find particularly problematic. And after that I'd like to ask Ms. Meyers if she would comment similarly.
MR. MARTIN: That's a good question. Thank you. I would respond very similarly to what someone said earlier, which is if I had my druthers I would like to see some sort of safe harbor built into it, because in every engagement I've had with employees, again starts out with liability concerns.

And in New York State for instance, although we've had an anti-discrimination law on the books for years, it was only a couple of years ago that we passed legislation to create a safe harbor which gives a rebuttable presumption to employers who exercise due diligence by doing background checks and following the factors in the anti-discrimination law.

MS. MEYERS: I would agree. That's the same, another particular area that would be helpful I think in our work with offering more protections or seeking more protection for employers in states. As I mentioned earlier that, as an advocacy organization, we've been working with legislators and with policy advocates in states around the country to figure out a way to address that and to possibly legislate around that particular issue.

And it would be helpful to have more discussion about that and how it could relate and serve as a complimentary factor as part of the whole
hiring process and consideration that employers will undertake.

CHAIRMAN CASTRO: Mr. Kirsanow, you have the last question.

COMMISSIONER KIRSANOW: Thank you very much, Mr. Chairman. And again, thanks to the panelists. And to Ms. Payne I want to thank you for coming to testify in a matter of important public concern, despite that your company is smeared by relationships you don't even have. And companies that exist in foreign countries that are not even subject to the EEOC Guidance about a matter that actually shows that imperfect policies are imperfect and establishes the need for criminal background checks.

But my question goes to Ms. Bone and that is you indicated there is no testimony at the EEOC hearing from victims, but do you know if anyone requested to testify?

CHAIRMAN CASTRO: Speak up, I'm sorry. Use the microphone there.

MS. BONE: To my knowledge they did not. And more than one occasion I wrote to the EEOC asking to look at victims and victim advocacy groups.

COMMISSIONER KIRSANOW: They did not ask
for people to testify?

MS. BONE: To my knowledge they did not.

COMMISSIONER KIRSANOW: My question is did anyone ask to testify, and you just said you wrote?

MS. BONE: I did.

COMMISSIONER KIRSANOW: Yes, Mr. Dodge?

MR. DODGE: Yes, I'm somewhat familiar with that. The way the witnesses went at that EEOC hearing, there were a number of us that were seeking to have other witnesses testify. But the EEOC Chair chose the panelists at the EEOC, so it wasn't like these Commission panels, which are, I would say, representative all different points of view on the issue. The EEOC hearing was very much focused on one side of the inquiry.

COMMISSIONER KIRSANOW: Mr. Chair, could you indulge me? I have a real quick question for Mr. Martin --

CHAIRMAN CASTRO: Real quickly, as long as you agree to give me the same power the EEOC Chair has to pick the panels.

(Laughter.)

CHAIRMAN CASTRO: Go ahead.

COMMISSIONER KIRSANOW: What is your
opinion of a guidance that would permit employers to
use criminal background checks with sufficient safe
harbors out there and allow them to go fully and
robustly in questioning about somebody's background,
but only after such as under the Americans With
Disabilities Act, a job offer has been tendered
already?

MR. MARTIN: Good question. Because
even as an advocate I've been on the fence about
that, mostly around the impact on small employers and
whether it would be overly burdensome on small
employers.

I think in concept it would lend itself
to the issues I care about, which is opening up doors
for people and then being able to isolate when the
criminal record is taken into account, similarly
under the Americans With Disabilities Act.

But if I were to support something like
that an advocate for it I may be open to, for
instance, maybe suggesting that certain small size
employers be exempted from it. Although the biggest
abusers to be quite frank, are the large employers.
Not the small to medium size employers.

Small to medium size employers actually
are the ones who typically hire people who are
formerly incarcerated because they tend to work with agencies like our, because they don't have their own HR departments and they rely on us for their initial screening. And for them, in their mind, whether it's real or not, it helps to reduce liability concerns because they have a sense of who they're getting through the door.

COMMISSIONER KIRSANOW: Thank you very much.

CHAIRMAN CASTRO: Thank you, on behalf of the Commission, to all of the panelists. We appreciate your time. And this concludes Panel II. We are taking a break now for a quick lunch. We will commence exactly at 12:30 back in this room. So I would ask Panel III to be ready and at your panel seats at 12:30. Thank you.

(Whereupon, the hearing in the aforementioned matter went off the record at 11:57 p.m. and went back on the record at 12:38 p.m.)

A-F-T-E-R-N-O-O-N  S-E-S-I-O-N

(12:39 p.m.)

CHAIRMAN CASTRO: Okay, we're back on the record. It is now 12:39, and this is the beginning of Panel III which is our final panel. I don't know if all the panelists were here earlier in the day,
but just to quickly summarize the housekeeping rules. Every panelist will have seven minutes
to make a presentation. Thereafter we will ask a
question, we, meaning the Commissioners. You will
notice there's a series of lights, like traffic
Obviously yellow, speed it up and try to get your
comments done as soon as possible when that light
comes on.

There will be an opportunity after your
remarks in the engagement with the Commissioners to
elaborate on topics you did not have the opportunity
to elaborate on.

PANEL III: TRADE ASSOCIATIONS

CHAIRMAN CASTRO: So I'd like to briefly
introduce the panelists. Our first panelist is
Montserrat Miller with the Arnall Golden Gregory LLP,
and she's also counsel to the National Association of
Professional Background Screeners.

Our second panelist is Nick Fishman,
cofounder and executive vice president with
EmployeeScreenIQ. Our third panelist is Todd
McCracken, president of the National Small Business
Association.

Our fourth panelist is Jonathan Segal
with Duane Morris LLP and the Society for Human Resource Management. Our fifth panelist is Rich Mellor, vice president for loss prevention for the National Retail Federation. Our sixth panelist is William Dombi, Vice President for Law, National Association for Home Care and Hospice.

I'll now ask each of you to swear or affirm that the information that you're about to provide to us is true and correct, true and accurate to the best of your knowledge and belief. Is that so?

(Chorus of ayes.)

CHAIRMAN CASTRO: Okay, thank you.

Ms. Miller, please proceed.

MS. MILLER: Thank you. Good afternoon, Chairman Castro and distinguished members of the Commission. Thank you, Chairman, for the correct pronunciation of my name. As you can imagine it's often just Miller.

My name is Montserrat Miller. I'm a partner with the firm, Arnall Golden Gregory, based here in Washington, D.C., and I serve as Washington counsel to the National Association of Professional Background Screeners.

NAPBS is a trade association
representing screening professionals involved in employment and tenant background screening. Founded in 2003, NAPBS represents 681 members, many of whom are engaged in employment and tenant background screening across the country.

The majority of these member companies are small businesses with 25 or less employees, although our membership includes a range of companies from Fortune 500 companies to small local businesses. Collectively, NAPBS member companies conduct millions of background checks each year.

NAPBS member companies provide background checks for private employers, volunteer organizations, nonprofits, government, public utilities, health care, higher education and publicly held corporations. The Association exists to promote ethical business practices in compliance with the Fair Credit Reporting Act, equal employment opportunity and state consumer protection laws relating to the background screening profession.

NAPBS provides educational programs aimed at empowering members to better serve clients and to maintain standards of excellence in the background screening profession including a company accreditation program, individual Fair Credit
Reporting Act certification program as well as a provider exam.

Over the past ten years there has been an increase in the number of background screenings and there are several contributing factors such as increased security concerns after 9/11 and greater emphasis by employers to focus on safe hiring to protect their business, employees and customers.

Employers value a good hire over a bad hire and seek to ensure that the right person is hired for the right job to avoid injury to customers, injury to other workers, regulatory noncompliance, potential litigation, shareholder suits or employee theft and fraud.

In addition, there has been an increase in the number of federal, state and local lawmakers enacting laws mandating checks especially for the most vulnerable populations such as the disabled, children and the elderly. In many states, background checks are required for a variety of private sector positions and state licenses.

One important factor to bear in mind with this increase in the number of background screens is an associated increase in employers and the public's desire to know more about individuals.
With the desire for greater knowledge comes an increase in the number of individuals conducting their own online Google searches as well as an increase in the number of instant online searches available to the general public.

However, there is a distinction between a Google search or an instant online search and a background report created by a professional background screening company under the requirements of the Fair Credit Reporting Act.

A professional screening firm providing background reports for employment purposes is required to follow strict procedures pursuant to the Fair Credit Reporting Act and other state and local laws that limit how information is reported. Use of an instant online website or search engines offers none of the consumer protections afforded under the Fair Credit Reporting Act and other applicable laws.

We believe that background screening is an effective tool used by employers to protect employees, customers and assets from risks such as theft in the workplace, employee-on-employee violence as well as ensuring that only appropriately screened individuals deliver goods or provide services in our homes.
To be clear, background screening is not conducted to keep individuals out of the workplace or, for instance, to impair reintegration of ex-offenders into the workplace. Rather, background screens are conducted to facilitate the right person for the right job.

Background screens provide employers with information to make informed hiring decisions. The federal government, including the EEOC, fully appreciates and values background screening, conducting millions of checks each year.

The Supreme Court, in a recent decision regarding the use of background checks, NASA versus Nelson, confirmed the value of such checks and said this in its opinion, and I quote, "The government has an interest in conducting basic background checks in order to ensure the security of its facilities and to employ a competent reliable workforce to carry out the peoples' business," end quote.

Further the Court said, and again I quote, "Like any employer, the government is entitled to have its projects staffed by reliable, law-abiding persons who will efficiently and effectively discharge their duties," end quote.

The private sector is no different.
NAPBS member companies are not insensitive to the frustrations some have in finding employment especially in time of national economic stress, and we also appreciate the strong desire to reintegrate ex-offenders into American society.

However, attempts to ease unemployment frustration or reentry desires should not come at the expense of keeping people and businesses safe from physical or financial harm. Also our experience is that ex-offenders are hired and their criminal history does not serve as a permanent bar to employment.

In the interest of time I will not restate what our previously provided written comments cover regarding the use of background screens and compliance under the Fair Credit Reporting Act as well as NAPBS’s concerns with the EEOC guidance’s. Those are already stated in the written testimony we provided.

In conclusion, we would ask that the Commission consider the following. First, we can all agree that reintegration of ex-offenders into society is important. The use of background screening is not the dominant cause of the troubles ex-offenders face.

The problems facing ex-offenders go well
beyond an employer's use of background screening in
the hiring process. Substance abuse, lack of
education and established work habits, the absence of
a stable family relationship can and should be looked
at as problems facing ex-offenders. These are issues
we must continue to address.

Second, we need to change the discussion
from focusing too much on placing constraints on or
discouraging the use of criminal history information
in the employment context and focus more on greater
public discussion about current and potential
programs geared to helping ex-offenders such as the
Federal Work Opportunity Tax Credit, WOTC, which
provides a tax credit for employers who hire ex-
offenders. There are also similar state programs.

And another is certificates of
rehabilitation or certificates of good standing which
could provide safe harbors for employers who hire ex-
offenders depending on how they are drafted.

With that, again we appreciate the
opportunity to provide this testimony to the
Commission given the importance and value of
background screening, and appreciate the Commission
holding this briefing as well. Thank you.

CHAIRMAN CASTRO: Mr. Fishman, please
proceed.

MR. FISHMAN: Chairman Castro, distinguished members of the Commission, thank you for having me here today. My name is Nick Fishman. I'm the co-founder, chief marketing officer and executive vice president at EmployeeScreenIQ.

Our company conducts employment background checks for over 3,000 organizations across the United States and abroad. We work with those who serve vulnerable populations such as schools, overnight camps and home health care agencies, hotels, airlines and banks, to name a few.

We provide these clients with a wide range of services, all of which allow them to make better informed hiring decisions. Today I'd like to share with the Commission my experience and perspective as a professional background screener.

I'll focus my remarks on how our company conducts criminal background checks. I'll also highlight the findings from our annual background screening marketplace survey completed by a random sampling of over 2,000 human resource professionals since 2010.

Our business is based on the core belief that background checks are necessary for employers to
have the information they need to make informed hiring decisions. Employers agree. Our 2010 survey revealed that 90 percent of all U.S. businesses perform criminal background checks on perspective employees. At the time, 70 percent said that these checks were growing in importance.

Our clients tell us that their most valuable assets are their employees, but if they're not screened properly they can become their biggest liability. Every new hire is a potential risk. Employers simply want to know that they're bringing in the right people and putting them in the right positions.

As for perspective job candidates, 96 percent of the employers that we surveyed indicate that applicants understand and accept the needs for these checks. Furthermore, these candidates must provide written consent before a search can commence.

The FCRA requires that we, as a consumer reporting agency, ensure maximum possible accuracy in all of our reports. This is a responsibility that our company takes very seriously. That means that with every background check we take steps to verify the information before it's reported to the employer.

We go to the most current, accurate
source each and every time. We confirm the
identifiers on a record belong to the subject of a
report such as the name and date of birth and/or
Social Security number, and follow standards for
acceptable and legal reporting.

As a result of our meticulous process, we stand by the accuracy of the information we
report. Our dispute rate is just 0.15 percent, and when disputes do occur we handle them quickly so that in the unlikely event the information needs to be modified it can be done without penalizing the candidate or unnecessarily delaying the hire.

We’ve heard the argument that the use of criminal background checks is creating an underclass of unemployable Americans. Based on the feedback and statistics that we pull from our survey that simply is not the case.

In fact, our 2012 survey revealed the majority of employers do not eliminate a candidate solely on the basis of a criminal record. Seventy percent of our responders said that when they find a criminal record on a job applicant that person is denied employment less than ten percent of the time.

When asked which is more important, qualifications or lack of a criminal record, 73
percent indicated that qualifications were, in fact, more important. And that's up from 70 percent in 2011.

These results demonstrate the willingness on the part of employers to look at qualifications and consider the needs of the business before eliminating candidates based on criminal history. In fact, 92 percent of those surveyed in 2011 indicated that they reach out to candidates or consider job relevance when a check contains adverse information. Many that did not go back to the candidate indicated that they were in regulated industries that barred them from hiring those with criminal records.

Lastly, it's important to note that when a criminal record is revealed, the report does not include protected class information. Employers review the report and contemplate if the type of record found would reasonably suggest a pattern of behavior. Our clients are looking for reasons to include, not exclude.

The EEOC Guidance on criminal records have caused tremendous confusion among our clients. There are three main areas that are causing the most confusion. First, the EEOC recommends as a best
practice that employers defer the job application question that asks if a person has been convicted of a crime.

The recommendation is not feasible for many clients who have bonafide job qualifications that require exclusions based on certain types of crimes. Clients are understandably confused about when they can and should ask about criminal history, and also when they should conduct a background check.

Delaying the question can cause both the employer and the candidate to invest heavily in an opportunity or even quit their job only to be disqualified later in the process.

Secondly, there's no relief or consideration for employers that have state law conflicts. Employers who have traditionally conducted background checks and excluded certain applicants based on criminal standards defined by state law are now between a rock and a hard place. In some instances, there's simply no way to abide by the law without setting aside the Guidance.

Finally, the EEOC adds a new requirement for employers to conduct an individualized assessment when a criminal record is found. The Guidance does not recommend any particular means of conducting an
assessment, and we're hearing a wide and variable range of practices that employers are considering to meet this requirement. Until tested in the courts, no one really knows what's sufficient.

To add to the confusion, public statements by EEOC field office attorneys have warned employers that they'd better think twice before conducting a criminal background check. This type of statement can certainly have a chilling effect on employers.

We suggest focusing on programs that offer training to those with criminal records. Identify programs that help those with convictions get on their feet, whether offering assistance with drug rehabilitation, finding a safe place to live, or helping them find gainful employment.

We also suggest looking at some of the laws that have been enacted across the country to help those with criminal records succeed in the workplace. Illinois has established a certificate of rehabilitation and offers employers legal protection if they were to hire someone with one of these certificates. The State of Ohio just passed a law that offers a certificate of employability.

Both our experience with our clients and
our survey findings suggest that employers are using background checks in a reasonable manner. Enacting laws that inhibit their ability to perform proper due diligence is not the answer. In fact, they can lead to devastating consequences for the company, their employees, their customers and the public.

Our research, while limited, does not support a finding of widespread discriminatory practices based on the use of criminal background checks, and such research if it exists was notably absent in the recent EEOC Guidance. It just isn't fair to ask employers to ignore information that could make them liable or keep them in the dark.

Thank you.

CHAIRMAN CASTRO: Thank you. Mr. McCracken, you can proceed.

MR. MCCRAKEN: Thank you, Mr. Chairman, members of the Commission. Good afternoon, my name is Todd McCracken. I'm the president of the National Small Business Association, and we are pleased to be here today to provide our perspective.

The 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 United States. We're representing more than 65,000
small businesses throughout the country in virtually all industries and in widely varying sizes.

The topic that we're here to talk about today, 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 some people entering other folks' homes. We do not want child molesters working in daycare centers, and we do want embezzlers handling large sums of cash.

Employers want to provide a safe place for their employees to work and 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 folks 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, sometimes is very nearly the only tool that employers have to protect their customers, their employees and themselves from criminal behavior.

Given that fact, small businesses are willing to comply with reasonable rules designed to ensure that criminal background screening is not
having a disproportionate impact on minorities. But they also want to know 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 held 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 the rules that 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.

Small businesses are often caught between competing government priorities and perspectives among different federal agencies, the courts, and 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 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 is complying 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 small businesses that hire felons who commit crimes at the workplace or in the customers' homes. Yet the EEOC has threatened 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 and executive branches to set forth consistent and comprehensible rules. This 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.

Workplace violence, protecting customers and preventing property crime is continuing as a 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.

Workplace theft and embezzlement are, as I mentioned before, very large problems. Both can be reduced through a proper background screening. According to the Bureau of Justice Statistics, approximately 500 to 72,000 non-fatal violent crimes occurred to individuals aged 15 or older or while they were at work in 2009.

Workplace violence accounted for 15 percent of non-fatal, violent crimes against persons age 16 or older. In short, workplace violence remains a very serious problem even though it has declined over the last 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 hiring decisions.

The vast majority of small businesses want to comply with the law and with EEOC Guidance, but 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 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 1964 issued by the EEOC on April 25th, 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 rules that small 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, EEOC Guidance will not achieve its objective.

In conclusion, we urge the Commission to not prioritize enforcement against firms with educational attainment requirements or 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.

CHAIRMAN CASTRO: Thank you. Mr. Segal, please proceed.

MR. SEGAL: Good afternoon, Chairman Castro and other distinguished members of the Commission. It is an honor to be here before you today. My name is Jonathan Segal. I am a partner with the Duane Morris law firm specializing in employment law in general and equal employment
opportunity in particular.

I also am the Pennsylvania state legislative director for the Society For Human Resource Management also known as SHRM, and, it is in that capacity, that I appear before you today.

SHRM is the world's largest association devoted to human resource management, HR, with more than 260,000 members in over 140 countries. SHRM has participated in ongoing discussions at both the national and the state levels regarding appropriate use of background information in the employment process.

These discussions are heightened by the competitive employment environment created by today's economy. SHRM and its members are supportive of and are involved with various public policy initiatives focusing on finding jobs for the unemployed. SHRM, for example, is currently working with the U.S. Departments of Labor and Defense to help increase employment opportunities among returning military veterans as well as disabled individuals.

At organizations, whether large or small, HR professionals are charged with ensuring that each individual hired possesses the talents, skills and work ethic needed for the organization's
success. The consequences of making a poor hiring choice can be great, possibly leading to financial losses, an unsafe work environment, and, if the employee engages in severe misconduct, legal liability to customers, shareholders or others in the form of negligent hiring lawsuits or other legal claims.

As a result, HR professionals strive to make the most informed choices possible under the law when selecting candidates for their organizations.

In today's market it is not uncommon for employers to receive hundreds of applications in response to just one advertisement for a vacant position.

To cull through these job candidates, employers must use many factors to narrow the applicant pool. Factors may include work experience, education, certifications and so on. Once a group of candidates or a finalist has been selected, most often after an initial round of interviews, the HR department typically conducts a background check on the candidates or candidate.

It is important to remember that certain federal and state laws, as we've heard before, statutorily require employers to conduct specific background checks for certain positions. Many state
laws require the use of criminal background checks for certain industries to maintain their licenses.

Health care and child care are but two examples. Some convictions under such state laws are automatic disqualifiers for employment.

Independent of any state law, failure to conduct a criminal background check can result in unreasonable risk. You've heard many examples this morning. I'd like to provide but one more example of the difficult decision faced by employers.

In response to the Gulf oil spill just a few years ago, BP worked with state unemployment offices in three states to fill thousands of positions to clean up affected beaches. In this case, no criminal background checks were performed. A BP contractor ended up hiring a supervisor who had a criminal history and who, during his employment on the cleanup, allegedly raped one of the workers whom he supervised.

As you can imagine, the media stories about the cleanup efforts quickly changed from kudos for job opportunities provided to thousands of unemployed individuals to stories about the obviously tragic alleged rape and to condemning the company for failing to provide for the safety of others and the
public by not performing criminal background checks.

When the EEOC published updated Guidance on the use of criminal history information in April of this year, SHRM members were pleased to see that the Guidance did not impose any new bright-line rules explicitly designed to prohibit employer access to and use of certain information. Instead, the Commission in this Guidance continues to embrace the use of long-standing three factor test identified in the Green case when evaluating criminal history, and we discussed those factors earlier today.

These factors are familiar to HR professionals. Indeed, SHRM has not received significant negative feedback from its members about the Guidance as a whole. Two specific aspects of the Guidance, however, have been mentioned as areas of concern by SHRM and its members.

First, our members have expressed concern about the statement in the Guidance that compliance with state and local laws will not shield them as employers from liability under Title VII. We appreciate preemption. However, this places employers between the proverbial rock and a hard place, between losing their state license or opening themselves up to liability if they don't comply with
the state law mandating criminal background checks, and risking a class action if they go forward with the criminal background checks and base hiring decisions on the results.

We believe the state law requirements can fit within the EEOC's concept of targeted exclusion based on the Green factors and specifically allowed for by the Guidance. We are hopeful that the EEOC will clarify the validity of state law requirements as lawful targeted exclusions or at least consider these concerns in exercising their prosecutorial discretion. We appreciate Commissioner Lipnic's recent written statement on this issue, which I understand has been submitted for the record.

Second, SHRM is concerned about the Guidance interpretation of disparate impact. The Guidance states, and I quote, "National data supports a finding that criminal record exclusions have a disparate impact on race and national origin. The national data provides the Commission a basis to investigate Title VII disparate impact charges challenging criminal record exclusions," end quote.

It is not clear how imputing disparate impact based on national data can be reconciled with the recommended individualized assessment. Further,
as written, it appears that employers may be vulnerable to EEOC investigation any time they take an adverse employment action against an individual of certain races or national origins based on criminal records checks, regardless of whether the employer has conducted a valid individualized assessment, seemingly making convictions a new protected status. SHRM believes this section should be clarified to help employers comply.

In conclusion, we believe the EEOC's Guidance serves a very important societal interest, but that clarification in the areas mentioned would greatly benefit employers, employees and third parties who do business with employers. If the legal risks of conducting background checks are too great, then some employers may be reluctant to use them.

We believe hiring decisions are enhanced when employers are able to combine the information obtained by the candidate's resume and interview with additional verifiable information available through background checks.

Thank you for the opportunity to participate in today's discussion.

MR. MELLOR: Thank you, Mr. Chairman, and good afternoon, Commissioners. On behalf of the
National Retail Federation I want to thank the Commission on Civil Rights for holding this briefing on the recent EEOC enforcement guidelines concerning the use of background checks in employment decisions. This is a very important topic for all of us. NRF appreciates being able to share our thoughts on this matter with the Commission.

As the world's largest retail trade association and the voice of retail worldwide, NRF membership includes retailers of all sizes, formats and distribution channels as well as chain restaurants in the United States. We represent more than 3.6 million business establishments, 42 million workers, 1 in 4 U.S. jobs, and $2.5 Trillion annually to the GDP.

My name is Rich Mellor and I serve as vice president of loss prevention for the NRF. My responsibilities at the NRF include communication of pertinent information for retail loss prevention, surveying members on important issues and to include background checks as one of them, facilitating educational conferences -- recently we've held two conferences to discuss these topics on the background checks and inform our members -- engaging law enforcement to help prevent retail crime, advocating
for appropriate legislation to protect retailers better.

Prior to my position at the NRF I served as a senior loss prevention executive for more than 25 years in retailing, most recently at a national jewelry chain. As part of my responsibilities I directed the company's employment screening process to include applicant processing, testing and background investigations.

Conducting this business in a professional and law-abiding manner is paramount in protecting the company brand and reputation. Over the past decade the use of background checks has increased steadily as retailers shoulder the enormous responsibility of securing the private data of customers, their safety and that of the employees, and protecting the company assets.

More important than ever before is the prevention of litigation and legal expense. Unnecessary expenses that stem from carelessness in employment related matters can have a huge impact on the company's financial stability. Employers are extremely careful to manage their employment process preventing even the slightest appearances of discrimination.
Social consciousness is a part of every retailer's business strategy. Employment practices and policies play an important role in creating a brand identity that encourages customers to want to shop and work for the company. Retailers, therefore, place a high priority on openly demonstrating fairness, credibility and serving the communities in which they do business.

As a result, hiring within the community is an important facet in perpetuating a healthy business environment. There is a fine line that retailers must walk between social responsibility and the obligation to protect customers, especially children, and to ensure the safety of employees.

A retailer who makes a decision to hire a former criminal who compromises customer private information has no protection under the EEOC guidelines to fall back upon. They will suffer the consequences, not the criminal that they hired.

The retailer who hires a delivery driver or a home repairman who has a criminal record for violence and theft and that person harms a customer or even an employee will again suffer the consequences and the liability for the crime. If a child is abused or hurt by a known sex offender in
the company, the damage to the child and the retailer can be so severe that it can put the company out of business.

Statistics show that these type of criminal behaviors are often repeated and it's a high risk to employ such individuals. We are obligated to know these things about our employees. When these crimes do occur, the investigators, the prosecutors and judges always ask these questions. How did the person get access to that information, the restricted area, the merchandise or even access to the child?

Sometimes this happens when the original job changes or a specific task is assigned without knowing the criminal history of the individual. A matter of discussing criminal history cannot be left to a chance opportunity hopefully addressed at a later date after an offer of employment and by someone not specialized in handling these conversations.

For those seeking to turn over a new leaf these conversations are better addressed by an HR professional before the offer of employment is conducted and when honesty and sincerity can be assessed appropriately. Often times in retailing
that is a concerted effort to involve other parties in that decision making. That would not be the case if it's offered on the end of the employment process.

With a workforce of more than 42 million employees, retailers handle millions of applications each year and have worked diligently to provide opportunities and second chances for individuals committed to rehabilitation. Survey results show that approximately 95 percent of retailers conduct criminal background checks.

The question is, why do retailers spend an extraordinary amount of money, sometimes hundreds of thousands of dollars per year, in a tough economy, when it would be easy to say, save the expense? The answer, they've all learned by costly mistakes made in their own company and those in other companies as well. They seek to protect themselves against negligent hiring and the checks do provide a good opportunity for minority applicants.

We have heard stories of mistakes in identity but we can fix those things if we stay committed to improving the background check process. What we can't fix is the harm that is done by criminals and therefore we must, above all, protect those who put their trust in us. Background checks

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are an essential part of taking our responsibilities seriously. Retailers cannot fulfill their responsibility to us without doing the very best they can to vet potential employees who have access to our data, our homes and our children.

NRF believes the criminal background check question needs to remain on the employment application. This vital information is every bit as relevant as an applicant's education, previous employment, experience and formal training. That said, retailers have embraced individual assessment, I can say that.

In closing, I want to sincerely thank the Commissioners for allowing us all, employers, employees, consumers and family members to express our views on this very important matter.

MR. DOMBI: Good afternoon. Thank you, Chairman Castro and Commissioners at large for the opportunity to testify today. My name is Bill Dombi. I'm vice president for law at the National Association for Home Care and Hospice.

NAC, as we call it, is a trade association representing tens of thousands of home care providers and hospices across the country. The issues involved in screening prospective employees'
criminal record backgrounds have been longstanding in health care presenting a myriad of challenges in complying with state and federal laws regulating the home health care community as a health service provider in addition to addressing their needs regarding best practices in employment and service to their customers along with fully respecting the civil rights of applicants for employment as well as the existing employees who may be on staff.

At the outset, let me state with total seriousness that my constituency and the Association fully supports efforts to ensure the civil rights guaranteed to employees and applicants for employment, but likewise, we support all the appropriate efforts to protect the highly vulnerable patient population served in home care along with the integrity of the numerous federal and state programs that finance this essential care.

In that regard, NAC has a longstanding support for the use of criminal background checks as an employment screen for individuals who have direct patient care contact, access to health information on patients, responsibilities that relate to health care financing including payments to federal and state health care programs. Comprehensive criminal
background checks are an essential tool for the home care provider in meeting their responsibilities to protect patients, payors, as well as their own organization.

It is fairly well known today what home care is. Some years ago people just couldn't distinguish us between Home Depot and health care in the home, but my assumption is that pretty much everyone in this room has been touched by home care in the last two decades, whether it's personal care services for their loved ones who are in their last years of life, hospice services for true end-of-life care, or as my own personal experiences, my father, my mother, my sister and my son, and most recently my mother-in-law as home care patients.

It is also very clear that that is an extremely vulnerable population of individuals. Home care is just what it says, care to individuals in their home. The vulnerable nature of that population is such that very often many of these individuals are just individuals in the home who open the door or have somebody give them a key to let them in the door, because these people are confined to a hospital bed or otherwise, to provide intimate and very important health care services.
It is a combination of high tech and high touch. Some of the most remarkable technology advances in health care have found their way into home care, but they haven't replaced the high touch aspect of personal care services to people who need assistance with activities of daily living. At the same time it's a very vulnerable payor population as well.

When we look at the issues of Medicare and Medicaid, today in particular, fraud, waste and abuse is way more than anyone would find acceptable. Even if you start with just one dollar as being acceptable we are dealing with billions and billions of dollars. So individuals who are entrusted not only with the care of elderly, disabled, pediatric, as well as populations of all ages need special selection when sent into individuals' homes.

Beyond that, home care is a small business. Yes, we do have some companies that are billion-dollar operations, but we have many, many, many more who are small operations, meeting the SBA's definition of a small business but meeting everyone's common sense definition of that as well. And with due respect to the testimonies that I've heard prior to this, counsel that I see sitting at this table,
counsel who preceded the people at this table, the social scientist as well, are not readily accessible to these small businesses to help in making these individualized determinations.

Asking the question, is this long enough after the conviction for the individual to then be employed to send to the home for your mother, is a very serious kind of matter but the resources are not there for these small businesses to do this. So instead, what happens is the businesses in home care look first to state and federal regulation.

We've talked a lot about preemption of state regulations today. In home care there is federal law requiring criminal background checks. All hospices must have a criminal background check of all employees who have contact with patients or sensitive health information as well as anyone they have as a subcontractor.

The Medicare conditions of participation require every home health agency to comply with all state and local laws, which then takes a state law requirement on criminal background checks and makes it a federal law requirement. In addition, over the last few years, the Congress has shown great attention to the issue of protecting the elderly in
their homes who are receiving home care services, most recently through the Affordable Care Act, extending the Elder Justice Act to require an expansion of a program that focuses in on criminal background checks.

Now I am in a slightly different world than I normally live, frankly, being here today. I'm a health care practitioner. My civil rights work ended with a school desegregation lawsuit back in the early '80s when the Supreme Court in Milliken v. Bradley stopped the opportunities to desegregate schools on an interdistrict basis. Disparate impact was never a viable standard in school segregation cases as well, but I'm back, you know, here talking a bit on civil rights.

And I had the opportunity to review the Guidance which, I think, is an extraordinarily well written document for lawyers. I would publish it any law review in any part of this country. But for my constituency, no chance of understanding it, frankly. I think they would misunderstand it before they do understand it.

It was described as common sense guidance, but I don't see how it takes 50 pages to describe something in common sense when, instead, my
constituency reads such things as this month's Consumer Report, which I didn't read until this morning. Happened to take a few minutes before I came out here, and it's an article, it's all about protecting Mom and Dad's money, just the money part of it. And it talks about how health care, home care in particular, is a high-risk area.

And so Consumer Reports, which is relied upon for common sense by people all across the country, writes as follows: "Make sure any care giver you're considering undergoes a background check. Don't assume that the placement agency will do a thorough one. Insist on a national rather than a state criminal check. To monitor home help, consider installing a surveillance camera if the state law permits it." That's a common sense instruction.

And in line with that I'm concerned, as another member, of the chilling effect. I submitted testimony, which I offer as a series of recommendations, which suggest a collaborative effort between the health care regulators and the EEOC. I think there is a ground that can be found common among all them. So thank you for the opportunity today.

CHAIRMAN CASTRO: Thank you. I have a
couple of questions then I'll open it up for the Commissioners.

Mr. McCracken, you were talking about, I think everyone mentioned it but I think you were the first to go into depth about the alleged conflict between the Guidance and adherence to state requirements that there be background checks. Now again, as I asked earlier, I don't think anyone here is saying, the EEOC is not saying that you can't do background checks. It's saying, this is how you do them and not violate Title VII.

So I don't know if you were here earlier for Ms. Miaskoff's presentation, and I believe when she presented orally she stated this, but in her written presentation to us she said that Title VII prohibits disparate impact discrimination. And it also includes language that preempts state or local laws when those laws, quote, "Purport to require or permit the doing of any act which would be an unlawful employment practice under the statute. Therefore, if an employer's exclusionary policy or practice has a disparate impact and is not job related and consistent with business necessity, the fact that it was adopted to comply with state or local law does not shield the employer from Title VII
Presumably these state laws that require background checks in certain instances are doing it because they feel in those instances there is a business necessity, is that not right? And that it is consistent with the job so it's job related, right? So that would seem to me that in those instances the issue of Title VII liability would not be there because they're allowing you to do the background check. They're not saying you can't at the federal level. As long as it's consistent with business necessity and job related, it's not violating Title VII.

So I don't understand where that conflict resides, because presumably if you do the background check you're going to do it for those reasons. You're not going to do a background check that's not going to be job related, right, and that has nothing to do with business necessity, right?

MR. MCCRACKEN: And I may be alone, and I'm not sure. I'm not an attorney so I'm not going to give you a legal opinion about that. But I do know a lot about small businesses, and I will tell you that you can walk them through something like that and get them to a correct conclusion. But when
they're making a decision in the field they have to feel confident, for instance, if they feel that there's a conflict between both laws.

The EEOC rules, as I understand them, require a level of judgment. You have to make some decisions about whether or not the background checks are directly related to the job, and a whole series of judgment calls that you have to feel confident about as a business owner, and to understand the law.

And that's our most significant issue is confusion. Small businesses need clarity and simplicity in terms of how they need to comply with these requirements, and then make sure they understand where the conflicts are or are not between state laws.

CHAIRMAN CASTRO: Mr. Segal, you mention in your presentation an example of a BP contractor for whom a background check was not done and then they committed a rape. Are you suggesting that that background check was not done as a result of some confusion about the EEOC's Guidance?

MR. SEGAL: No, I'm not suggesting that, sir. I am suggesting that, because of some confusion with regard to the Guidance, it's possible that a contractor would not perform a background check that
they otherwise would and that clarification with regard to the issues that we have raised would be helpful.

CHAIRMAN CASTRO: Hypothetical on your part. You're conjecturing that that might happen in another case.

MR. SEGAL: No. I would suggest, respectfully, it's not hypothetical but that there is the potential for employers to refrain from conducting appropriate background checks if there is confusion over the Guidance, and what we're hoping for is that the EEOC will provide clarification so that the respective rights of employers and applicants can be balanced.

CHAIRMAN CASTRO: There wasn't the case in this example for BP. That was not the case in the BP example.

MR. SEGAL: I'm not familiar with all of the background of the BP hiring process.

CHAIRMAN CASTRO: I saw Commissioner Kirsanow's hand go up in my peripheral vision, then Commissioner Kladney, and then Commissioner Gaziano.

COMMISSIONER KIRSANOW: Thank you, Mr. Chairman, and again thank you for the panelists, another splendid panel. Were any of you witnesses at
the EEOC hearing?

(No response.)

COMMISSIONER KIRSANOW: Nobody? Were any of you invited to testify at the EEOC hearing? Were any of you asked to submit written comment at the EEOC hearing? No.

MR. SEGAL: Yes.

COMMISSIONER KIRSANOW: Okay, SHRM was invited to submit comments but none of the rest of you were. Written comments, okay, and you supplied written comments. I've got a number of questions but I'll defer to others. Really, I've got a number and I hope I have the chance to follow up but --

CHAIRMAN CASTRO: You will.

COMMISSIONER KIRSANOW: Mr. Segal, you talked a little bit about the tension between disparate impact and individualized assessment.

MR. SEGAL: Yes, sir.

COMMISSIONER KIRSANOW: I'd like you to kind of elaborate upon that because the way I look at it, if you look at the case, I don't know if you're familiar with Ricci versus DiStefano where you had an employer that engaged in disparate treatment in order to avoid potential liability on disparate impact because its numbers weren't right.
Can you tell me a little bit about the potential for that kind of problem where this might, if not encourage disparate treatment, shade toward that in order to avoid a disparate impact liability lawsuit?

MR. SEGAL: Perhaps it would be helpful to start with the Guidance. The language from the Guidance provides that national data such as that cited above supports a finding that a criminal record exclusion to have a disparate impact based on race and national origin. The national data provides a basis for the Commission to further investigate such Title VII disparate impact charges. During the investigation the employer would have the opportunity to show that its employment policy or practice does not cause disparate impact on the protected group.

So as I understand the language, there would be the possibility for one adverse action to result in an investigation based on a disparate impact analysis. We have concerns about this language as previously noted. We believe the reasonableness of the Guidance ultimately will turn on the reasonableness of the prosecutorial discretion in enforcing it.

COMMISSIONER KIRSANOW: Mr. Fishman, you
said something that really interested me. You said that when you issue reports to your clients of criminal background check, protected class information is not contained therein, and suggests to me that what's happening is clients are sometimes blind to the actual applicants.

They simply do an initial screen to determine whether or not someone has a criminal background, correct? If that's the case, if clients don't know the protected class information how could there be a disparate impact issue?

MR. FISHMAN: I can't answer that question. It would seem that there wouldn't be.

COMMISSIONER KIRSANOW: I'll defer the rest of my questions for --

CHAIRMAN CASTRO: We'll come back.

COMMISSIONER KIRSANOW: Thank you.

CHAIRMAN CASTRO: Commissioner Kladney?

COMMISSIONER KLABNEY: As Commissioner Kirsanow, my cup runneth over with questions, and I don't know if I'll have enough time to ask, but I appreciate this panel and its input. And I would like everyone to know I support criminal background checks. I think they're good and I think they're worthy, worthwhile.
I wonder though, Mr. McCracken, you said that your group, and I assume it's a big Association, didn't quite grasp the analysis of the Guidance, is that correct, of how you go through the analysis of a criminal background check?

MR. MCCRACKEN: I was saying it's not clear for small businesses.

COMMISSIONER KLADNEY: And as an association do you find it to be incumbent upon you to communicate that information?

MR. MCCRACKEN: Well, sure. We try to communicate all kinds of information to our members. But the reality is, every kind of business in different states are all on different situations, and so ultimately it's up to a business owner to make a whole series of judgment calls on these issues and there's only so much that a group sitting in Washington can help them with.

COMMISSIONER KLADNEY: Have you done any of that work?

MR. MCCRACKEN: That's why we consistently advocate that federal agencies at all levels be clear and consistent and as simple as possible on communicating what businesses have to do. Because you have to remember, this isn't the only
thing that they're having to worry about and it's typically the business owner, him or herself, that is having to think through these issues and make these decisions.

COMMISSIONER KLADNEY: My question really is based upon Mr. Segal's analysis saying that the Green factors are not that difficult to apply. Is that correct, Mr. Segal? That's what you said, I think, in your statement.

MR. SEGAL: Based on the testimony we have heard today, we can see that there are competing considerations that employers must consider in making these difficult decisions. We believe employers can apply the Green factors but there will be times that, based on them, targeted exclusions will be appropriate. But the Green 3-factor analysis in and of itself is not new.

COMMISSIONER KLADNEY: It's been for 20, 30 years.

CHAIRMAN CASTRO: Here's the microphone, Mr. Segal, please. Thank you.

MR. SEGAL: Overall the Guidance is largely a restatement of existing law and SHRM has not received substantial concerns raised by its members. In our experience, the result has been that
most members are taking a closer look at the Green
factors in making individualized assessments and in
determining where targeted exclusions may be
appropriate.

COMMISSIONER KLADNEY: Thank you. And
then the background checkers, I'm wondering, you
know, obviously you're professional background
checkers and you do a very professional job. My
concern is, what are your thoughts regarding
regulating internet scrubbers where businesses get on
and do their criminal background check with these
organizations, well, dot coms on the internet? What's been your experience with that?

MR. FISHMAN: I don't have a lot of
experience with that. They operate under an entirely
separate set of circumstances than we do as
employment background screeners, and it's an entirely
different animal altogether.

COMMISSIONER KLADNEY: Is it reliable?

MR. FISHMAN: I don't know the answer to
that question because I'm not familiar with all of
them. I would say it's less reliable than that which
we engage in as employment background screeners.

COMMISSIONER KLADNEY: Ms. Miller?

MS. MILLER: When you say internet
scrubbers I think the devil's in the details, probably, as to what exactly you mean, because I'm not quite familiar with that.

COMMISSIONER KLADNEY: Well, I prefer not to use any company names. But people on the internet, like you're looking for somebody. If I put Montserrat Miller in, up pops the very first thing is, come here and find out about Montserrat Miller.

MS. MILLER: You would fall outside of the Fair Credit Reporting Act. So I, if you were to find information out about me, would not be protected. I wouldn't have all the rights that fall under the Fair Credit Reporting Act.

COMMISSIONER KLADNEY: So do you believe that small business should be made aware of that and business should understand not to use these internet scrubbers in terms of providing criminal background checks? Would that be your recommendation?

MS. MILLER: That's a good recommendation. As an association we do quite a bit of outreach and education. We've done outreach and education on the EEOC Guidance and we do it on other issues as well such as doing the perils of doing your own Google searches, because of the fact that the individuals upon who you are doing them may not know.
And not only is there an issue that you fall outside of the Fair Credit Reporting Act, but there are EEO considerations as well when you look at that type of information. So we do certainly try to educate as to the perils of doing searches outside of a professional background screening company.

COMMISSIONER KLADNEY: One more question to Mr. Fishman.

CHAIRMAN CASTRO: And then we'll go to Commissioner Gaziano. We'll come back to you, Commissioner Kladney, I promise.

COMMISSIONER KLADNEY: When you said an EEOC lawyer gave some guidance for people not to do criminal background checks, do you know what context that was given in?

MR. FISHMAN: It was reported in the Chicago Tribune, and then has been reported in several other areas. I don't know the context. I just know that the direction was that employers better think twice before conducting a background check.

COMMISSIONER KLADNEY: Was it a direction or was it, if you don't know the context how do you know it was a direction?

MR. FISHMAN: I guess I can't answer
that question.

COMMISSIONER Kladney: I mean are you just picking something out of the newspaper and putting it in your presentation?

MR. FISHMAN: Out of a number of articles that were written about that particular comment.

COMMISSIONER Kladney: It could have been said in a facetious point of view. It could have been said a lot of different ways.

MR. FISHMAN: From what I read it didn't appear to be that way, but I guess I couldn't --

COMMISSIONER Kladney: I read it. It was a three-paragraph deal. Thank you.

CHAIRMAN CASTRO: Commissioner Gaziano?

COMMISSIONER GAZIANO: Thank you. And thank you all for your wonderful testimony.

And before she walks away, I also want to publicly thank our Lenore Ostrowsky for her work on this panel and putting together such outstanding panels that, I think, represented the various views much more than seems to have been before the EEOC. And I think the record also reflects that the Commission reached out to Commissioners of the EEOC. Some of them have submitted written testimony. I
would have appreciated hearing from them as well.

But I want to focus on one of the, I think the last panel was unanimous that the purpose of the EEOC rule was to act on their hunch, since they didn't have the relevant data, to increase the costs on businesses that wanted to use criminal background checks.

And by there, there's many costs. One of them is it's been remarked on the individualized attention of course is the cost of screening, but what I'm really worried about was the cost of acting on screening. Of course everyone said, well, they can still do it, they can still do it.

But the problem with the Guidance is, in an attempt to increase litigation risks, increase legal, to try to through guidance create a standard that a court might apply, so that if someone actually acted on the criminal background check there's increased liability.

And one of the factors I want to concentrate on this panel is the sort of reversal of the precautionary principle that we normally have in government regulation. the various types of precautionary principle. But let's take some EPA regulation. Congress generally writes it. The
agency then takes it to an extreme.

But there are some conditions where if there's a risk of cancer no matter how infinitesimal, so-called "Delaney Clauses," EPA requires the companies to eliminate any risk. In Clean Air Act, there are some other extreme precautionary principles where the government says if there's even a very small risk that public health will be affected that the company must expend enormous amounts of money.

But it seems to me that this EEOC Guidance has the strangely opposite effect. It tells companies who may have a precautionary principle of their own, and I'm particularly directing this to you, Mr. Mellor, because it seemed to dovetail in some of your testimony, that you better abandon your precautionary.

And one little factor in the Guidance that it seems to suggest that the offense that you've got to consider disqualifying has to be really kind of close. One of the reasons that worries me is because I think most of us know a lot of convictions are also pled down.

Speaking with one of the witnesses in the prior panel, they're facing a multi-million dollar lawsuit because they hired someone with a
misdemeanor who was taking pictures of an underage woman as a security guard, he was acting as the security guard for a gated community, and he was taking pictures of this underage woman undressing. Well, it turns out that that misdemeanor was pled down from a Peeping Tom charge.

So how does, if you don't mind, any of you, but especially Mr. Mellor, could you comment on how the guidelines skew the normal risk precautionary principle decision making of a firm and whether you think that's a good idea or a bad idea?

MR. MELLOR: Commissioner, I'm not sure I understand the question, how it's -- sorry -- how it skews. Could you just be a bit more clear on that? I'd be very happy to answer that. It's opaque.

COMMISSIONER GAZIANO: Yes, I'm sure it is. I'm sorry about that. If a company would have, before the guidelines, applied a certain, you know, framework of relatedness to the type of crimes or would make a decision, do the guidelines, how would the guidelines tend to skew a company's decision when they have to factor in the possible liability for disparate impact litigation?

MR. MELLOR: I'm assuming that you're
speaking about prior to the guidelines where companies, and there's been lots of conversation about this, have put out blanket sort of matrix that we do not employ people with this type of criminal history, and apply that across the landscape, perhaps, of the whole company.

And I can comfortably say this after doing it for good number of years myself and involved with other people in retailing that actually conduct the background checks, comfortably say that even before the guidelines came out, and I happen to feel that the logic involved with the guidelines is well founded and that maybe it's a little bit behind the curve from the standpoint that retailers in particular have evolved out of those blanket policies and how they apply them across the landscape and do spend considerable time now analyzing what the Green factors are before even being asked or guided to do that.

My comments with regard to how that gets done and when it gets done, I focused on the fact that this is better done by corporate type people who have their head on straight, can analyze this information properly and interact, often me, on the telephone with the applicant, because some of these
interviews take place far and away from them.

But there are other people that become involved in that decision making and collaborating on whether this is a sensible risk and could we take it and would this job be a disqualifier for this particular individual.

I don't know that I've answered your question but I --

COMMISSIONER GAZIANO: Let me rephrase it and open it up to anyone.

MR. MELLOR: Okay.

COMMISSIONER GAZIANO: Does anyone want to comment on whether they think these guidelines tend to require companies, as an economic matter, to increase their risk in hiring to decrease their risk of a disparate impact lawsuit?

MR. SEGAL: In my experience, as an attorney who advises clients, and in SHRM's experience, this has not resulted generally in employers discontinuing use of the background checks. What we have seen as employers looking to the Guidance as just that and in reviewing more carefully the Green factors.

But, ultimately, I believe that the reasonableness of the Guidance will turn on the
reasonableness of the prosecutorial discretion in
terms of enforcement, and that may have an impact on
whether employers continue to use background checks.
I'd rather see employers use professional background
checks than simply search the internet and come up
with what may be invalid information.

CHAIRMAN CASTRO: Commissioner
Achtenberg?

COMMISSIONER ACHTENBERG: Thank you, Mr.
Chairman. Before asking Mr. Dombi a follow-up
question to his testimony I just want to say that we
don't have any information in our record or otherwise
that would suggest that the EEOC in its various
capacities, including whatever fact-finding it
undertook before promulgating the various guidelines
that it was certainly entitled to promulgate, failed
to, merely because it didn't invite everyone on this
terrific panel -- and by the way thank you all very
much for all the observations that you have proffered
before our little committee here -- merely because it
didn't ask everyone on this panel to participate
specifically in its fact-finding does not support the
assertion that somehow its fact-finding was skewed.
And I just wanted to make that observation for the
record.
Mr. Dombi, having recently lost many family members in my own family and had to supervise home health care that needed to be provided during their last illness, I'm very knowledgeable about and sympathetic to the plight of the lawyer who advises home health care providers and hospice providers, and I understand what a difficult situation that might put you in.

Could you talk a little bit about how a collaboration between a group like your industry group and the EEOC might be furthered so that home health care providers might do just the right kind of background screenings so as to enhance safety while not inadvertently or otherwise doing harm to ex-offenders who have a right to have their criminal backgrounds assessed properly by a prospective employer?

MR. DOMBI: The state regulation as brought into federal play varies from state to state. Some states have automatic exclusion, and I think we would support a safe harbor where a state's made that kind of a judgment there, and I think it would be an easy call for everybody on that. But beyond that, a number of states take certain criminal offenses and then allow them to be taken into consideration.
I learned more here today about what you should be considering than I knew coming in by far, and I think the collaboration that I would suspect would be very helpful would be, you know, the parties to get together to try to outline in more detail, with better clarity, how you take into consideration whether an offense has a connection to the risk that you have in an individual going into a home setting, the issue of the time frame, you know, and obviously you should let the individuals, perhaps, receiving the services make the ultimate judgment, but it appears there is some science that says that after a certain period of time someone with a record is no longer a greater risk than someone without a record. And so that, you know, would be certainly one way to go about it.

But beyond the collaboration in terms of what is told to individual companies is the health care system itself has a huge communications network. Medicare, for example, routinely puts out something they call the MedLearn articles, which are guidance instructions and they have contractors there who engage in training and the like.

And so the EEOC combined with HHS in doing some training around this, I think, would go a
long way to alleviate what I know would happen, that chilling effect. If my constituency read this they would be wondering, what's changed and what have I done wrong and I better do something different, so teach me what I'm supposed to do, because that's all they're really looking to accomplish is to meet the standard.

One of the things they'd have to work out between themselves is one that I don't have an answer to and that is that yes, criminal background checks are used in home care. They are mandated by and large. Decisions are made when it's discretionary to select from one offense or another, but the majority of the workforce, ultimately, that's in home care are actually in protected race categories. They are African American. They are Hispanic.

This is job not a lot of people want, and home care companies are searching high and low to get people to do the job. You know, for $10 an hour to clean up after an incontinent dementia patient, you're either a saint or you're desperate. Fortunately we have a lot of saints providing home care.

So trying to figure out how is that
disparate treatment in that situation would be, yes, deny a criminal record background candidate employment and accept another one who happens to be actually of the same race or may actually be of a protected class of the one that you've denied. My constituency doesn't understand disparate impact, doesn't understand that tough decision, and maybe together the EEOC and the Department of Health and Human Services can help guide them because they do want to comply.

CHAIRMAN CASTRO: I have a question, and then Commissioner Kirsanow, and I'm sure Commissioner Kladney's going to want to come back as well.

I'll direct this to Mr. Mellor, but anyone else feel free to chime in as well. In the materials that we've received and in some of the testimony we've heard earlier, although we haven't spent a lot of time on this, there has been issues raised about the inaccuracies of some criminal records and arrest records or the lack of clarity of some of those and, you know, wrong people being considered as the criminal compared to the actual person who's applying for the job.

And I believe, Mr. Mellor, in your remarks you said well, you know, we can fix those
inaccuracies. It seems to me that the reason for the individualized assessment is to kind of address that to fix these inaccuracies, which exist probably in various layers of government data and criminal records, has got to be an overwhelming task, maybe even more overwhelming than an individualized assessment.

How would you propose that we fix these inaccuracies? I believe if they could have been fixed easily that would have happened. Do you have some ideas and recommendations on how to do that?

MR. MELLOR: Well, I certainly agree with you, Mr. Chairman. It's not an easy task to do it and I wasn't trying to imply that it was an easy task. I was giving some relativity to, if we put our minds to it, we work together, the professional organization for background screeners is certainly tasked and working on that to collaborate with the retailers and the other organizations represented here, I think that that's a task that we can tackle, work on, collaborate with this Commission as well as the EEOC to kind of push forward and see if we can't do something about this.

My personal experience with doing the background checks over a pretty long period of time,
the folks that work for me doing that were tasked to go to every degree they possibly could to validate the information to include personal visits to courthouses and so forth. But it always, always included conversation with the individual that was applying for the job and whatever information they had placed on the application. In some cases it was understated on the application, in other cases it was very clear.

But to the point of trying to be precise in the identification of who the individual was, in my experience and in my management of that process, absolutely wouldn't go forward with a decision if we couldn't validate it 100 percent. Now I'm not suggesting that that doesn't happen out there. I think it does. I'm pretty comfortable saying that.

But as I made reference to in my remarks, there isn't a company that's willing to take a risk at doing something that's going to result in a litigation such as being confronted from the EEOC or other attorneys to take on as your information was inaccurate and this is what resulted.

So I don't suggest that this is easy to do, but I think the collective minds could put their heads to this. And it took a long time for the
guidelines to be reissued and I think it'll take time for us to get where we need to be on validating this kind of information in background checks.

CHAIRMAN CASTRO: I'd like to hear from you. Yes, please.

MS. MILLER: If I could, thank you. Accuracy of the reports is paramount. It's what is required by the Fair Credit Reporting Act, so maximum possible accuracy.

Contrary to popular belief, and as reported in the media, our member companies report to me 99 percent accuracy rates. So that means that when a consumer disputes a consumer report, and that might include criminal history information, that only one percent of consumer reports are disputed, and of that one percent an even smaller percentage actually require a correction. So as far as the individualized assessment, that doesn't replace the Fair Credit Reporting Act procedures.

And under the Fair Credit Reporting Act an individual has not one but two opportunities to correct the information in the report if there is an inaccuracy or incomplete information, which again inaccuracy is not, it's rare that the reports are inaccurate. Not one but two.
So the first bite of the apple is, if a report is done, and mind you, under the Fair Credit Reporting Act that requires your consent in order to do a background check and that, like I said, might include a criminal history check, you provide your consent.

There are multiple steps that then begin to kick in and those steps are requirements of background screening companies, consumer reporting agencies, which are actually defined under the Fair Credit Reporting Act, and it also places responsibilities on the employers. And those responsibilities of the employers would be that they provide individuals with a pre-adverse action notice if during the process any information, in whole or in part, is going to be used from that report that might adversely impact the individual and that might include criminal history information.

So the first opportunity is what's called the pre-adverse action notice. They're provided a copy of their report, a copy of the summary of their rights under the Fair Credit Reporting Act, and they can contest the information if it is inaccurate or incomplete. And then the next step would be again they could go through the same
process through the adverse action process if they will be denied employment based on the report.

What is providing some confusion with the Guidance is that the Guidance has the individualized assessment. So what is very new, at least in my opinion, is that there is this concept under the EEOC's Guidance that in order to avoid Title VII liability you could do either a validation study, which the Guidance itself says, but there's not enough social science in order to do a validation study, or you can do a matrix and an individualized assessment. This is a new concept provided by the Guidance.

That causes confusion with employers because then they say well, wait a minute, what happens to the Fair Credit Reporting Act? So I don't think that was intended, but the unintended consequence is employers now are faced with, well, do I follow the Fair Credit Reporting Act or do I follow this Guidance, I'm not quite sure. And what I hope doesn't happen is that consumers aren't afforded the rights because of confusion with the Guidance.

But there are two separate processes, and the Fair Credit Reporting Act, which has been around since the '70s, has provided many protections
for consumers when background checks are done and it already has what you could say would be similar to an individualized assessment, although under the Fair Credit Reporting Act what you're looking at are inaccuracies or incomplete information in the consumer report which the consumer can then challenge and background screeners have a duty to reinvestigate that information and provide correct information. But again the inaccuracy rates are very low.

Nick, I don't know if you want to --

MR. FISHMAN: I would just echo those same sentiments. They do have an opportunity, if there is an error in the report, to be able to dispute that information.

In addition to that as far as the misidentity, if you will, I can only speak for a company like my own where until we're able to confirm identifiers, meaning name and date of birth, name and Social Security or any combination thereof, we're not going to report a record.

So that's how you eliminate that kind of thing is that you pay attention to those identifiers and ensure that they actually belong to the applicant before it's been reported.

CHAIRMAN CASTRO: Commissioner Kirsanow,
then Commissioner Kladney.

COMMISSIONER KIRSANOW: Thank you. So far on all the panels I haven't heard anybody say that, you know, there shouldn't be background checks done, and I haven't heard anybody say that they oppose reintegration of criminals into society. And the real question is, is this Guidance --

(Simultaneous speaking.)

COMMISSIONER KIRSANOW: The real question is -- let me repeat myself. I haven't heard anybody say that they don't feel criminal backgrounds should be done nor that we don't support reintegration of those with criminal records into society. And the question, I think, is whether or not the EEOC Guidance is a smart way or the best way or even a decent way of doing this.

I want to pick up on something that I think Commissioner Kladney had asked of Mr. Fishman. I think it was interesting. It had to with, Mr. Fishman talked about the EEOC lawyer who was quoted in the paper, Chicago Tribune, as saying, "If you're thinking about doing a criminal background check you better think again."

We've heard about certain instances related to concerns about ambiguity of the Guidance.
I think it was Mr. Dombi said, a 55-page Guidance was beautifully written for lawyers. I would like to ask Mr. McCracken, Mr. Mellor and Mr. Dombi, with respect to small businesses, when a small businessman -- I appreciate he doesn't know the context in which an EEOC lawyer may say something.

When a small businessman hears or reads that an EEOC lawyer, as the character in Lincoln says, "Clothed in immense power," says, "You better think twice about using a criminal background check," how does that person construe that statement and what actions does he take as a result?

CHAIRMAN CASTRO: And if I could add, it could also apply to a businesswoman.

COMMISSIONER Kladney: Could I also give the correct quote? Would that be okay, Commissioner?

COMMISSIONER KIRSANOW: Sure, absolutely. I'd like to know it.

COMMISSIONER Kladney: This is the quote out of context, and we don't know what context it was given in. "I would suggest to," open parens, "businesses," close parens, "that they think long and hard about why they think they need to do a criminal background check."

If you look at the Guidance I guess that
would tell you why.

COMMISSIONER KIRSANOW: Yes, long and hard. If an EEOC lawyer says they better think long and hard, long and hard before they think about doing a criminal background check, Mom and Pop's there, doesn't have an HR department, doesn't have access to big-time lawyer, how does he construe it normally?

MR. MCCRACKEN: I would say -- and I missed what your comment was.

CHAIRMAN CASTRO: He said businessman. I said businesswoman as well.

MR. MCCRACKEN: You have to realize these are your very small business people, no one would be surprised to hear, you know, do operate largely on conventional wisdom, what they hear, what people tell them, because as you say they don't have the time and the resources to, so they will, I do think it has the potential at least to have a chilling effect on some companies that should and might be able to conduct criminal background checks legitimately that they will choose not to.

And that will have, you know, potential consequences for whether it's staffed in the workplace or other things down the road. And those will be hard to quantify because it's hard to know
what didn't happen.

But I do think that's a real thing because there, very much in the small business sector, there is sort of an accepted wisdom that comes from somewhere, like newspaper articles like this, that really does shape how people behave.

COMMISSIONER KIRSANOW: Anybody else have a comment on that, Mr. Dombi or Mr. Mellor?

MR. DOMBI: I think my constituency is very unique compared to some of the others that were referenced here. The enlightened ones would call me and say, what did that mean? And then I might be able to explain it to them. Others would say, what is that EEOC person talking about? It's pretty clear why we have criminal background checks in health care. And then the vast majority probably would be unfazed and they would recognize in a common sense way to do a criminal background check and to make the right judgment to keep their patients safe.

It's a priority for them. Patients first, payors second, business third, and prospective employee would probably be denied employment still even after seeing that.

CHAIRMAN CASTRO: Commissioner Kladney?

Oh, I'm sorry, did you want to answer?
MR. MELLOR: Quickly, I will. With regard to small businesses the NRF represents a lot of one-store business owners, and with regard to that I would say that as we suspect they would opt out and not do the background check. That's our fear, because they're fearful of not being able to do this process appropriately and rely on their instincts for their employment decisions.

COMMISSIONER KIRSANOW: Do many of your constituents have employment practices, liability insurance or anything similar in case your friendly neighborhood EEOC investigator comes knocking on the door?

MR. MELLOR: I'm not able to say that for sure, but I would think not.

MR. DOMBI: In health care, it's in the marketplace, I mean and a lot of the brokers, longer standing home care providers would likely have purchased it along with directors' and officers' liability, general liability, and it's in a package that many of them acquire today.

CHAIRMAN CASTRO: Mr. Kladney?

COMMISSIONER KLABDNEY: I personally think the quotation means to go ahead and do one because you're supposed to do one. Think long and
hard why you should do one, and you need to do one. But I guess beauty is in the eye of the beholder, Commissioner.

CHAIRMAN CASTRO: See, now that's how it should be.

COMMISSIONER KLADNEY: Mr. Fishman?

MR. FISHMAN: Sir.

COMMISSIONER KLADNEY: How are you?

MR. FISHMAN: Well, thank you.

COMMISSIONER KLADNEY: And anybody else can answer this question who would like to. In your presented document, statement, you said there's no relief or consideration for employers that have state law conflicts. Since 1987, when the initial Guidance came out, do you have any cases to back that up?

MR. FISHMAN: Well, that was referring to the new Guidance.

COMMISSIONER KLADNEY: Okay, the new Guidance. Any cases?

MR. FISHMAN: Not that I'm aware of. I think that one of the earlier panelists mentioned the fact though that she was caught between a rock and a hard place. I believe it was Pennsylvania law and the EEOC Guidance.

COMMISSIONER KLADNEY: That actually had
to do with the Pennsylvania law that merely provided
a background check but not exclusions. The
background check, background check. Anybody else?
Thank you.

CHAIRMAN CASTRO: Any other questions?
If not, I don't even know, is the Vice Chair on the
phone? I presume you've not asked to -- no, she's
not. Okay, I want to make sure that I don't close
this unless I've given her a chance to speak.

Well, that concludes this panel. I want
to, on behalf of the Commission, thank each and every
one of you who presented not only on the third panel
but also on each of our other panels. I also want to
again thank the staff that put this together. I
thank Pam Dunston and her staff for doing all the
logistics of this.

I also want to remind folks that the
record for this briefing report is going to remain
open for the next 30 days. If panelists or members
of the public would like to submit materials they can
either mail them to the U.S. Commission on Civil
Rights, Office of Civil Rights Evaluation, 1331
Pennsylvania Avenue, N.W., Suite 1150, Washington,
D.C. 20425, or they can send them via email to
publiccomments@usccr.gov. That's P-U-B-L-I-C-O-M-
M-E-N-T-S @ U-S-C-C-R.gov.

It is now 2:07 and this meeting of the Commission is hereby adjourned.

(Whereupon, the foregoing matter went off the record at 2:07 p.m.)