



UNITED STATES
COMMISSION ON
CIVIL RIGHTS

624 Ninth Street, N.W.
Washington, D.C. 20425

August 10, 2011

Commission Meeting, EEOC Executive Officer
Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, D.C. 20507

Re: EEOC Examination of Arrest and Conviction Records as a Hiring Barrier

Dear EEOC Executive Officer:

We¹ wish to submit a comment to be included in the record for the recent meeting of the Commission regarding EEOC's examination of employer use of conviction and arrest records as a hiring barrier. During the deliberations at the July 26 EEOC meeting, both panelists and commissioners appeared to share the assumption that aggressive EEOC oversight of employers' use of arrest and conviction records in hiring would lead to increased employment of African Americans. Because African Americans are disproportionately likely to have criminal backgrounds, the argument went, panelists and commissioners alike seemed to agree that employer use of criminal background checks would lead to lower hiring of African Americans. But two recent scholarly papers indicate that the picture is not quite so simple and that this assumption may not be warranted. These papers indicate that employers who do not use criminal background checks may be *less* likely to hire African Americans because they are using race, age, or other characteristics as proxies for past criminal history. Employer use of criminal background checks may thus actually benefit African-American job applicants without criminal records.

In a paper published in the *Journal of Law and Economics*, economists Harry Holzer and Stephen Raphael and public policy professor Michael Stoll analyzed the effect of employer-initiated criminal background checks on the likelihood that employers hire African Americans.² They found that employers who check criminal backgrounds are more likely to hire African-American workers, especially men.³ Their results suggest that, in the absence of criminal background checks, some employers discriminate statistically against black men and/or those with weak employment records.⁴

¹ Peter Kirsanow, Gail Heriot, and Todd Gaziano are all members of the United States Commission on Civil Rights, an agency of the federal government that makes appraisals of the laws and policies of the federal government with regard to discrimination or denials of equal protection of the laws under the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice. 42 U.S.C. § 1975(a). We are sending this letter in our individual capacities, not on behalf of the Commission. The views expressed in this document are not necessarily those of the Commission.

² Harry J. Holzer *et al.*, *Perceived Criminality, Criminal Background Checks, And the Racial Hiring Practices of Employers*, 49 J. LAW & ECON. 451 (2006).

³ *Id.* at 452.

⁴ *Id.* at 453.

In another article published in the *University of Chicago Legal Forum*, Michael Stoll performed an analysis similar to the one used in the paper he co-authored with Holzer and Raphael, but using a more recent data set.⁵ Stoll noted that, in the absence of a criminal background check, some employers may infer the likelihood of past criminal activity via markers such as race or age.⁶ If the tendency of employers is to overestimate the likelihood that African-American applicants have prior felony convictions, systematic background checks may actually increase the likelihood that an African American applicant is hired. This information effect from a background check could thus counter the exclusionary effect associated with the higher incidence of previous convictions among African American applicants.⁷ Stoll found that for employers that check backgrounds, about 12 percent of their last hired workers were black males, while the comparable figure for those employers who do not check is 3 percent, a difference of about 9 percentage points.⁸ The percentage point estimate of the difference in hiring black males by whether firms check backgrounds at 8.7 percentage points is similar in magnitude to the estimates found by Holzer, Raphael, and Stoll in the paper cited above.⁹

As Stoll indicates in his paper, these findings indicate that the use and effect of criminal background checks on hiring of ex-offenders and the employment of black workers is far more nuanced than previously thought,¹⁰ and certainly more so than time has permitted the EEOC to explore in its two meetings on this subject to date. The evidence adduced by Holzer, Raphael and Stoll is worthy of much closer scrutiny before the EEOC acts to amend its rules governing employers' consideration of arrest and conviction records. We recommend that the EEOC convene a meeting that focuses specifically on the data discussed herein before amending its policies to ensure that it is considering all facets of the issue. At a minimum, we believe that both of these papers are very relevant to the EEOC's deliberations, and thus we have included copies of them for inclusion in the public record. We also welcome any questions about this letter that members of the EEOC or their staff members wish to pose to us. Peter Kirsanow can be contacted at (216) 363-4481 or at pkirsanow@benesch.com; Gail Heriot can be contacted at (619) 260-2331 or at gheriot@sandiego.edu; and Todd Gaziano is at (202) 608-6182 or at Todd.Gaziano@heritage.org.

Sincerely,



Peter Kirsanow
Commissioner



Gail Heriot
Commissioner

⁵ Michael Stoll, *Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market*, 1 U. CHI. L.F. 381 (2009).

⁶ *Id.* at 384.

⁷ *Id.* at 402.

⁸ *Id.* at 403.

⁹ *Id.*

¹⁰ *Id.* at 406-07