August 10, 2011

VIA ELECTRONIC MAIL

Mr. Stephen Llewellyn  
Executive Officer  
Executive Secretariat, Equal Employment Opportunity Commission  
U.S. Equal Employment Opportunity Commission  
131 M Street, N.E.  
Washington, DC  20507

Re: SHRM’s Comments in Response to the EEOC’s July 26, 2011 Meeting Regarding “Arrest and Conviction Records as a Hiring Barrier”

Dear Mr. Llewellyn:

The Society for Human Resource Management (“SHRM”) commends the Commission for creating a process that enables members of the public to submit written comments in response to the Commission meeting held on July 26, 2011, entitled “Arrest and Conviction Records as a Hiring Barrier.” This issue is of vital interest to our members and we appreciate the opportunity to share the views, collective wisdom, and experience of our members with the Commission.

SHRM is the world’s largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, SHRM serves the needs of HR
professionals and advances the interests of the human resources profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in Canada and India. SHRM’s membership is comprised of HR professionals that are responsible for developing and administering their employer’s human resources policies and practices, including policies and practices relating to employee hiring, employment verification, compensation, promotion, training, and termination.

Over the years, the EEOC issued a number of guidance documents designed to educate the public about using arrest and conviction records in compliance with Title VII of the Civil Right Act. More recently, the Commission has become concerned that employer use of criminal background checks which rely on arrest and conviction records is contributing to the high unemployment rate among African Americans and Hispanics.

SHRM recognizes the obstacles that individuals with criminal records face in securing gainful employment and understands the Commission’s concerns. We strive to continually educate HR professionals about their legal obligations in this area and encourage our members to adopt sensible policies and procedures that do not arbitrarily reject applicants on the basis of past criminal behavior (i.e. policies that fail to take into account the specifics and circumstances surrounding that individual’s criminal past, including the nature and seriousness of the crime, the length of time that has passed since the criminal activity, etc.). At the same time, it is important for the Commission to recognize that there is a compelling public interest and, in some circumstances, a legal one as well, in allowing prospective employers to have access to and to appropriately use criminal background information. A prospective employee’s criminal background is directly relevant to legitimate business concerns, including workplace safety, privacy of important data, and business operations.

Our comments are intended to provide the EEOC with a full understanding as to when, how, and why HR professionals use criminal background reports in the employment process. Should the Commission determine that new Guidance in this area is warranted, we ask you to consider our comments and recommendations.

B. Employer Use of Criminal Background Checks

1 Under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §2000e et seq., if an employer’s use of arrest and conviction records has an adverse impact, it must be job-related and consistent with business necessity. 2 For the sake of brevity, we respectfully direct the Commission to Christine V. Walters’s statement at the October 20, 2010 Commission meeting of Employer Use of Credit History as a Screening Tool and in particular, Ms. Walters discussion of the Fair Credit Reporting Act. http://www.eeoc.gov/eeoc/meetings/10-20-10/walter.cfm
HR professionals are responsible for ensuring that each individual hired possesses the knowledge, skills, and abilities needed for the organization’s success. Making a poor hiring choice can lead to serious undesirable ramifications for employers. Statistics show that applicants with certain criminal backgrounds may present significant safety, legal, or financial risks for an employer. Nearly all of the panelists at the July 26 hearing have acknowledged the fact that criminal convictions are reliable evidence of an individual’s past behavior and the reality is that past behavior is often an indicator of future behavior. HR professionals rely on criminal background checks because they provide useful information as to whether an applicant may present problematic issues for the organization in the future.

In January 2010, SHRM surveyed its members on the use of criminal background reports. The survey demonstrated that 73 percent of respondents conduct criminal background checks on all job candidates, with an additional 19 percent of respondents indicating that they limit their use of criminal background checks to candidates for select jobs. Our survey also confirmed that most employers do not rely on arrest records when making an employment decision. In fact, the vast majority of respondents reported that they are not significantly influenced by an arrest record that did not result in a conviction, with a mere 5 percent of respondents reporting that arrest records that did not result in a conviction were “very influential.”

The SHRM survey also demonstrated that the vast majority of organizations and HR professionals follow the current EEOC guidelines when conducting criminal background checks at the hiring stage:

- 97 percent of respondents take into consideration the severity of the criminal activity;
- 95 percent of respondents take into consideration the number of convictions;
- 93 percent of respondents take into consideration the relevance of the criminal activity to the employment position;
- 95 percent of respondents take into consideration the length of time that has passed since the criminal activity; and
81 percent of respondents take into consideration the age of the individual when the criminal activity occurred and noted that they were less likely to hire the individual if the criminal activity occurred when the individual was an adult.

Lastly, where adverse information is found, 63 percent of SHRM respondents stated that they offer the candidate the opportunity to explain the circumstances surrounding the results before the hiring decision is made.

C. Rationale for Employer Use of Criminal Records

Employee and customer safety is of paramount importance and is the primary reason our members use criminal background checks. Indeed, 61 percent of respondents in our survey cited the need to ensure a safe working environment as a primary reason for conducting criminal background checks; and in a second survey of our members, over half reported that they were concerned that workplace violence might occur at their organization. When employees do engage in workplace violence or severe misconduct, employers must defend legal actions in the form of negligent hiring, negligent retention, vicarious-liability lawsuits, and other proceedings brought by employees, customers, and shareholders. In addition, the growing concerns with workplace privacy result in additional legal liability for employers if there is a data breach. Therefore it is not surprising that 55 percent of SHRM members list “reduc[ing] legal liability for negligent hiring” as one of the primary reasons for conducting criminal background checks.

In addition, many of our members must consider criminal background reports to comply with the increasing number of federal and state laws which mandate the use of these checks in the employment process for certain industries and positions. Further, because employers need to protect their financial assets and those of their clients, customers, and shareholders, our members also reported that they conduct criminal background checks to reduce and prevent future criminal activity. In fact, 39 percent of respondents listed reducing and preventing theft and embezzlement, along with other criminal activity, as a primary reason for conducting criminal background checks. Of course, criminal background checks may also be conducted to ensure that a potential employee is suitable for a particular employment position.

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3 We would add the Controlled Substances Act (“CSA”) to lists of federal laws and regulations mentioned by panelists.

4 SHRM members have indicated that the fear of criminal activity is pronounced in these challenging economic times. As financial pressures on households are increasing, employee theft is on the rise. This development is a
D. SHRM Concerns with the EEOC’s Approach and Recommendations

SHRM respectfully urges the Commission to consider the following recommendations in formulating future guidance regarding employer use of criminal records.

1. Excluding Violent Crimes

SHRM understands the concern that if employers were permitted to adopt true “blanket exclusions” such as the policy in Green v. Missouri Pacific Railroad Company,\(^5\) every individual with a conviction record might be counted among the unemployed. However, it is also clear that for certain violent offenses, the gravity of the offense is of such concern that an individualized assessment need not go beyond the recentness of the crime. A job-related inquiry would be wholly unnecessary. The EEOC’s current Guidelines fail to address whether certain offenses are serious enough to justify automatic disqualification. If the Commission decides to issue new guidance, it should recognize that, for certain serious crimes, business necessity does exist, regardless of the employment position sought. Simply put, employers should have the ability to categorically disqualify job applicants that have been convicted of serious crimes, within an appropriate time-frame, where it is determined that their employment would pose unacceptable safety risks to the employer, the employees, or customers.

SHRM believes that such a bright-line rule allowing employers to exclude violent crimes is necessary and would be instructive, given the lack of clarity regarding the EEOC’s current business necessity requirement. One need to look no further than the unfortunate incident that occurred during the clean-up of the much-publicized BP oil spill to understand why employers should not have to consider job-relatedness when excluding certain violent crimes. In that case, an individual who had been convicted for crimes of a sexual nature was hired to supervise a clean-up crew and is alleged to have raped one of the female workers. Under the current EEOC Guidelines, it is unclear as to whether BP and its contractors could have disqualified this individual from employment as a clean-up supervisor. Specifically, it is uncertain whether the

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\(^5\) In *Green* 523 F.2d 1290 (8th Cir. 1976) the employer refused to hire anyone that had been convicted of any offense other than a minor traffic offense for any position.
EEOC would interpret his sexual criminal history as sufficiently job-related to his duties as a clean-up supervisor, overseeing men and women in non-confined locations.

Moreover, the implementation of this bright-line rule would provide helpful guidance to employers. The Commission should also recognize that not every employer has the resources available to do an extensive individualized analysis on every applicant and that matrixes and other similar tools that adjudicate based on the nature of the offense enable employers to differentiate between safe and unsafe applicants as instructed in *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232 (3d Cir. 2007) (“SEPTA”). Thus, a bright-line rule would ensure that employer workplaces remains safe and provide helpful instruction to employers, while meeting the Third Circuit’s requirement that an employer’s bright-line policy accurately distinguish between those applicants that pose an unacceptable risk on the job and those that do not.

2. Use of Disparate Impact Statistics

SHRM understands that the proper framework and use of statistics must factor prominently in any discussion involving adverse impact. Disparate impact should never be presumed. We urge the Commission to adhere to the approach it took in the *1987 Policy Statement on Use of Statistics in Charges Involving the Exclusion of Individuals with Convictions Records From Employment*. When conducting an actual disparate impact analysis, it is far more appropriate to rely on more narrowly drawn statistics showing the impact of the employer’s hiring policy on its own applicant pool, or in the alternative, on a particular sub-category of crimes. National or regional statistics should only be used as a preliminary tool to evaluate the probability of whether disparate impact could have occurred.

3. Employer Compliance with Federal Laws

As previously noted, many SHRM members must now conduct criminal background checks in order to comply with federal and state laws. Some of our members have found the EEOC’s recent enforcement efforts around employer use of criminal background policies perplexing given the increasing number of federal laws and regulations that require criminal
background checks for certain jobs and/or industries and often ban employment based on those results.

For example, in July 2010 Congress enacted the Secure and Fair Enforcement for Mortgage Licensing Act, 12 U.S.C. § 1501 et. seq. (S.A.F.E Act) requiring all U.S. mortgage brokers to undergo a criminal background screening process and precluding individuals with criminal convictions from being involved in real estate lending approval. While the Commission’s Office of Legal Counsel acknowledged in a non-binding Advisory Opinion letter issued last year that Title VII does not override federal laws or regulations mandating the use of criminal background checks and that in a challenge, the SAFE Act’s requirements would control, SHRM believes that this does not go far enough. Any guidance should make clear that an employer’s effort to comply with federal law and regulations is sufficient to demonstrate business necessity, and thus, insulate an employer from any potential discrimination liability.

The Advisory Opinion letter also advises that “if a state enacts licensing and registration requirements that go beyond the minimum standards in the SAFE Act, such provisions will be subject to scrutiny Title VII because Title VII preempts state and local laws to the extent they ‘purport[] to require or permit the doing of any act which would be an unlawful employment practice ‘ under the statute.’” Although SHRM recognizes that Title VII may supersede certain state or local laws containing mandates for criminal background checks, we would recommend that any new guidance issued by the Commission acknowledge that an employer’s efforts to comply with state laws and regulations is appropriate indicia that the practice is in fact job-related and consistent with business necessity. It makes absolutely no sense as a matter of public policy to force employers to choose between violating state laws or federal policy pronouncements which are well intentioned but not necessarily directed to the realities of today’s workplace.

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6 Congress enacted the SAFE Act in the wake of the mortgage crisis to help curb dishonest practices within the mortgage industry.
4. Evidence of/ Certificates of Rehabilitation

While SHRM clearly recognizes that the current business necessity test\(^7\) is at best imperfect, should the EEOC decide to revisit the three factor test the Commission adopted in the 1987 *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act*, we would recommend against a monolithic approach which imposes unrealistic mandates on employers. For example, it is unrealistic to expect that all employers will be able to assess whether an individual with a criminal record meets the requirements to receive a certificate of rehabilitation. Most HR professionals are not equipped to determine whether an individual with a criminal history has been sufficiently rehabilitated or to determine a certificate of rehabilitation’s authenticity. Factors such as evidence of and certificates of rehabilitation are better suited as best practices or perhaps alternatively, as part of a more flexible and realistic evaluation of business necessity.

E. Conclusion

SHRM recognizes and appreciates the fact that securing employment for individuals with criminal records is a complex and problematic societal issue and we applaud employer programs, such as the program run by D.C. Central Kitchen, which focus on rehabilitating individuals with criminal records. The reality is, however, that most employers do not possess the resources or expertise to implement programs focusing on rehabilitating individuals with criminal records.\(^8\)

While we acknowledge the difficulties that individuals with criminal records possess in finding employment, we believe that employers should be able to utilize criminal records to make informed decisions regarding whether an applicant, if employed, will contribute to a safe and productive workplace or may cause harm to people or property.\(^9\) Accordingly, as the Commission contemplates next steps, we ask that you give careful consideration to the legitimate

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\(^7\) The Commission revised its business necessity analysis to follow the analysis by the Eight Circuit in *Green v. Missouri Pacific Railroad Company*, 523 F. 2d 1290 (8th Cir. 1976).

\(^8\) Victoria Kane the Area Director for Labor Relations & Integration at Portfolio Hotels & Resorts spoke about the importance of community programs and resources in her testimony.

\(^9\) We also are concerned that any action that serves to limit and employers’ abilities to use criminal background checks or causes more uncertainty regarding use of this important information could have a discouraging effect on hiring. With less available information upon which to base hiring decisions, HR professionals will be more apprehensive in hiring because of applicant uncertainty.
concerns of our members and to bear in mind that HR professionals are on the front line and will experience the practical repercussions of a decision that effectively limits the use criminal background checks.

We want to thank the EEOC once again for the opportunity to comment on this important issue. Please consider SHRM as a resource as the Commission further analyzes this issue.

Yours truly,

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