<table>
<thead>
<tr>
<th>Agenda Item</th>
<th>Presenter/Spokesperson</th>
</tr>
</thead>
<tbody>
<tr>
<td>Welcome</td>
<td>Carlton M. Hadden, Director</td>
</tr>
<tr>
<td></td>
<td>Office of Federal Operations, EEOC</td>
</tr>
<tr>
<td>Introduction of EEOC Chair</td>
<td>Carlton M. Hadden</td>
</tr>
<tr>
<td>Jacqueline A. Berrien</td>
<td></td>
</tr>
<tr>
<td>Remarks</td>
<td>Jacqueline A. Berrien, Chair</td>
</tr>
<tr>
<td></td>
<td>U.S. EEOC</td>
</tr>
<tr>
<td>Federal Sector Diversity Initiative</td>
<td>Christine M. Griffin, Deputy Director</td>
</tr>
<tr>
<td></td>
<td>U.S. Office of Personnel Management</td>
</tr>
<tr>
<td>Panel Discussion: Criminal Background Checks</td>
<td>Maurice Emsellem, Policy Co-Director</td>
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<td>for Employment with Federal Agencies and Agency</td>
<td>National Employment Law Project</td>
</tr>
<tr>
<td>Contractors</td>
<td>Sharon Dietrich, Managing Attorney</td>
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<td>Community Legal Services, Philadelphia</td>
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<td>April Frazier, Program Coordinator</td>
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<td>Public Defender Service, District of Columbia and</td>
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<td>Project Director, ABA Commission on Effective Criminal</td>
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<td>Sanctions</td>
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<td>Shawn Bushway, Professor</td>
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<td>State University of New York at Albany</td>
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<td>Closing Remarks</td>
<td>Carlton M. Hadden</td>
</tr>
</tbody>
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Criminal Background Checks for Employment: Promoting Model Federal Hiring & Contractor Policies that Protect Civil Rights & Public Safety

Equal Employment Opportunity Commission
Federal Agency EEO Forum
Washington, D.C.
April 21, 2010

Maurice Emsellem
National Employment Law Project
Oakland, California
(510) 663-5700
emsellem@nelp.org
The Elements of a Model Federal Criminal Background Check Policy

- **#1 Fair Fitness Standards**: The criteria for evaluating criminal records should be “job related” as required by Title VII and incorporate evidence of rehabilitation.
- **#2 Strong Appeal Procedures**: To protect the integrity of the process, the criminal records should be accurate and there should be effective appeal rights.
- **#3 Maximum Transparency**: The screening standards and appeal procedures should broadly publicized and transparent, which also promotes the goal of rehabilitation.
About One in Four Adults in the U.S. Has a Criminal Record on File with the States
(Bureau of Justice Statistics 2006, Table 2)
Disparate Impact of Arrests (3 to 1) on African Americans
(Crime in the United States, 2008)
Key Standards Regulating Background Checks for Federal Employment

- **Title VII of the Civil Rights Act of 1964:** EEOC guidelines require disqualifying criminal convictions to be “job related” while strongly disfavoring blanket arrest or conviction disqualifications.

- **Office of Personnel Management (OPM) Regs:** Subject to each agency’s discretion, OPM “suitability” criteria consider nature of the position, age of offense and rehabilitation, and other factors (5 CFR Part 731).

- **Homeland Security Presidential Directive 12:** Requires screening of all federal workers and contractors who require routine access to federal facilities and a Personal Identity Verification (PIV) credential based on a criminal background check.
Fitness Standards & Appeal Rights Depend on Worker’s Classification

- **Competitive Service:** Traditional federal workers are subject to OPM’s “suitability” standards and appeal rights.

- **Excepted Service (exceed competitive service):** Federal workers exempted by law from traditional civil service rules (including OPM’s “suitability” guidelines), thus subject to each federal agency’s requirements.

- **Federal Contract & Intermittent Workers:** No uniform federal standards, thus the workers’ rights depend entirely on the discretion of the “sponsoring” federal agency.
Faulty FBI Records & Federal Procedures Produce Major Hardship

- FBI’s criminal records are **50% incomplete** because the arrests are not updated by the state and local criminal records systems to reflect dispositions.
- 35% of felony arrests never lead to convictions (lower level offenses produce even higher rates of dismissals).
- Most federal agencies put the entire burden on the worker to produce documentation on open arrests that show up on the FBI background check, which prejudices large numbers of workers.
- At a minimum, agencies should isolate the problem arrest and wait until the final stages of the hiring process to require additional documentation.
- H.R. 7033 (Fairness & Accuracy in Employment Background Checks Act) requires that the FBI records be updated for employment screening purposes.
Best Practices:
Post Office Fitness Standards

- **Policy Statement:** “The Postal Service recognizes that many persons with criminal records are capable of performing the duties of postal jobs. These applicants are entitled to compete for jobs on individual merits.” (Handbook EL-312, Section 514.31).

- **Strong Fitness Criteria:** An applicant can only be rejected “after a specific finding that the history is directly related to the applicant’s present capacity to perform as a Postal Service employee,” including evidence of rehabilitation and the individual’s employment record (Section 514.37).

- **Age Limits on Offenses:** Applicant’s conviction record may not serve as the “sole basis for disqualification” if the conviction is more than 10 years old and the individual has not be incarcerated in the past 5 year. (Section 514.38).
Best Practices: Port Worker Security Program

- **Program Goals**: Post-9/11 maritime security law required two million port workers to be screened by TSA for “terrorism security” risks and credentialed to work at the ports.

- **Age Limits & Narrowly Tailored Disqualifications**: Federal law (insert cite) limits disqualification to specific felony convictions more than 7 years old (or released from incarceration in past 5 years), not including drug possession.

- **Appeal of Faulty Records**: In writing, TSA isolates the specific disqualifying offense, allowing the worker 60 days to produce documentation challenging its accuracy.

- **Waiver to Prove Rehabilitation**: TSA “waiver” procedure allows workers to establish rehabilitation (based on employment and education record, drug treatment and statements of support from the community).
Favorable Impact of TSA's Port Worker Appeal and Waiver Protections on African-Americans and Latinos (NELP's Docket, N=287)
Best Practices:
States & Cities “Ban the Box”

“Ban the Box” on the Rise: The policy has been adopted by three states - New Mexico (2010), Minnesota (2009), Hawaii (1998) and 20 cities and counties – removes the criminal history question from the job application and delays the criminal background check until the final stages of the hiring process.

Reduces Discrimination/Conserves Resources: By isolating the background check until the final stages of the hiring process, the policy reduces the likelihood of discrimination and conserves federal resources by limiting the number of workers who have to track down problem FBI records.

Relevant OPM Regulations: “Agencies may begin to determine an applicant’s suitability at any time during the hiring process. Because suitability issues may not arise until late in the application/appointment process, it is generally more practical and cost-effective to first ensure that the applicants is eligible for the position, deemed by OPM or a Delegated Examining Unit to be among the best qualified, and/or within reach of selection.” (5 CFR Section731.103(d) (Emphasis added).
Title VII and Criminal Record Consideration

Sharon M. Dietrich
Managing Attorney
Community Legal Services, Inc.
Philadelphia, PA
Growth of CLS’s criminal record and employment intake
Disqualifications based on criminal records has a racially disparate impact.

Therefore, criminal record policies must conform to job relatedness/business necessity analysis.
Racially Disparate Impact Presumed

“It is the [EEOC’s] position that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population.”

EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (7/29/87)

http://www.eeoc.gov/policy/docs/convict2.html
Consideration of Conviction Records

“The Respondent must show that it considered these three factors to determine whether its decision was justified by business necessity:

- The nature and gravity of the offense or offenses;
- The time that has passed since the conviction and/or completion of the sentence; and
- The nature of the job held or sought.”


http://www.eeoc.gov/policy/docs/convict1.html
Consideration of Arrest Records

- Fourth factor: “Even where the conduct alleged in the arrest record is related to the job at issue, the employer must evaluate whether the arrest record reflects the applicant’s conduct. “

- “Since business justification rests on issues of job relatedness and credibility, a blanket exclusion of people with arrest records will almost never withstand scrutiny.”


http://www.eeoc.gov/policy/docs/arrest_records.html
OPM Suitability Requirements

OPM and agencies must consider any of the following additional considerations to the extent OPM or the relevant agency, in its sole discretion, deems any of them pertinent to the individual case:

- (1) The nature of the position for which the person is applying or in which the person is employed;
- (2) The nature and seriousness of the conduct;
- (3) The circumstances surrounding the conduct;
- (4) The recency of the conduct;
- (5) The age of the person involved at the time of the conduct;
- (6) Contributing societal conditions; and
- (7) The absence or presence of rehabilitation or efforts toward rehabilitation.

5 CFR § 731.202(c).
Procedural Considerations

- Individualized consideration of job applicants’ records is necessary.
- Background screen procedures matter, along with suitability policy, because they can present a barrier to people with criminal records.
Implications – Expert Testimony

- Statistics of racially disparate impact.
- “Desistance” research.
Relevant Social Science Evidence on Race, Employment and Hiring

Shawn Bushway, Ph.D.
Associate Professor
School of Criminal Justice
University at Albany
Findings

- Race correlated with Criminal History
- Criminal History affects employment
- Offenders desist/can be “redeemed”
Race and Criminal History

- Blacks were 13.5% of U.S. pop. in 2008

- Blacks were 28.3% of arrests in 2008
  - http://www.albany.edu/sourcebook/csv/t4102008.csv

- Blacks were 38% of felony convictions in state courts in 2004
  - http://www.albany.edu/sourcebook/csv/t5452004.csv
Criminal History Affects Employment

FIGURE 1
THE EFFECT OF RACE AND CRIMINAL BACKGROUND
ON EMPLOYMENT OPPORTUNITIES

Pager, Western and Sugie 2009 – Audit Study in NYC
Consensus in the Literature

- Conviction reduces employment and earnings by at least 20%
  - Audit studies
  - Panel studies
  - Administrative data
Desistance – Age Crime Curve

Figure 2a
Age-Specific Arrest Rates
Robbery and Burglary in 1985

- Burglary
- Robbery x 3

Arrests per 100,000 Population
Age
0  5  10  15  20  25  30  35  40  45  50  55  60  65

1200
1000
800
600
400
200
0
Desistance Research

  - "We conclude that desistance processes are at work even among active offenders"

- Blumstein, Bushway and others
  - Want to study job performance.
  - Best we can do: risk of arrest
    - Risk eventually becomes equal to non offenders
    - Faster for older offenders/those with stable jobs
Figure 1
Overall Hazards

- Virgins
- Arrested 1977
- Convicted 1977

Probability of Conviction vs Years

- Axes: Probability of Conviction on the y-axis, Years on the x-axis.