

April 7, 2016

Fair Employment and Housing Council
Brian Sperber, Legislative & Regulatory Counsel
Department of Fair Employment and Housing
320 West 4th Street, 10th Floor
Los Angeles, CA 90013

RE: Comments on the Fair Employment and Housing Council's Consideration of Criminal History in Employment Decisions Regulations

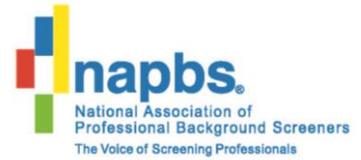
Dear Mr. Sperber,

On behalf of the National Association of Professional Background Screeners (NAPBS), we respectfully submit the following comments regarding the Fair Employment and Housing Council's proposed rulemaking on the consideration of criminal history in employment decisions. Founded as a non-profit trade association in 2003, NAPBS was established to represent the interest of companies offering employment and tenant background screening services. The Association currently represents over 700 member companies engaged in employment and tenant background screening across the United States, including California. Our member companies range from Fortune 100 companies to small local businesses, conducting millions of pre-employment background checks each year as part of the hiring and leasing process.

Adverse Action Requirements

Specifically, NAPBS has concerns regarding the rulemaking's requirement that an employer give the impacted individual notice of the disqualifying criminal conviction before the employer may take adverse action to decline to hire, discharge, or decline to promote the individual. As the proposed rule would be applicable to all private employers, this approach assumes that every employer has a black-and-white policy with respect to hiring those with past criminal convictions, which generally is not the case. A person's criminal history is only one factor of many in an employer's decision-making process when considering whether to hire or promote an individual, and may not alone serve as the sole basis for any adverse action. More often, the decision not to hire or promote an individual is made based on a totality of circumstances which include interviews, reference checks, and/or a person's skill set and previous employment background. It is not realistic to require employers to identify and provide notice of a single criminal conviction that would disqualify a candidate from employment.

Additionally, for employers that conduct background screening via Consumer Reporting Agencies (CRAs), the Federal Fair Credit Reporting Act (FCRA) requires a specific adverse action process to be followed any time an employer is potentially making an adverse decision (i.e., denying employment, terminating an employee, deciding not to promote an individual) based in whole or in part on information contained within a background report – which may or may not contain criminal history information. Further, California Civil Code Section 1786.40 requires employers to also follow a specific adverse action process similar to the FCRA's requirements. By requiring employers to specifically state the fact that the individual's criminal history is the



basis for an adverse decision, the proposed ordinance extends beyond existing federal and state requirements which presents potential compliance challenges for employers that hire in multiple jurisdictions. Based on the foregoing, we respectfully submit that this notice requirement be removed from the proposed rule.

Establishing Job-Relatedness and Business Necessity

The proposed regulations would require an employer to conduct a specific analysis to determine if the adverse impact to an individual on the basis of criminal conviction information is job-related and consistent with business necessity. This includes factors such as the nature and gravity of the offense, time passed since the offense and the nature of the job held or sought.

The Equal Employment Opportunity Commission issued guidance in 2012 addressing the use of criminal and arrest records in employment decisions. In this guidance, the EEOC recommended employers weigh three factors when assessing whether the existence of a criminal record is sufficient for job exclusion: the nature and gravity of the offence or conduct, the time that has passed since the offence or conduct and the nature of the job held or sought. These factors and recommendations are substantially similar to the provisions in the proposed regulations. Based on this existing EEOC Guidance, we request this provision be removed.

Less Discriminatory Alternatives

Under this provision of the proposed regulations, individuals may still “prevail under the Act” if they can establish a “less discriminatory policy or practice” exists that serves the employer’s needs – regardless of if the employer demonstrates that its consideration of criminal history information is job-related and consistent with business necessity. This provision raises some significant concerns as to interpretation and additional burdens placed on employers. Further, we are not aware of any other state law (such as in various ban the box or fair chance legislation) that includes similar language and requirements. We firmly believe employers are in the best position to determine what information is relevant to a hiring decision, and that this provision would place employers in uncharted – and uncertain – territory.

NAPBS and its members stand ready to provide you with any further information or to answer any questions you may have.

Sincerely,

Melissa Sorenson
Executive Director, NAPBS