State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0410

July 24, 2013

Via Certified Mail & Email

Chair Jacqueline A. Berrien
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507
jacqueline.berrien@eeoc.gov

Commissioner Constance S. Barker
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507
constance.barker@eeoc.gov

Commissioner Victoria A. Lipnic
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507
victoria.lipnic@eeoc.gov

Commissioner Chai Feldblum
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507
chai.feldblum@eeoc.gov

Commissioner Jenny Yang
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507
jennifer.yang@eeoc.gov

Re: A communication from the States of Alabama, Colorado, Georgia, Kansas, Montana, Nebraska, South Carolina, Utah, and West Virginia regarding the U.S. Equal Employment Opportunity Commission's position on bright-line criminal background screens in hiring

Dear Chair Berrien and Commissioners Barker, Feldblum, Lipnic, and Yang:

We write to express concern regarding the substantive position you have taken in two lawsuits recently filed in federal court by your agency against Dolgencorp, doing business as Dollar General, and BMW Manufacturing Co., LLC. Both lawsuits allege that the employers' use of bright-line criminal background checks in the hiring process violates Title VII of the 1964

Civil Rights Act. We believe that these lawsuits and your application of the law, as articulated through your enforcement guidance, are misguided and a quintessential example of gross federal overreach. Our states urge you to reconsider your position and these lawsuits.

An Attack on Criminal Background Checks in the Hiring Process

Title VII liability for employment discrimination can arise either because of "disparate treatment" or "disparate impact." In other words, the statute "prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009). To make a case for disparate impact liability, a plaintiff must first show that "a particular employment practice … causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(k)(1)(A)(i). An employer may rebut that showing by demonstrating that the practice is "job related for the position in question and consistent with business necessity." *Id.* The plaintiff may then seek to establish that there is an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs. *Id.* § 2000e–2(k)(1)(A)(ii).

According to the complaints, Dollar General and BMW violated the disparate impact prohibition by using generally applicable criminal background checks as bright-line screening tools in their hiring processes. These background checks do not simply exclude all individuals with any criminal history, the complaints admit, but rather target past convictions in certain categories of crime—*e.g.*, murder, assault, reckless driving, and possession of drug paraphernalia. The companies allegedly follow policies of refusing employment to individuals solely for failing the criminal background checks and not conducting any individualized assessments. Your agency contends that these policies have a disparate impact on African-American applicants because African Americans have higher convictions rates, are not job-related or consistent with business necessity, and are therefore unlawful under Title VII. In the BMW case, your agency seeks to permanently enjoin "the application of a conviction records policy as a selection or plant access criteria without conducting an individualized assessment that considers the nature and gravity of the offense, the time that has passed since the conviction and/or completion of the sentence, and the nature of the job held or sought."

Importantly, neither lawsuit alleges overt racial discrimination or discriminatory intent on the part of the companies. There is no allegation, for example, that the companies are employing these policies based on racial stereotypes of criminality. Nor is there any contention that the companies have treated dissimilarly individuals of different races who have similar criminal records. To the contrary, every individual who fails a criminal background check is equally refused employment.

We understand that these lawsuits carry out your agency's policy as set forth in EEOC Enforcement Guidance No. 915.002 ("Enf. Guidance"), which was issued on April 25, 2012, and purportedly "builds on" previous policy guidance. Enf. Guidance 3. That guidance document briefly explains why screening for past criminal conduct has a disparate racial impact, but focuses primarily on making the case for individualized consideration of criminal background.

To establish that a criminal conduct screen is job-related and consistent with business necessity, your agency explains, "the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position." *Id.* at 14. Employers are therefore urged to use individualized assessments rather than bright-line screens, taking into account factors such as "[t]he facts or circumstances surrounding the offense or conduct," the individual's "age at the time of conviction," and any "[r]ehabilitation efforts." *Id.* at 18. Although your agency does not rule out that a bright-line screen might sometimes be appropriate, the guidance document makes clear that it would be the rare exception: "[s]uch a screen would need to be *narrowly* tailored to identify criminal conduct with a demonstrably *tight* nexus to the position in question." *Id.* at 14 (emphases added).

Unlawful Expansion of Title VII

We believe that your policy guidance—and the recently filed lawsuits—incorrectly apply the law. It defies common sense to suggest that a bright-line criminal conviction screen will only rarely be "job related" and "consistent with business necessity." An employer may have any number of business-driven reasons for not wanting to hire individuals who have been convicted of rape, assault, child abuse, weapons violations, or murder—all crimes specifically mentioned in the complaints. It might have concerns about the safety of other employees and customers, or a desire to minimize the risk of liability. A criminal background may also be indicative of a lack of dependability, reliability, or trustworthiness. *See, e.g.*, *Equal Employment Opportunity Comm'n v. Carolina Freight Carriers Corp.*, 723 F. Supp. 2d 734, 753 (S.D. Fla. 1989) ("It is exceedingly reasonable for an employer to rely upon an applicant's past criminal history in predicting trustworthiness.").

Your policy guidance purports to rely on a 1975 Eighth Circuit decision, but we are not persuaded. That case rejected a particularly broad criminal conviction screen. At most, it stands for the proposition that no business necessity can ever justify the automatic rejection of "every individual convicted of any offense, except a minor traffic offense." *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975). As a threshold matter, we question whether that principle is correct. We can imagine certain jobs—in law enforcement, for example—for which the existence of any criminal history could logically and reasonably be an absolute disqualifier. But even assuming that *Green* was rightly decided, the case's specific holding certainly does not support your agency's sweeping condemnation of nearly all bright-line criminal conviction screens.

We are troubled that your agency's true purpose may not be the correct enforcement of the law, but rather the illegitimate expansion of Title VII protection to former criminals. Indeed, that was the complaint of the dissenting opinion in *Green*: "In effect, the present case has judicially created a new Title VII protected class—persons with conviction records. This extension, if wise, is a legislative responsibility and should not be done under the guise of racial discrimination." *Id.* at 1300 (Gibson, C.J., dissenting from denial of rehearing en banc). Although the policy guidance and your recently filed cases are premised on disparate racial impact, race discrimination cannot plausibly be your agency's actual concern. As noted, there are numerous nondiscriminatory reasons for wanting to screen out former criminals in the hiring process. Moreover, the individualized consideration that your agency advocates would create far

more opportunity for racial discrimination than the nondiscretionary screening processes allegedly used by the companies. And finally, if there is truly a concern about racial prejudice in the criminal justice system, there are more direct ways to reform that system than spending federal dollars to compel employers to hire convicted criminals.

Your real target appears to be the perceived unfairness of judging an individual—of any race—solely by his or her past criminal behavior. That is the focus of the hypotheticals discussed in your guidance document. One example explains that your agency believes it would be unlawful to terminate a public relations account executive upon discovering a twenty-year-old misdemeanor assault charge without considering how he has reformed in the intervening years. Enf. Guidance 17. Your agency also would find it unlawful to fire a shredding company's employee for a five-year-old guilty plea for misdemeanor insurance fraud without taking into account other factors. *Id.* at 20.

But no matter how unfair a bright-line criminal background check might seem to some, it is not your agency's role to expand the protections of Title VII under the pretext of preventing racial discrimination. If Congress wishes to protect former criminals from employment discrimination, it can amend the law. Title VII's prohibition on practices that have a disparate impact should not be used as just another regulatory tool to advance your agency's policy agenda.

This gross federal overreach is further exacerbated by your agency's claimed preemption of state and local law. The guidance document purports to supersede state and local hiring laws that impose bright-line criminal background restrictions that are not narrowly tailored. We are concerned that many of our states' laws could be affected. *See, e.g.*, W. Va. Code § 16-5H-4(a)(5) ("No person may own or be employed by or associated with a pain management clinic who has previously been convicted of, or pleaded guilty to, any felony in this state or another state or territory of the United States."); *id.* § 24-6-5(d) ("As a condition of employment, a person employed as the director of an emergency dispatch center who dispatches emergency calls or supervises the dispatching of emergency call takers is subject to an investigation of their character and background. … A felony conviction shall preclude a person from holding any of these positions."); *id.* § 8-10-2(b) ("No person convicted of a felony or any misdemeanor crime set forth in articles eight, eight-a, eight-b, eight-c or eight-d, chapter sixty-one, of this code is eligible to become a municipal judge."). As the chief legal officers for our states, we find this intrusion into state sovereignty particularly egregious.

A Burden on Business

The practical consequences of your policy guidance are also concerning. Forcing employers to undertake more individualized assessments will add significant costs. Employers will have to spend more time and money evaluating applicants that they would not have previously considered due to their criminal history and, in many cases, are unlikely to hire even after a more thorough vetting. In addition, more individualized assessments are liable to increase the number of discrimination suits by rejected applicants and, in turn, employers' litigation expenses. At a time when American businesses—from large companies to mom-and-pop small

businesses—are already saddled with burdensome regulations, our country can ill afford yet another federal mandate.

We urge you to reconsider your position, rescind EEOC Enforcement Guidance No. 915.002, and dismiss the lawsuits filed against Dollar General and BMW. Please do not hesitate to contact us to discuss these matters. We appreciate your consideration of our concerns.

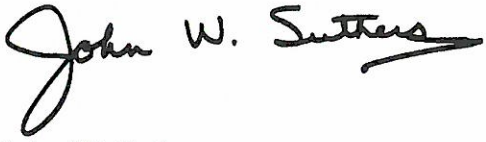
Sincerely,

Patrick Morrisey
West Virginia Attorney General

Tim Fox
Montana Attorney General

Luther Strange
Alabama Attorney General

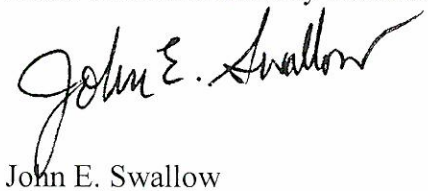
Jon Bruning
Nebraska Attorney General



John W. Suthers
Colorado Attorney General

Alan Wilson
South Carolina Attorney General

Samuel S. Olens
Georgia Attorney General



John E. Swallow
Utah Attorney General

Derek Schmidt
Kansas Attorney General