Employment Background Checks Reduce Discrimination

By Jeffrey L. Sedgwick

During its most recent meeting (26 July 2011) and on 20 November 2008, the Equal Employment Opportunity Commission (EEOC) has visited the topic of the impact of criminal history background checks on the employment prospects of African-Americans, a protected class under Title VII of the Civil Rights Act of 1964. At each of these meetings, individuals representing some points of view within the research, legal and advocacy communities offered statements concerning the potential impact of criminal histories on the employment prospects of job applicants.

Based on the Commissioners' questions and responses from the witnesses at the meeting on July 26, 2011, it appears that the Commission intends to issue new guidance to employers that would dramatically reduce their ability to use background checks in employment screening. I believe this would be a tragic mistake that expose innocent and unwitting members of the general public to violent crimes against them, expose employers to greater risk of theft, fraud and negligent hiring lawsuits and, ironically, increase rather than decrease discrimination against African-Americans males.

According to U.S. Department of Justice surveys and studies, over 60% of inmates had been incarcerated previously. A 2002 Department of Justice study of 272,111 inmates released from prison in 1994 found that they had accumulated 4.1 million arrest charges before their most recent imprisonment and another 744,000 charges within 3 years of release. This is an average of 17.9 charges each. Given this documented risk of recidivism, Federal, State and local governments have passed some 38,000 statutes limiting or proscribing employment of released offenders, especially in jobs involving contact with vulnerable populations. Many of these statutes mandate criminal history background checks.

Employers, too, have a strong interest in knowing the background of their employees. Drawing on responses to the National Crime Victimization Survey, a Justice Department report estimated that an average of 1.7 million violent victimizations occurred in the workplace each year from 1993 through 1999. This included 900 homicides, 36,500 rapes or sexual assaults, 70,100 robberies and 1,636,600 aggravated or simple assaults.

Estimates of the costs, from lost work time and wages, reduced productivity, medical costs, workers' compensation payments, and legal and security expenses, are less exact, but clearly run into many billions of dollars. And these estimates do not include the costs associated with employee financial crimes such as fraud, theft and embezzlement. In addition, Employers face an explosive growth in negligent-hiring lawsuits and employer liabilities in the United States given these victimizations. Employers in negligent-hiring cases lose more than 70 percent of such lawsuits, and the average jury plaintiff award is more than $1.6 million.

The meetings of the EEOC have been marked by numerous references to recent social science research on "redemption" or the point in time during which a released offender has avoided further contact with the criminal justice system that renders his or her criminal record essentially useless in predicting the risk of reoffending. Relying on these studies, some have called for governmental action barring the inclusion of such information in criminal background checks.

The authors of these studies readily concede, however, that: (1) individuals with a prior arrest or juvenile contact with police *always* pose a risk of arrest that is statistically significantly higher than those without prior police contact or arrest; (2) there is no single estimate of time "clean" or "straight" that applies to all ex-offenders specifying when their risk of reoffending is no greater than the general population; and (3) the determination of time "clean" or "straight" that renders an ex-offender employable depends on specific attributes of the employer or job.

This "redemption research" does not identify a single estimate of the time since last contact with the criminal justice system at which a criminal record becomes "stale" and unpredictive, but rather a very large number of such estimates, each tailored to the unique circumstances of the particular offender, including age at first offense, nature of most recent offense, and current age (to mention just of few). Thus there is no single estimate on which a one-size-fits-all regulatory standard or administrative "bright line" sealing past criminal records can be anchored. The fruits of this particular line of research are more relevant to the employers' assessment of the comparative risk of individual job applicants than to the articulation of administrative or regulatory guidance or rules uniformly applied.

Finally, the Commissioners have been reticent to acknowledge a recent body of research demonstrating that criminal history background checks *reduce* employment discrimination against African-Americans. Harry J. Holzer and his colleagues found that employers who conducted criminal background checks on applicants were more than 50% *more likely* to hire African-Americans than employers who did not (24% versus 14.8%, respectively). Shawn Bushway has found that African-Americans have *higher* wages in those states that have automated access to criminal history records to the greatest degree; Bushway also found that access to criminal history records reduced the differential between whites' wages and blacks' wages and the differential between whites and black employment levels. The conclusion reached by Lior Jacob Strahilevitz is quite striking: we should "provide decision makers with something that approximates complete information about each applicant, so that readily discernable facts like race or gender will not be overemphasized and more obscure but relevant facts, like past job performance and social capital, will loom larger." This recommendation points in exactly the opposite direction as those recommending curtailing access to criminal histories through background checks; indeed, it suggests that such limits on access to information will make racial discrimination *worse*.

Jeffrey L. Sedgwick was appointed on January 2008 by President George W. Bush to serve as Assistant Attorney General for the Office of Justice Programs; he was confirmed by the Senate of

the United States in October 2008 and served until January 2009. Mr. Sedgwick also served until October 2008 as director of the Bureau of Justice Statistics, the statistical agency of the Department of Justice, a position to which he was appointed by President George W. Bush in January 2006. Prior to his appointments, Dr. Sedgwick taught for 30 years at the University of Massachusetts - Amherst. He is currently Professor Emeritus of Political Science at the University.