March 24, 2016

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

Dear Councilmembers:

Thank you for this opportunity to comment on your proposed Consideration of Criminal History in Employment Decisions Regulations (the “Proposal”). The Council is to be commended for its leadership in addressing this issue of critical importance to racial equality in the workplace, and for highlighting the vital role of disparate impact claims within employment discrimination law. I was honored to share some of my analysis of these issues with the Council as a guest speaker at your May 4, 2015 meeting, and I am gratified to see your action in this area. I hope these comments will assist you in the ongoing refinement of the proposed regulations.

My comments highlight three general areas where the Proposal could be clarified to more closely conform to the relevant law and to advance the policies underlying the Fair Employment and Housing Act. These areas are (1) specifying the appropriate role for national- and state-level statistics in establishing a prima facie case of disparate impact, (2) explaining the significance of “necessity” in the employer’s defense, and (3) prohibiting disparate treatment in employers’ use of criminal records. Both (2) and (3) highlight how uses of conviction history information that seem justifiable in isolation may be discriminatory when an employer applies a double standard.

These comments draw on my expertise as a law professor specializing in employment discrimination law and in legal issues concerning employment of people with past convictions. At UCLA School of Law, I regularly teach Employment Discrimination Law, which I also have taught at the University of Chicago and at Yale University during years as a visiting professor at their law schools. I have designed and now regularly teach a course in Reentry, Work, and Race. My first law review article addressing the application of disparate impact analysis to criminal records issues was published in 2002, and since then I have published regularly on employment discrimination law in forums ranging from the Columbia Law Review to the California Labor & Employment Law Review. My current research lies in developing a general theory of disparate impact liability and its relationship to other discrimination claims. Part of that research was recently published in the Stanford Law Review Online.

I. The Prima Facie Case of Disparate Impact

As currently drafted, Section 11017.1(d) provides little guidance on what a plaintiff must prove in order to establish a prima facie case of adverse impact, and it suggests various complications...
without clarifying their significance. I recommend that the Council address the relevance of state- and national-level statistics documenting deep, pervasive racial disparities in criminal records. Specifically, the regulations should explain when such statistics can be sufficient to establish a *prima facie* case. They should suffice absent evidence showing why this robust pattern of disparities may not apply to the particular employer use of criminal records at issue.

An instructive comparison comes from the existing FEHA regulations the two other “specific practices” addressed in Section 11017(d): height and weight restrictions. These regulations establish an irrebuttable presumption that such restrictions impose an adverse impact, relieving individual plaintiffs of any burden to establish a *prima facie* case. Employers simply are forbidden to use such restrictions “unless pursuant to a permissible defense.” § 11017(d)(2)-(3).

These longstanding height and weight regulations are grounded in the United States Supreme Court’s ruling in *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Applying federal employment discrimination law under Title VII, *Dothard* struck down an Alabama employer’s height and weight restrictions because of their disparate impact on women and the inadequacy of the employer’s defense.¹ One issue litigated in *Dothard* was whether the plaintiffs could establish a *prima facie* case by relying on national data showing the percentage of all women and men who were above or below certain heights and weights. In other words, this data was neither geographically tailored nor tailored to the age, education, or work experience characteristics of the labor market for the prison guard positions at issue.

*Dothard* held that “reliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population.” *Id.* at 330. Without such regional variation, this general demographic data could establish the relative percentages of applicants who would be excluded by selection rules tied to particular heights and weights. It was appropriate to infer that the specific labor market at issue would, in this respect, reflect the broader pattern. Eight Justices affirmed this principle, including Justice Rehnquist’s concurrence. *Id.* at 338. In explaining its approach, the Court noted the serious infirmities that would infect any alternative that relied on employer-level applicant flow data. Such data would be distorted when potential applicants may self-select out of applying for jobs from which they know they are excluded.² *Id.* at 330.

*Dothard*’s approval of the inference from general demographic statistics to the relevant labor market was also consistent with the Court’s foundational disparate impact opinion in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There, the Court relied on similarly general statewide statistics on racial disparities in North Carolina high school graduation rates as the basis for establishing that the employer’s high school degree requirement had a disparate impact. *Id.* at 430 & n.6 (1971). See also *Bradley v. Pizzaco*, 939 F.2d 610, 613 (8th Cir. 1991) (relying on national statistics concerning the incidence of pseudofolliculitis barbae to establish the racial disparate impact of an employer’s no-beard policy). There were no statistics tailored to the area

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¹ These comments assume that FEHA adverse impact analysis generally follows that for disparate impact claims under Title VII as amended by the Civil Rights Act of 1991, see *Frank v. Cnty. of Los Angeles*, 57 Cal. Rptr. 3d 430, 440 & n.3 (Ct. App. 2007), as the Proposal properly reaffirms, see § 11017.1(d).

² In this regard, criminal record exclusions are akin to height and weight or educational attainment rules. An applicant can know where he stands in advance of application of the rule; this is unlike, for instance, the effect of a test administrated by the employer or of a subjective decision-making process.
of the state in which the employer operated nor to the subset of the general population likely to apply, or be qualified for, the jobs in question.

These principles are instructive in the criminal records context. The ultimate question is whether plaintiffs have shown that, more likely than not, the challenged policy or practice causes an adverse impact. See, e.g., 42 U.S.C. § 2000e-2(k)(1)(A)(i); E.E.O.C. v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1278 (11th Cir. 2000). In other words, does it tend to disproportionately exclude applicants with a particular protected status relative to the effects of an otherwise identical hiring process that omitted the criminal record exclusion?3 As in Dothard and Griggs, a reasonable factfinder may draw that inference from national- and state-level statistics showing pervasive, deep racial disparities in criminal justice involvement. National statistics show that African-American men are nearly six times more likely to be incarcerated than non-Hispanic white men.4 African Americans are nearly two and a half times more likely to be arrested than Hispanic and non-Hispanic whites combined.5

Whether it is appropriate to draw conclusions from national- or state-level statistics about the labor market for a specific job at a specific employer depends on whether the overall pattern reflected in those statistics conceals substantial contextual variation. In Dothard, the Court assumed that sex differences in height and weight were unlikely to vary substantially by location, education, age, and so forth. This principle is not limited to biological differences but applies as well to deeply ingrained social patterns. In mid-century North Carolina, racial segregation was such a pattern, and so Griggs did not pause to worry that statewide disparities in graduation rates would conceal the absence of such disparities in some counties or among younger adults.

Unfortunately, racial disparities in today’s criminal justice system are as pervasive and robust as those at issue in Dothard and Griggs. For instance, the national level disparities cited above are replicated in every one of our nation’s 50 very different states.6 The degree of disparity does vary, from Alaska at the low end (4:1 black:white incarceration rate) to Iowa at the high end

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(11:1). But here it is essential to consider the probative power of the stupendously large disparities in question. Even if African Americans were excluded by these policies just 20% more often whites, that would satisfy the “four-fifths” rule of thumb for identifying particularly significant cases of adverse impact. See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (1978). See also United States v. City of Chicago, 549 F.2d 415, 428 (7th Cir. 1977) (utilizing fail rates rather than pass rates); Malave v. Potter, 320 F.3d 321, 327 (2d Cir. 2003) (relying on small, but statistically significant, disparities). When disparities instead are more like 200% or 600%, there is room for very substantial variations in degree that make no difference to whether there is an actionable disparity. Even a disparity merely one-tenth or one-twentieth the broader average would still be sufficient to make out a prima facie case.

The consistency of the nationwide pattern is replicated across California. Our incarceration rate is 8.8 times larger for African Americans than for whites. The felony arrest rate is 3.6 times larger. Across the state, 90% of counties have incarceration rates for African Americans at least double (100% higher) that for whites, far above the one-fifth (20% higher) rule of thumb.

Moreover, these disparities persist across distinctions between felonies and misdemeanors and among vastly different types of offense. Accordingly, absent additional evidence to the contrary, a reasonable person should, and certainly could, conclude that any particular criminal record exclusion will have an adverse impact, even if the policy applies only to select offenses.

Furthermore, these disparities are robust across demographic subsets that might be particularly important in the relevant labor markets for certain jobs. For instance, stark disparities are not confined to people with particular levels of education. Among 20-34 year olds with less than a high school education, black men are three times more likely than white men to be incarcerated, a rate of 37.1% for the former compared to 12.0% for the latter. Among 20-34 year olds with at least some college education, black men are seven times more likely to be incarcerated, a rate of 2.1% compared to 0.3%.

These examples by educational attainment illustrate the importance of distinguishing the essence of an adverse impact claim—disparity—from questions of absolute magnitude. Regardless of

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9 Id.

10 Id.


13 Id.
race, people without a high school degree are vastly more likely to be incarcerated than those with some college. Indeed, the statistics above show that African Americans with some college are 18 times less likely to be incarcerated than those with no high school degree and 6 six times less likely than whites with no high school degree. Nonetheless, despite the much lower absolute incarceration rates, the racial disparity in incarceration rates actually is much higher among those with more education. Similar points apply to comparisons across age groups.14

In the face of disparities this extreme and this robust, it is irrational to assume that disparities will disappear in some specific context without any evidence to that effect. Of course it always is theoretically possible that within some sub-population defined by geography, offense, or other job qualifications, no actionable disparity exists. But a plaintiff does not bear the burden of establishing the existence of a disparity to an absolute certainty, beyond all reasonable doubt, or even by clear and convincing evidence. Instead, the standard is simply a preponderance: is it more likely than not that the employer practice creates a disparate impact. For this reason, in the criminal records context, both the U.S. EEOC and the federal courts have relied on national statistics to establish an actionable disparity in the absence of countervailing evidence of employer-specific idiosyncrasy. See EEOC Guidance, supra note 4, at V.A.2 (Apr. 25, 2012) (collecting cases).15 That position is in keeping with sound logic, with the Supreme Court’s treatment of analogous issues in Dothard and Griggs, and with California’s regulatory approach to height and weight restrictions under the FEHA.

Although existing regulations already embrace an irrebuttable presumption of disparate impact for height and weight restrictions, the Council may not wish to go this far again. At a minimum, though, establishing a rebuttable presumption of disparate impact would be supported by state and national statistics such as those recited above, as well as further variations on them available to the Council and no doubt detailed in other submissions.16 Under such an approach, these statistics would establish a prima facie case as a matter of law. However, the employer could rebut the presumption by introducing evidence sufficient to show that the particular case at issue in fact deviates from the general pattern to a degree that eliminates the actionable disparity. As explained above, it would not be enough merely to show that the disparity in the particular case was smaller than in the general statistics: even eliminating half of a disparity makes no difference if the remaining half is large enough to be actionable.

14 Id.

15 One district court has rejected national statistics out of hand. See E.E.O.C. v. Freeman, 961 F. Supp. 2d 783, 799 (D. Md. 2013). On appeal, Freeman was affirmed on other grounds, without reaching this issue. 778 F.3d 463 (4th Cir. 2015). The Freeman district court opinion was an outlier in its reasoning and context. It neither acknowledged nor attempted to distinguish the directly contrary Supreme Court precedent cited above.

16 For simplicity, I have focused on black-white disparities. These can establish the unlawfulness of an employer’s screening practice, regardless of the race of the plaintiff challenging that practice. Like Title VII, the FEHA provides for legal action by “[a]ny person claiming to be aggrieved by an alleged unlawful practice.” Cal. Govt. Code § 12960(b); compare 42 U.S.C. § 2000e-5(f)(1). This language confers standing beyond merely any “person claiming to have been discriminated against” but instead reaches anyone within the statute’s “zone of interests.” Thompson v. N. Am. Stainless, LP, 562 U.S. 170 (2011). Because the statutes aim “to protect employees from their employers’ unlawful actions,” id. at 178, any employee harmed by the unlawful practice—such as any applicant with a criminal record excluded by the employer’s criminal records policy—may sue for relief, even if they are not a member of the group that suffers the disparate impact. See Anjelino v. New York Times Co., 200 F.3d 73, 92 (3d Cir. 1999).
Even if the Council is unwilling to establish such a presumption by regulation—despite its having done so in the past—at the very least it should make clear that state-level statistics of the sort discussed above are a sufficient basis for a reasonable fact-finder to conclude that adverse impact has been shown. Even if that conclusion is not necessary as a matter of law, such unrebutted statistics should suffice to defeat an employer’s motion for summary judgment. That approach is the bare minimum necessary to follow the sound principles articulated in Dothard and elsewhere adhered to in the criminal records context.

An example of regulatory language that could achieve this bare minimum would be as follows:

An adverse impact may be established based on state- and national-level statistics showing substantial, persistent disparities in criminal records. Circumstances bearing on whether an employer’s use of criminal records imposes an adverse impact include (a) whether state- or national-level disparities are large enough that even substantially smaller disparities would still constitute an adverse impact, and (b) whether there is a basis in fact to expect those disparities to be eliminated after accounting for characteristics of (i) the geographic area at issue, (ii) the particular offenses at issue, or (iii) the particular job at issue.

II. The Role of “Necessity” and the “Less is Better” Problem

In Section 11017.1(e)(1), the initial statement of the employer’s defense characterizes it as a showing that the challenged practice “bear[s] a demonstrable relationship to successful performance on the job and in the workplace and measure[s] the person’s fitness for the specific job, not merely an evaluation of the person in the abstract.” This language, drawn directly from Griggs, contains an important ambiguity that has been the source of much subsequent dispute. The issue is how tight the “relationship to successful job performance” must be to provide a defense. Although the precise formulation is notoriously difficult, some parameters are clear. The employer must do more than merely establish that its policy is rational rather than arbitrary. Instead, it must meet the more demanding standard connoted by “business necessity,” as the Proposal rightly and repeatedly notes. That standard is appropriately captured by a phrase used later in subsection (e)(2), namely “unacceptable level of risk.”

The easiest cases involving conviction histories are those in which the employer cannot establish that the prior conviction indicates any increase in the relevant risk. This may occur after enough time passes since conviction that the conviction itself provides no useful information. Identifying that amount of time is the goal of so-called “redemption” research in criminology. That research supports the Proposal’s commendable presumption against the business necessity of disqualifications based on convictions more than seven years old. Even if an increased risk of future conviction indicates an increased risk in some job-related consideration—an important assumption that an employer should be required to substantiate—the point is moot when past conviction fails to predict future criminal justice contact.

The difficult cases arise when a criminal record may indicate some elevated risk relative to an otherwise identical applicant with no record. How to distinguish between a real, yet insignificant, incremental risk and one that must be avoided as a matter of business necessity? There are two reasons why an employer should be required to show more than that the risk is above zero.

First, employers should not be permitted to apply a double standard by rejecting one level of risk in someone with a criminal record yet accepting that level in someone else. For any potential
concern—workplace violence, intoxication, theft, etc.—there is always some risk in any individual. Employers routinely tolerate such risk. Otherwise, they could not hire anybody. Therefore, it is essential to distinguish tolerable from unacceptable levels of risk. Establishing that there is some risk associated with a criminal record does not establish that this risk is unacceptable. If the employer accepts such risks in other employees, its conduct establishes that those risks are acceptable.

In analogous circumstances, courts have rejected attempts to establish business necessity merely by showing that “more is better.” See Lanning v. SEPTA, 181 F.3d 478, 493 (3d Cir. 1999); El v. SEPTA, 479 F.3d 232, 240 (3d Cir. 2007). All else equal, it might always be better to hire someone a little faster, a little stronger, a little better at math, etc. Griggs itself rejected that reasoning in the face of the employer’s plausible argument that its intelligence tests and diploma requirements would “improve the overall quality of the work force.” 401 U.S. at 431. Instead, in order to justify a blanket disqualification, the employer must establish that the level of proficiency at issue “reflects the minimum qualifications necessary to perform successfully the job in question.” Lanning, 181 F.3d at 489. Accord E.E.O.C. v. Dial Corp., 469 F.3d 735, 742 (8th Cir. 2006) (rejecting a strength test that required applicants to perform more quickly than the job itself required). Indeed, that principle is reflected in the Uniform Guidelines on Employee Selection Procedures, see 29 C.F.R. § 1607.5(H) (cited in Lanning, 181 F.3d at 489), which the FEHA regulations already incorporated by reference prior to this Proposal.

Analogous reasoning applies here. Just as employers cannot rely on the principle that more of a good thing is always better, neither can they rely on the principle that less of a bad thing—some risk of harm—is always better. Employers cannot justify imposing a disparate impact by requiring a positive qualification to a degree above the minimum necessary to perform successfully, and neither can they justify imposing a disparate impact by barring a risk factor to a degree below the maximum acceptable risk.

One way to assess whether a level of risk is “unacceptable” is to consider how employers treat similar risks when they are indicated by something other than an applicant’s criminal record, and how diligently employers seek to identify such risks. If an employer cites a fear of theft as a reason to exclude someone with a criminal record, then it should be taking other steps to identify comparable theft risks and to minimize them. If the employer does not, then even if someone with a record does present an elevated theft risk, the employer’s own conduct refutes the notion that this level of risk is “unacceptable.” This comparative assessment of what constitutes an “unacceptable” risk in someone without a criminal record is not well captured by reliance on individualized assessment of individuals who do have a record.

Second, employers routinely balance multiple factors relevant to a hiring decision. For this reason, an “all else equal” way of looking at criminal records and risk can be misleading. Consider an employer hiring drivers. The employer might care a lot both about the risk of an accident and about the risk of cargo theft. It might tolerate somewhat less proficient driving in someone who is extraordinarily trustworthy or somewhat less firmly established trustworthiness in someone who is an exceptionally safe driver. For both considerations there may be some absolute minimum required, but above that, there will be tradeoffs.

Now consider an applicant with a criminal record who also has an outstanding track record of safe driving under difficult conditions, a track record that surpasses most drivers whom the
employer hires. There could be circumstances where the criminal record rationally lowers the employer’s confidence in the applicant’s honesty. In a driver with a marginal safety record, or even a typical one, this doubt might be enough to reject the application. But it is an unacceptable risk only if that doubt is serious enough to trump an application that is unusually strong in other respects.

Any bright-line disqualification should be required to meet the following standard: the risk indicated by the record is sufficiently great as to justify excluding the applicant no matter how strong the application is in other respects. This standard is suggested by the Proposal’s use of the term “unacceptable risk,” but that conclusion may be undermined by the immediately following “negative bearing” language. Skepticism that this standard could ever be met is the intuition underlying the EEOC’s suggestion that bright-line exclusions almost never will be justified. Individualized considerations may defeat the inference from criminal record to unacceptable risk, even if it holds true on average.

Similarly, any individualized assessment should go beyond considering mitigating circumstances relating to the criminal record or post-conviction evidence of rehabilitation. It also should include attention to an applicant’s distinctive strengths.

The two concerns noted above also underline the importance of requiring the employer to specify the particular risk or risks that it is attempting to manage by considering criminal records. Is there a reason why any future criminal justice contact would be job-related? Is there a specific concern with workplace violence, intoxication, or theft? Only after the employer specifies the asserted relevance of a criminal record does it become possible to assess whether the employer’s rationale can be substantiated and whether it is sufficiently important to constitute “business necessity.” It is striking in this regard that the only scientific study designed to determine whether past conviction predicts future problems at work found that it did not.17

Examples of regulatory language that could address these concerns would be as follows:

To demonstrate that a policy or practice of considering conviction history is job-related, an employer must specify the job-related function or risk implicated by a conviction history and demonstrate that such a history predicts impairment of that function or existence of that risk.

A bright-line disqualification cannot be justified merely by showing that a conviction history indicates some elevated risk relative to someone similarly situated to the applicant or employee in question but who lacks his or her conviction history. Instead, an employer must demonstrate that this specific type and level of risk is unacceptable for any applicant or employee. If the employer would sometimes tolerate similar risks in other employees, including those without a conviction history but with other factors indicating a similar risk, then the employer’s conduct demonstrates that the risk, even if real, does not rise to the level of being unacceptable.

For a bright-line disqualification to be job-related and consistent with business necessity, the specific risk indicated by the conviction history must be sufficiently great as to justify excluding the applicant no matter how strong the application is in other respects. For such a risk to be indicated by the conviction history, it must be sufficiently consistent across

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all persons with such a conviction history that there is no reasonable likelihood that individualized assessment would indicate a materially lower risk in particular cases. Otherwise, the existence of an unacceptable risk cannot be determined without an individualized assessment.

An individualized assessment of an employee or applicant with a conviction history must consider whether the employee or applicant’s positive qualifications might outweigh any risks indicated by the conviction history. A level of risk that might justify excluding a minimally qualified candidate might not justify excluding an otherwise exceptionally qualified candidate.

III. Disparate Treatment in Evaluation of Conviction Histories

The Proposal omits any provisions directed at disparate treatment in an employer’s use of conviction history information. As the EEOC Guidance notes, that is an important way, in addition to disparate impact, that employers might use criminal records in violation of the Act. EEOC Guidance, supra, at IV. Consider an employer that utilizes a bright-line disqualification that can be successfully defended under the Proposal. There is no disparate impact liability. Nonetheless, if the employer applies the rule rigorously to applicants of color but occasionally makes ad hoc exceptions for white applicants, it may be liable for disparate treatment if an applicant’s race makes a difference to the employer’s willingness to make an exception. See Devah Pager, et al., Discrimination in a Low-Wage Labor Market: A Field Experiment, 74 Am. Sociol. Rev. 777, 789 (2009) (“Even in cases where the white tester presented as a felon, we see some evidence that this applicant was afforded the benefit of the doubt in ways that his minority counterparts were not.”). This concern is especially acute because of the risk that racial stereotypes about criminality will influence how employers evaluate conviction histories, self-consciously or not. See Devah Pager, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration 101-02 (2007).

Addressing the possibility of disparate treatment is an important complement to the Proposal’s salutary emphasis on individualized assessment. Relative to bright-line disqualifications, an individualized assessment may appropriately promote well-tailored use of conviction histories and avoid overbroad exclusions. It thereby may enable an employer’s use of conviction history to satisfy the business necessity standard. However, the inevitably subjective nature of individualized assessment may also open the door to disparate treatment. This may occur when the employer makes judgments about mitigating circumstances of the underlying offense, evidence of rehabilitation, and the totality of the applicant’s or employee’s qualifications.

There is considerable evidence of disparate treatment in employers’ use of conviction histories. In Devah Pager’s landmark audit study, white applicants with conviction histories received a much greater benefit from personal contact with employers than did black applicants with conviction histories. Id. at 103-06. The point is not that the latter received no benefit in absolute terms: they did, meaning that all applicants benefitted at least somewhat from personal contact. The problem, however, was the racially differential benefits of personal contact. For white applicants, personal contact increased the success of applicants with criminal records four- to five-fold, and it diminished the penalty for having a record from 70% to 20%, relative to white applicants with no record. For black applicants, however, personal contact increased their success much less (by one half, not four- to five-fold), and it actually increased the penalty for
having a record from 40% to 80%, relative to black applicants with no record.\textsuperscript{18} \textit{Id.} Another similarly designed study in a different city produced different results, with personal contact producing comparable reductions in the criminal record penalty for both white and black applicants. \textit{See} Devah Pager, et al., \textit{Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records}, 623 Annals Am. Acad. Pol. & Soc. Sci. 195, 211 (2009). Thus, the point is not that such differentials will inevitably arise, just that there is reason to be alert to the possibility.

One technique for limiting the risk of disparate treatment in individualized assessment may be for employers to provide their hiring managers with some guidance in how to consider conviction histories. There is considerable evidence that one way that racial disparate treatment occurs is through shifting standards. \textit{See} Pager et al., \textit{Discrimination in a Low-Wage Labor Market, supra}, at 788-90. Therefore, identifying the factors to consider and guiding the discretion in considering them may reduce discrimination. \textit{See} Tristin K. Green, \textit{Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory}, 38 Harv. C.R.-C.L. L. Rev. 91, 147-48 (2003). Similarly, when discretion is guided by formal policies, managers are more likely to assess applicants with conviction histories based on job-related criteria. \textit{See} Sarah Esther Lageson, et al., \textit{Legal Ambiguity in Managerial Assessments of Criminal Records}, 40 Law & Soc. Inquiry 175 (2015).

An example of regulatory language that could identify disparate treatment in use of criminal history records would be as follows, as a new Section 11017.1(c)(3):

\begin{quote}
An employer may not consider any aspect of a criminal history when the action taken on that basis is also substantially motivated by an enumerated basis, as provided in Section 11009(c). This would occur if the same criminal history were treated differently depending on, for instance, the race of the applicant or employee in question.
\end{quote}

With regard to individualized assessment, an example of regulatory language would be as follows, at the end of Section 11017.1(d)(2):

\begin{quote}
Any individualized assessment must itself be conducted in a nondiscriminatory fashion, including as noted in subsection (c)(3) above.
\end{quote}

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Thank you for considering these comments and for undertaking this important rulemaking process.

Sincerely,

Noah Zatz

\textsuperscript{18} The increase in the relative penalty is consistent with an absolute increase in success because applicants with no record also increased their success rate with personal contact, but to a greater degree.