**Wake Up Call for the Background Screening Industry**

By W. Barry Nixon, COO, PreemploymentDirectory.com

Several weeks ago, the article, *How Criminal Background Checks Lead to Discrimination Against Millions of Americans,*’ by Sarah Lageson was published in the Washington Post and it caused a bit of an uproar in the background screening community. Several prominent members of the industry posted comments very critical of the article choosing to focus on the aspects of the article which they felt misrepresented the background industry. I totally get where they are coming from, however, in my humble opinion, they missed the point of the article.

When I read several of the comments about the article it put me on the ‘horns of a dilemma.’ On one hand, I am very clear that I make my living by selling services to the background screening industry. At the same time, I am very uncomfortable with the role the industry continues to play as a contributor to perpetrating discrimination against underserved communities in our country and has made the conscious choice to turn a blind eye to this injustice. Please note, in my eyes, ‘doing nothing’ about a known problem is turning a blind eye.

# As a person of color, despite the potential challenge to my livelihood, I cannot stand quiet on the sidelines and be complicit about this issue. I am reminded of the famous words of Dr. Martin Luther King,

“The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy.” We are at point of controversy in this country and I want history to note that I stood up for what I believe is right.

First, let me be clear about the injustice I am referring to. The background screening industry thrives on and makes money by providing information to employers to help them make hiring decisions. This information provided to employers includes information gathered about an individual’s encounter with the criminal justice system, e.g., arrest, booking and convictions, which are based on a Police officer’s decision. If the officer’s decision is based on racism the information from this encounter is then baked into the information that is collected and reported by background screening companies. This is no small matter because criminal records are by far the most prevalent type of background check conducted by employers.

# It is well established by research that people of color, especially African-Americans and Hispanics are much more likely to have negative encounters with the criminal justice system. And, when this information is used in hiring decisions it potentially can lead to disparate treatment and illegal discrimination. As I am sure you will recall this was the genesis of the creation of the ‘Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions’ in April 2012. The intent of these guidelines is to reduce the negative impact of the improper use of arrest and criminal records in hiring decisions. The issuing of the EEOC Guidelines should have been a wake-up call for the background screening industry.

Just so you know, I have personal experience with being victimized by the criminal justice system. While I have been pulled over by the police on many occasions in different places I have lived for no apparent reason because I was driving an expensive car or in a place, they didn’t think I belonged. One of the many times I have been stopped stands out in my mind. This time it happened when I lived in Orange County, California. The first of these occurred when I was pulled over about 25 yards from my house. It was early on a Saturday afternoon and I was on full display in front of my neighbors being frisked and told to put my hands behind my head. One of the officer’s who was the most aggressive starting searching through my glove compartment and when asked what was he doing he said he was looking to see if I had a gun. Now as it turns out, my next-door neighbor saw what was happening and called the Chief of Police who was a friend of hers. After a few minutes two cruisers pulled up and a sergeant told the officers to back off and to leave. He apologized for what had happened. I share this story with you because I thank God my neighbors intervened, or we don’t know what might have happened. No, I didn’t get arrested, but without my neighbors’ intervention I easily could have been arrested and charged with some kind of crime.

Similarly, a couple years ago, Sen. Tim Scott (R-S.C.) gave a [powerful speech](https://urldefense.proofpoint.com/v2/url?u=https-3A__www.cnn.com_2016_07_13_politics_tim-2Dscott-2Dpolice-2Dracial-2Dprofiling_index.html&d=DwMFaQ&c=RAhzPLrCAq19eJdrcQiUVEwFYoMRqGDAXQ_puw5tYjg&r=nbKK7coza-77jenLzGL-ANiuQ3Xcws_fKsT8_vAbPP4&m=ZLM6jx8CaY2x8m7oQKacYJlnuPN-KG2S1kqUiCMqnbw&s=lcfQHLXUeRdoi6_pi9Wuv5DiewBdG4OFcv8_Mj2X7Bc&e=) on the floor of the U.S. Senate in which he talked about how he had been repeatedly pulled over by police officers who seemed to be suspicious of a black man driving a nice car.

What is my point? Numerous people of color have been pulled over just like me, however, based on different circumstances many of them were actually arrested so now they have an arrest record whether or not they were stopped for a legitimate reason or not. I also want to insert that while I have used examples that mostly deal with people being stopped while driving, the incidents occur in many other areas as well. Read the report, [NYCLU Releases Report Analyzing Stop-and-Frisk Data](https://www.nyclu.org/en/press-releases/nyclu-releases-report-analyzing-nypd-stop-and-frisk-data) on the infamous ‘stop and frisk’ process implemented in New York City that is known to have targeted black and Hispanics if you continue to doubt that people of color often are victimized by the criminal justice system.

One of the post that was critical of the Washington Post article severely challenged the notion that ‘an arrest reflected more on the arresting officer’s beliefs rather than any wrong doing by the person arrested’ and questioned this notion as being ludicrous. I encourage anyone that shares this belief to have a discussion with an African American male that is a friend or colleague to hear what they have to say about it.

This leads me to my first suggestion. The members of the background screening industry need to start having dialogues about these issues so that we are better informed, educate ourselves and learn where our own blind spots may be. Our blind spots are windows into our unconscious bias beliefs. I am sure you will agree, simply because you believe something does not make it true. As the voice of the industry I think PBSA should lead the way in facilitating these type dialogues.

I am sure as many of you have started reading this article you have thought we are just the messenger. We provide employers the information. We do not make hiring decision, so they are the culprit not us. While this statement certainly has some truth to it, it also ignores the reality that if the information we are providing is tainted then the old adage of ‘garbage in, garbage out’ comes into play. Since it is well established that many arrests are racially motivated are you doing your part to help employers have the full information about the data you are providing to them? Are you sufficiently educating employers about the information they are receiving from you so that they can potentially balance their decision making? Are we doing enough or are we simply standing on the sidelines saying, ‘it’s not my problem’? Consider that, in the meantime, real people’s lives are being adversely impacted.

The background screening industry shares in the responsibility for the negative impact in hiring decisions that are being perpetrated against people every day because they provided significant information that led to the final hire/no hire decision. Background screening providers should acknowledge the potentially problematic nature of the information they provide and take affirmative steps to mitigate the negative impacts of the information they are providing. Let me be very clear, I am not advocating that background screening providers stop providing the information, more so, that they actively pursue ways of mitigating the situation.

The background screening industry has many really smart people. If enough people are willing to recognize and address this issue, I am very confident that many potential solutions will be identified. As previously suggested, we could certainly do a better job in educating employers, e.g., HR professionals about the challenges faced in using criminal justice system information. Letting employers know that using criminal justice information may not be as objective, and cut and dry as many employers would like to believe it is. Perhaps a fact sheet about race, bias and the criminal justice system could be created that CRAs could provide to their clients along with the criminal record report. A PBSA task force could be instrumental in developing such a document.

Another possibility to consider is something that GoodHire has been doing for more than five years. They provide job applicants the opportunity to place a statement or commentary along with their report that explains situations and the circumstances associated with negative information that may be reported as part of their background check. Employers then have a more complete picture of a situation rather than making a decision on only partial information.

According to Elizabeth McClean, Corporate Counsel for GoodHire, ‘Our goal is to change the background screening report into a dialogue to allow an applicant to present themselves as an individual. Allowing candidates to comment has improved the candidate experience and enhanced their trust in the process.”

McClean added, it could also be a great title VII defense if you are being sued.

A real-life example that could occur as a result of the recent protest that have occurred nationwide over George Floyd’s death by police. A job applicant’s background check shows that they were arrested several times over the last three months for unlawful assembly, illegal gathering or trespassing. The practical reality is that they were executing their constitutional right to protest and were arrested. Using this information as part of a hiring decision would mean that Martin Luther King, Andrew Young (former Mayor of Atlanta and Ambassador to the United Nations), former senator, John Lewis, and many other great Americans would have difficulty getting jobs. To this point, it is likely that many of you are thinking, but background screening companies don’t report arrest records. While it may be true that your specific company does not report arrest records this cannot be said for the industry as a whole.

Research in 2014 showed that companies are using arrest records in hiring decisions (I wonder where they got that information from). The results were clear that an arrest without a conviction led to less employment callbacks in the experimental field study with black males being heavily impacted. In addition, a recent lawsuit, Gilder v. Sallie Mae Bank, D. Del., No. 1:20-cv-00924, class complaint filed 7/8/20, also illustrates that use of arrest records in hiring decision is still happening. Also, we have seen the rise of continuous screening as an important tool for employers and reporting real-time arrest records is oftentimes part of the information employers are being alerted to.

We are at a precipice and have the opportunity to change the course of history by evolving background screening to another level where it is not a simple tool of a broken justice system and helping applicants of all colors to have a fair chance at getting hired. Progressive companies are already looking at this issue and taking actions to help the situation. See Checkr’s article ‘[Taking Action to Help Reduce Bias in Hiring.](https://checkr.com/blog/taking-action-to-help-reduce-bias-in-hiring)’

So what would I like to see you do?

I am asking you to be a ‘stand up citizen’ and to consider how your company can contribute to addressing this issue. To stop simply standing on the sideline which makes you part of the problem. Working together, I truly believe we can make this situation better and do more to give our fellow Americans a fairer chance at getting meaningful employment.

Let me hear your thoughts and ideas.

*Barry*

<https://preemploymentdirectory.com/wbn-editorial-on-washington-post-article/>