



**Comments of the  
National Employment Law Project to the  
U.S. Attorney General, Office of Legal Policy  
(OLP Docket No. 100)**

**Summary of Recommendations**

We appreciate this opportunity to comment on the Attorney General's initiative to evaluate the nation's polices related to criminal background checks conducted for employment purposes and to make recommendations for reform to Congress. (70 Fed.Reg. 32849, June 6, 2005).

As an organization that promotes labor protections for the working poor, the National Employment Law Project (NELP) appreciates this opportunity to comment on this important initiative to evaluate federal policy related to employment screening for criminal records. NELP's Second Chance Labor Project works with advocates, policy makers and people with criminal records to ensure a more fair and effective system of employment screening for criminal records. The Project seeks to protect public safety and security while promoting the rehabilitative value of work and the basic employment rights of all workers, including those with criminal records.

**I. Policy Recommendations**

Section 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004 [P.L. 108-458] broadly mandates the Attorney General to "make recommendations to Congress for improving, standardizing, and consolidating the existing statutory authorization, programs, and procedures for the conduct of criminal history record checks for non-criminal justice purposes." In addition to 14 specific policy themes identified by Congress, the Department is authorized to make recommendations related to "any other factors that the Attorney General determines to be relevant to the subject of the report." (Section 6403(d)(15)).

**A. Adopt Employee Protections Necessary to  
Compensate for the Expanded Reliance on Criminal Records**

The federal law specifically calls on the Attorney General to make recommendations related to "privacy rights and other employee protections." (Section 6403(d)(5)). We strongly support policies to expand procedural rights in federal laws designed to ensure that criminal records are complete and accurate while also protecting privacy. In addition, we urge the Department to promote substantive employee protections that determine the appropriate limits on the scope of criminal background checks.

**1. Adopt substantive worker protections defining the proper scope of federal and state employment prohibitions based on criminal records.**

The Attorney General should recommend that Congress adopt the following substantive employee protections regulating employment disqualifications in federal and state laws based on an individual's criminal record. (Sections 6403(d)(5), (15)).

- Establish threshold federal standards regulating when to apply new screening requirements and employment prohibitions based on a criminal record, taking into account public safety and security, individual and civil rights.
  - Absent special circumstances, new employment prohibitions based on an individual's criminal records should only apply prospectively, not to current workers.
  - Disqualifying offenses should be time limited, and lifetime disqualifications should be eliminated except in special circumstances.
  - All workers with disqualifying offenses should be provided an opportunity to establish that they have been rehabilitated and do not pose a safety or security threat.
  - Employment prohibitions imposed by federal law should "directly relate" to the responsibilities of the occupation, thus especially broad categories of offenses should be more closely scrutinized (including blanket felony disqualifications and broad categories of drug offenses and other non-violent crimes that disproportionately disqualify people of color).
- 2. Adopt stronger procedural rights to ensure that employment decisions are based on more complete criminal records while also protecting the individual worker's privacy.**

We urge the Department to adopt the following recommendations to strengthen the procedural guarantees designed to ensure that criminal records are complete and reliable and that their privacy is adequately protected.

- Create additional safeguards against adverse employment decisions and discrimination based on incomplete criminal records, including a one-year limit on arrests with no dispositions. (Sections 6403(d)(5), (8), (12)).
- Federal procedural protections should be significantly strengthened by making the FBI's information available to all those who produce a criminal record while also clarifying that the opportunity to correct the individual's record should be available *before* an adverse employment determination is made by any authorized agency or employer. (Sections 6403(d)(5)(B), (15)).
- Consistent with current federal practice, fingerprints collected for employment and licensing purposes should be destroyed and not retained by the FBI. (Section 6403(d)(5)(C)).

**B. Strictly Limit the Scope of Private Employer Access to Federal Criminal Record Information**

We urge the Attorney General to recommend that Congress limit, not expand, the authority of private employers to request and review national records. (Sections 6403(d)(7), (9)).

Expanding the authority of private employers to request and review FBI criminal records absent state laws creates a significant potential for error and abuse by employers which will unfairly penalize the nation's workers. Thus, the employer's role should be limited to receiving the standard results of a "fitness determination" from the appropriate agency that reviews the FBI criminal records pursuant to state or federal employment and licensing laws.

**C. Employers, Not Workers, Should Absorb the Fees Requiring or Authorizing a Criminal Records Search for Employment Purposes**

Federal laws authorizing employers to request FBI criminal records should direct that the employer pay the full costs of the fingerprinting and processing of the criminal records, while also precluding employers from seeking to recoup the fee, either directly or indirectly, from the worker's compensation. (Sections 6403(d)(7), (10)).

Absent these protections, the significant fees associated with fingerprint-based criminal records searches will impose a financial hardship on working families, especially on the many new categories of low-wage, entry-level workers who are now required to be fingerprinted and screened for criminal records. In addition, the absence of federal laws regulating who pays for the criminal records search often leads to fees being passed on workers and to inequitable treatment of similarly-situated individuals from different states.

**D. Federal and State Agencies Should Devote Their Limited Resources to Strengthening the Infrastructure to Produce Reliable Criminal History Information, Not Rely on Commercial Providers of Criminal History Data and Screening Services**

We urge the Department to adopt the following recommendations which strictly limit, not expand, the functions of commercial firms as they relate to employment screening of criminal histories required by federal and state laws.

- Commercially-available databases should not be used to supplement the FBI criminal history information because of serious questions related to their accuracy and the industry's lack of compliance with privacy protections. (Section 6403(d)(1)).
- Because the demands to comply with new employment screening mandates require a strategic investment in the federal and state infrastructure, Congress should revisit the FBI's recent guidance authorizing governmental agencies to outsource sensitive screening functions involving the FBI's criminal records system. (Section 6403(d)(13)).

**Comments of the  
National Employment Law Project to the  
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(OLP Docket No. 100)**

We are writing in response to the Attorney General's request for comments related to criminal background checks conducted for employment and licensing purposes. (70 Fed.Reg. 32849, June 6, 2005).

As an organization that promotes employment opportunities and labor protections for the working poor, the National Employment Law Project (NELP) appreciates the opportunity to comment on this important initiative to evaluate federal policy related to employment screening for criminal records. NELP's Second Chance Labor Project works with advocates, policy makers and people with criminal records to ensure a more fair and effective system of employment screening for criminal records. The Project seeks to protect public safety and security while promoting the rehabilitative value of work and the basic employment rights of all workers, including those with criminal records.

**I. The Attorney General's Broad Congressional Mandate**

Section 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004 [P.L. 108-458] broadly mandates the Attorney General to "make recommendations to Congress for improving, standardizing, and consolidating the existing statutory authorization, programs, and procedures for the conduct of criminal history record checks for non-criminal justice purposes."

The statute lists 14 factors that the Department must consider in making these recommendations to Congress. These factors cover not only federal policies, but also recommendations related to state policy, private employment and the private entities in the business of providing criminal history information for employment purposes. In addition, the Department is authorized to consider "any other factors that the Attorney General determines to be relevant to the subject of the report." (Section 6403(d)(15)).

Finally, the Department is required to consult with state and federal officials, "appropriate representatives of private industry, and representatives of labor, as determined appropriate by the Attorney General." (Section 6403(e)). According to the Department's Federal Register notice, public comments are being solicited "to provide a means of input to these named parties, and to allow for broader public input on the issues that will be addressed in the report . . ." (70 Fed. Reg. at 32849).

**II. Recommendations for Federal Priorities**

The practice of employment screening for criminal records has reached a critical juncture nationally and in the states, thus requiring an informed evaluation of existing policies and options

for reform as mandated by Congress.<sup>1</sup> These developments have been driven by the renewed concern for national security and for public safety in occupations serving especially vulnerable populations. Given the scope of the federal mandate, we begin by describing the overriding concerns which we urge the Department to incorporate as a framework for responding to the specific policy challenges identified by Congress.

**A. The unprecedented volume of criminal records checks elevates the risk of error and abuse of the employment screening process, thus requiring expanded privacy, civil rights and basic employee protections.**

In 2002, for the first time, the FBI performed more fingerprint-based background checks for civil purposes than for criminal investigations.<sup>2</sup> In the past ten years, the number of civil requests for criminal records has more than doubled, exceeding 9 million in 2004. In 2004, nearly 5 million of the FBI criminal records requests were conducted specifically for employment and licensing purposes.<sup>3</sup>

State criminal records checks for employment and licensing purposes have also expanded as a result of the many new laws mandating criminal background checks of workers employed in a broad range of occupations and industries. For example, in California alone, about 1.5 million state criminal records checks were conducted last year pursuant to state laws, which accounts for roughly one in ten California workers employed in hundreds of occupations. In addition, criminal background checks conducted by private screening firms have increased at a record rate, with 80% of large employers in the U.S. now screening their workers for criminal records (an increase of 29% since 1996).<sup>4</sup>

These new screening policies potentially impact one in five adults in the United States who have a criminal record on file with the states.<sup>5</sup> As the Equal Employment Opportunity

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<sup>1</sup> In addition, the National Consortium for Justice Information and Statistics (SEARCH) has initiated a major review of the issue with the creation of a Task Force with the Bureau of Justice Statistics to examine “America’s expanding criminal record backgrounding culture.” The Task Force will “take a close look at the four issues likely to determine whether history will judge America’s emerging backgrounding culture as a good or bad thing,” including: 1) “clarity” of what is considered a background check; 2) “reliability” of the information produced; 3) the “relevancy” of specific disqualifying crimes; and 4) the “fairness” of the system, responding to whether the system can “ensure that backgrounding doesn’t disparately impact minorities; will not snuff out chances for reintegration; be misused; or will not smother the values that nourish democracy-anonymity, privacy and freedom?” SEARCH News, “BJS/SEARCH Task Force Examines America’s Expanding Criminal Record Backgrounding Culture” (2004).

<sup>2</sup> Steve Fischer, FBI, Criminal Justice Information Services Division, Office of Multimedia, Response to Information Request from Maurice Emsellem, National Employment Law Project (dated July 22, 2005). From 2002-2004, the number of fingerprint-based criminal records requests increased sharply, thus they again exceeded the number of civil requests in 2004 (9.6 million criminal requests, compared with 9.1 million civil requests).

<sup>3</sup> Id.; “Job Seekers Increasingly Fingerprinted: Background Checks Give Rise to New Technology, Mixed Reviews,” *Wall Street Journal* (June 13, 2005).

<sup>4</sup> Press Release, “SHRM Finds Employers are Increasingly Conducting Background Checks to Ensure Workplace Safety,” (Society for Human Resources Management, January 20, 2004).

<sup>5</sup> According to the latest state survey, there are 64.3 million people with criminal records on file with the states, including serious misdemeanor and felony arrests. Bureau of Justice Statistics, *Survey of State Criminal History Systems, 2001* (August 2003), at Table 2. Because of over counting due to individuals who have records in multiple states and other factors, to arrive at a conservative national estimate we reduce this figure by 30% (45 million). Thus, as a percentage of the U.S. population over the age of 18 (209 million according to the 2000 Census), an estimated

Commission (EEOC) concluded, excessive reliance on criminal records can also produce adverse employment decisions that have a discriminatory impact on African-Americans and Latinos who are far more likely to have had contact with the criminal justice system.<sup>6</sup> And despite the best efforts of government officials, criminal records checks also impose a hardship on thousands of workers who have never committed a crime when they become the victims of identity theft, “false positives” routinely generated by name-based criminal records checks, and delays often produced by the poor quality of images collected for fingerprint-based checks.

Given the unprecedented volume of national, state and private industry criminal records checks for non-criminal justice purposes, we urge the Attorney General to give special weight in its recommendations to Congress to the full range of privacy, civil rights and basic employee protections to guard against the elevated risk of error and abuse involving the livelihood of millions of working families.

**B. In order to more effectively promote public safety, new federal policies must also limit unwarranted barriers to employment for people with criminal records and protect current workers.**

The unprecedented reliance on employment screening for criminal records is largely driven by the nation’s fundamental concern for security against terrorism, public safety and the protection of especially vulnerable populations, including the elderly and children.

However, a broad consensus has also developed among policy makers, criminal justice professionals, and communities hit hard by crime, that far more should be done to reduce recidivism -- and thereby increase public safety -- by creating job opportunities for the record numbers of people leaving prison. President Bush, in his 2004 State of the Union address, joined in support of this cause, stating “We know from experience that if [former prisoners] can’t find work, or a home, or help, they are much more likely to commit more crimes and return to prison . . . America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life.”

Thus, federal legislation has been introduced with bi-partisan support (Second Chance Act of 2005, H.R. 1704) seeking to reduce recidivism in the participating states by 50% over 10 years. A key element of the strategy is to reduce unwarranted barriers in laws that limit the job opportunities of people with criminal records. Accordingly, the federal bill (Section 3(f)(4)(A)) requires participating states to make “recommendations with respect to laws, regulations, rules and practices that: disqualify former prisoners from obtaining professional licenses or other requirements necessary for certain types of employment, and that hinder full civic participation. . . .”

In addition, the bi-partisan Re-Entry Policy Council recently expressed concern for the role of employment barriers in federal and state laws, thus recommending that policy makers conduct a “review of employment laws that affect employment of people based on criminal history, and

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21.5% of the U.S. population has a criminal record on file with the states.  
6 EEOC Guidance, No. N-915-061 (September 7, 1990).

eliminate those provisions that are not directly linked to improving public safety.”<sup>7</sup> Similarly, the American Bar Association, adopting the recommendations of the Justice Kennedy Commission, recently urged the federal government to “limit situations in which a convicted person may be disqualified from otherwise available benefits, including employment, to the greatest extent consistent with public safety.”<sup>8</sup>

These respected authorities are responding to the staggering numbers of people now leaving prison and looking for work. A record 656,000 people were released from prison last year, and two-thirds of them have served time for non-violent offenses, mostly for drug and property crimes.<sup>9</sup> Access to meaningful employment, including many of the entry-level occupations now regulated by state and federal employment prohibitions, is critical to their successful “reentry” to society. The more they are denied access to jobs, the greater the risk of recidivism and crime, which impacts all of society but especially those low-income communities where they return in large concentrations. A steady job can make all the difference in turning an individual’s life around and contributing to the safety and security of the community.<sup>10</sup>

Accordingly, the Attorney General’s recommendations to Congress should be carefully tailored to promote public safety *both* in the workplace and in those communities hit hard by crime, thus taking into account the impact of employment prohibitions in screening laws on the economic opportunities of people with criminal records.

### **III. Specific Policy Recommendations**

The following comments respond more specifically to the factors that the Attorney General must consider in making policy recommendations to Congress for reforms related to employment screening for criminal records. In addition, we urge the Department to adopt several related recommendations based on its authority to consider “any other factors that the Attorney General determines to be relevant to the subject of the report.” (Section 6403(d)(15)).

#### **A. Employee Protections Necessary to Compensate for the Expanded Reliance on Criminal Records**

The federal law specifically calls on the Attorney General to make recommendations related to “privacy rights and other employee protections,” while also referencing several procedural protections, such as access to the criminal record when employment is denied and appeal mechanisms. (Section 6403(d)(5)). We recommend policies to expand procedural protections in federal laws designed to ensure that criminal records are complete and accurate and promote privacy (Section III.A.2). In addition to these procedural protections, we urge the Department to adopt recommendations incorporating key substantive employee rights (Section III.A.1) to determine the appropriate limits on the scope of criminal background checks.

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<sup>7</sup> Reentry Policy Council, *Charting the Safe & Successful Return of Prisoners to the Community* (2004), at page 299.

<sup>8</sup> American Bar Association, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (August 2004), Recommendations at page 2 (adopted by the House of Delegates on August 4, 2004).

<sup>9</sup> Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2004*, Table 7.

<sup>10</sup> Robert J. Sampson, John H. Laub, “Crime in the Making” (Harvard University Press: 1993).

**1. Substantive Worker Protections Defining the Scope of Employment Prohibitions Based on Criminal Records.** Federal laws require or authorize FBI criminal background checks covering millions of workers employed in both the public and private sectors. In addition to screening for criminal records, these federal laws often prohibit individuals with certain criminal records from being employed in various industries and occupations or they allow the states to do so based on information provided by the FBI's national records system.

For example, federal employment prohibitions enacted since the September 11<sup>th</sup> attacks now apply to workers with criminal records employed in the nearly the entire transportation industry (including aviation, port and ground transportation workers),<sup>11</sup> as well as private security officers.<sup>12</sup> In the past decade, Congress has also enacted laws regulating nursing home and home health care workers,<sup>13</sup> and workers who have "responsibility for the safety and well-being of children, the elderly, or individuals with disabilities."<sup>14</sup> Moreover, the Attorney General is authorized to make the FBI's national criminal records available to the states, covering most categories of workers who are disqualified due to a criminal history pursuant a state's employment and licensing laws.<sup>15</sup>

These federal and state laws are developed by diverse legislative committees and government agencies without the benefit of any uniform federal standards or guidelines. As a result, policies prohibiting employment based on a criminal record tend to evolve piecemeal without federal benchmarks to evaluate the comparative risks and benefits of subjecting new categories of workers to background checks. In addition, there are often no specific safeguards that, for example, take into account the relevancy of disqualifying offenses and protections for current workers who may have an isolated record but a history of loyal service to their employer.

For example, in May of this year, proposed regulations were issued by the Centers for Medicare and Medicaid Programs requiring criminal background checks of all those employed in federally-subsidized programs that provide hospice care, an estimated 20,000 workers not now screened by state laws.<sup>16</sup> While applying to new workers who provide "hands-on" patient contact, including maintenance and administrative workers, the federal mandate contains no limits on the offenses that may be considered or other basic employee protections.<sup>17</sup> There is also inconsistent treatment in federal laws, even among related categories of workers. For example, in contrast to the federal protections that apply to port workers and hazmat drivers, airport workers are not entitled to a procedure which allows them to "waive" a disqualifying offense in cases where the worker has clearly been rehabilitated.

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11 USA Patriot Act of 2001, 49 U.S.C. Section 5103a (hazmat drivers); Aviation and Transportation Security Act of 2001, 40 U.S.C. Section 44936 (unescorted access to airport security areas); Maritime Transportation Security Act of 2002 (46 U.S.C. Section 70105) (secured areas of ports).

12 Private Security Officer Employment Authorization Act of 2004, P.L. 108-458, Title VI, Subtitle E, Section 6402.

13 P.L. 105-277, Div. A, Title I, Section 101(b).

14 42 U.S.C. 5119a(a)(1).

15 P.L. 92-544; 28 C.F.R. 50.12.

16 70 Fed.Reg. 30840 (May 27, 2005).

17 In full, the standard provides that: "The hospice must obtain a criminal background check on each hospice employed and contracted employee before employment at the hospice." 70 Fed.Reg. at 30893 (quoting proposed 42 C.F.R. Section 418.114(d)).

**Recommendation:** Accordingly, the Attorney General should recommend that Congress adopt the following substantive employee protections regulating employment disqualifications under federal law based on an individual’s criminal record:

**a. Establish threshold federal standards regulating when to apply new screening requirements and employment prohibitions based on a criminal record, taking into account public safety and security, individual and civil rights.**

As described above, employment screening requirements increasingly impact millions of individuals who have a criminal record, some recently released from prison and others who have been working as productive members of society for many years job. Indeed, in response to a criminal background search, there is a significant chance (40% according to one study) that the employer will deny an applicant with a criminal record a job without regard to the nature of the offense or any other individual factors.<sup>18</sup>

Moreover, many of the occupations and industries now subject to employment prohibitions based on a criminal record also tend to employ entry-level workers. As a result, the new laws are foreclosing employment opportunities to those with criminal records who rely on entry-level work as their first, and often only, employment option. For example, federal laws have mandated or encouraged criminal records checks of large numbers of non-certified school employees, nursing home workers, and private security officers.<sup>19</sup> In addition, an analysis prepared for NELP based on U.S. Census data found that these and other entry-level occupations most “at risk” of being subject to screening laws and employment prohibitions are the same jobs that traditionally employ disproportionately more people of color.<sup>20</sup>

Before exposing these and other workers to more significant screening requirements, clear federal standards should be established that regulate the expansion of criminal background checks and take into account their impact on employment opportunities for current workers who may have a criminal record, new hires seeking work in entry-level occupations, and people of color. Accordingly, we urge the Department to adopt a balancing test that would consistently apply to proposed screening rules adopted by Congress and federal agencies. Similar to the ABA

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<sup>18</sup> According to this survey of Los Angeles employers, over 40% indicated they that they would “probably not” or “definitely not” be willing to hire an applicant with a criminal record, compared with 20% who indicated they would consider doing so and 35% who indicated it would depend on the applicant’s crime. Harry Holzer, Steven Raphael, Michael Stoll, “Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles,” (March 2003), at page 7.

<sup>19</sup> Under the National Child Protection Act, states are authorized to conduct FBI criminal records checks of most school employees, not just caregivers. According to the federal guidance, “school cooks and janitors fall within the definition of ‘provider’-and, therefore, are amendable to backgrounding – even though they have no direct responsibility for the care of children. They fall within the parameters of the VCA because their employer (the school) is a qualified entity.” CJIS Information Letter (dated December 1, 1999), at Questions 6. Similarly, the recent legislation authorizing a 10-state pilot program of background checks for nursing home and home health workers extends to all “direct patient *access* employees,” which expands the federal law that now applies to “direct patient *care*” employees. P.L. 108-173, Section 307(b)(2)(A)(1)(i); P.L. 105-277, Title I, Section 124. Thus, the pilot program covers support staff, including housekeepers, who have access to patients. Questions & Answers on the Invitation to Apply for “Program for Background Checks of Employees with Direct Access to Individuals Who Require Long Term Care, Sponsored by the Centers for Medicare & Medicaid Services” (August 2004), Question C7.

<sup>20</sup> University of California, Center for Labor Research and Education, *Security Screening and Entry Level Work* (2004).

recommendation, the standard should “limit situations in which a convicted person may be disqualified from otherwise available benefits, including employment, to the greatest extent consistent with public safety.”<sup>21</sup>

**b. Absent special circumstances, new employment prohibitions based on an individual’s criminal records should only apply prospectively, not to current workers.**

Current workers, their employers, customers and clients suffer severe hardships when new employment screening laws apply retroactively. Especially when new employment prohibitions apply to industries that are experiencing serious labor shortages, like trucking and nursing homes, employers are penalized as well when they have no choice but to fire experienced employees based on a disqualifying offense imposed by law.

These policies are entirely inconsistent with experience and research documenting that those workers with a history of employment are also far less likely to commit a crime. Indeed, a major study of former offenders concluded that “for the majority of men, job stability is central in explaining adult desistance from crime.”<sup>22</sup> The study also found that for “all crimes types, job stability has a significant negative effect on the hazard rate,” that is the likelihood of re-arrest.<sup>23</sup> However, while many federal laws apply prospectively to new hires, some of the more recent statutes, including the laws that apply to private security officers and transportation workers, extend broadly to all current workers without regard to their years of service or loyalty to the job.

Accordingly, we urge the Attorney General to recommend a review of existing federal laws and regulations that apply to current workers to evaluate their reliability and effectiveness in identifying actual security and safety risks. In addition, federal standards regulating future laws and agency regulations should be adopted to strictly limit criminal background checks as applied to current workers.

**c. Disqualifying offenses should be time limited, and lifetime disqualifications should be eliminated except in special circumstances.**

Another troubling feature of many federal and state employment screening laws is the absence of reasonable limits on the age of the offenses that disqualify a worker from employment. The absence of reasonable time limits on disqualifying offenses significantly undermines the compelling public safety goal of encouraging rehabilitation through work. These policies are also inconsistent with all the evidence indicating that those who have steered clear of the criminal justice system for extended periods of time are far less likely to commit another crime.

The 2004 law regulating private security officers illustrates where federal policy failed to impose reasonable age limits on criminal history information. According to NELP’s analysis, <sup>24</sup> states preclude anyone with a felony from being employed as a private security guard no matter

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<sup>21</sup> American Bar Association, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (August 2004), Recommendations at page 2 (adopted by the House of Delegates on August 4, 2004).

<sup>22</sup> *Crime in the Making* (1993), at page 162.

<sup>23</sup> *Id.* at page 176.

the age of the disqualifying offense (out of 36 states that have state law standards).<sup>24</sup> The new federal law which authorizes these states to also access the FBI's national criminal records does nothing to limit these lifetime disqualifications as applied to private security officers. Indeed, for those states that do not have their own standards regulating private security officers, the federal law also requires them to provide the employer the results of the FBI records check indicating any felony conviction no matter the age of the offense.<sup>25</sup>

Employment prohibitions that fail to place strict limits on the age of criminal history information are not supported by the research, which documents the declining likelihood of re-arrest over time. Indeed, a leading expert found that those individuals who remained crime-free for 10 years after their conviction are *no more likely* than the average person with no record to commit another offense.<sup>26</sup> The latest research, to be presented in September by respected researchers from the University of South Carolina and the University of Maryland, found even stronger evidence which supports strict age limits on disqualifying offenses. <sup>27</sup> Based on data tracking a cohort of offenders from the Philadelphia area, their study found that by the time a person who was arrested at age 18 reaches age 24 without committing any more crimes, he is statistically no more likely than someone with no prior record to commit a crime.

Accordingly, the Attorney General should recommend that Congress adopt the model of the Maritime Transportation Security Act of 2002 and other federal laws that impose reasonable time limits on disqualifying offenses. For example, the MTSA limits the age of most disqualifying offenses to 7 years since the conviction or 5 years from release, whichever event occurred more recently. (46 U.S.C. Section 70105(c)). These standards should apply not only to specific screening requirements mandated by federal law, but also to those situations where the states or private employers are authorized by federal law to receive the FBI national criminal records for employment and licensing purposes.

**d. All workers with disqualifying offenses should be provided an opportunity to establish that they have been rehabilitated and do not pose a safety or security threat.**

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<sup>24</sup> PowerPoint Presentation by Maurice Emsellem, National Employment Law Project, Congressional Briefing, "Smart on Crime' Agenda to Promote Public Safety While Addressing Occupational Barriers to Employment," (June 9, 2005).

<sup>25</sup> Specifically, the statute requires the state to notify authorized employers if the employee has been "convicted of a felony, an offense involving dishonesty or false statement if the conviction occurred within the previous 10 years, or an offense involving the use or attempted use of physical force against the person of another if the conviction occurred during the previous 10 years. . . ." P.L. 108-458, Section 6402((d)(1)(D)(ii)(I)(aa).

<sup>26</sup> Declaration of Jeffrey Fagan, Ph.D., in the case of *Earl Nixon v. The Commonwealth of Pennsylvania*, in the Commonwealth of Pennsylvania (No. C.D. 2000), at page 5. The affidavit, analyzing longitudinal data from Essex County, New Jersey, also concluded that: "These data dramatically demonstrate that the greater the number of years have passed since criminal activity, the lower the likelihood of subsequent activity." The Pennsylvania Supreme Court invalidated a state law imposing lifetime disqualifications on nursing home workers as applied to those who were employed less than one year. The Court invalidated the law, concluding that the one-year cut-off was irrational under state law, while two concurring Justices concluded that the lifetime disqualification was also unconstitutional. *Nixon v. Commonwealth of Pennsylvania*, 576 Pa. 385 (December 2003).

<sup>27</sup> Power Point Presentation, "Criminal Records and the Risk of Future Criminal Behavior," Study Collaborators Robert Brame (University of South Carolina), Megan Kurylchek (University of South Carolina), Shawn Bushway (University of Maryland).

All workers who have a criminal record should be provided an opportunity as part of the employment screening or licensing process to make their case that they have paid their debt to society and no longer pose a realistic threat to safety or security. This is especially true of individuals who have been convicted of isolated disqualifying crimes that have since steered clear of the criminal justice system and of those workers with a history of alcohol or drug abuse who successfully completed treatment programs.

Waiver protections exist in several state employment and licensing laws, thus providing an opportunity for individuals to challenge a disqualifying offense. For example, in California, most “community care” programs serving seniors, adults and children are subject to a criminal background check that identifies all misdemeanor and felony offenses. However, individual “exemptions” are granted by the Community Care Licensing Division taking into account non-violent offenses, the age of the crime and other mitigating factors.<sup>28</sup> Similarly, the Illinois Health Care Worker Background Check Act provides for a “waiver” from disqualification based on the age and seriousness of the offense, work history and other “mitigating circumstances” indicating that the individual “does not pose a threat to the health of safety or residents, patients, or clients.” (225 ILCS 46/40).

A leading example under federal law is the maritime security law, which established a “waiver” standard for port workers being screened as a “terrorism security risk.” (46 U.S.C. Section 70105(c)(2)). The MTSA waiver standard was also adopted by the TSA in the regulations now being implemented as part of the USA Patriot Act to screen more than two million commercial drivers who are authorized by the states to transport hazardous material. (49 U.S.C. 5103a; 49 C.F.R. Section 1572.7).<sup>29</sup> The MTSA waiver standard should be adopted by the Attorney General as a model for Congress to apply to all current and future federal laws that disqualify workers from selected occupations based on their criminal record.

**e. Disqualifying offenses imposed by federal law should “directly relate” to the responsibilities of the occupation and be more closely scrutinized to limit broad categories of offenses and less serious crimes.**

A fair and effective federal policy requires that special scrutiny apply to the major offenses that result in disqualification from employment or licensing, requiring that they “directly relate” to the responsibilities of the job. This necessary standard is consistent with the employment protections adopted by the EEOC as applied to criminal records and with the employment and licensing laws in place in half the states.<sup>30</sup>

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<sup>28</sup> California Department of Social Services, Caregiver Background Check Bureau, *Evaluator Manual: Background Check Procedures* (04RM-01) (January 2004). See Sections 7-1700 to 7-1736, describing the waiver process and the levels of exemptions based on the seriousness of the offense (including “simplified,” “standard,” and “non-exempt” offenses).

<sup>29</sup> As the preamble to the hazmat regulations state: “Waivers are being offered because an applicant may be rehabilitated to the point that he or she can be trusted in sensitive or potentially dangerous work or has been declared mentally competent.” 69 Fed.Reg. at 68738.

<sup>30</sup> EEOC Guidance No. N-915-061(September 7, 1990); Margaret Colgate Love, “Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide,” (July 2005), at page 9. The report documents that more than half the states have similar language prohibiting a refusal to hire and/or issue a professional or occupational license unless the offense is “directly related” (or “substantially related” or “rationally related”) to the

Absent these protections, thousands of individuals, including record numbers of people now being released from prison for non-violent crimes, will continue to be denied an opportunity to contribute to society. In addition, workers applying for the same jobs with the same criminal record will receive dissimilar treatment, which undermines the integrity of the screening system.

As the Criminal Justice Information Services states in its guidance interpreting the broad language of the National Child Protection Act (amended by the Volunteers for Children Act, or VCA): “A persuasive argument in favor of formalizing the criteria to be applied by the ‘authorized agency’ in rendering its fitness determination is the concern regarding equitable treatment. The broad breadth of the VCA raises the likelihood that those with similar backgrounds – for example, two teacher applicants with five-year-old convictions for petty larceny – will receive dissimilar treatment by two different clerks in the authorize agency who must apply the VCA in the absence of specific disqualifying criteria.” 31

Evaluating the proper scope of disqualifying offenses requires a close look at the profile of the population now leaving prison and entering the labor market. Over 650,000 people were released from prison in 2003 alone, which is an increase of more than 50,000 in just three years.<sup>32</sup> Three out of four individuals being released from prison have served time for non-violent offenses. 40% of the non-violent offenders expected to be released in the next six months committed property offenses. And 37% committed drug offenses, including the 17.5% being released for drug possession specifically.<sup>33</sup>

Also of special significance, 48% of non-violent offenders being released from prison are African-American and 25% are of Hispanic origin. As a recent state study found, “Among those arrested on drug charges, African Americans are five times more likely to be sentenced to prison terms of a year or more than Whites arrested on drug charges.”<sup>34</sup> Nationally, African Americans men and women are five to six times more likely than Whites to be incarcerated during their lifetimes.<sup>35</sup>

Disqualifying Drug Offenses: Given the vast numbers of people leaving prison with non-violent drug convictions, and the resultant impact of these disqualifying drug offenses on the employment opportunities of people of color, it is especially important to closely scrutinize disqualifying drug offenses in federal screening laws.

While time-limited drug offenses are appropriate disqualifications for those employed in medical and other settings involving exposure to controlled substances, they are far less relevant

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occupation.

31 CJIS Information Letter, dated December 1, 1999, Question 11.

32 Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2004* (April 2005), Table 7.

33 Bureau of Justice, “Profile of Nonviolent Offenders Exiting State Prisons” (October 2004).

34 Thomas P. Eichler, *Race and Incarceration in Delaware: A Preliminary Consideration* (Delaware Center for Justice and Metropolitan Wilmington Urban League: 2005), at page 5.

35 African-American men are six times more likely that White men to go to prison during their lifetime (32.2% versus 5.9%). American-American women are more than five times more likely that White women to go to prison during their lifetime (5.6% versus 0.9%) Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S., 1974-2001* (August 2003), at page 1.



procedural protections to ensure that criminal records are complete and accurate, while also safeguarding the individual's privacy.<sup>41</sup> (Sections 6403(d)(5), (8)).

By way of background, it is important to identify some of the key strengths and limitations of the federal criminal records system as applied to employment and licensing. In contrast to the state record systems and most of the private firms that conduct criminal record searches, the FBI's system makes it possible to search the records in most states. In addition, the FBI's system reduces the likelihood of misidentification when fingerprint records are available as required by federal law when searches are conducted for employment and licensing purposes.

However, the increased reliance on the FBI's national system for employment and licensing purposes also poses serious concerns. First, the quality of the FBI's system is dependent on the significant limits of state records. For example, in more than half of the states, 40% of the arrests in the past five years have no final disposition recorded, which means that the FBI's system is similarly incomplete.<sup>42</sup> Indeed, the federal records for each state are often *more* incomplete than the state criminal records database due to the inability of the FBI to access all available state records and the delays inherent in reporting dropped charges and other dispositions to the FBI.

In addition, the FBI system of fingerprint searches can produce serious processing delays. When fingerprints are collected for non-criminal justice purposes, they are often rejected by the FBI because of the impaired quality of the fingerprints collected by private firms and other non-criminal justice agencies. Indeed, fingerprints are rejected by the FBI 68% more often in the case of record requests submitted for civil purposes versus those submitted for criminal purposes.<sup>43</sup> In 2004 alone, 536,000 civil fingerprint submissions were rejected as inadequate by the FBI (or 6% of the total). As a result, the screening process is delayed and the worker's employment status is left pending while new fingerprints are submitted to the state, then screened again by the FBI.

**Recommendation:** We urge the Department to adopt the following recommendations to strengthen procedural protections ensuring that individual records are current and reliable and that their privacy is adequately protected.

**a. Create safeguards protecting against adverse employment decisions and discrimination based on incomplete criminal records, including a one-year limit on arrests with no dispositions.**

Stronger federal standards should be established protecting individuals with incomplete criminal records without prejudicing their employment or licensing opportunities. Records indicating an arrest without a disposition are especially problematic given the routine failure of the state systems to update their records and the burden imposed on the individual to negotiate

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<sup>41</sup> Section 6403(d)(5) calls for recommendations related to "Privacy rights and other employee protections, including – (A) Employee consent; (B) Access to records if employment was denied; (C) The disposition of the fingerprint submissions after the records are searched; (D) An appeal mechanism; and (E) Penalties for misuse of the information." In this section, we also address "Which requirements should apply to the handling of incomplete records," as set forth in Section 6403(d)(8).

<sup>42</sup> Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2001* (August 2003), at page 2.

<sup>43</sup> Steve Fischer, FBI, Criminal Justice Information Services Division, Office of Multimedia, Response to Information Request from Maurice Emsellem, National Employment Law Project (dated July 22, 2005).





















