



GREATER BOSTON  
LEGAL SERVICES  
*...and justice for all*

August 8, 2005

Mr. Richard A. Hertling  
Deputy Assistant Attorney General  
Office of Legal Policy  
4234 Robert F. Kennedy Building  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Re: Employment Screening for Criminal Records (OLP Docket No. 100)  
Attorney General's Recommendations to Congress

Dear Mr. Hertling:

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

Greater Boston Legal Services's (GBLS) Employment Unit represents families with incomes that are at 125% or less of the federal poverty guidelines. Many of our clients are recipients of public assistance, unemployment claimants, or low wage workers, who are seeking to improve their skills in order to obtain employment at a wage level that will provide adequate wages and benefits to support their families. Many of our clients have limited English proficiency, learning disabilities, are illiterate (some in both English and their native language), and have other barriers in accessing the employment.

The Employment Unit's mission is to represent low wage workers who are the most vulnerable in today's labor market to enable them to maximize their income and to overcome obstacles which limit their employment opportunities and income levels. We seek to accomplish this mission by representing workers to ensure income during periods of joblessness, to enforce their workplace rights, to increase access to job training programs, and to increase their wages to support their families.

Many of our clients have had difficulties obtaining or sustaining work because of a criminal record. These clients complain that they are offered a job and later turned down for the job because of a criminal record. They are barred from many of these jobs even when they have no convictions, and the criminal charges may have no bearing on the job for which they were applying. Nevertheless, low skilled workers find themselves shut out of the labor pool because of criminal records with little or no recourse. Thus, we have a special interest in the Attorney General's report and recommendations to Congress.

## **I. Recommendations for Federal Priorities**

Based on our experience advocating for the employment rights of people with criminal records, we urge the Department to incorporate two key concerns as a framework for responding to the policy challenges identified by Congress. First, we are especially concerned that the unprecedented volume of criminal records checks for employment purposes elevates the risk of error and abuse of the employment screening process. Thus, to compensate for the unprecedented potential for harm to the nation's workers, we recommend that the Attorney General give special weight in its policy proposals to the full range of privacy, civil rights and basic employee protections.

In order to more effectively promote public safety, new federal policies must also limit unwarranted barriers to employment for people with criminal records. As President Bush indicated in his 2004 State of the Union address, "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." 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.

## **II. Specific Policy Recommendations**

### **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)).

- 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 rules and disqualifications based non-violent crimes, including drug offenses, 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 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.

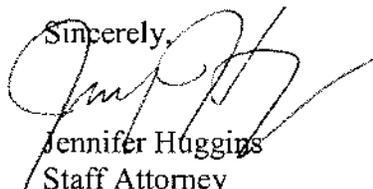
**D. Federal and State Agencies Should Strengthen their Infrastructure to Produce Reliable Criminal History Information, Not Rely on Commercial Providers of Criminal History Data and Screening Services**

We strongly 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)).

\* \* \*

Thank you for the opportunity to comment on this especially timely initiative to help shape the nation's policies regulating employment screening for criminal records. As these policies fast evolve to meet the public's concern for safety and security, now is the time to ensure that stronger worker protections and meaningful employment opportunities for people with criminal records become a key priority as part of a more fair and effective regime of criminal background checks.

Sincerely,  
  
Jennifer Huggins  
Staff Attorney  
Greater Boston Legal Services