

September 9, 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 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).

The mission of the D.C. Employment Justice Center is to secure, protect and promote workplace justice in the D.C. metropolitan area. We have a special interest in the Attorney General's report and recommendations to Congress because we routinely serve individuals who have criminal records that are proving to be a barrier for finding good employment. We help people try to seal and expunge records when possible, and work with people with criminal records to deal with those records in job interviews and applications.

I. Recommendations for Federal Priorities

Section 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004 [Pub. 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)).

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).

- 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 rules and disqualifications based non-violent crimes, including drug offenses, that disproportionately disqualify people of color).

