Roadblocks to Re-entry: Employment Obstacles Following Conviction and a Guide to Ease the Transition

Arizonans convicted of crimes often face obstacles in re-entering the community after completing the terms of their sentences and paying their debts to society. These obstacles, including barriers to employment and self-sufficiency, create roadblocks that can lead to recidivism. Come join a talented and diverse faculty for a discussion on how to overcome these barriers, to set aside criminal records, restore civil rights, and in the process reduce recidivism.

PRESENTED BY: Legal Services Committee

CHAIRS:
• Lori MacLeod, Petti and Briones PLLC
• Gary Restaino, U.S. Attorney’s Office

FACULTY:
• David Euchner, Pima County Public Defender’s Office
• Mary Jo O’Neill, Regional Attorney, Equal Employment Opportunity Commission
• Hon. Charles Pyle, United States Magistrate Judge
• Professor Andy Silberman, Director of Clinical Program, University of Arizona
• Marie Sullivan, President & CEO, Arizona Women’s Employment & Education, Inc.
• Wynkiesha McKnight, Maricopa County Adult Probation Department

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Roadblocks to Re-entry Materials

1. Panel Bios
2. “Court and Community Collaboration to Reduce Recidivism” (Judge Pyle)
5. Selected Statutes: A.R.S. §§ 13-905, 906, 907, 912 and 4051
6. Powerpoint: “Reality or Myth: The Plight of Ex-Offenders” (Prof. Silverman)
7. EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions (No. 915.002)
PANEL BIOGRAPHIES
Judge Pyle graduated from Stanford University with a Bachelor of Arts degree in 1970 and received his law degree from the University of Arizona College of Law in 1973. For ten years, beginning in 1977 through 1987, Judge Pyle was a staff attorney with Southern Arizona Legal Aid specializing in consumer and indigent health care.

In 1987, Judge Pyle then worked in the Civil Division of the Pima County Attorney’s Office, working extensively with the Pima County Health Department in their response to the AIDS crisis. From 1989 to 2001, Judge Pyle supervised the Tucson Office of the Liability Management Section of the Arizona Attorney General’s Office. During that time, he frequently wrote and lectured on the use of ADR, particularly mediation, to resolve civil disputes.

Judge Pyle was sworn in as a United States Magistrate Judge on June 28, 2001 for the United States District Court, District of Arizona, Tucson Division.
Biography of Andy Silverman

Andy Silverman is a Professor of Law Emeritus at the Rogers College of Law, University of Arizona. Even though he is retired, he still directs the Civil Rights Restoration Clinic and teaches Immigration Law at the law school where he has taught for 44 years. The Civil Rights Restoration Clinic was started eight years ago by Professor Silverman and Jonathan Rothschild, a lawyer who is now mayor of Tucson. Professor Silverman is also involved with the Arizona Justice Project where he has worked with volunteer lawyers and law students in representing Arizona inmates in challenging their convictions and sentences and applying for commutation before the Arizona Board of Executive Clemency.
**Biography**

**Mary O’Neill** is the Regional Attorney for the Phoenix District Office of the EEOC, which includes Arizona, Utah, New Mexico, Colorado, and Wyoming. She currently manages a legal staff of approximately 30 employees, litigates employment discrimination cases in federal court in the five states Mary Jo has responsibility for, advising her enforcement colleagues, and is a frequent trainer/speaker for the EEOC, local and national bar associations, employer groups, and community organizations.

She graduated Phi Beta Kappa and summa cum laude from the University of Arizona with a B.A. in political science and women’s studies in 1976. Following graduation cum laude from the University of Arizona law school in 1979, Mary Jo clerked for an appellate judge for a year and then represented indigent Native Americans individually and in groups at the Urban Indian Law Project, first as a Reginald Heber Fellow. Mary Jo is the past chair of the labor section of the Arizona State Bar Association and is very active in the Arizona NELA chapter. She is also the current President of the Morris Institute for Justice, a non-profit legal organization which advocates for poor Arizonans in the legislature, within governmental organizations, and in court. In 1986, Mary Jo began working at the EEOC as a trial attorney, then as a supervisory trial attorney, until she was selected as the Regional Attorney in 2002. While at the EEOC, Mary Jo has litigated many cases, conducted jury trials, and has negotiated many complex and difficult nationwide settlements, including the global settlement of the EEOC’s cases filed against Wal-Mart under the Americans with Disabilities Act and the nationwide gender promotion case against Outback. Mary Jo has also been selected to be a frequent trainer for lawyers and OGC staff on skills and substantive subjects, including discovery training, trial skills, deposition skills, new lawyer training and negotiation training.
Biography of David Euchner

David Euchner is the appellate unit supervisor of the Pima County Public Defender's Office and the 2014 President of Arizona Attorneys for Criminal Justice. He has argued and won cases before the Arizona Court of Appeals, Arizona Supreme Court, and United States Court of Appeals for the Ninth Circuit, and he is also admitted to practice before the Supreme Court of the United States. He graduated from Rutgers College, Rutgers University in 1994 with a Bachelor of Arts in Classics, and he received his Juris Doctor from Rutgers University School of Law in Camden in 1999.

Upon joining the Public Defender's Office in 2005, Dave began in the felony trial unit, and he transferred to the appellate unit in 2007. His caseload predominantly consists of cases involving convictions for first-degree murder and includes capital cases. In addition to direct appeals, he manages post-conviction collateral challenges (Rule 32's) involving complex and evolving scientific evidence, such as firearms identification, "shaken baby syndrome," DNA, insanity and mental health defenses, etc.

Dave has served on the Arizona Attorneys for Criminal Justice Board since 2009. Prior to his election as President-Elect in 2013, he was elected Secretary in 2011 and 2012 and appointed to chair the amicus/rules committee between 2011 and 2013. He has submitted amicus briefs in all state and federal courts on a variety of issues affecting the rights of the criminally accused and the practice of criminal defense in Arizona.

Dave has served on the State Bar's Criminal Jury Instructions Committee since 2010. He has given over twenty presentations on a variety of topics, including technological advances and the law, updates in Arizona case law, and introductory and advanced topics in appellate advocacy. Including amicus cases, he has participated in more than twenty oral arguments in appellate courts and has over thirty published opinions.
Marie Sullivan has been involved in education, women and family issues, and community development for over 40 years. She has been the President and CEO of Arizona Women’s Education and Employment, Inc. (AWEE), a non-profit organization dedicated to changing people’s lives through the dignity of work, since 1997. Prior to her work at AWEE, Marie worked in public policy development and advocacy in the social service and faith based sector. Currently, Marie is a member of the Maricopa County Workforce Connection Board, chairs the Board of Directors for Arizona Saves, serves as a board member for the Organization of Nonprofits (ONE), is a member of the Governance and Nominating Committee for the Catholic Community Foundation and participates as a member of the Phoenix College President’s Advisory Council and the ASU Community Leadership Council. Her other memberships include the Arizona Town Hall, Valley Leadership, and the Association of Fundraising Professionals. Marie has been awarded the Greater Phoenix Chamber of Commerce’s prestigious ATHENA Award, given to a woman acknowledged for her excellence in business, her community service and involvement, and her professional mentorship of women. She was the named Public Service Leader of the Year, Tribute to Women Award, by the YWCA and was named Goodman’s Good Guy Award winner as the outstanding nonprofit leader in the Metropolitan Phoenix area. For eight years Marie served as a publicly elected member of the Madison Elementary School District Governing Board, where she served both as President and Clerk of the Board. She represented her congressional district to the National School Board Association’s Federal Relations Network for over five years during that time. She is an alumna of Leadership America where she participated with a select group of women from throughout the United States to discuss and give leadership to issues affecting the American landscape, and an alumna of the Bank of America’s Neighborhood Excellence Initiative Executive Training program. Marie is also involved with a number of organizations focused on political equity and achievement for women, and workforce development. Marie is married and the mother of two young adults.

Additionally, she served on the governing board of the Arizona School Board Association and was an advising member to the national Executive Committee of the Council of Urban Boards of Education. She was on the Governor’s Commission on the Health Status of Women and Children in Arizona for several years.
Biography of Wynkiesha McKnight

Wynkiesha McKnight has enjoyed a ten (10) year career as a Surveillance Officer with Maricopa County Adult Probation. She has previously worked with probationers on intensive probation, as well as those who were sentenced to a DUI Court program. Since 2010, she has exclusively worked in a specialized prison re-entry unit as a Pre-Release Officer. She travels to various prisons in Arizona to interview inmates with consecutive probation upon release so critical needs can be identified at the pre-release stage. She has been directly involved in several federal grants which contributed to making this highly successful unit a permanent program within Maricopa County Adult Probation. Along with being a cognitive behavioral certified “Thinking for a Change” instructor, Wynkiesha has also conducted several trainings for the Arizona Office of the Court regarding prison re-entry and community reintegration.
MATERIALS
Reducing Recidivism – Why Is It Important

Four decades ago, three policy initiatives dramatically influenced our criminal justice system. In 1971, President Richard Nixon declared the War on Drugs. Quickly the focus of that war became interdiction and prosecution, instead of treatment, resulting in millions of arrests over the ensuing decades. At around the same time, politicians from both parties found it advantageous or even necessary to be “tough on crime.” Over the next three decades, criminal sentencing statutes were changed to provide ever increasing punishments, flat-time sentences, three-strikes provisions, and mandatory minimums. Finally, in 1974 a prominent sociologist, Robert Martinson, followed up his study of 231 prison rehabilitation programs in an article in the magazine Public Interest and in an appearance on 60 Minutes, where he explained that relative to prison rehabilitation programs, nothing works. Policymakers for decades understandably implemented the “nothing works” conclusion by doing nothing on rehabilitation.

The outcome of the confluence of these three policy initiatives has been dramatic and expensive. By the end of 2011, almost 7 million adults, one in 34, were in jail, prison, or on criminal justice supervision. Almost one in 100 adults were in jail or prison. The United States has by far the highest incarceration rate in the world, three times number two Poland, eight times Germany, and twelve times the rate of incarceration in Japan.

Our rehabilitation efforts have overall not been impressive. Each year 635,000 people are released after being sentenced to jail or prison. Two-thirds of those will be rearrested within three years of release. Of those sent back to prison, two-thirds return for “technical violations,” drug use or failure to report for example. Only one-third return for a new crime. Thirty percent of the new admissions to the Arizona State Prison facilities are for parole or probation revocations. This is perhaps not surprising given the de-emphasis of rehabilitation efforts in state and federal corrections for budgetary, policy or cultural reasons.

“..I thought that modern penology has abandoned that rehabilitation thing, and ... they no longer call prisons reformatories or whatever, and punishment...is the criterion now.”

“Let’s assume I don’t believe in rehabilitation, as I think sentencing authorities nowadays do not. Both at the Federal and the State levels, it’s been made clear.”

— Justice Antonin Scalia,

Transcript from Miller v. Alabama, March 20, 2012, pgs 21-22

Incarceration is very damaging to families, not infrequently leading family members into problems with mental health issues, substance abuse and even arrest. Even if all those issues are avoided, the economic harm and social stigma are significant. What is particularly unfortunate is these harms are being passed on from generation to generation. Moreover these harms dramatically impact our
neighborhoods, our community and our public treasury. All of these problems are exacerbated by recidivism.

The time has come to replace stigmatization and isolation with acceptance and inclusion. Our government and community institutions and entities must focus on rehabilitation, reducing recidivism and strengthening communities and families.

The Judge and Attorney in the Revocation Process

My impression is that revocation of post-conviction release conditions in state and federal court is a probation officer driven process. If a warrant is issued with the petition to revoke, revocation and a sentence of incarceration is most likely. Procedures are abbreviated and the time spent by the defense attorney and the judge during that process is minimal. In my view, more personal interaction with the defendant by the officer, attorney and judge during the revocation process could lead to greater success in avoiding revocation and reincarceration.

The situations I am referring to are only technical violations. If a new felony offense is committed while on supervision, revocation is the only alternative. Nationally about two-thirds of the probation and parole revocations are for technical violations. This is the biggest slice of reincarceration picture.

I have three suggestions for attorneys and judges to have a more positive impact on defendants in the revocation process for technical violations:

1. **Examine the Whole Picture**
   When a case gets to the point of revocation of conditions, the focus understandably is on the alleged violation. It is just as important to determine what successes the defendant has had and what other problems or challenges he is facing. If a defendant is succeeding on important issues like employment, schooling or remaining drug-free, will revocation set back that hard-earned success? Have we adequately dealt with barriers to successful compliance? I remain concerned that all of us, officers, attorneys and judges, tend to focus on the violating conduct and fail to analyze those two critical issues. At that point, revocation of release conditions becomes almost inevitable. If we acknowledge the success a defendant is having and identify the barriers to continued success or causes for present violations, we are in a far better position to avoid the default to incarceration and problem-solve a path to long-term success.

2. **Ask Why**
   Frequently, defendants will have several excuses for their violative conduct, or unknown problems impacting the violative conduct. Asking why presents an opportunity to coach the defendant through his excuses to better decision-making. It also allows us to identify unknown problems that are preventing success on supervision.
As an attorney analyzing a defense or a judge establishing a factual basis, the most important question is did you do it? For behavior modification the most important question is why did you do it? It concerns me that in far too many revocation proceedings that question is never asked.

The why questions can definitely encourage the defendants to try to excuse their conduct. Many of these defendants have experienced failure on a long-term, continuing basis. Their talent at on-the-fly excuse-making is somewhat understandable. They have no doubt also received harsh evaluations of their excuses for many years. Instead of evaluating the excuse, talk them through it. What were your other options? Did you have a better choice? How would making the better choice have impacted your family?

The response to a why question may also identify other problems. I missed work because I lost my childcare. I didn’t sign up for GED classes because I can’t read. I used drugs because I was stressed by a death in the family, a relationship break-up or a job loss. If officers, attorneys and judges ask the why question, there is an opportunity for problem-solving and adjusting the supervision plan for greater success going forward.

Deemphasize Cops and Robbers Mentality
Many people coming out of prison view probation officers as the police and the judge as the person who will return them to prison for the slightest violation. Consequences for behavior are key to successful supervision, but equally important is sincerely expressed commitment to the defendant succeeding on supervision. Defendants are used to messages of restraint and control and threats of reincarceration. They are not used to expressions of interest and concern for defendant’s success on release.

Last year I heard a presentation from Chief District Judge Casey Rogers concerning her reentry court program in the Northern District of Florida. She brought two of her success stories with her. One man was huge and covered in tattoos and looked like a classic “hard case”. It turned out he had made up his mind in prison that he needed to succeed for his children’s sake. He was a very motivated and successful participant. The other man had spent his time in prison planning on returning to “the life”, to restart his old criminal schemes. After meeting with Judge Rogers about participating in reentry court his whole attitude changed. He was stunned that a federal judge would meet with him outside the courtroom and discuss a path to success.

We should not prescreen failure based on appearance or attitude. As attorneys and judges our interaction with defendants is frequently not at the optimal time, but departing from our normal stern professional demeanor may ultimately lead to success in some cases. Communicating about what success would look like and how to get there, inquiring about children, parents or other family members, and generally not sending the message of the inevitability of incarceration can be an important step in the behavior and attitude change we seek.
Finally, encourage the defendant to look on his probation officer as a coach not a cop. That may not be an accurate description of the officer, the long-standing culture of our system being what it is, but it is nonetheless good advice. Most of these defendants have already been to prison, have already manipulated, lied and cheated others. Convince the defendant that keeping the probation officer from catching you doing something wrong is a small, short-term, meaningless victory. Actually avoiding bad conduct and recovering from mistakes quickly requires help from others, including the probation officer, but leads to long-term success. In my view, due process rights offer little pragmatic protection in the revocation context. Lawyers and judges should move the defendant out of the adversary mindset and instead get them focused on collaborating with the probation officer to achieve success.

**Reentry Programs**

Arizona has a number of specialized “courts” to help those with significant barriers to successful compliance with supervision. Maricopa County Superior Court and Adult Probation are national leaders in utilizing “problem-solving courts” to deal with challenging populations. Nationally the first of these courts were drug courts, and the drug court model is the basis for all of these courts whether the focus is addiction, mental health or returning veterans.

There are important lessons for attorneys and judges from the drug court model that can be applied outside the drug court setting. While the names of these courts can be diverse, including drug courts, therapeutic courts, problem-solving courts, mental health courts and veterans courts, there are three essential principles to all of these courts: motivational interviewing, effectively applying rewards and sanctions, and understanding addiction and co-occurring disorders.

The dynamics of motivational interviewing is almost the opposite of our present criminal justice system dynamic. MI emphasizes three aspects: collaboration, evocation and autonomy. MI uses collaboration while the justice system and corrections relies on confrontation. Collaboration builds more trust and forces the defendant to take more personal responsibility for behavior change. Similarly, evocation is a skill to direct the defendant to determine reasons for failure and make plans to change behavior. The principle of autonomy reserves the power to change with the defendant, as opposed to imposing change based on the power of authority.

Effective use of rewards and sanctions are critical to behavior change. Recognizing positive behavior is as important if not more important than sanctioning bad behavior, but our present criminal justice model focuses almost exclusively on the latter. Most importantly, to be effective rewards and sanctions must be imposed promptly, predictably and proportionately. Our current sanctions model of no action on the first few violations followed by several months in prison for the same conduct that was earlier ignored violates all three principles.

A majority of those going through the criminal justice system suffer from addiction issues, mental health issues or both. With the prevalence of addiction and mental health problems at
the foundation of so many defendants’ interactions with the criminal justice system, it is incumbent on lawyers and judges working in that system to learn as much as they can about substance abuse and co-occurring disorders. We often-times assume volitional conduct where that is not the complete story. Without responding to the underlying addiction or mental health problem, efforts at behavior change are futile.

These three principles are fundamental to specialized reentry courts, but they are not irrelevant to the defendants in the rest of the criminal docket. After a defendant has served his sentence and returns to the community for post-conviction supervision, this is the time to emphasize problem-solving and de-emphasize moral judgments. We need to resist the impulse to preach to and frighten defendants and instead work with them to mutually arrive at a plan for success the defendant is invested in. We need to look for opportunities to praise defendants, and respond much more quickly, consistently and proportionately to problematic behavior. And we have to provide realistic support to deal with substance abuse and mental health issues.

Community Collaboration – Second Chance Tucson
The criminal justice system is predominantly insular. The system relies on some community resources, usually by contract. We do little to foster relationships with non-profit groups, faith-based groups, service organizations, other government agencies or the private sector. We have this disconnect despite the fact that our reentry mission is to reconnect the former prisoner with the community he is reentering. To be successful, this is the critical mission for the court, the defendant and the community.

“Parole and reentry services of the future must focus on linking offenders with community institutions. This means we have to reach outside the criminal justice system to other units of government and the community: churches, ex-prisoners self-help groups, families, and non-profit programs. We have to share the responsibility for transitioning offenders to the community with the community. Community partnerships not only help the offender connect with the community, but just as important, help the community connect with the offender”


For the last year and a half I have been working with Tucson Mayor Jonathan Rothschild and a coalition of non-profit groups, faith-based organizations, a handful of private companies and a variety of government agencies. We call our group Second Chance Tucson. We have three goals:

a) Educate the community about the importance of reducing recidivism;
b) Provide support and greater coordination of services to those returning from jail or prison; and
c) Increase cooperation and understanding amongst the various entities attacking this problem.

Our first event was on September 27, 2013. There was a resource fair featuring over 30 tables with representatives for addiction treatment, government benefits, restoration of rights and even entrepreneurship training. Then there was a symposium presided over by Mayor Rothschild featuring two nationally recognized speakers, a service provider panel and a success story panel. Following that there were workshops on five different subjects.

Over 350 people registered at the event. The success story panel and video was the most important feature of the event. You can see the Sam and Lakeesha video at the Second Chance Tucson website: www.secondchancetucson.org. The video is nine minutes long and well worth watching. I am convinced that if you watch that video you will be convinced that our neglect of efforts at rehabilitation must change.

On March 20, 2014, we held our first Second Chance Job Fair. The Job Fair was proceeded by coordinated efforts with state and federal probation to identify good candidates for the Job Fair and train them to present themselves in the best light possible. Seventeen candidates who went through that training received jobs before the Job Fair. Thirty-two employers were present as well as 40 resource booths. Five hundred job-seekers attended even though the event was not aggressively publicized. Many of the job candidates were extremely pleased about the effort put forth to help them. This highly stigmatized constituency can be very motivated and appreciative of community efforts to assist them.

3. **Conclusion**

Incarcerating such a large proportion of our population and returning two-thirds of those released from prison back to prison is simply unacceptable. Lawyers and judges have a role in reducing recidivism. In particular, we need to avoid treating revocations for technical violations in a routine manner. We need to take the time and develop the skills to more effectively communicate with defendants. Innovative programs based on the well-studied drug court model should be encouraged. Most importantly, we need to get out of our offices, our buildings and our criminal justice system and collaborate in earnest with community resources to reduce recidivism. With a new approach we can make a major difference for individual defendants, their families and our community.
Court of Appeals of Arizona, Division 2, Department B.
The STATE of Arizona, Petitioner, v.
Hon. Deborah BERNINI, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, and
Debbie Lynn Copeland, Real Party in Interest.

No. 2 CA–SA 2013–0057.

Background: State petitioned for special action relief from order of the Superior Court, Deborah Bernini, J., setting aside defendant's conviction for attempted aggravated assault.

Holding: The Court of Appeals, Kelly, P.J., held that attempted aggravated assault conviction that was designated in the judgment of conviction as a non-dangerous offense was eligible to be set aside.

Denied.

West Headnotes

[1] Criminal Law 110 1226(3.1)

110 Criminal Law
110XXVIII Criminal Records
110k1226 In General
110k1226(3) Expungement or Correction; Effect of Acquittal or Dismissal
110k1226(3.1) k. In general. Most Cited Cases


110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In general. Most Cited Cases

[3] Criminal Law 110 1226(3.1)

110 Criminal Law
110XXVIII Criminal Records
110k1226 In General
110k1226(3) Expungement or Correction; Effect of Acquittal or Dismissal
110k1226(3.1) k. In general. Most Cited Cases

*47 Barbara LaWall, Pima County Attorney By Jacob R. Lines, Tucson, Attorneys for Petitioner.

OPINION

KELLY, Presiding Judge.

¶ 1 In this special action proceeding, the state has asked us to consider the relationship between a trial court's designation of an offense as “non-dangerous” for the purpose of conviction and sentencing, see A.R.S. §§ 13–702, 13–704, and another judge's later consideration of whether that same conviction had been for “a dangerous offense,” which would render the defendant ineligible to have the conviction set aside pursuant to A.R.S. § 13–907(D)(1). Specifically, the state argues the respondent judge erred as a matter of law when she set aside real-party-in-interest Debbie Copeland's conviction for attempted aggravated assault.

¶ 2 The state contends Copeland's conviction cannot be set aside because it was “for a dangerous offense, even though the allegation of the dangerous nature was dropped” by Copeland's plea agreement, and even though the offense had been designated at conviction as non-dangerous. The state also urges this court to “grant jurisdiction and publish its decision to provide guidance to the trial courts on this issue,” a matter of first impression in Arizona courts.FN1 Copeland joined in that request at oral argument.

FN1. In support of its argument for special action review, the state submitted two memoranda decisions that purportedly “address[ed] the issue” raised here and “resolve[d] it in the State's favor.” In those decisions, other panels of this court applied an earlier version of § 13–907(D) to conclude the designation of an offense as “non-dangerous” did not preclude a trial court from finding a defendant had been “convicted of a criminal offense ... [i]nvolving the use or exhibition of a deadly weapon or dangerous instrument,” 2006 Ariz. Sess. Laws, ch. 238, § 2, and therefore was ineligible to apply for relief under § 13–907.

¶ 3 Although special action review is not available “where there is an equally plain, speedy, and adequate remedy by appeal,” Ariz. R.P. Spec. Actions 1(a), the state's right to appeal from post-judgment orders is limited to those orders “affecting the substantial rights of the state or a victim.” A.R.S. § 13–4032(4). The state believes its right to a remedy by appeal is not readily apparent, and Copeland agrees. We may accept special action jurisdiction when the “remedy by appeal is not ‘equally plain’ compared to [a] remedy by special action.” State v. Bernini, 230 Ariz. 223, ¶ 5, 282 P.3d 424, 426 (App.2012). We do so here because the question raised may be resolved on purely legal grounds and is likely to arise again, but may evade review by direct appeal. See State ex rel. Romley v. Martin, 203 Ariz. 46, ¶ 4, 49 P.3d 1142, 1143 (App.2002) (“Special action jurisdiction is appropriate in matters of statewide importance, issues of first impression, cases involving purely legal questions, or issues that are likely to arise again.”). Although we accept special action jurisdiction, we deny relief, for the reasons that follow.

*48 Background

¶ 4 On March 28, 2011, Copeland pleaded guilty pursuant to a plea agreement that provided,

Having been placed under oath by the Court, Defendant, Debbie Lynn Copeland, agrees to plead guilty to the charge(s) of:

Amended count one: attempted aggravated assault, deadly weapon/dangerous instrument, domestic violence, a class four felony

On or about the 23rd day of October, 2010, Debbie Lynn Copeland attempted to assault [T.C.] with a deadly weapon or dangerous instrument, to wit: a knife, in violation of A.R.S. §§ 13–1001, 13–1204(A)(2) and (C),FN2 13–3601, 13–603,
The agreement also “amend[ed] the charges filed in this case to the offense(s) set forth above,” with “[a]ll other charges and allegations in this case ... dismissed.” Presumably, the agreement's dismissal of “other ... allegations” included the dismissal of a separate allegation that Copeland had committed a “dangerous offense” that subjected her to an enhanced sentence under § 13–704(A). The agreement did not exclude the possibility of probation, but required that any probation ordered by the court be for a minimum three-year term and include specific conditions.

¶ 5 The trial court accepted Copeland's guilty plea, stating in its sentencing minute entry,

It is the judgment of the court that the defendant is guilty of amended count one: attempted aggravated assault, deadly weapon/dangerous instrument, a knife, domestic violence, a Class Four Felony, nondangerous, nonrepetitive offense, in violation of A.R.S. § 13–1001, 13–1204, and 13–3601 committed on October 23, 2010.

The court suspended the imposition of sentence and placed Copeland on a three-year term of probation.

¶ 6 On April 29, 2013, the respondent judge awarded Copeland a certificate of graduation from a “Specialty Court” and ordered her probation successfully terminated. On May 1, Copeland applied for an order setting aside her judgment of conviction and “restoring her civil rights, with the exception of the right to bear arms,” pursuant to A.R.S. §§ 13–907 and 13–908. Recognizing that § 13–907(D)(1) provides the section “does not apply” to a person “convicted of a criminal offense ... [i]nvolving a dangerous offense,” Copeland argued her “conviction is not for a dangerous offense” because “[i]n accordance with her plea of guilty, [she] currently stands convicted of attempted aggravated assault, a non-dangerous class four felony.”

¶ 7 The state did not object to restoration of Copeland's civil rights, but argued § 13–907(D)(1) precluded the respondent judge from setting aside the conviction because the charge to which Copeland had pleaded guilty, as reflected in her plea agreement, was necessarily a dangerous offense, notwithstanding its designation at conviction as non-dangerous. Relying on State v. Leon, 197 Ariz. 48, ¶ 8, 3 P.3d 968, 970 (App.1999), the state maintained its construction of § 13–907(D) “is consistent with case law” in which this court has found the designation of a prior offense as non-dangerous, and therefore not subject to an enhanced sentencing range, is not necessarily determinative of other sentencing factors. After a hearing, the respondent granted Copeland's motion to set aside her conviction, and the state's petition for special action relief followed.

FN3. Because Copeland was a first-time felony offender successfully discharged from probation, the civil rights she sought to have restored were restored by operation of law. See A.R.S. § 13–912.

FN4. In granting Copeland's motion, the respondent judge did not identify her reasons for rejecting the state's argument that § 13–907(D) precluded such relief.

Discussion

¶ 8 We review a decision to set aside a conviction for an abuse of discretion. See A.R.S. § 13–908; State v. Key, 128 Ariz. 419, 421, 626 P.2d 149, 151 (App.1981). We review de novo legal issues, including issues involving statutory construction.
Rasmussen v. Munger, 227 Ariz. 496, ¶ 4, 260 P.3d 296, 297 (App.2011). According to the state, Copeland was ineligible to apply to have her conviction set aside under § 13–907(D) because she was “convicted of a criminal offense ... [i]nvolving a dangerous offense,” even though the judgment of conviction specifies that she was convicted of a non-dangerous offense. Implicitly, the state raises the legal question whether the respondent judge misapplied the law and abused her discretion if she relied on the judgment of conviction designating the offense as non-dangerous in finding, over the state's objection, that Copeland was eligible to apply to have her conviction set aside.FN5 See Tobin v. Rea, 231 Ariz. 189, ¶ 14, 291 P.3d 983, 988 (2013) (“Misapplication of law or legal principles constitutes an abuse of discretion.”). As addressed below, we conclude such reliance would not be an abuse of discretion.

FN5. See supra note 1. The state's related claim—that the attempted aggravated assault charge in Copeland's plea agreement necessarily establishes her “conviction was for a dangerous offense”—is inconsistent with Arizona law regarding the crime of attempt. See A.R.S. § 13–1001(A)(2) (attempt encompasses “any step in a course of conduct planned to culminate in commission of an offense”); Mejak v. Granville, 212 Ariz. 555, ¶ 20, 136 P.3d 874, 878 (2006) (“an attempt to commit an offense does not require that all the elements be present for the commission of the offense,” but “requires only that the defendant intend to engage in illegal conduct and that he take a step to further that conduct”); State v. May, 137 Ariz. 183, 187, 669 P.2d 616, 620 (App.1983) (travelling to intended victim's house while armed under circumstances inferring intent to assault victim sufficient to establish attempted aggravated assault under §§ 13–1001 and 13–1204(A)(2)); cf. State v. Kiles, 222 Ariz. 25, ¶¶ 51–52, 213 P.3d 174, 185 (2009) (capital defendant's conviction for attempted aggravated assault not prior felony conviction involving use or threat of violence “because Arizona's attempt statute permits a crime to be committed with a single nonviolent step”). In light of these authorities, the language in Copeland's plea agreement—that she had “attempted to assault [T.C.] with a deadly weapon or dangerous instrument, to wit: a knife”—does not establish that she “us[ed] a knife” to commit that attempt, as the state contends.

Definition of “Dangerous Offense”

¶ 9 “‘Dangerous offense’” is defined in A.R.S. § 13–105(13) as “an offense involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person.” This definition was added in 2008 to § 13–105, the general definition section for title 13, when the legislature “reorganiz[ed] title 13, chapters 6 and 7, ... for the purpose of simplifying the criminal sentencing laws.” 2008 Ariz. Sess. Laws, ch. 301, §§ 10, 119. The language for the definition was drawn from former A.R.S. § 13–604, 2007 Ariz. Sess. Laws, ch. 248, § 1, a statute that prescribed enhanced penalties for “[d]angerous ... offenders” “if the dangerous nature of the felony is charged in the indictment or information and admitted or found by the trier of fact.”

¶ 10 Since the legislature's reorganization of Arizona's sentencing statutes in 2008, the substance of this sentence enhancement provision is found in § 13–704 and is applicable to “a person ... who stands convicted of a felony that is a dangerous offense,” as now defined in § 13–105(13). In 2011, the legislature amended § 13–907(D) to adopt the phrase “dangerous offense” for the purpose of the exclusions found in that subsection._FN6 2011 Ariz. Sess. Laws, ch. 90, § 5.

FN6. Before its amendment in 2011, the subsection had provided, in relevant part,
“This section does not apply to a person convicted of a criminal offense: 1. Involving the infliction of serious physical injury. 2. Involving the use or exhibition of a deadly weapon or dangerous instrument.” 2006 Ariz. Sess. Laws, ch. 238, § 2. For the purpose of this special action, we accept the parties' assumption that the current statute applies. See In re Shane B., 198 Ariz. 85, ¶¶ 11, 16, 7 P.3d 94, 97–98 (2000) (criminal statute “may be applied retroactively if it has no effect on the underlying offense or the resulting punishment for that offense” and does not affect “pre-existing substantive rights”); Key, 128 Ariz. at 421–22, 626 P.2d at 151–52 (unlike restoration of “fundamental” civil rights to vote, hold office, and serve as juror, “[t]here is no fundamental right” to set aside a conviction; latter is “special benefit conferred” at court's discretion).

Application to Set Aside Conviction under § 13–907

¶ 11 Section 13–907 provides, “Except as provided in subsection D of this section, every person convicted of a criminal offense, on fulfillment of the conditions of probation or sentence and discharge by the court, may apply to have the judgment of guilt set aside.” § 13–907(A). Section 13–907(D) thus serves a gate-keeping function; it identifies those who are ineligible even to apply for such relief. Relevant here, § 13–907(D)(1) provides, “This section does not apply to a person who was convicted of a criminal offense ... [i]nvolving a dangerous offense.” When a motion to set aside a conviction is filed by an eligible applicant—that is, by someone not subject to the exclusions in § 13–907(D)—the decision to grant or deny the request “is always discretionary with the court.” Key, 128 Ariz. at 421, 626 P.2d at 151; see also A.R.S. § 13–908 (grant of relief “under the provisions of [title 13, chapter 9] shall be in the discretion of the superior court judge”).

Does “Dangerous Offense” Have a Distinct Meaning under § 13–907(D)?

¶ 12 The state maintains Copeland's argument below “incorrectly conflates the definitions of the term ‘dangerous’ as it is used in Section ... 13–907(D)(1) ... and the term as it is used in the sentence enhancement scheme set forth in ... § 13–704.” As suggested in the state's opposition to Copeland's motion below, this court previously has held a judgment's designation of an offense as non-dangerous, and therefore not subject to § 13–704, may not preclude consideration of whether the prior offense was subject to sentencing decisions based on other, similarly worded factors. For example, in Leon, an offender challenged a sentence enhancement imposed for committing dangerous offenses while on probation for “an offense resulting in serious physical injury or an offense involving the use or exhibition of a deadly weapon or dangerous instrument.” 197 Ariz. 48, ¶¶ 1, 3, 3 P.3d at 969, quoting former A.R.S. § 13–604.02(A), 1997 Ariz. Sess. Laws, ch. 34, § 2 (now A.R.S. § 13–708(B)). Leon had been placed on probation for felony disorderly conduct committed by “recklessly handl[ing], display[ing] or discharg[ing] a deadly weapon or dangerous instrument,” A.R.S. § 13–2904(A)(6), designated at sentencing as a non-dangerous offense. Id. ¶¶ 5–8.

¶ 13 We noted “[t]he designation of [Leon]'s disorderly conduct conviction as nondangerous at sentencing on that charge governed the sentencing range for that offense” pursuant to former § 13–604(F), and the “designation of the prior conviction as nondangerous, as opposed to dangerous, could affect the sentencing range under [former] § 13–604 on some offenses in the present case.” Id. ¶ 5. But “[b]ased on the plain language” of former § 13–604.02(A), we concluded the legislature had “not limited the predicate for enhanced punishment under that provision to release or escape from confinement for offenses considered ‘dangerous’ ” under former § 13–604. Id. ¶ 6. Thus, by distinguishing the language used in the two statutes, we determined Leon's
sentences were enhanced properly pursuant to § 13–604.02(A), notwithstanding the designation of his prior disorderly conduct conviction as non-dangerous, because he was sentenced for dangerous offenses committed while he was on probation for an offense that necessarily “involved the use or exhibition of a deadly weapon.” *Id.* ¶¶ 6–8.

**FN7.** Specifically, we wrote:


> [Section] 13–604.02(A) enhances punishment whenever a defendant is on release or has escaped from confinement for a prior offense which “result [ed] in serious physical injury,” whereas § 13–604 requires either the “intentional or knowing infliction of serious physical injury” in order for a crime to be designated as dangerous. The second sentence of § 13–604.02(A) also applies when a defendant is on release or has escaped from confinement for a prior offense involving the use or exhibition of a deadly weapon, whereas § 13–604(P) requires the exhibition be in a “threatening” manner for the crime to be dangerous. Furthermore, the second sentence of § 13–604.02(A) also enhances punishment when a defendant is on release or has escaped from confinement for a prior offense which was “a serious offense as defined in § 13–604,” although serious offenses are not necessarily dangerous offenses. Compare § 13–604(P) and (U)(3).

*Leon, 197 Ariz. 48,* ¶ 6, 3 P.3d at 969–70 (emphasis added in *Leon*).

¶ 14 Similarly, in *Montero v. Foreman,* we found no error in the trial court's determination that a defendant convicted of a drug *¶ 51 possession charge would be ineligible for probation under A.R.S. § 13–901.01 because his previous conviction for disorderly conduct “constituted a ‘violent crime,’” defined as the “‘criminal use of a deadly weapon or dangerous instrument.’” 204 Ariz. 378, ¶¶ 5, 12–13, 64 P.3d 206, 208–10 (App.2003). Like Leon, Montero previously had been convicted of “[r]ecklessly handl[ing], display[ing] or discharg[ing] a deadly weapon or dangerous instrument” pursuant to § 13–2904(A)(6), and that offense had been designated a non-dangerous offense at sentencing. *Id.* We explained that “even though the definitions of these two terms are similar, ‘dangerous’ and ‘violent’ are different concepts,” *id.* ¶ 12; the designation of the offense as non-dangerous at sentencing therefore did not preclude a finding that Montero had been convicted of a “violent offense,” rendering him ineligible for probation under § 13–901.01, *id.* ¶¶ 12–13.

[3] ¶ 15 Thus, in *Leon* and *Montero,* we expressly relied on distinctions between the definitions of “dangerous” in former § 13–604 and definitions of similar—but not identical—concepts found elsewhere in the criminal code. In contrast here, we see no basis for distinguishing a determination of whether an offense was “dangerous” pursuant to § 13–704, as entered in the judgment of conviction, and whether it was “dangerous” pursuant to § 13–907(D). Thus, contrary to the state's argument, there are no separate definitions to “conflate[ ]” in this case, because both statutory sections now rely on the common definition of dangerous offense in § 13–105(13). Although the state suggests a trial court may not rely on a judgment of conviction designating an offense as non-dangerous to conclude a defendant was not “convicted” of a dangerous offense, and so is not subject to the exclusion in § 13–907(D), it cites no authority to support this proposition. Nor has the state explained why the judgment of conviction designating Copeland's offense as non-dangerous is not a conclusive resolution of that issue, or why relitigation of the designation is not barred by principles of res judicata and collateral estoppel. See *State v. Williams,* 131 Ariz. 211, 213, 639 P.2d 1036, 1038 (1982) (collateral estoppel “}
‘means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit’ 


¶ 16 At oral argument, the state reasoned that, as a policy matter, it would like the flexibility to reach an appropriate, negotiated resolution by a plea agreement in which it dismisses allegations of a dangerous offense—and therefore does not subject a defendant to the sentence enhancement features of § 13–704—without losing the ability to assert the offender “was convicted of ... a dangerous offense” under § 13–907(D)(1), and therefore is ineligible to apply for a set-aside of the conviction. We are not persuaded the state loses much by our resolution of this issue.

¶ 17 As we already have explained, § 13–907(D) serves a gate-keeping function; it precludes those convicted of a dangerous offense from even applying to have the conviction set aside. A court's determination that an offender was convicted of a non-dangerous offense, based on that express finding in a judgment of conviction, merely permits the application. It does not end the inquiry, but opens it to any facts relevant to the court's broad discretion in considering the request to set aside a conviction, including any facts or issues the state raises in opposition. See, e.g., Key, 128 Ariz. at 420–22, 626 P.2d at 150–52 (court did not abuse discretion in considering nature of offense and short time since conviction in denying motion to set aside). From a policy perspective, we conclude the state suffers little prejudice from having to oppose the merits of an application to set aside a conviction for an offense designated at judgment as non-dangerous.

Conclusion

¶ 18 The respondent judge did not abuse her discretion in concluding Copeland was not ineligible, under § 13–907(D), to apply to set aside her conviction for attempted aggravated assault, which was designated a non-dangerous offense in the judgment of conviction. FN8 Because §§ 13–704 and 13–907(D) both employ the definition of “[d]angerous offense” provided in § 13–105(13), a trial court may rely on a conviction's designation of an offense as non-dangerous to find a defendant eligible to apply for relief pursuant to § 13–907. Whether to grant the requested relief and set aside the conviction remains in the sound discretion of the trial court, as provided in § 13–908.

FN8. The state has argued only that Copeland was ineligible, as a matter of law, to have her conviction set aside and otherwise has not challenged the respondent judge's exercise of discretion in granting relief.

¶ 19 Accordingly, although we accept jurisdiction of the state's petition for special action, we deny the requested relief.

CONCURRING: PETER J. ECKERSTROM, Judge and J. WILLIAM BRAMMER, JR., Judge. FN*

FN* A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.

State v. Bernini

END OF DOCUMENT
The STATE of Arizona, Appellee,
v.
Raymond Anthony HALL, Appellant.

No. 2 CA–CR 2012–0513.
March 20, 2014.

Background: After defendant pled guilty to conspiracy to commit armed robbery and was discharged from sentence, defendant petitioned to set aside his conviction and to restore his civil rights, including right to bear firearms. The Superior Court, Pima County, No. CR200000137, Richard Gordon, J., granted petition in part and denied petition in part. Defendant appealed.

Holding: The Court of Appeals, Eckerstrom, J., held that defendant's right to gun possession would not be automatically restored on setting aside of defendant's conviction, and thus court's refusal to set aside defendant's conviction on basis that this would necessarily restore defendant's gun rights was error.

Reversed and remanded.

West Headnotes

[1] Criminal Law 110

110 Criminal Law

Appellate court reviews a trial court's decision in setting aside a conviction for an abuse of discretion.

[2] Criminal Law 110

110 Criminal Law

Appellate court reviews any issues of statutory construction de novo.

[3] Criminal Law 110

110 Criminal Law

An error of law committed in reaching a discretionary conclusion may constitute an abuse of discretion.


110 Criminal Law

Defendant's right to gun possession would not be automatically restored on setting aside of defendant's conviction, and thus court's refusal to set aside defendant's conviction on basis that this would necessarily restore defendant's gun rights was error; statutory scheme as whole treated right to bear firearms separately from other civil rights and imposed mandatory waiting period between discharge from probation or imprisonment and restoration of gun rights. U.S.C.A. Const. Amend. 2; A.R.S. § 13–907(C).

Appeal from the Superior Court in Pima County; No. CR20000137; The Honorable Richard Gordon, Judge. REVERSED AND REMANDED. Barbara LaWall, Pima County Attorney By Nicolette Kneup, Deputy County Attorney, Tucson, Counsel for Appellee.

Lori J. Lefferts, Pima County Public Defender by Abigail Jensen, Assistant Public Defender, Tucson,
Counsel for Appellant.

Judge ECKERSTROM authored the opinion of the Court, in which Presiding Judge KELLY and Judge ESPINOSA concurred.

OPINION

ECKERSTROM, Judge.

¶ 1 Appellant Raymond Hall appeals from the trial court's decision denying his application to set aside his felony conviction. For the following reasons, we reverse and remand.

Factual and Procedural Background

¶ 2 In 2005, Hall pled guilty to conspiracy to commit armed robbery. He was sentenced to a mitigated term of imprisonment, from which he was absolutely discharged in 2007. In 2012, he petitioned the court to set aside his conviction under A.R.S. § 13–907 and to restore his civil rights, including his right to bear firearms under A.R.S. §§ 13–906 and 13–908. After a hearing on Hall's application, the court restored his civil rights, with the exception of the right to possess firearms, but denied Hall's request to set aside the conviction. At that hearing, the court stated, "[I]f it wasn't for my belief that the set aside provision would necessarily mean that your gun rights were restored, I would have granted you relief under [§ ] 13–907 on the conspiracy conviction." Hall now appeals, claiming the court abused its discretion in concluding that setting aside his conviction pursuant to § 13–907 would necessarily include restoring his right to bear firearms. We have jurisdiction pursuant to A.R.S. §§ 12–120.21(A)(1) and 13–4033(A)(3).


¶ 4 The sole question presented is whether, as the trial court concluded, a person whose conviction is set aside pursuant to § 13–907(C) automatically has all his civil rights, including his right to gun possession, restored or whether, as Hall argues, a court may set aside a person's conviction without restoring the right to gun possession.

¶ 5 Section 13–907(C) provides:

If the judge ... grants the application [to set aside a judgment of guilt], the judge ... shall set aside the judgment of guilt, dismiss the accusations or information and order that the person be released from all penalties and disabilities resulting from the conviction except those imposed by [the Department of Transportation or the Game and Fish Commission pursuant to specified statutes].

The trial court concluded this language means that, if a judge grants an application to set aside a conviction, the judge also must restore the applicant's right to bear arms. Hall contends that, because the statutory schemes governing restoration of rights and setting aside convictions are separate from one another, the specific statutes governing restoration of the right to possess firearms should control over the more general statute governing restoration of civil rights broadly. He further maintains that if we construe § 13–907 as controlling the right to bear firearms, as the trial court did here, we would render certain other statutory provisions superfluous. We agree.
Key addressed whether a judge had the authority to restore civil rights without vacating a conviction, *id.* at 420, 626 P.2d at 150—the reverse of the question before us—our reasoning applies with equal force to the instant problem. In *Key*, we also observed that “the considerations which would form the basis of a judge's decision to restore a person's civil rights ... may differ substantially from the considerations which form the basis of a determination to vacate a defendant's conviction and dismiss the charge.” *Id.* at 421–22, 626 P.2d 149, 626 P.2d at 151–52. We thus concluded that both the legislative intent expressed by the separate remedies provided in the statutory scheme and the logic of considering the matters separately provide courts the flexibility to restore a person's civil rights without setting aside his or her conviction. See *id.*

¶ 7 Within the statutory scheme governing restoration of rights after conviction of a felony, our legislature has addressed the right to bear firearms separately from other civil rights. Section 13–912, A.R.S., provides for the automatic restoration of all civil rights for first time felony offenders meeting certain criteria, with the exception of the “right to possess weapons.” Sections 13–905 and 13–906, A.R.S., governing the restoration of rights to persons completing probation and absolutely discharged from prison respectively, both treat the restoration of the right to possess guns or firearms as separate and distinct from the restoration of other civil rights, imposing stricter limitations on a person's ability to regain the right to possess weapons. See §§ 13–905(C), 13–906(C).

¶ 8 As noted above, when interpreting a statute, we look first to the plain language of the statute as “the best and most reliable index of a statute's meaning.” *State v. Christian*, 205 Ariz. 64, ¶ 6, 66 P.3d 1241, 1243 (2003); see A.R.S. § 1–213. We acknowledge that some language in § 13–907(C) could support the trial court's interpretation. That provision states that when a court sets aside a judgment of guilt, “the judge... shall ... order that the person be released from all penalties and disabilities resulting from the conviction.” The prohibition on possessing a firearm is one of those disabilities. A.R.S. § 13–904(A)(5). However, “[w]hen two statutes appear to conflict, we will attempt to harmonize their language to give effect to each,” *True v. Stewart*, 199 Ariz. 396, ¶ 12, 18 P.3d 707, 710 (2001), and “[c]ourts must avoid construction of statutes which would render them meaningless or of no effect.” *State v. Clifton Lodge No. 1174, Benevolent & Protective Order of Elks of the U.S.*, 20 Ariz.App. 512, 513, 514 P.2d 265, 266 (1973).

¶ 9 Under § 13–907(A), a person who has been convicted of any criminal offense—including a “serious offense” under A.R.S. § 13–706—is eligible to apply to have that conviction set aside upon fulfilling his probation or sentence, so long as the conviction is not for a “dangerous offense” or another type of offense specifically excluded by § 13–907(D). However, under §§ 13–905(C) and 13–906(C), a person who has been convicted of a serious offense is not eligible to apply for the restoration of his right to carry firearms until ten years after his discharge from probation or imprisonment. Likewise, a person convicted of a felony offense that is neither serious nor dangerous is eligible to have his conviction set aside immediately upon discharge from probation or prison, but is ineligible to have his right to carry firearms restored until two years after such discharge. §§ 13–905(C), 13–906(C). Therefore, were we to interpret § 13–907(C) as requiring a judge who sets aside a conviction to restore a defendant's right to bear firearms, it would allow defendants to avoid the mandatory waiting periods imposed by §§ 13–905 and 13–906.

¶ 10 In situations where a general statute conflicts with a specific one, “the specific governs.” *State v. Rice*, 110 Ariz. 210, 213, 516 P.2d 1222, 1225 (1973). Sections 13–905(C) and 13–906(C) are specific provisions governing the restoration of the right to carry firearms, whereas § 13–907(C) concerns only the restoration of rights in a general way, and so, to the
extent they conflict, §§ 13–905 and 13–906 should control. In keeping with this principle, and in harmonizing the two statutes to the extent possible, True, 199 Ariz. 396, ¶ 12, 18 P.3d at 710, we conclude that § 13–907(C) allows a judge to set aside a defendant's conviction without restoring his right to bear firearms.

¶ 11 The state does not directly contradict any of Hall's arguments but maintains that the law needs clarification. In this vein, the state observes that if a defendant's conviction has been set aside, but the ban on possession of firearms remains, “it is not clear what the remaining basis for the prohibition is.” But, as the state acknowledges, a conviction that has been set aside is not a nullity under Arizona law. A set-aside pursuant to § 13–907(C) “is a special benefit conferred by statute,” Key, 128 Ariz. at 421, 626 P.2d at 151, meaning it is naturally subject to legislative control and limitations. For example, the legislature has expressly determined that a set aside conviction may be used to enhance or aggravate future sentences. § 13–907(C)(1); State v. Barr, 217 Ariz. 445, ¶ 17, 175 P.3d 694, 698–99 (App.2008). A person whose conviction has been set aside still must disclose the fact of the conviction if directly asked on an insurance application. Russell v. Royal Maccabees Life Ins. Co., 193 Ariz. 464, ¶ 27, 974 P.2d 443, 449 (App.1998). And, a conviction that has been set aside may nonetheless be used to impeach a witness pursuant to Rule 609, Ariz. R. Evid. State v. Tyler, 149 Ariz. 312, 315, 718 P.2d 214, 217 (App.1986). Thus, a court's grant of relief pursuant to § 13–907(C) is not intended to eliminate all consequences of a person's criminal conviction under Arizona law, and we conclude a conviction set aside under this statute may continue to serve as the basis for restricting a defendant's right to bear firearms.

**Conclusion**

*4* ¶ 12 The trial court committed an error of law and thus abused its discretion by determining § 13–907 did not allow it to set aside Hall's conviction without also restoring his right to bear firearms. See Wall, 212 Ariz. 1, ¶ 12, 126 P.3d at 150. Because the court expressly based its decision upon this error of law, we reverse the order denying Hall's application to set aside his conviction and remand for further proceedings consistent with this opinion.
13-905. Restoration of civil rights; persons completing probation
A. A person who has been convicted of two or more felonies and whose period of probation has been completed may have any civil rights which were lost or suspended by the felony conviction restored by the judge who discharges him at the end of the term of probation.
B. On proper application, a person who has been discharged from probation either before or after adoption of this chapter may have any civil rights which were lost or suspended by the felony conviction restored by the superior court judge by whom the person was sentenced or the judge's successors in office from the county in which the person was originally convicted. The clerk of the superior court shall have the responsibility for processing the application on request of the person involved or the person's attorney. The superior court shall serve a copy of the application on the county attorney.
C. If the person was convicted of a dangerous offense under section 13-704, the person may not file for the restoration of the right to possess or carry a gun or firearm. If the person was convicted of a serious offense as defined in section 13-706 the person may not file for the restoration of the right to possess or carry a gun or firearm for ten years from the date of his discharge from probation. If the person was convicted of any other felony offense, the person may not file for the restoration of the right to possess or carry a gun or firearm for two years from the date of the person's discharge from probation.
13-906. Applications by persons discharged from prison
A. On proper application, a person who has been convicted of two or more felonies and who has received an absolute discharge from imprisonment may have any civil rights which were lost or suspended by his conviction restored by the superior court judge by whom the person was sentenced or the judge's successors in office from the county in which the person was originally sentenced.
B. A person who is subject to subsection A of this section may file, no sooner than two years from the date of his absolute discharge, an application for restoration of civil rights that shall be accompanied by a certificate of absolute discharge from the director of the state department of corrections. The clerk of the superior court that sentenced the applicant shall have the responsibility for processing applications for restoration of civil rights upon request of the person involved, the person's attorney or a representative of the state department of corrections. The superior court shall serve a copy of the application on the county attorney.
C. If the person was convicted of a dangerous offense under section 13-704, the person may not file for the restoration of the right to possess or carry a gun or firearm. If the person was convicted of a serious offense as defined in section 13-706, the person may not file for the restoration of the right to possess or carry a gun or firearm for ten years from the date of his absolute discharge from imprisonment. If the person was convicted of any other felony offense, the person may not file for the restoration of the right to possess or carry a gun or firearm for two years from the date of the person's absolute discharge from imprisonment.
13-907. Setting aside judgment of convicted person on discharge; application; release from disabilities; exceptions

A. Except as provided in subsection D of this section, every person convicted of a criminal offense, on fulfillment of the conditions of probation or sentence and discharge by the court, may apply to the judge, justice of the peace or magistrate who pronounced sentence or imposed probation or such judge, justice of the peace or magistrate's successor in office to have the judgment of guilt set aside. The convicted person shall be informed of this right at the time of discharge.

B. The convicted person or, if authorized in writing, the convicted person's attorney or probation officer may apply to set aside the judgment.

C. If the judge, justice of the peace or magistrate grants the application, the judge, justice of the peace or magistrate shall set aside the judgment of guilt, dismiss the accusations or information and order that the person be released from all penalties and disabilities resulting from the conviction except those imposed by:

1. The department of transportation pursuant to section 28-3304, 28-3306, 28-3307, 28-3308 or 28-3319, except that the conviction may be used as a conviction if the conviction would be admissible had it not been set aside and may be pleaded and proved in any subsequent prosecution of such person by the state or any of its subdivisions for any offense or used by the department of transportation in enforcing section 28-3304, 28-3306, 28-3307, 28-3308 or 28-3319 as if the judgment of guilt had not been set aside.

2. The game and fish commission pursuant to section 17-314 or 17-340.

D. This section does not apply to a person who was convicted of a criminal offense:

1. Involving a dangerous offense.

2. For which the person is required or ordered by the court to register pursuant to section 13-3821.

3. For which there has been a finding of sexual motivation pursuant to section 13-118.

4. In which the victim is a minor under fifteen years of age.

5. In violation of section 28-3473, any local ordinance relating to stopping, standing or operation of a vehicle or title 28, chapter 3, except a violation of section 28-693 or any local ordinance relating to the same subject matter as section 28-693.
13-912. Restoration of civil rights for first offenders; exception
A. Any person who has not previously been convicted of any other felony shall automatically be restored any civil rights that were lost or suspended by the conviction if the person both:
1. Completes a term of probation or receives an absolute discharge from imprisonment.
2. Pays any fine or restitution imposed.
B. This section does not apply to a person's right to possess weapons as defined in section 13-3101 unless the person applies to a court pursuant to section 13-905 or 13-906.
13-4051. Entry on records; stipulation; court order
A. Any person who is wrongfully arrested, indicted or otherwise charged for any crime may petition the superior court for entry on all court records, police records and any other records of any other agency relating to such arrest or indictment a notation that the person has been cleared.
B. After a hearing on the petition, if the judge believes that justice will be served by such entry, the judge shall issue the order requiring the entry that the person has been cleared on such records, with accompanying justification therefor, and shall cause a copy of such order to be delivered to all law enforcement agencies and courts. The order shall further require that all law enforcement agencies and courts shall not release copies of or provide access to such records to any person except on order of the court.
C. Any person who has notice of such order and fails to comply with the court order issued pursuant to this section shall be liable to the person for damages from such failure.
PAYING ONE’S DEBT TO SOCIETY: REALITY OR MYTH?
THE PLIGHT OF EX-OFFENDERS

Andy Silverman
Civil Rights Restoration Clinic
Rogers College of Law, University of Arizona

CIVIL RIGHTS RESTORATION CLINIC

• Rogers College of Law, University of Arizona
• Director: Andy Silverman
• Contact Information: (520) 621-1975; silverman@law.arizona.edu

PRISON STATISTICS: ARIZONA
(February 2014)

Arizona Prison Population:
Total: 41,270 (men 37,506; women 3,764)

Ethnic Breakdown:
--Caucasian – 39.4%
--African American – 13.2%
--Native American – 5.1%
--Hispanic – 40.5%
--Other – 1.8%

Released FY 2014 (to date): 12,564
Admitted FY 2014 (to date): 13,148
PROBATION STATISTICS: ARIZONA
(FY 2011)

Arizona Adult Probation Population: 84,344

Pima County: 7,741

WHAT DO THESE OCCUPATIONS HAVE IN COMMON?

Acupuncturists  Athlete Trainers  Chiropractors
Court Reporters  Dentists  Physicians  Nurses
Optometrists  Podiatrists  Veterinarians
Appraisers  Collection Agents  Contractors
Pharmacists  Private Investigators  Accountants
Security Guards  Cosmetologist
Real Estate Agents  AND EMBALMERS

CONSEQUENCES OF CRIMINAL CONVICTIONS

DIRECT CONSEQUENCES
• Prisons/Jails
• Probation
• Fines
• Fees
• Restitution

COLLATERAL CONSEQUENCES
• Loss of Civil Rights
• Immigration
• Sex Offender Reg.
• Licensing Req.
• Driver’s License
• Public Benefits
• Jobs
• Housing
COLLATERAL CONSEQUENCES: SOME GENERALIZATIONS

- No body knows what they are
- They are increasingly significant
- They are clearly proliferating

CIVIL RIGHTS LOST BY A FELONY CONVICTION
(A.R.S. § 13-904(A))

- Voting
- Holding Public Office
- Serving on a Jury
- Possessing a Gun

RESTORATION: ONE FELONY CONVICTION
(A.R.S. § 13-912)

AUTOMATIC once:
- Probation or imprisonment completed
- Fines or restitution paid

Exception: Gun rights – restoration by court. If convicted of a dangerous offense (ARS 13-704), cannot restore gun rights. If convicted of a serious offense (ARS 13-706), must wait 10 years. If convicted of any other felony, must wait 2 years.
**RESTORATION: TWO OR MORE FELONY CONVICTIONS**  
(A.R.S. §§ 13-905 & 906)

- **Restoration:** Apply to sentencing judge or successor
- **Imprisonment:** Must wait 2 years after absolute discharge; need Certificate of Absolute Discharge from ADOC
- **Probation:** No waiting period
- **Gun Rights:** Not restored for dangerous offenses; 10 year waiting period for serious offenses and 2 year waiting period for any other felony.

**RESTORATION: TWO OR MORE FEDERAL FELONY CONVICTIONS**  
(A.R.S. §§ 13-909 & 910)

- **Federal Felony Convictions:** May apply for restoration of civil rights before presiding judge in county of residence
- **Out-of-State Convictions:** No jurisdiction to restore rights in Arizona courts; must apply in state convicted

**SETTING ASIDE FELONY AND MISDEMEANOR CONVICTIONS**  
(A.R.S. § 13-907)

- Not an expungment or sealing of records
- **Criminal Record:** Conviction will still appear but there will be a notation that it was set aside
- **Application:** May apply to the sentencing judge or successor upon completion of probation or prison sentence – no waiting period
- **Requirement:** “Fulfillment” of sentence
SETTING ASIDE CONVICTIONS

• Exceptions: Offense was a dangerous offense, person must register as a sex offender, there has been a finding of sexual motivation, victim is under 15 and some traffic offenses (but not DUI).

• Effect: Releases the person from “all penalties and disabilities resulting from the conviction” except:
  -- Conviction can be used for recidivist purposes
  -- Penalties imposed by Dept. of Transportation
  -- Penalties imposed by Game and Fish Comm.

COURT DISCRETION

• Under A.R.S. § 13-908 (for restoring rights and setting aside state convictions) and under A.R.S. § 13-911 (for restoring rights where convicted federally), the superior court judge is given discretion by statute in dealing with restoration and set aside cases.

DESIGNATIONS: CLASS 6 OPEN FELONY
(A.R.S. § 13-604)

• May remain undesignated while on probation
• Upon completion of probation, may be designated as a class 1 misdemeanor or class 6 felony
• If probation is revoked and defendant is given a prison sentence, the undesignated class 6 becomes a felony
• Exceptions: Convicted of a dangerous offense or has been convicted of 2 or more felonies
Fines, Fees and Restitution

- Check Collection History in Clerk's Office
- Check if they have been converted to a “civil judgment”
- Determine which may be waivable
- Converting to a “Criminal Restitution Order” under A.R.S. § 13-805

2. **PURPOSE**: The purpose of this Enforcement Guidance is to consolidate and update the U.S. Equal Employment Opportunity Commission’s guidance documents regarding the use of arrest or conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq*.

3. **EFFECTIVE DATE**: Upon receipt.

4. **EXPIRATION DATE**: This Notice will remain in effect until rescinded or superseded.

5. **ORIGINATOR**: Office of Legal Counsel.
**Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964**

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VIII. Employer Best Practices
I. Summary

- An employer’s use of an individual’s criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended.

- The Guidance builds on longstanding court decisions and existing guidance documents that the U.S. Equal Employment Opportunity Commission (Commission or EEOC) issued over twenty years ago.

- The Guidance focuses on employment discrimination based on race and national origin. The Introduction provides information about criminal records, employer practices, and Title VII.

- The Guidance discusses the differences between arrest and conviction records.
  - The fact of an arrest does not establish that criminal conduct has occurred, and an exclusion based on an arrest, in itself, is not job related and consistent with business necessity. However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question.
  - In contrast, a conviction record will usually serve as sufficient evidence that a person engaged in particular conduct. In certain circumstances, however, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision.

- The Guidance discusses disparate treatment and disparate impact analysis under Title VII.
  - A violation may occur when an employer treats criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment liability).
  - An employer’s neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity (disparate impact liability).
    - National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.
Two circumstances in which the Commission believes employers will consistently meet the “job related and consistent with business necessity” defense are as follows:

- The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or

- The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in Green v. Missouri Pacific Railroad, 549 F.2d 1158 (8th Cir. 1977)). The employer’s policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII).

- Compliance with other federal laws and/or regulations that conflict with Title VII is a defense to a charge of discrimination under Title VII.

- State and local laws or regulations are preempted by Title VII if they “purport[] to require or permit the doing of any act which would be an unlawful employment practice” under Title VII. 42 U.S.C. § 2000e-7.

- The Guidance concludes with best practices for employers.
II. Introduction

The EEOC enforces Title VII of the Civil Rights Act of 1964 (Title VII) which prohibits employment discrimination based on race, color, religion, sex, or national origin. This Enforcement Guidance is issued as part of the Commission’s efforts to eliminate unlawful discrimination in employment screening, for hiring or retention, by entities covered by Title VII, including private employers as well as federal, state, and local governments.

In the last twenty years, there has been a significant increase in the number of Americans who have had contact with the criminal justice system and, concomitantly, a major increase in the number of people with criminal records in the working-age population. In 1991, only 1.8% of the adult population had served time in prison. After ten years, in 2001, the percentage rose to 2.7% (1 in 37 adults). By the end of 2007, 3.2% of all adults in the United States (1 in every 31) were under some form of correctional control involving probation, parole, prison, or jail. The Department of Justice’s Bureau of Justice Statistics (DOJ/BJS) has concluded that, if incarceration rates do not decrease, approximately 6.6% of all persons born in the United States in 2001 will serve time in state or federal prison during their lifetimes.

Arrest and incarceration rates are particularly high for African American and Hispanic men. African Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population. Assuming that current incarceration rates remain unchanged, about 1 in 17 White men are expected to serve time in prison during their lifetime; by contrast, this rate climbs to 1 in 6 for Hispanic men; and to 1 in 3 for African American men.

The Commission, which has enforced Title VII since it became effective in 1965, has well-established guidance applying Title VII principles to employers’ use of criminal records to screen for employment. This Enforcement Guidance builds on longstanding court decisions and policy documents that were issued over twenty years ago. In light of employers’ increased access to criminal history information, case law analyzing Title VII requirements for criminal record exclusions, and other developments, the Commission has decided to update and consolidate in this document all of its prior policy statements about Title VII and the use of criminal records in employment decisions. Thus, this Enforcement Guidance will supersede the Commission’s previous policy statements on this issue.

The Commission intends this document for use by employers considering the use of criminal records in their selection and retention processes; by individuals who suspect that they have been denied jobs or promotions, or have been discharged because of their criminal records; and by EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions.
III. Background

The contextual framework for the Title VII analysis in this Enforcement Guidance includes how criminal record information is collected and recorded, why employers use criminal records, and the EEOC’s interest in such criminal record screening.

A. Criminal History Records

Criminal history information can be obtained from a wide variety of sources including, but not limited to, the following:

- **Court Records.** Courthouses maintain records relating to criminal charges and convictions, including arraignments, trials, pleas, and other dispositions. Searching county courthouse records typically provides the most complete criminal history. Many county courthouse records must be retrieved on-site, but some courthouses offer their records online. Information about federal crimes such as interstate drug trafficking, financial fraud, bank robbery, and crimes against the government may be found online in federal court records by searching the federal courts’ Public Access to Court Electronic Records or Case Management/Electronic Case Files.

- **Law Enforcement and Corrections Agency Records.** Law enforcement agencies such as state police agencies and corrections agencies may allow the public to access their records, including records of complaints, investigations, arrests, indictments, and periods of incarceration, probation, and parole. Each agency may differ with respect to how and where the records may be searched, and whether they are indexed.

- **Registries or Watch Lists.** Some government entities maintain publicly available lists of individuals who have been convicted of, or are suspected of having committed, a certain type of crime. Examples of such lists include state and federal sex offender registries and lists of individuals with outstanding warrants.

- **State Criminal Record Repositories.** Most states maintain their own centralized repositories of criminal records, which include records that are submitted by most or all of their criminal justice agencies, including their county courthouses. States differ with respect to the types of records included in the repository, the completeness of the records, the frequency with which they are updated, and whether they permit the public to search the records by name, by fingerprint, or both. Some states permit employers (or third-parties acting on their behalf) to access these records, often for a fee. Others limit access to certain types of records, and still others deny access altogether.

- **The Interstate Identification Index (III).** The Federal Bureau of Investigation (FBI) maintains the most comprehensive collection of criminal records in the nation, called the “Interstate Identification Index” (III). The III database compiles
records from each of the state repositories, as well as records from federal and international criminal justice agencies.\textsuperscript{33}

The FBI’s III database may be accessed for employment purposes by:

- the federal government;\textsuperscript{34}
- employers in certain industries that are regulated by the federal government, such as “the banking, nursing home, securities, nuclear energy, and private security guard industries; as well as required security screenings by federal agencies of airport workers, HAZMAT truck drivers and other transportation workers”;\textsuperscript{35} and
- employers in certain industries “that the state has sought to regulate, such as persons employed as civil servants, day care, school, or nursing home workers, taxi drivers, private security guards, or members of regulated professions.”\textsuperscript{36}

Recent studies have found that a significant number of state and federal criminal record databases include incomplete criminal records.

- A 2011 study by the DOJ/BJS reported that, as of 2010, many state criminal history record repositories still had not recorded the final dispositions for a significant number of arrests.\textsuperscript{37}
- A 2006 study by the DOJ/BJS found that only 50\% of arrest records in the FBI’s III database were associated with a final disposition.\textsuperscript{38}

Additionally, reports have documented that criminal records may be inaccurate.

- One report found that even if public access to criminal records has been restricted by a court order to seal and/or expunge such records, this does not guarantee that private companies also will purge the information from their systems or that the event will be erased from media archives.\textsuperscript{39}
- Another report found that criminal background checks may produce inaccurate results because criminal records may lack “unique” information or because of “misspellings, clerical errors or intentionally inaccurate identification information provided by search subjects who wish to avoid discovery of their prior criminal activities.”\textsuperscript{40}

Employers performing background checks to screen applicants or employees may attempt to search these governmental sources themselves or conduct a simple Internet search, but they often rely on third-party background screening businesses.\textsuperscript{41} Businesses that sell criminal history information to employers are “consumer reporting agencies” (CRAs)\textsuperscript{42} if they provide the information in “consumer reports”\textsuperscript{43} under the Fair Credit Reporting Act, 15 U.S.C. § 1681 \textit{et seq.} (FCRA). Under FCRA, a CRA generally may not report records of arrests that did not result in entry of a judgment of conviction, where the arrests occurred more than seven years ago.\textsuperscript{44}
However, they may report convictions indefinitely.  

CRAs often maintain their own proprietary databases that compile information from various sources, such as those described above, depending on the extent to which the business has purchased or otherwise obtained access to data. Such databases vary with respect to the geographic area covered, the type of information included (e.g., information about arrests, convictions, prison terms, or specialized information for a subset of employers such as information about workplace theft or shoplifting cases for retail employers), the sources of information used (e.g., county databases, law enforcement agency records, sex offender registries), and the frequency with which they are updated. They also may be missing certain types of disposition information, such as updated convictions, sealing or expungement orders, or orders for entry into a diversion program.

B. Employers’ Use of Criminal History Information

In one survey, a total of 92% of responding employers stated that they subjected all or some of their job candidates to criminal background checks. Employers have reported that their use of criminal history information is related to ongoing efforts to combat theft and fraud, as well as heightened concerns about workplace violence and potential liability for negligent hiring. Employers also cite federal laws as well as state and local laws as reasons for using criminal background checks.

C. The EEOC’s Interest in Employers’ Use of Criminal Records in Employment Screening

The EEOC enforces Title VII, which prohibits employment discrimination based on race, color, religion, sex, or national origin. Having a criminal record is not listed as a protected basis in Title VII. Therefore, whether a covered employer’s reliance on a criminal record to deny employment violates Title VII depends on whether it is part of a claim of employment discrimination based on race, color, religion, sex, or national origin. Title VII liability for employment discrimination is determined using two analytic frameworks: “disparate treatment” and “disparate impact.” Disparate treatment is discussed in Section IV and disparate impact is discussed in Section V.

IV. Disparate Treatment Discrimination and Criminal Records

A covered employer is liable for violating Title VII when the plaintiff demonstrates that it treated him differently because of his race, national origin, or another protected basis. For example, there is Title VII disparate treatment liability where the evidence shows that a covered employer rejected an African American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record.

Example 1: Disparate Treatment Based on Race. John, who is White, and Robert, who is African American, are both recent graduates of State University. They have similar educational backgrounds, skills, and work experience. They each pled guilty to charges of possessing and
After college, they both apply for employment with Office Jobs, Inc., which, after short intake interviews, obtains their consent to conduct a background check. Based on the outcome of the background check, which reveals their drug convictions, an Office Jobs, Inc., representative decides not to refer Robert for a follow-up interview. The representative remarked to a co-worker that Office Jobs, Inc., cannot afford to refer “these drug dealer types” to client companies. However, the same representative refers John for an interview, asserting that John’s youth at the time of the conviction and his subsequent lack of contact with the criminal justice system make the conviction unimportant. Office Jobs, Inc., has treated John and Robert differently based on race, in violation of Title VII.

Title VII prohibits “not only decisions driven by racial [or ethnic] animosity, but also decisions infected by stereotyped thinking . . . ”. Thus, an employer’s decision to reject a job applicant based on racial or ethnic stereotypes about criminality—rather than qualifications and suitability for the position—is unlawful disparate treatment that violates Title VII.

Example 2: Disparate Treatment Based on National Origin. Tad, who is White, and Nelson, who is Latino, are both recent high school graduates with grade point averages above 4.0 and college plans. While Nelson has successfully worked full-time for a landscaping company during the summers, Tad only held occasional lawn-mowing and camp-counselor jobs. In an interview for a research job with Meaningful and Paid Internships, Inc. (MPII), Tad discloses that he pled guilty to a felony at age 16 for accessing his school’s computer system over the course of several months without authorization and changing his classmates’ grades. Nelson, in an interview with MPII, emphasizes his successful prior work experience, from which he has good references, but also discloses that, at age 16, he pled guilty to breaking and entering into his high school as part of a class prank that caused little damage to school property. Neither Tad nor Nelson had subsequent contact with the criminal justice system.

The hiring manager at MPII invites Tad for a second interview, despite his record of criminal conduct. However, the same hiring manager sends Nelson a rejection notice, saying to a colleague that Nelson is only qualified to do manual labor and, moreover, that he has a criminal record. In light of the evidence showing that Nelson’s and Tad’s educational backgrounds are similar, that Nelson’s work experience is more extensive, and that Tad’s criminal conduct is more indicative of untrustworthiness, MPII has failed to state a legitimate, nondiscriminatory reason for rejecting Nelson. If Nelson filed a Title VII charge alleging disparate treatment based on national origin and the EEOC’s investigation
confirmed these facts, the EEOC would find reasonable cause to believe that discrimination occurred.

There are several kinds of evidence that may be used to establish that race, national origin, or other protected characteristics motivated an employer’s use of criminal records in a selection decision, including, but not limited to:

- **Biased statements.** Comments by the employer or decisionmaker that are derogatory with respect to the charging party’s protected group, or that express group-related stereotypes about criminality, might be evidence that such biases affected the evaluation of the applicant’s or employee’s criminal record.

- **Inconsistencies in the hiring process.** Evidence that the employer requested criminal history information more often for individuals with certain racial or ethnic backgrounds, or gave Whites but not racial minorities the opportunity to explain their criminal history, would support a showing of disparate treatment.

- **Similarly situated comparators (individuals who are similar to the charging party in relevant respects, except for membership in the protected group).** Comparators may include people in similar positions, former employees, and people chosen for a position over the charging party. The fact that a charging party was treated differently than individuals who are not in the charging party’s protected group by, for example, being subjected to more or different criminal background checks or to different standards for evaluating criminal history, would be evidence of disparate treatment.

- **Employment testing.** Matched-pair testing may reveal that candidates are being treated differently because of a protected status.\(^58\)

- **Statistical evidence.** Statistical analysis derived from an examination of the employer’s applicant data, workforce data, and/or third party criminal background history data may help to determine if the employer counts criminal history information more heavily against members of a protected group.

V. **Disparate Impact Discrimination and Criminal Records**

A covered employer is liable for violating Title VII when the plaintiff demonstrates that the employer’s neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity.\(^59\)

In its 1971 *Griggs v. Duke Power Company* decision, the Supreme Court first recognized that Title VII permits disparate impact claims.\(^60\) The *Griggs* Court explained that “[Title VII] proscribe[s] . . . practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited.”\(^61\) In 1991,
Congress amended Title VII to codify this analysis of discrimination and its burdens of proof. Title VII, as amended, states:

An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. . . .

With respect to criminal records, there is Title VII disparate impact liability where the evidence shows that a covered employer’s criminal record screening policy or practice disproportionately screens out a Title VII-protected group and the employer does not demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity.

A. Determining Disparate Impact of Policies or Practices that Screen Individuals Based on Records of Criminal Conduct

1. Identifying the Policy or Practice

The first step in disparate impact analysis is to identify the particular policy or practice that causes the unlawful disparate impact. For criminal conduct exclusions, relevant information includes the text of the policy or practice, associated documentation, and information about how the policy or practice was actually implemented. More specifically, such information also includes which offenses or classes of offenses were reported to the employer (e.g., all felonies, all drug offenses); whether convictions (including sealed and/or expunged convictions), arrests, charges, or other criminal incidents were reported; how far back in time the reports reached (e.g., the last five, ten, or twenty years); and the jobs for which the criminal background screening was conducted. Training or guidance documents used by the employer also are relevant, because they may specify which types of criminal history information to gather for particular jobs, how to gather the data, and how to evaluate the information after it is obtained.

2. Determining Disparate Impact

Nationally, African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population. In 2010, 28% of all arrests were of African Americans, even though African Americans only comprised approximately 14% of the general population. In 2008, Hispanics were arrested for federal drug charges at a rate of approximately three times their proportion of the general population. Moreover, African Americans and Hispanics were more likely than Whites to be arrested, convicted, or sentenced for drug offenses even though their rate of drug use is similar to the rate of drug use for Whites.

African Americans and Hispanics also are incarcerated at rates disproportionate to their numbers in the general population. Based on national incarceration data, the U.S. Department of Justice estimated in 2001 that 1 out of every 17 White men (5.9% of the White men in the U.S.)
is expected to go to prison at some point during his lifetime, assuming that current incarceration rates remain unchanged. This rate climbs to 1 in 6 (or 17.2%) for Hispanic men. For African American men, the rate of expected incarceration rises to 1 in 3 (or 32.2%). Based on a state-by-state examination of incarceration rates in 2005, African Americans were incarcerated at a rate 5.6 times higher than Whites, and 7 states had a Black-to-White ratio of incarceration that was 10 to 1. In 2010, Black men had an imprisonment rate that was nearly 7 times higher than White men and almost 3 times higher than Hispanic men.

National data, such as that cited above, supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to further investigate such Title VII disparate impact charges. During an EEOC investigation, the employer also has an opportunity to show, with relevant evidence, that its employment policy or practice does not cause a disparate impact on the protected group(s). For example, an employer may present regional or local data showing that African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer’s particular geographic area. An employer also may use its own applicant data to demonstrate that its policy or practice did not cause a disparate impact. The Commission will assess relevant evidence when making a determination of disparate impact, including applicant flow information maintained pursuant to the Uniform Guidelines on Employee Selection Procedures, workforce data, criminal history background check data, demographic availability statistics, incarceration/conviction data, and/or relevant labor market statistics.

An employer’s evidence of a racially balanced workforce will not be enough to disprove disparate impact. In Connecticut v. Teal, the Supreme Court held that a “bottom line” racial balance in the workforce does not preclude employees from establishing a prima facie case of disparate impact; nor does it provide employers with a defense. The issue is whether the policy or practice deprives a disproportionate number of Title VII-protected individuals of employment opportunities.

Finally, in determining disparate impact, the Commission will assess the probative value of an employer’s applicant data. As the Supreme Court stated in Dothard v. Rawlinson, an employer’s “application process might itself not adequately reflect the actual potential applicant pool since otherwise qualified people might be discouraged from applying” because of an alleged discriminatory policy or practice. Therefore, the Commission will closely consider whether an employer has a reputation in the community for excluding individuals with criminal records. Relevant evidence may come from ex-offender employment programs, individual testimony, employer statements, evidence of employer recruitment practices, or publicly posted notices, among other sources. The Commission will determine the persuasiveness of such evidence on a case-by-case basis.

B. Job Related For the Position in Question and Consistent with Business Necessity

1. Generally

After the plaintiff in litigation establishes disparate impact, Title VII shifts the burdens of
production and persuasion to the employer to “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”81 In the legislative history of the 1991 Civil Rights Act, Congress referred to Griggs and its progeny such as Albemarle Paper Company v. Moody82 and Dothard83 to explain how this standard should be construed.84 The Griggs Court stated that the employer’s burden was to show that the policy or practice is one that “bear[s] a demonstrable relationship to successful performance of the jobs for which it was used” and “measures the person for the job and not the person in the abstract.”85 In both Albemarle86 and Dothard,87 the Court emphasized the factual nature of the business necessity inquiry. The Court further stated in Dothard that the terms of the exclusionary policy must “be shown to be necessary to safe and efficient job performance.”88

In a case involving a criminal record exclusion, the Eighth Circuit in its 1975 Green v. Missouri Pacific Railroad decision, held that it was discriminatory under Title VII for an employer to “follow[] the policy of disqualifying for employment any applicant with a conviction for any crime other than a minor traffic offense.”89 The Eighth Circuit identified three factors (the “Green factors”) that were relevant to assessing whether an exclusion is job related for the position in question and consistent with business necessity:

- The nature and gravity of the offense or conduct;90
- The time that has passed since the offense or conduct and/or completion of the sentence;91 and
- The nature of the job held or sought.92

In 2007, the Third Circuit in El v. Southeastern Pennsylvania Transportation Authority93 developed the statutory analysis in greater depth. Douglas El challenged SEPTA’s policy of excluding everyone ever convicted of a violent crime from the job of paratransit driver.94 El, a 55 year-old African American paratransit driver-trainee, was terminated from employment when SEPTA learned of his conviction for second-degree murder 40 years earlier; the conviction involved a gang fight when he was 15 years old and was his only disqualifying offense under SEPTA’s policy.95 The Third Circuit expressed “reservations” about a policy such as SEPTA’s (exclusion for all violent crimes, no matter how long ago they were committed) “in the abstract.”96

Applying Supreme Court precedent, the El court observed that some level of risk is inevitable in all hiring, and that, “[i]n a broad sense, hiring policies . . . ultimately concern the management of risk.”97 Recognizing that assessing such risk is at the heart of criminal record exclusions, the Third Circuit concluded that Title VII requires employers to justify criminal record exclusions by demonstrating that they “accurately distinguish between applicants [who] pose an unacceptable level of risk and those [who] do not.”98

The Third Circuit affirmed summary judgment for SEPTA, but stated that the outcome of the case might have been different if Mr. El had, “for example, hired an expert who testified that there is a time at which a former criminal is no longer any more likely to recidivate than the average person, . . . [so] there would be a factual question for the jury to resolve.”99 The Third Circuit reasoned, however, that the recidivism evidence presented by SEPTA’s experts, in
conjunction with the nature of the position at issue—paratransit driver-trainee with unsupervised access to vulnerable adults—required the employer to exercise the utmost care.

In the subsections below, the Commission discusses considerations that are relevant to assessing whether criminal record exclusion policies or practices are job related and consistent with business necessity. First, we emphasize that arrests and convictions are treated differently.

2. Arrests

The fact of an arrest does not establish that criminal conduct has occurred. Arrests are not proof of criminal conduct. Many arrests do not result in criminal charges, or the charges are dismissed. Even if an individual is charged and subsequently prosecuted, he is presumed innocent unless proven guilty.

An arrest, however, may in some circumstances trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action. Title VII calls for a fact-based analysis to determine if an exclusionary policy or practice is job related and consistent with business necessity. Therefore, an exclusion based on an arrest, in itself, is not job related and consistent with business necessity.

Another reason for employers not to rely on arrest records is that they may not report the final disposition of the arrest (e.g., not prosecuted, convicted, or acquitted). As documented in Section III.A., supra, the DOJ/BJS reported that many arrest records in the FBI’s III database and state criminal record repositories are not associated with final dispositions. Arrest records also may include inaccuracies or may continue to be reported even if expunged or sealed.

Example 3: Arrest Record Is Not Grounds for Exclusion. Mervin and Karen, a middle-aged African American couple, are driving to church in a predominantly white town. An officer stops them and interrogates them about their destination. When Mervin becomes annoyed and comments that his offense is simply “driving while Black,” the officer arrests him for disorderly conduct. The prosecutor decides not to file charges against Mervin, but the arrest remains in the police department’s database and is reported in a background check when Mervin applies with his employer of fifteen years for a promotion to an executive position. The employer’s practice is to deny such promotions to individuals with arrest records, even without a conviction, because it views an arrest record as an indicator of untrustworthiness and irresponsibility. If Mervin filed a Title VII charge based on these facts, and disparate impact based on race were established, the EEOC would find reasonable cause to believe that his employer violated Title VII.

Although an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes.
Example 4: Employer's Inquiry into Conduct Underlying Arrest.
Andrew, a Latino man, worked as an assistant principal in Elementary School for several years. After several ten and eleven-year-old girls attending the school accused him of touching them inappropriately on the chest, Andrew was arrested and charged with several counts of endangering the welfare of children and sexual abuse. Elementary School has a policy that requires suspension or termination of any employee who the school believes engaged in conduct that impacts the health or safety of the students. After learning of the accusations, the school immediately places Andrew on unpaid administrative leave pending an investigation. In the course of its investigation, the school provides Andrew a chance to explain the events and circumstances that led to his arrest. Andrew denies the allegations, saying that he may have brushed up against the girls in the crowded hallways or lunchroom, but that he doesn’t really remember the incidents and does not have regular contact with any of the girls. The school also talks with the girls, and several of them recount touching in crowded situations. The school does not find Andrew’s explanation credible. Based on Andrew’s conduct, the school terminates his employment pursuant to its policy.

Andrew challenges the policy as discriminatory under Title VII. He asserts that it has a disparate impact based on national origin and that his employer may not suspend or terminate him based solely on an arrest without a conviction because he is innocent until proven guilty. After confirming that an arrest policy would have a disparate impact based on national origin, the EEOC concludes that no discrimination occurred. The school’s policy is linked to conduct that is relevant to the particular jobs at issue, and the exclusion is made based on descriptions of the underlying conduct, not the fact of the arrest. The Commission finds no reasonable cause to believe Title VII was violated.

3. Convictions

By contrast, a record of a conviction will usually serve as sufficient evidence that a person engaged in particular conduct, given the procedural safeguards associated with trials and guilty pleas. However, there may be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction. For example, a database may continue to report a conviction that was later expunged, or may continue to report as a felony an offense that was subsequently downgraded to a misdemeanor.

Some states require employers to wait until late in the selection process to ask about convictions. The policy rationale is that an employer is more likely to objectively assess the relevance of an applicant’s conviction if it becomes known when the employer is already knowledgeable about the applicant’s qualifications and experience. As a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about
convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.

4. Determining Whether a Criminal Conduct Exclusion Is Job Related and Consistent with Business Necessity

To establish that a criminal conduct exclusion that has a disparate impact is job related and consistent with business necessity under Title VII, the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.

Two circumstances in which the Commission believes employers will consistently meet the “job related and consistent with business necessity” defense are as follows:

- The employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible); or

- The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three Green factors), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

The individualized assessment would consist of notice to the individual that he has been screened out because of a criminal conviction; an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances; and consideration by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity. See Section V.B.9, infra (examples of relevant considerations in individualized assessments).

Depending on the facts and circumstances, an employer may be able to justify a targeted criminal records screen solely under the Green factors. Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question. Title VII thus does not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity.

5. Validation

The Uniform Guidelines describe three different approaches to validating employment screens. However, they recognize that “[t]here are circumstances in which a user cannot or
need not utilize” formal validation techniques and that in such circumstances an employer “should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact as set forth [in the following subsections].”\textsuperscript{113} Although there may be social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications,\textsuperscript{114} and thereby provide a framework for validating some employment exclusions, such studies are rare at the time of this drafting.

6. Detailed Discussion of the \textit{Green} Factors and Criminal Conduct Screens

Absent a validation study that meets the Uniform Guidelines’ standards, the \textit{Green} factors provide the starting point for analyzing how specific criminal conduct may be linked to particular positions. The three \textit{Green} factors are:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct and/or completion of the sentence; and
- The nature of the job held or sought.

a. The Nature and Gravity of the Offense or Conduct

Careful consideration of the nature and gravity of the offense or conduct is the first step in determining whether a specific crime may be relevant to concerns about risks in a particular position. The nature of the offense or conduct may be assessed with reference to the harm caused by the crime (e.g., theft causes property loss). The legal elements of a crime also may be instructive. For example, a conviction for felony theft may involve deception, threat, or intimidation.\textsuperscript{115} With respect to the gravity of the crime, offenses identified as misdemeanors may be less severe than those identified as felonies.

b. The Time that Has Passed Since the Offense, Conduct and/or Completion of the Sentence

Employer policies typically specify the duration of a criminal conduct exclusion. While the \textit{Green} court did not endorse a specific timeframe for criminal conduct exclusions, it did acknowledge that permanent exclusions from all employment based on any and all offenses were not consistent with the business necessity standard.\textsuperscript{116} Subsequently, in \textit{El}, the court noted that the plaintiff might have survived summary judgment if he had presented evidence that “there is a time at which a former criminal is no longer any more likely to recidivate than the average person . . . .”\textsuperscript{117} Thus, the court recognized that the amount of time that had passed since the plaintiff’s criminal conduct occurred was probative of the risk he posed in the position in question.

Whether the duration of an exclusion will be sufficiently tailored to satisfy the business necessity standard will depend on the particular facts and circumstances of each case. Relevant and available information to make this assessment includes, for example, studies demonstrating how much the risk of recidivism declines over a specified time.\textsuperscript{118}
c. The Nature of the Job Held or Sought

Finally, it is important to identify the particular job(s) subject to the exclusion. While a factual inquiry may begin with identifying the job title, it also encompasses the nature of the job’s duties (e.g., data entry, lifting boxes), identification of the job’s essential functions, the circumstances under which the job is performed (e.g., the level of supervision, oversight, and interaction with co-workers or vulnerable individuals), and the environment in which the job’s duties are performed (e.g., out of doors, in a warehouse, in a private home). Linking the criminal conduct to the essential functions of the position in question may assist an employer in demonstrating that its policy or practice is job related and consistent with business necessity because it “bear[s] a demonstrable relationship to successful performance of the jobs for which it was used.”119

7. Examples of Criminal Conduct Exclusions that Do Not Consider the Green Factors

A policy or practice requiring an automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct is inconsistent with the Green factors because it does not focus on the dangers of particular crimes and the risks in particular positions. As the court recognized in Green, “[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed.”120

Example 5: Exclusion Is Not Job Related and Consistent with Business Necessity. The National Equipment Rental Company uses the Internet to accept job applications for all positions. All applicants must answer certain questions before they are permitted to submit their online application, including “have you ever been convicted of a crime?” If the applicant answers “yes,” the online application process automatically terminates, and the applicant sees a screen that simply says “Thank you for your interest. We cannot continue to process your application at this time.”

The Company does not have a record of the reasons why it adopted this exclusion, and it does not have information to show that convictions for all offenses render all applicants unacceptable risks in all of its jobs, which range from warehouse work, to delivery, to management positions. If a Title VII charge were filed based on these facts, and there was a disparate impact on a Title VII-protected basis, the EEOC would find reasonable cause to believe that the blanket exclusion was not job related and consistent with business necessity because the risks associated with all convictions are not pertinent to all of the Company’s jobs.

Example 6: Exclusion Is Not Job Related and Consistent with Business Necessity. Leo, an African American man, has worked
successfully at PR Agency as an account executive for three years. After a change of ownership, the new owners adopt a policy under which it will not employ anyone with a conviction. The policy does not allow for any individualized assessment before exclusion. The new owners, who are highly respected in the industry, pride themselves on employing only the “best of the best” for every position. The owners assert that a quality workforce is a key driver of profitability.

Twenty years earlier, as a teenager, Leo pled guilty to a misdemeanor assault charge. During the intervening twenty years, Leo graduated from college and worked successfully in advertising and public relations without further contact with the criminal justice system. At PR Agency, all of Leo’s supervisors assessed him as a talented, reliable, and trustworthy employee, and he has never posed a risk to people or property at work. However, once the new ownership of PR Agency learns about Leo’s conviction record through a background check, it terminates his employment. It refuses to reconsider its decision despite Leo’s positive employment history at PR Agency.

Leo files a Title VII charge alleging that PR Agency’s conviction policy has a disparate impact based on race and is not job related for the position in question and consistent with business necessity. After confirming disparate impact, the EEOC considers PR Agency’s defense that it employs only the “best of the best” for every position, and that this necessitates excluding everyone with a conviction. PR Agency does not show that all convictions are indicative of risk or danger in all its jobs for all time, under the Green factors. Nor does PR Agency provide any factual support for its assertion that having a conviction is necessarily indicative of poor work or a lack of professionalism. The EEOC concludes that there is reasonable cause to believe that the Agency’s policy is not job related for the position in question and consistent with business necessity.  

8. Targeted Exclusions that Are Guided by the Green Factors

An employer policy or practice of excluding individuals from particular positions for specified criminal conduct within a defined time period, as guided by the Green factors, is a targeted exclusion. Targeted exclusions are tailored to the rationale for their adoption, in light of the particular criminal conduct and jobs involved, taking into consideration fact-based evidence, legal requirements, and/or relevant and available studies.
As discussed above in Section V.B.4, depending on the facts and circumstances, an employer may be able to justify a targeted criminal records screen solely under the *Green* factors. Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question. Title VII thus does not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity.

9. Individualized Assessment

Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual’s additional information shows that the policy as applied is not job related and consistent with business necessity.

The individual’s showing may include information that he was not correctly identified in the criminal record, or that the record is otherwise inaccurate. Other relevant individualized evidence includes, for example:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;\(^{122}\)
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;\(^ {123}\)
- Rehabilitation efforts, e.g., education/training;\(^ {124}\)
- Employment or character references and any other information regarding fitness for the particular position;\(^ {125}\) and
- Whether the individual is bonded under a federal, state, or local bonding program.\(^ {126}\)

If the individual does not respond to the employer’s attempt to gather additional information about his background, the employer may make its employment decision without the information.

**Example 7: Targeted Screen with Individualized Assessment Is Job Related and Consistent with Business Necessity.** County Community Center rents meeting rooms to civic organizations and small businesses, party rooms to families and social groups, and athletic facilities to local recreational sports leagues. The County has a targeted rule prohibiting anyone with a conviction for theft crimes (e.g., burglary, robbery, larceny, identity theft) from working in a position with access to personal financial
information for at least four years after the conviction or release from incarceration. This rule was adopted by the County’s Human Resources Department based on data from the County Corrections Department, national criminal data, and recent recidivism research for theft crimes. The Community Center also offers an opportunity for individuals identified for exclusion to provide information showing that the exclusion should not be applied to them.

Isaac, who is Hispanic, applies to the Community Center for a full-time position as an administrative assistant, which involves accepting credit card payments for room rentals, in addition to having unsupervised access to the personal belongings of people using the facilities. After conducting a background check, the County learns that Isaac pled guilty eighteen months earlier, at age twenty, to credit card fraud, and that he did not serve time in prison. Isaac confirms these facts, provides a reference from the restaurant where he now works on Saturday nights, and asks the County for a “second chance” to show that he is trustworthy. The County tells Isaac that it is still rejecting his employment application because his criminal conduct occurred eighteen months ago and is directly pertinent to the job in question. The information he provided did nothing to dispel the County’s concerns.

Isaac challenges this rejection under Title VII, alleging that the policy has a disparate impact on Hispanics and is not job related and consistent with business necessity. After confirming disparate impact, the EEOC finds that this screen was carefully tailored to assess unacceptable risk in relevant positions, for a limited time period, consistent with the evidence, and that the policy avoided overbroad exclusions by allowing individuals an opportunity to explain special circumstances regarding their criminal conduct. Thus, even though the policy has a disparate impact on Hispanics, the EEOC does not find reasonable cause to believe that discrimination occurred because the policy is job related and consistent with business necessity.127

Example 8: Targeted Exclusion Without Individualized Assessment Is Not Job Related and Consistent with Business Necessity. “Shred 4 You” employs over 100 people to pick up discarded files and sensitive materials from offices, transport the materials to a secure facility, and shred and recycle them. The owner of “Shred 4 You” sells the company to a competitor, known as “We Shred.” Employees of “Shred 4 You” must reapply for employment with “We Shred” and undergo a background check. “We Shred” has a targeted criminal conduct exclusion policy that prohibits the employment of anyone who has been convicted of any crime related to theft or fraud in the past five years, and the policy does not provide for any individualized consideration. The company explains that its clients entrust it with handling sensitive and confidential information
and materials; therefore, it cannot risk employing people who pose an above-average risk of stealing information.

Jamie, who is African American, worked successfully for “Shred 4 You” for five years before the company changed ownership. Jamie applies for his old job, and “We Shred” reviews Jamie’s performance appraisals, which include high marks for his reliability, trustworthiness, and honesty. However, when “We Shred” does a background check, it finds that Jamie pled guilty to misdemeanor insurance fraud five years ago, because he exaggerated the costs of several home repairs after a winter storm. “We Shred” management informs Jamie that his guilty plea is evidence of criminal conduct and that his employment will be terminated. Jamie asks management to consider his reliable and honest performance in the same job at “Shred 4 You,” but “We Shred” refuses to do so. The employer’s conclusion that Jamie’s guilty plea demonstrates that he poses an elevated risk of dishonesty is not factually based given Jamie’s history of trustworthiness in the same job. After confirming disparate impact based on race (African American), the EEOC finds reasonable cause to believe that Title VII was violated because the targeted exclusion was not job related and consistent with business necessity based on these facts.

C. Less Discriminatory Alternatives

If an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory “alternative employment practice” that serves the employer’s legitimate goals as effectively as the challenged practice but that the employer refused to adopt.128

VI. Positions Subject to Federal Prohibitions or Restrictions on Individuals with Records of Certain Criminal Conduct

In some industries, employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations. Compliance with federal laws and/or regulations is a defense to a charge of discrimination. However, the EEOC will continue to coordinate with other federal departments and agencies with the goal of maximizing federal regulatory consistency with respect to the use of criminal history information in employment decisions.129

A. Hiring in Certain Industries

Federal laws and regulations govern the employment of individuals with specific convictions in certain industries or positions in both the private and public sectors. For example, federal law excludes an individual who was convicted in the previous ten years of specified crimes from working as a security screener or otherwise having unescorted access to the secure areas of an airport.130 There are equivalent requirements for federal law enforcement officers,131
child care workers in federal agencies or facilities, bank employees, and port workers, among other positions. Title VII does not preempt these federally imposed restrictions. However, if an employer decides to impose an exclusion that goes beyond the scope of a federally imposed restriction, the discretionary aspect of the policy would be subject to Title VII analysis.

Example 9: Exclusion Is Not Job Related and Consistent with Business Necessity. Your Bank has a rule prohibiting anyone with convictions for any type of financial or fraud-related crimes within the last twenty years from working in positions with access to customer financial information, even though the federal ban is ten years for individuals who are convicted of any criminal offense involving dishonesty, breach of trust, or money laundering from serving in such positions.

Sam, who is Latino, applies to Your Bank to work as a customer service representative. A background check reveals that Sam was convicted of a misdemeanor for misrepresenting his income on a loan application fifteen years earlier. Your Bank therefore rejects Sam, and he files a Title VII charge with the EEOC, alleging that the Bank’s policy has a disparate impact based on national origin and is not job related and consistent with business necessity. Your Bank asserts that its policy does not cause a disparate impact and that, even if it does, it is job related for the position in question because customer service representatives have regular access to financial information and depositors must have “100% confidence” that their funds are safe. However, Your Bank does not offer evidence showing that there is an elevated likelihood of committing financial crimes for someone who has been crime-free for more than ten years. After establishing that the Bank’s policy has a disparate impact based on national origin, the EEOC finds that the policy is not job related for the position in question and consistent with business necessity. The Bank’s justification for adding ten years to the federally mandated exclusion is insufficient because it is only a generalized concern about security, without proof.

B. Obtaining Occupational Licenses

Title VII also does not preempt federal statutes and regulations that govern eligibility for occupational licenses and registrations. These restrictions cover diverse sectors of the economy including the transportation industry, the financial industry, and import/export activities, among others.

C. Waiving or Appealing Federally Imposed Occupational Restrictions

Several federal statutes and regulations provide a mechanism for employers or individuals to appeal or apply for waivers of federally imposed occupational restrictions. For example, unless a bank receives prior written consent from the Federal Deposit Insurance
Corporation (FDIC), an individual convicted of a criminal offense involving dishonesty, breach of trust, money laundering, or another financially related crime may not work in, own, or control “an insured depository institution” (e.g., bank) for ten years under the Federal Deposit Insurance Act. To obtain such FDIC consent, the insured institution must file an application for a waiver on behalf of the particular individual. Alternatively, if the insured institution does not apply for the waiver on the individual’s behalf, the individual may file a request directly with the FDIC for a waiver of the institution filing requirement, demonstrating “substantial good cause” to grant the waiver. If the FDIC grants the individual’s waiver request, the individual can then file an application directly with the FDIC for consent to work for the insured institution in question. Once the institution, or the individual, submits the application, the FDIC’s criminal record waiver review process requires consideration of mitigating factors that are consistent with Title VII, including evidence of rehabilitation, and the nature and circumstances of the crime.

Additionally, port workers who are denied the Transportation Workers Identification Credential (TWIC) based on their conviction record may seek a waiver for certain permanently disqualifying offenses or interim disqualifying offenses, and also may file an individualized appeal from the Transportation Security Administration’s initial determination of threat assessment based on the conviction. The Maritime Transportation Security Act, which requires all port workers to undergo a criminal background check to obtain a TWIC, provides that individuals with convictions for offenses such as espionage, treason, murder, and a federal crime of terrorism are permanently disqualified from obtaining credentials, but those with convictions for firearms violations and distribution of controlled substances may be temporarily disqualified. Most offenses related to dishonesty are only temporarily disqualifying.

Example 10: Consideration of Federally Imposed Occupational Restrictions. John Doe applies for a position as a truck driver for Truckers USA. John’s duties will involve transporting cargo to, from, and around ports, and Truckers USA requires all of its port truck drivers to have a TWIC. The Transportation Security Administration (TSA) conducts a criminal background check and may deny the credential to applicants who have permanently disqualifying criminal offenses in their background as defined by federal law. After conducting the background check for John Doe, TSA discovers that he was convicted nine years earlier for conspiracy to use weapons of mass destruction. TSA denies John a security card because this is a permanently disqualifying criminal offense under federal law. John, who points out that he was a minor at the time of the conviction, requests a waiver by TSA because he had limited involvement and no direct knowledge of the underlying crime at the time of the offense. John explains that he helped a friend transport some chemical materials that the friend later tried to use to damage government property. TSA refuses to grant John’s waiver request because a conviction for conspiracy to use weapons of mass destruction is not subject to the TSA’s waiver procedures. Based on this denial, Truckers USA rejects John’s application for the port truck driver position. Title VII does not override Truckers USA’s policy because the policy is consistent with another federal law.
While Title VII does not mandate that an employer seek such waivers, where an employer does seek waivers it must do so in a nondiscriminatory manner.

D. Security Clearances

The existence of a criminal record may result in the denial of a federal security clearance, which is a prerequisite for a variety of positions with the federal government and federal government contractors. A federal security clearance is used to ensure employees’ trustworthiness, reliability, and loyalty before providing them with access to sensitive national security information. Under Title VII’s national security exception, it is not unlawful for an employer to “fail or refuse to hire and employ” an individual because “such individual has not fulfilled or has ceased to fulfill” the federal security requirements. This exception focuses on whether the position in question is, in fact, subject to national security requirements that are imposed by federal statute or Executive Order, and whether the adverse employment action actually resulted from the denial or revocation of a security clearance. Procedural requirements related to security clearances must be followed without regard to an individual’s race, color, religion, sex, or national origin.

E. Working for the Federal Government

Title VII provides that, with limited coverage exceptions, “[a]ll personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.” The principles discussed above in this Guidance apply in the federal employment context. In most circumstances, individuals with criminal records are not automatically barred from working for the federal government. However, the federal government imposes criminal record restrictions on its workforce through “suitability” requirements for certain positions. The federal government’s Office of Personnel Management (OPM) defines suitability as “determinations based on a person's character or conduct that may have an impact on the integrity or efficiency of the service.” Under OPM's rules, agencies may bar individuals from federal employment for up to three years if they are found unsuitable based on criminal or dishonest conduct, among other factors. OPM gives federal agencies the discretion to consider relevant mitigating criteria when deciding whether an individual is suitable for a federal position. These mitigating criteria, which are consistent with the three Green factors and also provide an individualized assessment of the applicant’s background, allow consideration of: (1) the nature of the position for which the person is applying or in which the person is employed; (2) the nature and seriousness of the conduct; (3) the circumstances surrounding the conduct; (4) the recency of the conduct; (5) the age of the person involved at the time of the conduct; (6) contributing societal conditions; and (7) the absence or presence of rehabilitation or efforts toward rehabilitation. In general, OPM requires federal agencies and departments to consider hiring an individual with a criminal record if he is the best candidate for the position in question and can comply with relevant job requirements. The EEOC continues to coordinate with OPM to achieve employer best practices in the federal sector.
VII. Positions Subject to State and Local Prohibitions or Restrictions on Individuals with Records of Certain Criminal Conduct

States and local jurisdictions also have laws and/or regulations that restrict or prohibit the employment of individuals with records of certain criminal conduct.\textsuperscript{165} Unlike federal laws or regulations, however, state and local laws or regulations are preempted by Title VII if they “purport[] to require or permit the doing of any act which would be an unlawful employment practice” under Title VII.\textsuperscript{166} Therefore, if an employer’s exclusionary policy or practice is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability.\textsuperscript{167}

Example 11: State Law Exclusion Is Job Related and Consistent with Business Necessity. Elijah, who is African American, applies for a position as an office assistant at Pre-School, which is in a state that imposes criminal record restrictions on school employees. Pre-School, which employs twenty-five full- and part-time employees, uses all of its workers to help with the children. Pre-School performs a background check and learns that Elijah pled guilty to charges of indecent exposure two years ago. After being rejected for the position because of his conviction, Elijah files a Title VII disparate impact charge based on race to challenge Pre-School’s policy. The EEOC conducts an investigation and finds that the policy has a disparate impact and that the exclusion is job related for the position in question and consistent with business necessity because it addresses serious safety risks of employment in a position involving regular contact with children. As a result, the EEOC would not find reasonable cause to believe that discrimination occurred.

Example 12: State Law Exclusion Is Not Consistent with Title VII. County Y enforces a law that prohibits all individuals with a criminal conviction from working for it. Chris, an African American man, was convicted of felony welfare fraud fifteen years ago, and has not had subsequent contact with the criminal justice system. Chris applies to County Y for a job as an animal control officer trainee, a position that involves learning how to respond to citizen complaints and handle animals. The County rejects Chris’s application as soon as it learns that he has a felony conviction. Chris files a Title VII charge, and the EEOC investigates, finding disparate impact based on race and also that the exclusionary policy is not job related and consistent with business necessity. The County cannot justify rejecting everyone with any conviction from all jobs. Based on these facts, County Y’s law “purports to require or permit the doing of an[] act which would be an unlawful employment practice” under Title VII.
VIII. Employer Best Practices

The following are examples of best practices for employers who are considering criminal record information when making employment decisions.

General

- Eliminate policies or practices that exclude people from employment based on any criminal record.

- Train managers, hiring officials, and decisionmakers about Title VII and its prohibition on employment discrimination.

Developing a Policy

- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
  
  - Identify essential job requirements and the actual circumstances under which the jobs are performed.
  
  - Determine the specific offenses that may demonstrate unfitness for performing such jobs.
    
    o Identify the criminal offenses based on all available evidence.
  
  - Determine the duration of exclusions for criminal conduct based on all available evidence.
    
    o Include an individualized assessment.
  
  - Record the justification for the policy and procedures.
  
  - Note and keep a record of consultations and research considered in crafting the policy and procedures.

- Train managers, hiring officials, and decisionmakers on how to implement the policy and procedures consistent with Title VII.

Questions about Criminal Records

- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.
Confidentiality

- Keep information about applicants’ and employees’ criminal records confidential. Only use it for the purpose for which it was intended.

Approved by the Commission:

_____________________________                                                  _____________
Chair Jacqueline A. Berrien                                                Date
ENDNOTES

1 42 U.S.C. § 2000e et seq. The EEOC also enforces other anti-discrimination laws including: Title I of the Americans with Disabilities Act of 1990, as amended (ADA), and Section 501 of the Rehabilitation Act, as amended, which prohibit employment discrimination on the basis of disability; the Age Discrimination in Employment Act of 1967, as amended (ADEA), which prohibits discrimination on the basis of age 40 or above; Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits discrimination on the basis of genetic information; and the Equal Pay Act of 1963, as amended (EPA), which requires employers to pay male and female employees at the same establishment equal wages for equal work.

2 All entities covered by Title VII are subject to this analysis. See 42 U.S.C. § 2000e-2 (anti-discrimination provisions); 42 U.S.C. § 2000e(b)–(e) (defining “employer,” “employment agency,” and “labor organization”); 42 U.S.C. § 2000e-16(a) (prohibiting discriminatory employment practices by federal departments and agencies). For purposes of this Guidance, the term “employer” is used in lieu of listing all Title VII-covered entities. The Commission considers other coverage questions that arise in particular charges involving, for example, joint employment or third party interference in Compliance Manual Section 2: Threshold Issues, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, § 2-III B., Covered Entities, http://www.eeoc.gov/policy/docs/threshold.html#2-III-B (last visited April 23, 2012).

3 For the purposes of this Guidance, references to “contact” with the criminal justice system may include, for example, an arrest, charge, indictment, citation, conviction, incarceration, probation, or parole.

4 See Thomas P. Bonczar, Bureau of Justice Statistics, U.S. Dep’t of Justice, Prevalence of Imprisonment in the U.S. Population, 1974–2001, at 3 (2003), http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf [hereinafter Prevalence of Imprisonment] (“Between 1974 and 2001 the number of former prisoners living in the United States more than doubled, from 1,603,000 to 4,299,000.”); Sean Rosenmerkel et al., Bureau of Justice Statistics, U.S. Dep’t of Justice, Felony Sentences in State Courts, 2006 – Statistical Tables 1 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (reporting that between 1990 and 2006, there has been a 37% increase in the number of felony offenders sentenced in state courts); see also Pew Ctr. on the States, One in 31: The Long Reach of American Corrections 4 (2009), http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf [hereinafter One in 31] (“During the past quarter-century, the number of prison and jail inmates has grown by 274 percent . . . [bringing] the total population in custody to 2.3 million. During the same period, the number under community supervision grew by a staggering 3,535,660 to a total of 5.1 million.”); Pew Ctr. on the States, One in 100: Behind Bars in America 2008, at 3 (2008), http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf (“[M]ore than one in every 100 adults is now confined in an American jail or
prison.”); Robert Brame, Michael G. Turner, Raymond Paternoster, & Shawn D. Bushway, *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25, 26 (2012) (finding that approximately 1 out of 3 of all American youth will experience at least 1 arrest for a nontraffic offense by the age of 23).

5 See **John Schmitt & Kris Warner, Ctr. For Econ. & Policy Research, Ex-Offenders and the Labor Market** 12 (2010), [www.cepr.net/documents/publications/ex-offenders-2010-11.pdf](http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf) (“In 2008, ex-prisoners were 2.9 to 3.2 percent of the total working-age population (excluding those currently in prison or jail) or about one in 33 working-age adults. Ex-felons were a larger share of the total working-age population: 6.6 to 7.4 percent, or about one in 15 working-age adults [not all felons serve prison terms].”); see id. at 3 (concluding that “in the absence of some reform of the criminal justice system, the share of ex-offenders in the working-age population will rise substantially in coming decades”).

6 **Prevalence of Imprisonment**, *supra* note 4, at 4, Table 3.

7 **Id.**

8 **One in 31**, *supra* note 4, at 5 (noting that when all of the individuals who are probationers, parolees, prisoners or jail inmates are added up, the total is more than 7.3 million adults; this is more than the populations of Chicago, Philadelphia, San Diego, and Dallas combined, and larger than the populations of 38 states and the District of Columbia).

9 **Prevalence of Imprisonment**, *supra* note 4, at 7.

10 **Id.** at 5, Table 5; cf. **Pew Ctr. on the States, Collateral Costs: Incarceration’s Effect on Economic Mobility** 6 (2010), [http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653](http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653) (“Simply stated, incarceration in America is concentrated among African American men. While 1 in every 87 white males ages 18 to 64 is incarcerated and the number for similarly-aged Hispanic males is 1 in 36, for black men it is 1 in 12.”). Incarceration rates are even starker for 20-to-34-year-old men without a high school diploma or GED: 1 in 8 White males in this demographic group is incarcerated, compared to 1 in 14 Hispanic males, and 1 in 3 Black males. **Pew Ctr. on the States, supra**, at 8, Figure 2.

11 This document uses the terms “Black” and “African American,” and the terms “Hispanic” and “Latino,” interchangeably.

12 See infra notes 65–67 (citing data for the arrest rates and population statistics for African Americans and Hispanics).

13 **Prevalence of Imprisonment**, *supra* note 4, at 1.

14 **Id.** at 8.


In addition to these federal efforts, several state law enforcement agencies have embraced initiatives and programs that encourage the employment of ex-offenders. For example, Texas’ Department of Criminal Justice has a Reentry and Integration Division and within that Division, a Reentry Task Force Workgroup. See Reentry and Integration Division-Reentry Task Force, TEX. DEP’T OF CRIMINAL JUSTICE, http://www.tdcj.state.tx.us/divisions/rid/rid_texas_reentry_task_force.html (last visited April 23, 2012). One of the Workgroups in this Task Force specifically focuses on identifying
employment opportunities for ex-offenders and barriers that affect ex-offenders’ access to employment or vocational training programs. *Reentry and Integration Division – Reentry Task Force Workgroups*, TEX. DEP’T OF CRIMINAL JUSTICE, http://www.tdcj.state.tx.us/divisions/rid/r_workgroup/rid_workgroup_employment.html (last visited April 23, 2012). Similarly, Ohio’s Department of Rehabilitation and Correction has an Offender Workforce Development Office that “works with departmental staff and correctional institutions within the Ohio Department of Rehabilitation and Correction to prepare offenders for employment and the job search process.” *Jobs for Ohio Offenders*, OHIO DEP’T OF REHAB. AND CORR. OFFENDER WORKFORCE DEV., http://www.drc.ohio.gov/web/JOBOFFEN.HTM (last updated Aug. 9, 2010). Law enforcement agencies in other states such as Indiana and Florida have also recognized the importance of encouraging ex-offender employment. *See, e.g., IDOC: Road to Re-Entry*, IND. DEP’T OF CORR., http://www.in.gov/idoc/reentry/index.htm (last visited April 23, 2012) (describing various services and programs that are available to ex-offenders to help them to obtain employment); *FLA. DEP’T OF CORRS., RECIDIVISM REDUCTION STRATEGIC PLAN: FISCAL YEAR 2009-2014*, at 11, 12 (2009), http://www.dc.state.fl.us/orginfo/FinalRecidivismReductionPlan.pdf (identifying the lack of employment as one of the barriers to successful ex-offender reentry).


19  Id.


21  LEXISNEXIS, supra note 18, at 6. *See also* NAT’L ASS’N OF PROF’L BACKGROUND SCREENERS, supra note 20 at 5.

22  ERNST & ROSEN, supra note 17, at 1.

23  Id.

24  *See SEARCH, THE NATIONAL TASK FORCE ON THE CRIMINAL BACKGROUNDING OF AMERICA* 3, 4 (2005), http://www.search.org/files/pdf/ReportofNTFCBA.pdf. Registries and watch lists can also include federal and international terrorist watch lists, and registries of individuals who are being investigated for certain types of crimes, such as gang-related crimes. *Id. See also* LEXISNEXIS, supra note 18, at 5 (reporting that “all 50 states currently have a publicly available sex offender registry”).

25  *See U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY*

26 See NAT’L ASS’N OF PROF’L BACKGROUND SCREENERS, supra note 20, at 5. See also LEXISNEXIS, supra note 18, at 5.


28 AM. ASS’N OF COLLS. OF PHARMACY, supra note 27, at 6–7.

29 BACKGROUND CHECKS, supra note 25, at 4.

30 Id.

31 NAT’L ASS’N OF PROF’L BACKGROUND SCREENERS, supra note 20, at 5.

32 BACKGROUND CHECKS, supra note 25, at 4.

33 Id. at 3.

34 See id. (“Non-criminal justice screening using FBI criminal history records is typically done by a government agency applying suitability criteria that have been established by law or the responsible agency.”).

35 Id. at 5.

36 Id. at 4.


38 See BACKGROUND CHECKS, supra note 25, at 17.

39 SEARCH, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 83 (2005), www.search.org/files/pdf/RNTFCSCJRI.pdf; see also Douglas Belkin, More Job Seekers Scramble to Erase Their Criminal Past, WALL ST. J., Nov. 11, 2009, at A1, available at http://online.wsj.com/article/SB125789494126242343.html?KEYWORDS=Douglas+Belkin (“Arrests that have been legally expunged may remain on databases that data-harvesting companies offer to prospective employers; such background companies are under no legal obligation to erase them.”).
If applicants deny the existence of expunged or sealed records, as they are permitted to do in several states, they may appear dishonest if such records are reported in a criminal background check. See generally Debbie A. Mukamal & Paul N. Samuels, Statutory Limitations on Civil Rights of People with Criminal Records, 30 FORDHAM URB. L.J. 1501, 1509–10 (2003) (noting that 29 of the 40 states that allow expungement/sealing of arrest records permit the subject of the record to deny its existence if asked about it on employment applications or similar forms, and 13 of the 16 states that allow the expungement/sealing of adult conviction records permit the subject of the record to deny its existence under similar circumstances).

See SEARCH, INTERSTATE IDENTIFICATION NAME CHECK EFFICACY: REPORT OF THE NATIONAL TASK FORCE TO THE U.S. ATTORNEY GENERAL 21–22 (1999), www.search.org/files/pdf/III_Name_Check.pdf (“A so-called 'name check' is based not only on an individual's name, but also on other personal identifiers such as sex, race, date of birth and Social Security Number. . . . [N]ame checks are known to produce inaccurate results as a consequence of identical or similar names and other identifiers.”); id. at 7 (finding that in a sample of 82,601 employment applicants, 4,562 of these individuals were inaccurately indicated by a “name check” to have criminal records, which represents approximately 5.5% of the overall sample).

BACKGROUND CHECKS, supra note 25, at 2.

A “consumer reporting agency” is defined by FCRA as “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purposes of furnishing consumer reports to third parties . . . .” 15 U.S.C. § 1681a(f) (emphasis added); see also BACKGROUND CHECKS, supra note 25, at 43 (stating that the records that CRAs collect include “criminal history information, such as arrest and conviction information”).

A “consumer report” is defined by FCRA as “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for . . . employment purposes . . . .” 15 U.S.C. § 1681a(d)(1) (emphasis added).

See 15 U.S.C. § 1681c(a)(2) (“[N]o consumer reporting agency may make any consumer report containing . . . records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.”). But see id. §1681c(b)(3) (stating that the reporting restrictions for arrest records do not apply to individuals who will earn “an annual salary which equals, or which may reasonably be expected to equal $75,000 or more”).

15 U.S.C. § 1681c(a)(5) (“[N]o consumer reporting agency may make any consumer report containing . . . [a]ny other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.”).


SOC’Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS, slide 3 (Jan. 22, 2010), [http://www.slideshare.net/shrm/background-check-criminal?from=share_email](http://www.slideshare.net/shrm/background-check-criminal?from=share_email) [hereinafter CONDUCTING CRIMINAL BACKGROUND CHECKS] (73% of the responding employers reported that they conducted criminal background checks on all of their job candidates, 19% reported that they conducted criminal background checks on selected job candidates, and a mere 7% reported that they did not conduct criminal background checks on any of their candidates). The survey excluded the “not sure” responses from its analysis, which may account for the 1% gap in the total number of employer responses. *Id.*


CONDUCTING CRIMINAL BACKGROUND CHECKS, *supra* note 49, at slide 7 (61% of the surveyed employers reported that they conducted criminal background checks “[t]o ensure a safe work environment for employees”); *see also* Erika Harrell, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, WORKPLACE VIOLENCE, 1993–2009, at 1 (2011), [http://bjs.ojp.usdoj.gov/content/pub/pdf/wv09.pdf](http://bjs.ojp.usdoj.gov/content/pub/pdf/wv09.pdf) (reporting that in 2009, “[n]onfatal violence in the workplace was about 15% of all nonfatal violent crime against persons age 16 or older”). *But see id.* (noting that from “2002 to 2009, the rate of nonfatal workplace violence has declined by 35%, following a 62% decline in the rate from 1993 to 2002”). Studies indicate that most workplace violence is committed by individuals with no relationship to the business or its employees. *See id.* at 6 (reporting that between 2005 and 2009, strangers committed the majority of workplace violence against individuals (53% for males and 41% for females) while violence committed by co-workers accounted for a much smaller percentage (16.3% for males and 14.3% for females)); *see also* NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTR. FOR DISEASE CONTROL & PREVENTION, WORKPLACE VIOLENCE PREVENTION STRATEGIES AND RESEARCH.
NEEDS 4, Table 1 (2006), http://www.cdc.gov/niosh/docs/2006-144/pdfs/2006-144.pdf (reporting that approximately 85% of the workplace homicides examined were perpetrated in furtherance of a crime by persons with no relationship to the business or its employees; approximately 7% were perpetrated by employees or former employees, 5% were committed by persons with a personal relationship to an employee, and 3% were perpetrated by persons with a customer-client relationship to the business).

CONDUCTING CRIMINAL BACKGROUND CHECKS, supra note 49, at slide 7 (55% percent of the surveyed employers reported that they conducted criminal background checks “[t]o reduce legal liability for negligent hiring”). Employers have a common law duty to exercise reasonable care in hiring to avoid foreseeable risks of harm to employees, customers, and the public. If an employee engages in harmful misconduct on the job, and the employer has not exercised such care in selecting the employee, the employer may be subject to liability for negligent hiring. See, e.g., Stires v. Carnival Corp., 243 F. Supp. 2d 1313, 1318 (M.D. Fla. 2002) (“[N]egligent hiring occurs when . . . the employer knew or should have known of the employee’s unfitness, and the issue of liability primarily focuses upon the adequacy of the employer’s pre-employment investigation into the employee’s background.”).

CONDUCTING CRIMINAL BACKGROUND CHECKS, supra note 49, at slide 4 (40% of the surveyed employers reported that they conducted criminal background checks for “[j]ob candidates for positions for which state law requires a background check (e.g., day care teachers, licensed medical practitioners, etc.)”; see id. at slide 7 (20% of the employers reported that they conducted criminal background checks “[t]o comply with the applicable State law requiring a background check (e.g., day care teachers, licensed medical practitioners, etc.) for a particular position”). The study did not report the exact percentage of employers that conducted criminal background checks to comply with applicable federal laws or regulations, but it did report that 25% of the employers conducted background checks for “[j]ob candidates for positions involving national defense or homeland security.” Id. at slide 4.


Disparate treatment based on the race or national origin of job applicants with the same qualifications and criminal records has been documented. For example, a 2003 study demonstrated that White applicants with the same qualifications and criminal records as Black applicants were three times more likely to be invited for interviews than the Black applicants. See Devah Pager, The Mark of a Criminal Record, 108 Am. J. Soc. 937, 958, Figure 6 (2003), www.princeton.edu/~pager/pager_ajs.pdf. Pager matched pairs of young Black and White men as “testers” for her study. The “testers” in Pager’s study were college students who applied for 350 low-skilled jobs advertised in Milwaukee-area classified advertisements, to test the degree to which a criminal record affects subsequent employment opportunities. The same study showed that White job applicants with a criminal record were called back for interviews more often than equally-qualified Black applicants who did not have a criminal record. Id. at 958. See also Devah Pager et al., Sequencing Disadvantage: The Effects of Race and Criminal Background for Low Wage Job Seekers, 623 Annals Am. Acad. Pol. & Soc. Sci., 199 (2009), www.princeton.edu/~pager/annals_sequencingdisadvantage.pdf (finding that among Black and
White testers with similar backgrounds and criminal records, “the negative effect of a criminal conviction is substantially larger for blacks than whites. . . . the magnitude of the criminal record penalty suffered by black applicants (60 percent) is roughly double the size of the penalty for whites with a record (30 percent)”; see id. at 200–201 (finding that personal contact plays an important role in mediating the effects of a criminal stigma in the hiring process, and that Black applicants are less often invited to interview, thereby having fewer opportunities to counteract the stigma by establishing rapport with the hiring official); Devah Pager, Statement of Devah Pager, Professor of Sociology at Princeton University, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, http://www.eeoc.gov/eeoc/meetings/11-20-08/pager.cfm (last visited April 23, 2012) (discussing the results of the Sequencing Disadvantage study); Devah Pager & Bruce Western, NYC Commission on Human Rights, Race at Work, Realities of Race and Criminal Record in the NYC Job Market 6, Figure 2 (2006), http://www.nyc.gov/html/cchr/pdf/race_report_web.pdf (finding that White testers with a felony conviction were called back 13% of the time, Hispanic testers without a criminal record were called back 14% of the time, and Black testers without a criminal record were called back 10% of the time).


57 A 2006 study demonstrated that employers who are averse to hiring people with criminal records sometimes presumed, in the absence of evidence to the contrary, that African American men applying for jobs have disqualifying criminal records. Harry J. Holzer et al., Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers, 49 J.L. & ECON. 451 (2006), http://www.jstor.org/stable/pdfplus/10.1086/501089.pdf; see also Harry Holzer et al., Urban Inst., Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles 6–7 (2003), http://www.urban.org/UploadedPDF/410779_ExOffenders.pdf (describing the results of an employer survey where over 40% of the employers indicated that they would “probably not” or “definitely not” be willing to hire an applicant with a criminal record).

58 The Commission has not done matched-pair testing to investigate alleged discriminatory employment practices. However, it has issued an Enforcement Guidance that discusses situations where individuals or organizations file charges on the basis of matched-pair testing, among other practices. See generally Enforcement Guidance: Whether “Testers” Can File Charges and Litigate Claims of Employment Discrimination, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (May 22, 1996), http://www.eeoc.gov/policy/docs/testers.html.

59 42 U.S.C. § 2000e-2(k)(1)(A)(i). If an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory “alternative employment practice” that serves the employer’s legitimate goals as effectively as the challenged practice but that the employer refused to adopt. Id. § 2000e-2(k)(1)(A)(ii).

61  Id. at 431.


64  The Commission presumes that employers use the information sought and obtained from its applicants and others in making an employment decision. See Gregory v. Litton Sys. Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970). If an employer asserts that it did not factor the applicant’s or employee’s known criminal record into an employment decision, the EEOC will seek evidence supporting this assertion. For example, evidence that the employer has other employees from the same protected group with roughly comparable criminal records may support the conclusion that the employer did not use the applicant’s or employee’s criminal record to exclude him from employment.


67  Accurate data on the number of Hispanics arrested and convicted in the United States is limited. See NANCY E. WALKER ET AL., NAT’L COUNCIL OF LA RAZA, LOST OPPORTUNITIES: THE REALITY OF LATINOS IN THE U.S. CRIMINAL JUSTICE SYSTEM 17–18 (2004), http://www.policyarchive.org/handle/10207/bitstreams/20279.pdf (explaining why “[i]t is very difficult to find any information – let alone accurate information – on the number of Latinos arrested in the United States”). The Department of Justice’s Bureau of Justice Statistics’ (BJS) Sourcebook of Criminal Justice Statistics and the FBI’s Crime Information Services Division do not provide data for arrests by ethnicity. Id. at 17. However, the U.S. Drug Enforcement Administration (DEA) disaggregates data by Hispanic and non-Hispanic ethnicity. Id. at 18. According to DOJ/BJS, from October 1, 2008 to September 30, 2009, 45.5% of drug arrests made by the DEA were of Hispanics or Latinos. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2009 – STATISTICAL TABLES, at 6, Table 1.4 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf. Accordingly, Hispanics were arrested for drug offenses by the DEA at a rate of three times their numbers in the general population. See U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 3 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf (reporting that in 2010, “there were 50.5 million Hispanics in the United States, composing 16 percent of the total population”). However, national statistics indicate that Hispanics have similar or lower drug usage rates compared to Whites. See, e.g., SUBSTANCE ABUSE & MENTAL HEALTH SERVS.
See, e.g., HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 1 (2009), http://www.hrw.org/sites/default/files/reports/us0309web_1.pdf (noting that the "[t]he higher rates of black drug arrests do not reflect higher rates of black drug offending . . . . blacks and whites engage in drug offenses - possession and sales - at roughly comparable rates"); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 21 (2011), http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.pdf (reporting that in 2010, the rates of illicit drug use in the United States among persons aged 12 or older were 10.7% for African Americans, 9.1% for Whites, and 8.1% for Hispanics); HARRY LEVINE & DEBORAH SMALL, N.Y. CIVIL LIBERTIES UNION, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY, 1997–2007, at 13–16 (2008), www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf (citing U.S. Government surveys showing that Whites use marijuana at higher rates than African Americans and Hispanics; however, the marijuana arrest rate of Hispanics is nearly three times the arrest rate of Whites, and the marijuana arrest rate of African Americans is five times the arrest rate of Whites).

PREVALENCE OF IMPRISONMENT, supra note 4, at 1, 8. Due to the nature of available data, the Commission is using incarceration data as a proxy for conviction data.

Id.

Id.

Id.

Id.

Paul Guerino et al., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2010, at 27, Table 14 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf (reporting that as of December 31, 2010, Black men were imprisoned at a rate of 3,074 per 100,000 Black male residents, Hispanic men were imprisoned at a rate of 1,258 per 100,000 Hispanic male residents, and White men were imprisoned at a rate of 459 per 100,000 White male residents); cf. One in 31, supra note 4, at 5 (“Black adults are four times as likely as whites and nearly 2.5 times as likely as Hispanics to be under correctional control. One in 11 black adults -- 9.2 percent -- was under correctional control [probation, parole, prison, or jail] at year end 2007.”).
The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. part 1607, provide that “[employers] should maintain and have available . . . information on [the] adverse impact of [their employment selection procedures].” 29 C.F.R. § 1607.15A. “Where [an employer] has not maintained [such records, the EEOC] may draw an inference of adverse impact of the selection process from the failure of [the employer] to maintain such data . . . .” Id. § 1607.4D.

See, e.g., El v. SEPTA, 418 F. Supp. 2d 659, 668–69 (E.D. Pa. 2005) (finding that the plaintiff established a prima facie case of disparate impact with evidence from the defendant’s personnel records and national data sources from the U.S. Bureau of Justice Statistics and the Statistical Abstract of the U.S.), aff’d on other grounds, 479 F.3d 232 (3d Cir. 2007); Green v. Mo. Pac. R.R., 523 F.2d 1290, 1294–95 (8th Cir. 1975) (concluding that the defendant’s criminal record exclusion policy had a disparate impact based on race by evaluating local population statistics and applicant data), appeal after remand, 549 F.2d 1158, 1160 (8th Cir. 1977).


Id. at 453–54


See, e.g., Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977) (stating that “[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection”).


422 U.S. 405 (1975).


137 Cong. Rec. 15273 (1991) (statement of Sen. Danforth) (“[T]he terms ‘business necessity’ and ‘job related’ are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Attonia.” (citations omitted)). Section 105(b) of the Civil Rights Act of 1991 provides that only the interpretive memorandum read by Senator Danforth in the Congressional Record may be considered legislative history or relied upon in construing or applying the business necessity standard.

401 U.S. at 431, 436.
422 U.S. at 430–31 (endorsing the EEOC’s position that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to predict or correlate with “‘important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated’” (quoting 29 C.F.R. § 1607.4(c))).

433 U.S. at 331–32 (concluding that using height and weight as proxies for strength did not satisfy the business necessity defense because the employer failed to establish a correlation between height and weight and the necessary strength, and also did not specify the amount of strength necessary to perform the job safely and efficiently).

Id. at 331 n.14.

523 F.2d 1290, 1293 (8th Cir. 1975). “In response to a question on an application form, Green [a 29-year-old African American man] disclosed that he had been convicted in December 1967 for refusing military induction. He stated that he had served 21 months in prison until paroled on July 24, 1970.” Id. at 1292–93.

Green v. Mo. Pac. R.R., 549 F.2d 1158, 1160 (8th Cir. 1977) (upholding the district court’s injunction prohibiting the employer from using an applicant’s conviction record as an absolute bar to employment but allowing it to consider a prior criminal record as a factor in making individual hiring decisions, as long as the defendant took these three factors into account).

Id. (referring to completion of the sentence rather than completion of parole).

Id.

479 F.3d 232 (3d Cir. 2007).

Id. at 235.

Id. at 235, 236.

Id. at 235.

Id. at 244.

Id. at 244–45.

Id. at 247. Cf. Shawn Bushway et al., The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?, 49 CRIMINOLOGY 27, 52 (2011) [hereinafter The Predictive Value of Criminal Background Checks] (“Given the results of the current as well as previous [recidivism] studies, the 40-year period put forward in El v. SEPTA (2007) . . . seems too old of a score to be still in need of settlement.”).
Some states have enacted laws to limit employer inquiries concerning all or some arrest records. See BACKGROUND CHECKS, supra note 25, at 48–49. At least 13 states have statutes explicitly prohibiting arrest record inquiries and/or dissemination subject to certain exceptions. See, e.g., Alaska (ALASKA STAT. § 12.62.160(b)(8)); Arkansas (ARK. CODE ANN. § 12-12-1009(c)); California (CAL. LAB. CODE § 432.7(a)); Connecticut (CONN. GEN. STAT. § 46a-80(e)); Illinois (775 ILL. COMP. STAT. § 5/2-103(A)) (dealing with arrest records that have been ordered expunged, sealed, or impounded); Massachusetts (MASS. GEN. LAWS ch. 151B § 4(9)); Michigan (MICH COMP. LAWS § 37.2205a(1) (applying to misdemeanor arrests only)); Nebraska (NEB. REV. STAT. § 29-3523(2)) (ordering no dissemination of arrest records under certain conditions and specified time periods)); New York (N.Y. EXEC. LAW § 296(16)); North Dakota (N.D. CENT. CODE § 12-60-16.6(2)); Pennsylvania (18 PA. CONS. STAT. § 9121(b)(2)); Rhode Island (R.I. GEN. LAWS § 28-5-7(7)); and Wisconsin (WIS. STAT. §§ 111.321, 111.335a).

See United States v. Armstrong, 517 U.S. 456, 464 (1996) (discussing federal prosecutors’ broad discretionary authority to determine whether to prosecute cases and whether to bring charges before a grand jury); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (explaining same for state prosecutors); see also THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 10, Table 11 (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf (reporting that in the 75 largest counties in the country, nearly one-third of the felony arrests did not result in a conviction because the charges against the defendants were dismissed).

Schware v. Bd. of Bar Exam’rs, 353 U.S. 232, 241 (1957) (“The mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.”); United States v. Hynes, 467 F.3d 951, 957 (6th Cir. 2006) (upholding a preliminary jury instruction that stated that a “defendant is presumed to be innocent unless proven guilty. The indictment against the Defendant is only an accusation, nothing more. It’s not proof of guilt or anything else.”); see Gregory v. Litton Sys. Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) (“[I]nformation concerning a prospective employee’s record of arrests without convictions, is irrelevant to [an applicant’s] suitability or qualification for employment.”), modified on other grounds, 472 F.2d 631 (9th Cir. 1972); Dozier v. Chupka, 395 F. Supp. 836, 850 n.10 (S.D. Ohio 1975) (stating that the use of arrest records was too crude a predictor of an employee’s predilection for theft where there were no procedural safeguards to prevent reliance on unwarranted arrests); City of Cairo v. Ill. Fair Empl. Prac. Comm., 8 Empl. Prac. Dec. (CCH) ¶ 9682 (Ill. App. Ct. 1974) (concluding that, where applicants sought to become police officers, they could not be absolutely barred from appointment solely because they had been arrested, as distinguished from convicted); see also EEOC Dec. 74-83, ¶ 6424 (CCH) (1983) (finding no business justification for an employer’s unconditional termination of all employees with arrest records (all five employees terminated were Black), purportedly to reduce thefts in the workplace; the employer produced no evidence that these particular employees had been involved in any of the thefts, or that all people who are arrested but not convicted are prone towards crime in the future); EEOC Dec. 76-87, ¶ 6665 (CCH) (1983) (holding that an applicant who sought to become a police officer could not be rejected based on one arrest five years earlier
for riding in a stolen car when he asserted that he did not know that the car was stolen and the charge was dismissed).

104 See State Criminal History, supra note 37, at 2; see also Background Checks, supra note 25, at 17.

105 See supra notes 39–40.

106 See Clark v. Arizona, 548 U.S. 735, 766 (2006) (“The first presumption [in a criminal case] is that a defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged. . . .”). See also Fed. R. Crim P 11 (criminal procedure rule governing pleas). The Supreme Court has concluded that criminal defendants have a Sixth Amendment right to effective assistance of counsel during plea negotiations. See generally Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012).

107 See supra text accompanying note 39.

108 See e.g., Haw. Rev. Stat. § 378-2.5(b). Under this provision, the employer may withdraw the offer of employment if the prospective employee has a conviction record “that bears a rational relationship to the duties and responsibilities of the position.” Id. See also Conn. Gen. Stat. § 46a-80(b) (“[N]o employer . . . shall inquire about a prospective employee’s past convictions until such prospective employee has been deemed otherwise qualified for the position.”); Minn. Stat. § 364.021(a) (“[A] public employer may not inquire or consider the criminal record or criminal history of an applicant for public employment until the applicant has been selected for an interview by the employer.”). State fair employment practices agencies have information about applicable state law.

109 See generally Nat’l League of Cities & Nat’l Emp’t Law Project, Cities Pave the Way: Promising Reentry Policies that Promote Local Hiring of People with Criminal Records (2010), www.nelp.org/page/-/SCLP/2010/CitiesPavetheWay.pdf?nocdn=1 (identifying local initiatives that address ways to increase employment opportunities for individuals with criminal records, including delaying a background check until the final stages of the hiring process, leveraging development funds, and expanding bid incentive programs to promote local hiring priorities); Nat’l Emp’t Law Project, City and County Hiring Initiatives (2010), www.nelp.org/page/-/SCLP/CityandCountyHiringInitiatives.pdf (discussing the various city and county initiatives that have removed questions regarding criminal history from the job application and have waited until after a conditional offer of employment has been made to conduct a background check and inquire about the applicant’s criminal background).

110 Several federal laws automatically prohibit employing individuals with certain felony convictions or, in some cases, misdemeanor convictions. See, e.g., 5 U.S.C. § 7371(b) (requiring the mandatory removal of any federal law enforcement officer who is convicted of a felony); 46 U.S.C. § 70105(c)(1)(A) (mandating that individuals who have been convicted of espionage, sedition, treason or terrorism be permanently disqualified from receiving a biometric transportation security card and thereby excluded from port work employment); 42 U.S.C.
§ 13726(b)(1) (disqualifying persons with felony convictions or domestic violence convictions from working for a private prisoner transport company); 25 U.S.C. § 3207(b) (prohibiting individuals with a felony conviction, or any of two or more misdemeanor convictions, from working with Indian children if their convictions involved crimes of violence, sexual assault, molestation, exploitation, contact or prostitution, crimes against persons, or offenses committed against children); 18 U.S.C. § 922(g)(1), (9) (prohibiting an individual convicted of a felony or a misdemeanor for domestic violence from possessing a firearm, thereby excluding such individual from a wide range of jobs that require such possession); 18 U.S.C. § 2381 (prohibiting individuals convicted of treason from “holding any office under the United States”). Other federal laws prohibit employing individuals with certain convictions for a defined time period. See, e.g., 5 U.S.C. § 7313(a) (prohibiting individuals convicted of a felony for inciting a riot or civil disorder from holding any position in the federal government for five years after the date of the conviction); 12 U.S.C. § 1829 (requiring a ten-year ban on employing individuals in banks if they have certain financial-related convictions); 49 U.S.C. § 44936(b)(1)(B) (imposing a ten-year ban on employing an individual as a security screener for an air carrier if that individual has been convicted of specified crimes).

See 29 C.F.R. § 1607.5 (describing the general standards for validity studies).

Id.

Id. § 1607.6B. The following subsections state:

(1) Where informal or unscored procedures are used. When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.

(2) Where formal and scored procedures are used. When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.

See, e.g., Brent W. Roberts et al., Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study, 92 J. APPLIED PSYCHOL. 1427, 1430 (2007), http://internal.psychology.illinois.edu/~broberts/Roberts,%20Harms,%20Caspi,%20&%20Moffitt,%202007.pdf (finding that in a study of New Zealand residents from birth to age 26, “[a]dolescent criminal convictions were unrelated to committing counterproductive activities at work [such as tardiness, absenteeism, disciplinary problems, etc.].” In fact, according to the
[results of the study], people with an adolescent criminal conviction record were less likely to get in a fight with their supervisor or steal things from work.

See Ohio Rev. Code Ann. § 2913.02.

523 F.2d at 1298 (stating that “[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed”).

479 F.3d at 247.

See, e.g., Keith Soothill & Brian Francis, When do Ex-Offenders Become Like Non-Offenders?, 48 Howard J. of Crim. Just., 373, 380–81 (2009) (examining conviction data from Britain and Wales, a 2009 study found that the risk of recidivism declined for the groups with prior records and eventually converged within 10 to 15 years with the risk of those of the nonoffending comparison groups); Alfred Blumstein & Kiminori Nakamura, Redemption in the Presence of Widespread Criminal Background Checks, 47 Criminology 327 (2009) (concluding that there may be a “point of redemption” (i.e., a point in time where an individual’s risk of re-offending or re-arrest is reasonably comparable to individuals with no prior criminal record) for individuals arrested for certain offenses if they remain crime free for a certain number of years); Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement, 53 Crime & Delinquency 64 (2007) (analyzing juvenile police contacts and Racine, Wisconsin police contacts for an aggregate of crimes for 670 males born in 1942 and concluding that, after seven years, the risk of a new offense approximates that of a person without a criminal record); Megan C. Kurlychek et al., Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?, 5 Criminology & Pub. Pol’y 483 (2006) (evaluating juvenile police contacts and arrest dates from Philadelphia police records for an aggregate of crimes for individuals born in 1958, a 2006 study concluded that the risk of recidivism decreases over time and that, six or seven years after an arrest, an individual’s risk of re-arrest approximates that of an individual who has never been arrested).

Griggs, 401 U.S. at 431.

523 F.2d at 1298; see also Field v. Orkin Extermination Co., No. Civ. A. 00-5913, 2002 WL 32345739, at *1 (E.D. Pa. Feb. 21, 2002) (unpublished) (“[A] blanket policy of denying employment to any person having a criminal conviction is a [per se] violation of Title VII.”). The only exception would be if such an exclusion were required by federal law or regulation. See, e.g., supra note 110.

Cf. Field, 2002 WL 32345739, at *1. In Field, an employee of ten years was fired after a new company that acquired her former employer discovered her 6-year-old felony conviction. The new company had a blanket policy of firing anyone with a felony conviction less than 10 years old. The court granted summary judgment for the employee because the employer’s argument that her conviction was related to her job qualifications was “weak at best,” especially
given her positive employment history with her former employer. *Id.*

122 Recidivism rates tend to decline as ex-offenders’ ages increase. A 2011 study found that an individual’s age at conviction is a variable that has a “substantial and significant impact on recidivism.” *The Predictive Value of Criminal Background Checks, supra* note 99, at 43. For example, the 26-year-olds in the study, with no prior criminal convictions, had a 19.6% chance of reoffending in their first year after their first conviction, compared to the 36-year-olds who had an 8.8% chance of reoffending during the same time period, and the 46-year-olds who had a 5.3% of reoffending. *Id.* at 46. *See also* PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, at 7 (2002), [http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf](http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf) (finding that, although 55.7% of ex-offenders aged 14–17 released in 1994 were reconvicted within three years, the percentage declined to 29.7% for ex-offenders aged 45 and older who were released the same year).

Consideration of an applicant’s age at the time the offense occurred or at his release from prison would benefit older individuals and, therefore, would not violate the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq. See Age Discrimination in Employment Act, 29 C.F.R. § 1625.2 (“Favoring an older individual over a younger individual because of age is not unlawful discrimination under the ADEA, even if the younger individual is at least 40 years old.”); *see also* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (concluding that the ADEA does not preclude an employer from favoring an older employee over a younger one within the protected age group).

123 *See* Laura Moskowitz, *Statement of Laura Moskowitz, Staff Attorney, National Employment Law Project’s Second Chance Labor Project, U.S. EQUAL EMP’T OPPORTUNITY COMM’N,* [http://www.eeoc.gov/eeoc/meetings/11-20-08/moskowitz.cfm](http://www.eeoc.gov/eeoc/meetings/11-20-08/moskowitz.cfm) (last visited April 23, 2012) (stating that one of the factors that is relevant to the assessment of an ex-offender’s risk to a workplace and to the business necessity analysis, is the “length and consistency of the person’s work history, including whether the person has been recently employed”; also noting that various studies have “shown a strong relationship between employment and decreases in crime and recidivism”). *But see* Stephen J. Tripodi et al., *Is Employment Associated With Reduced Recidivism?: The Complex Relationship Between Employment and Crime*, 54 INT’L J. OF OFFENDER THERAPY AND COMP. CRiminology 716, 716 (2010) (finding that “[b]ecoming employed after incarceration, although apparently providing initial motivation to desist from crime, does not seem to be on its own sufficient to prevent recidivism for many parolees”).

stability, such as stable employment, family and community involvement, and recovery from substance abuse, are correlated with a decreased risk of recidivism).

Some employers have expressed a greater willingness to hire ex-offenders who have had an ongoing relationship with third party intermediary agencies that provide supportive services such as drug testing, referrals for social services, transportation, child care, clothing, and food. See Amy L. Solomon et al., From Prison to Work: The Employment Dimensions of Prisoner Reentry, 2004 URBAN INST. 20, http://www.urban.org/UploadedPDF/411097_From_Prison_to_Work.pdf. These types of services can help ex-offenders avoid problems that may interfere with their ability to obtain and maintain employment. Id.; see generally Victoria Kane, Transcript of 7-26-11 Meeting, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#kane (last visited April 23, 2012) (describing why employers should partner with organizations that provide supportive services to ex-offenders).


This example is loosely based on a study conducted by Alfred Blumstein and Kiminori Nakamura measuring the risk of recidivism for individuals who have committed burglary, robbery, or aggravated assault. See Blumstein & Nakamura, supra note 118.


See Exec. Order No. 12,067, 3 C.F.R. 206 (1978 Comp.).


See 5 U.S.C. § 7371(b) (requiring mandatory removal from employment of law enforcement officers convicted of felonies).

See 42 U.S.C. § 13041(c) (“Any conviction for a sex crime, an offense involving a child victim, or a drug felony may be grounds for denying employment or for dismissal of an employee. . .”).

Other jobs and programs subject to federally-imposed restrictions based on criminal convictions include the business of insurance (18 U.S.C. § 1033(e)), employee benefits employee (29 U.S.C. § 1111(a)), participation in Medicare and state health care programs (42 U.S.C. § 1320a-7(a)–(b)), defense contractor (10 U.S.C. § 2408(a)), prisoner transportation (42 U.S.C. § 13726b(b)(1)), and court-imposed occupational restrictions (18 U.S.C. §§ 3563(b)(5), 3583(d)). This list is not meant to be exhaustive.

See, e.g., federal statutes governing commercial motor vehicle operator’s licenses (49 U.S.C. § 31310(b)-(h)), locomotive operator licenses (49 U.S.C. § 20135(b)(4)(B)), and certificates, ratings, and authorizations for pilots, flight instructors, and ground instructors (49 U.S.C. §§ 44709(b)(2), 44710(b), 4711(c); 14 C.F.R. § 61.15).


See, e.g., custom broker’s licenses (19 U.S.C. § 1641(d)(1)(B)), export licenses (50 U.S.C. App. § 2410(h)), and arms export (22 U.S.C. § 2778(g)).

See, e.g., grain inspector’s licenses (7 U.S.C. § 85), merchant mariner’s documents, licenses, or certificates of registry (46 U.S.C. § 7503(b)), licenses to import, manufacture, or deal in explosives or permits to use explosives (18 U.S.C. § 843(d)), and farm labor contractor’s certificates of registration (29 U.S.C. § 1813(a)(5)). This list of federally-imposed restrictions on occupational licenses and registrations for individuals with certain criminal convictions is not meant to be exhaustive. For additional information, please consult the relevant federal agency or department.

See 12 U.S.C. § 1829(a)(1). The statute imposes a ten-year ban for individuals who have been convicted of certain financial crimes such as corruption involving the receipt of commissions or gifts for procuring loans (18 U.S.C. § 215), embezzlement or theft by an officer/employee of a lending, credit, or insurance institution (18 U.S.C. § 657), false or fraudulent statements by an officer/employee of the federal reserve or a depository institution (18 U.S.C. § 1005), or fraud by wire, radio, or television that affects a financial institution (18 U.S.C. § 1343), among other crimes. See 12 U.S.C. § 1829(a)(2)(A)(i), (II). Individuals who have either been convicted of the crimes listed in § 1829(a)(2)(A), or conspiracy to commit those crimes, will not receive an exception to the application of the 10-year ban from the FDIC. 12 U.S.C. § 1829(a)(2)(A).


“Approval is automatically granted and an application [for a waiver] will not be required where [an individual who has been convicted of] the covered offense [criminal offenses involving dishonesty, breach of trust, or money laundering] . . . meets all of the [“de minimis”] criteria” set forth in the FDIC’s Statement of Policy. FDIC POLICY, supra, § B (5). These criteria include the following: (1) there is only one conviction or program of record for a covered offense; (2) the offense was punishable by imprisonment for a term of one year or less and/or a fine of $1,000 or less, and the individual did not serve time in jail; (3) the conviction or program was entered at least five years prior to the date an application would otherwise be required; and (4) the offense did not involve an insured depository institution or insured credit union. Id. Additionally, an individual’s conviction for writing a “bad” check will be considered a de minimis offense, even if it involved an insured depository institution or insured credit union, if: (1) all other requirements of the de minimis offense provisions are met; (2) the aggregate total face value of the bad or insufficient funds check(s) cited in the conviction was $1000 or less; and (3) no insured depository institution or insured credit union was a payee on any of the bad or insufficient funds checks that were the basis of the conviction. Id.

See FDIC POLICY, supra note 141, § C, “PROcedures.”

Id. But cf. NAT’L H.I.R.E. NETWORK, PEOPLE WITH CRIMINAL RECORDS WORKING IN FINANCIAL INSTITUTIONS: THE RULES ON FDIC WAIVERS, http://www.hirenetwork.org/FDIC.html (“Institutions rarely seek a waiver, except for higher level positions when the candidate is someone the institution wants to hire. Individuals can only seek FDIC approval themselves if they ask the FDIC to waive the usual requirement. Most individuals probably are unaware that they have this right.”); FED. DEPOSIT INSUR. CORP. 2010 ANNUAL REPORT, § VI.A: KEY STATISTICS, FDIC ACTIONS ON FINANCIAL INSTITUTION APPLICATIONS 2008–2010 (2011), http://www.fdic.gov/about/strategic/report/2010annualreport/chpt6-01.html (reporting that between 2008 and 2010, the FDIC approved a total of 38 requests for consent to employ individuals with covered offenses in their background; the agency did not deny any requests during this time period).

FDIC POLICY, supra note 141, § D, “EVALUATION OF SECTION 19 APPLICATIONS” (listing the factors that are considered in this waiver review process, which include: (1) the nature and circumstances underlying the offense; (2) “[e]vidence of rehabilitation including the person’s reputation since the conviction . . . the person’s age at the time of conviction . . . and the time which has elapsed since the conviction”; (3) the position to be held in the insured institution; (4) the amount of influence/control the individual will be able to exercise over management affairs; (5) management’s ability to control and supervise the individual’s activities; (6) the degree of ownership the individual will have in the insured institution; (7) whether the institution’s fidelity bond coverage applies to the individual; (8) the opinion of the applicable federal and/or state regulators; and (9) any other relevant factors).
See 49 C.F.R. §§ 1515.7 (describing the procedures for waiver of criminal offenses, among other standards), 1515.5 (explaining how to appeal the Initial Determination of Threat Assessment based on a criminal conviction). In practice, some worker advocacy groups have criticized the TWIC appeal process due to prolonged delays, which leaves many workers jobless; especially workers of color. See generally MAURICE EMSELLEM ET AL., NAT’L EMP’T LAW PROJECT, A SCORECARD ON THE POST-911 PORT WORKER BACKGROUND CHECKS: MODEL WORKER PROTECTIONS PROVIDE A LIFELINE FOR PEOPLE OF COLOR, WHILE MAJOR TSA DELAYS LEAVE THOUSANDS JOBLESS DURING THE RECESSION (2009), http://nelp.3cdn.net/2d5508b4cecc6e13da6_upm6b20e5.pdf.

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6201, 124 Stat. 721 (2010) (the Act) includes a process to appeal or dispute the accuracy of information obtained from criminal records. The Act requires participating states to perform background checks on applicants and current employees who have direct access to patients in long-term care facilities, such as nursing homes, to determine if they have been convicted of an offense or have other disqualifying information in their background, such as a finding of patient or resident abuse, that would disqualify them from employment under the Social Security Act or as specified by state law. See 42 U.S.C. § 1320a-7a(a)(3)(A), (a)(4)(B), (6)(A)–(E). The background check involves an individualized assessment of the relevance of a conviction or other disqualifying information. The Act protects applicants and employees in several ways, for example, by: (1) providing a 60-day provisional period of employment for the prospective employee, pending the completion of the criminal records check; (2) providing an independent process to appeal or dispute the accuracy of the information obtained in the criminal records check; and (3) allowing the employee to remain employed (subject to direct on-site supervision) during the appeals process. 42 U.S.C. § 1320a-7a(a)(4)(B)(iii), (iv).

See 46 U.S.C. § 70105(d); see generally TWIC Program, 49 C.F.R. § 1572.103 (listing the disqualifying offenses for maritime and land transportation security credentials, such as convictions and findings of not guilty by reason of insanity for espionage, murder, or unlawful possession of an explosive; also listing temporarily disqualifying offenses, within seven years of conviction or five years of release from incarceration, including dishonesty, fraud, or misrepresentation (expressly excluding welfare fraud and passing bad checks), firearms violations, and distribution, intent to distribute, or importation of controlled substances).


See 49 C.F.R. § 1515.7(a)(i) (explaining that only certain applicants with disqualifying crimes in their backgrounds may apply for a waiver; these applicants do not include individuals
who have been convicted of a Federal crime of terrorism as defined by 18 U.S.C. § 2332b(g)).

151 These positions are defined as “national security positions” and include positions that “involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States” or “require regular use of, or access to, classified information.” 5 C.F.R. § 732.102(a)(1)-(2). The requirements for “national security positions” apply to competitive service positions, Senior Executive Service positions filled by career appointment within the Executive Branch, and excepted service positions within the Executive Branch. Id. § 732.102(b). The head of each Federal agency can designate any position within that department or agency as a “sensitive position” if the position “could bring about, by virtue of the nature of the position, a material adverse effect on the national security.” Id. § 732.201(a). Designation of a position as a “sensitive position” will fall under one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive. Id.


[E]ligibility for access to classified information shall be granted only to employees who are United States citizens for whom an appropriate investigation has been completed and whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honestly, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information. A determination of eligibility for access to such information is a discretionary security decision based on judgments by appropriately trained adjudicative personnel. Eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.

153 42 U.S.C. § 2000e-2(g); see, e.g., Bennett v. Chertoff, 425 F.3d 999, 1001 (D.C. Cir. 2005) (“[E]mployment actions based on denial of a security clearance are not subject to judicial review, including under Title VII.”); Ryan v. Reno, 168 F.3d 520, 524 (D.C. Cir. 1999) (“[A]n adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII.”).

154 See Policy Guidance on the use of the national security exception contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as amended, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, § II, Legislative History (May 1, 1989), http://www.eeoc.gov/policy/docs/national_security_exemption.html (“[N]ational security requirements must be applied equally without regard to race, sex, color, religion or national origin.”); see also Jones v. Ashcroft, 321 F. Supp. 2d 1, 8 (D.D.C. 2004) (indicating that the
national security exception did not apply because there was no evidence that the government considered national security as a basis for its decision not to hire the plaintiff at any time before the commencement of the plaintiff’s lawsuit, where the plaintiff had not been forthright about an arrest).

155 Federal contractor employees may challenge the denial of a security clearance with the EEOC or the Office of Contract Compliance Programs when the denial is based on race, color, religion, sex, or national origin. See generally Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965 Comp).


157 Robert H. Shriver, III, Written Testimony of Robert H. Shriver, III, Senior Policy Counsel for the U.S. Office of Personnel Management, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, http://www.eeoc.gov/eeoc/meetings/7-26-11/shriver.cfm (last visited April 23, 2012) (stating that “with just a few exceptions, criminal convictions do not automatically disqualify an applicant from employment in the competitive civil service”); see also REENTRY MYTHBUSTER! ON FEDERAL HIRING POLICIES, supra note 16 (“The Federal Government employs people with criminal records with the requisite knowledge, skills and abilities.”). But see supra note 110, listing several federal statutes that prohibit individuals with certain convictions from working as federal law enforcement officers or port workers, or with private prisoner transport companies.

158 OPM has jurisdiction to establish the federal government’s suitability policy for competitive service positions, certain excepted service positions, and career appointments in the Senior Executive Service. See 5 C.F.R. §§ 731.101(a) (stating that OPM has been directed “to examine ‘suitability’ for competitive Federal employment”), 731.101(b) (defining the covered positions within OPM’s jurisdiction); see also Shriver, supra note 157.

OPM is also responsible for establishing standards that help agencies decide whether to grant their employees and contractor personnel long-term access to federal facilities and information systems. See Homeland Security Presidential Directive 12: Policy for a Common Identification Standard for Federal Employees and Contractors, 2 PUB. PAPERS 1765 (Aug. 27, 2004) (“establishing a mandatory, Government-wide standard for secure and reliable forms of identification issued by the Federal Government to its employees and contractors [including contractor employees]”); see also Exec. Order No. 13,467, § 2.3(b), 3 C.F.R. 196 (2009 Comp.) (“[T]he Director of [OPM] . . . [is] responsible for developing and implementing uniform and consistent policies and procedures to ensure the effective, efficient, and timely completion of investigations and adjudications relating to determinations of suitability and eligibility for logical and physical access.”); see generally Shriver, supra note 157.

159 5 C.F.R. § 731.101(a).

160 See 5 C.F.R. §§ 731.205(a) (stating that if an agency finds applicants unsuitable based on the factors listed in 5 C.F.R. § 731.202, it may, in its discretion, bar those applicants from federal employment for three years), § 731.202(b) (disqualifying factors from federal civilian
employment may include: misconduct or negligence in employment; material, intentional false statement, or deception or fraud in examination or appointment; refusal to furnish testimony as required by 5 C.F.R. § 5.4; alcohol abuse without evidence of substantial rehabilitation; illegal use of narcotics, drugs, or other controlled substances; and knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force).

161 See id. § 731.202(c).

162 Id.

163 See generally Shriver, supra note 157. See also REENTRY MYTHBUSTER! ON FEDERAL HIRING POLICIES, supra note 16 (“Consistent with Merit System Principles, [federal] agencies [and departments] are required to consider people with criminal records when filling positions if they are the best candidates and can comply with requirements.”).


165 See Stephen Saltzburg, Transcript of 7-26-11 Meeting, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#saltzburg (last visited April 23, 2012) (discussing the findings from the American Bar Association’s (ABA) Collateral Consequences of Conviction Project, which found that in 17 states that it has examined to date, 84% of the collateral sanctions against ex-offenders relate to employment). For more information about the ABA’s project, visit: Janet Levine, ABA Criminal Justice Section Collateral Consequences Project, INST. FOR SURVEY RESEARCH, TEMPLE UNIV., http://isrweb.isr.temple.edu/projects/accproject/ (last visited April 20, 2012). In April 2011, Attorney General Holder sent a letter to every state Attorney General, with a copy to every Governor, asking them to “evaluate the collateral consequences” of criminal convictions in their state, such as employment-related restrictions on ex-offenders, and “to determine whether those [consequences] that impose burdens on individuals . . . without increasing public safety should be eliminated.” Letter from Eric H. Holder, Jr., Att’y Gen., Dep’t of Justice, to state Attorney Generals and Governors (April 18, 2011), http://www.nationalreentryresourcecenter.org/documents/0000/1088/Reentry_Council_AG_Letter.pdf.

Most states regulate occupations that involve responsibility for vulnerable citizens such as the elderly and children. See STATE CRIMINAL HISTORY, supra note 37, at 10 (“Fifty states and the District of Columbia reported that criminal history background checks are legally required” for several occupations such as nurses/elder caregivers, daycare providers, caregivers in residential facilities, school teachers, and nonteaching school employees). For example, Hawaii’s Department of Human Services may deny applicants licensing privileges to operate a childcare facility if: (1) the applicant or any prospective employee has been convicted of a crime other than a minor traffic violation or has been confirmed to have abused or neglected a child or threatened harm; and (2) the department finds that the criminal history or child abuse record of
the applicant or prospective employee may pose a risk to the health, safety, or well-being of children. See HAW. REV. STAT. § 346-154(e)(1)–(2).


\[167\] See Int’l Union v. Johnson Controls, Inc., 499 U.S. 187, 210 (1991) (noting that “[i]f state tort law furthers discrimination in the workplace and prevents employers from hiring women who are capable of manufacturing the product as efficiently as men, then it will impede the accomplishment of Congress’ goals in enacting Title VII”); Gulino v. N.Y. State Educ. Dep’t, 460 F.3d 361, 380 (2d Cir. 2006) (affirming the district court’s conclusion that “the mandates of state law are no defense to Title VII liability”).
65 MILLION
“NEED NOT APPLY”

The Case for Reforming Criminal Background Checks for Employment

Michelle Natividad Rodriguez | Maurice Emsellem
The National Employment Law Project

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Authors

Michelle Natividad Rodriguez
Maurice Emsellem
1 Introduction

In recent years, the criminal background check industry has grown exponentially. Particularly in the wake of 9/11, the ready availability of inexpensive commercial background checks has made them a popular employee screening tool. In one survey, more than 90 percent of companies reported using criminal background checks for their hiring decisions. At the same time that the background check industry has expanded, the share of the U.S. population with criminal records has soared to over one in four adults.

In the right situations, criminal background checks promote safety and security at the workplace. However, imposing a background check that denies any type of employment for people with criminal records is not only unreasonable, but it can also be illegal under civil rights laws. Employers that adopt these and other blanket exclusions fail to take into account critical information, including the nature of an offense, the age of the offense, or even its relationship to the job.

Yet, as this report documents, based on a survey of online job ads posted on Craigslist, major companies as well as smaller employers routinely deny people with criminal records any opportunity to establish their job qualifications. For any number of entry-level jobs, ranging from warehouse workers to delivery drivers to sales clerks, employers and staffing agencies post these and other job ads that unambiguously close the doors on applicants with criminal records:

“**No Exceptions! . . . No Misdemeanors and/or Felonies of any type ever in background,”**

“**DO NOT APPLY WITH ANY MISDEMEANORS / FELONIES”**

“You must not have any felony or misdemeanor convictions on your record. Period.”

Even some of the nation’s largest companies have imposed overbroad background check requirements, including Bank of
Across the nation there is a consistent theme: people with criminal records “need not apply” for available jobs. Combine today’s tight job market, the upsurge in background checks, and the growing number of people with criminal records, and the results are untenable. In the end, workers are not the only ones who suffer. Employers are also disadvantaged as blanket hiring restrictions undermine the integrity of criminal background checks and artificially limit the employers’ pool of qualified candidates.

While this report explores the exclusion of people with criminal records from work, which severely impacts communities of color, it also reveals a promising shift in policy and practice. Indeed, this is an opportune moment to capitalize on a recent wave of impact litigation and model state and local reforms to develop fairer and more accurate criminal background checks for employment.

If adopted, the following reforms featured in this report would significantly advance the employment rights of people with criminal records and promote safety and security at the workplace:

- The federal government should aggressively enforce civil rights and consumer protections that apply to criminal background checks for employment in the public and private sectors.
- The federal government should adopt fair hiring policies regulating federal employment and contracting that serve as a model for all employers.
- State and local governments should certify that their hiring policies fully comply with federal civil rights standards and launch employer outreach and education campaigns.
- The employer community, together with Craigslist, should play a leadership role in raising the profile of this critical issue and promoting best practices that properly balance the mutual interest of workers and employers in fairer and more accurate criminal background checks for employment.
American workers are treading water in the worst labor market since the Great Depression. To keep afloat, U.S. workers need strong policies and protections to support their ability to find work—their lifeline to economic and social stability. Yet an estimated 65 million U.S. adults who have criminal records often confront barriers that prevent even the most qualified from securing employment.

For many companies, criminal background checks are a means to determine the safety and security risk a prospective or current employee poses on the job. Yet even the assumption that the existence of a criminal record accurately predicts negative work behavior is subject to some debate; one limited study questions whether the two are, in fact, empirically related. The irony is that employers' attempts to safeguard the workplace are not only barring many people who pose little to no risk, but they also are compromising public safety. As studies have shown, providing individuals the opportunity for stable employment actually lowers crime recidivism rates and thus increases public safety.

Not only is it a matter of public safety to ensure that all workers have job opportunities, but it is also critical for the struggling economy. No healthy economy can sustain such a large and growing population of unemployable workers, especially in those communities already hard hit by joblessness. Indeed, the impact on the economy is staggering. The cost of corrections at each level of government has increased 660 percent from 1982 to 2006, consuming $68 billion a year, and the reduced output of goods and services of people with felonies and prison records is estimated at between $57 and $65 billion in losses.
The concurrent losses to the individual are devastating. A person’s interaction with the criminal justice system extends beyond what may be a minor arrest or conviction to a lifetime of social and economic disadvantage. One prominent researcher has found that a criminal record reduces the likelihood of a job callback or offer by nearly 50 percent, an effect even more pronounced for African American men than for white men. Not surprisingly, the U.S. Equal Employment Opportunity Commission (EEOC) has recognized that employer reliance on proxies for race—such as having a criminal record—is “an important civil rights issue.”

Although greatly impacted by arrest and conviction records, people of color are not the only ones burdened with the indelible mark of a criminal record. The reality that over one in four U.S. adults has a criminal record brings this issue and its public safety and economic consequences to the doorstep of every home in America. As U.S. Secretary of Labor Hilda L. Solis recently stated, “Stable employment helps ex-offenders stay out of the legal system. Focusing on that end is the right thing to do for these individuals, and it makes sense for local communities and our economy as a whole.”

Johnny Magee | Livermore, California

Garden Center Attendant at Lowe’s

In September 1999, 40-year-old Johnny Magee, who is developmentally disabled, picked up a package for his uncle that, unknown to him, contained drugs. Johnny was arrested and convicted of misdemeanor conspiracy to commit a drug offense. He had never used drugs and has never been convicted of any other offense. Johnny held a landscaping job at the Lawrence Livermore National Laboratory for six years until budget cuts forced him to look for a new job in 2008. He applied to Lowe’s Home Improvement store in Dublin, California, for a garden center attendant position. Despite his related prior work experience, Lowe’s refused to hire Johnny because of his conviction. “Lowe’s policy is unfair to me and lots of other good people,” said Johnny. “It’s unfair because they only see something that happened to me many years ago, even though I’ve never been in trouble since.” Later in 2008, Johnny petitioned the court for a dismissal of his conviction. It was granted and his “finding of guilt . . . [was] set aside.” In 2009, Johnny filed Title VII charges with the EEOC against Lowe’s.
Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, gender, national origin, and other protected categories.\textsuperscript{12} Enforced by the EEOC, Title VII has long been recognized as prohibiting not only overt, intentional discrimination, but also disallowing those facially neutral policies and practices that have a disproportionate impact on certain groups. Using arrest and conviction records to screen for employment is an example of the kind of “neutral” selection criteria that invites Title VII scrutiny.

The EEOC’s policy guidance on conviction records, issued in 1987, recognized that barring people from employment based on their criminal records disproportionately excludes African Americans and Latinos because they are overrepresented in the criminal justice system.\textsuperscript{13} For example, African Americans account for 28.3 percent of all arrests in the United States,\textsuperscript{14} although they represent just 12.9 percent of the population; that arrest rate is more than double their share of the population.\textsuperscript{15} In contrast, the arrest rate for whites actually falls below their share.\textsuperscript{16}

Screening out job applicants with criminal records thus excludes a much larger share of African American candidates. Hence, as the EEOC guidance makes clear, such a policy has a “disparate impact” on African Americans (and Latinos). The disparate impact approach ensures that practices that appear to be “race-neutral” on their face—such as no-hire policies against people with criminal records—are prohibited. Just as it is unlawful and immoral to refuse to hire someone because of skin color, it is also a violation of Title VII for an employer to use non-job-related selection criteria that have the effect of differentiating along racial lines.
Definitively establishing when criminal background checks for employment cross the line, the EEOC has stated that “an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII.” Thus, blanket hiring prohibitions of the type documented in this report violate this fundamental mandate. Yet Title VII does not wholly bar the use of criminal records in employment decisions. Instead, the EEOC has provided a strong and clear framework for assessing criminal records when making an employment decision. An employer’s consideration of criminal records may pass muster under Title VII if an individualized assessment is made taking into account:

1. The nature and gravity of the offense or offenses;
2. The time that has passed since the conviction and/or completion of the sentence; and
3. The nature of the job held or sought.

The EEOC’s case-by-case approach ensures that people with criminal records are not barred from employment for youthful indiscretions, minor run-ins with the law, or more serious offenses from the distant past. Although the EEOC developed this framework more than 20 years ago, subsequent research has underscored its wisdom.

Buttressing one of the core EEOC factors regulating the use of criminal background checks, research indicates that lifetime employment bans on people with criminal records are not correlated to risk. For example, a major study of people with felony convictions found that 18-year-olds arrested for burglary had the same risk of being arrested as same-aged individuals with no record after 3.8 years had passed since the first arrest (for aggravated assault it was 4.3 years, and for robbery it was 7.7 years). If the individual was arrested initially for robbery at age 20 instead of at age 18, then it takes the person three fewer years to have the same arrest rate as a non-offender. Notably, those individuals convicted of property crimes are especially likely to stay clear of the criminal justice system compared to other offenders.

This groundbreaking research has major implications for how employers evaluate the criminal records of workers. Professor Alfred Blumstein, one of the nation’s leading criminologists, and his colleague Kiminori Nakamura, conclude that within a narrow period of time, an individual’s “criminal record empirically may be shown to be irrelevant as a factor in a hiring decision.” Furthermore, these studies evaluate

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A major study found that 18-year-olds who were arrested had the same risk of being arrested as someone with no record after 3.8 years had passed since a burglary arrest, 4.3 years for aggravated assault, and 7.7 years for robbery.
the risk of committing an offense without distinguishing whether it took place on the job or if it was job-related. The probability of committing an offense at the workplace, which is a significantly smaller subset of offenses, would likely be even more remote.

A criminal record alone is an inadequate measure of an individual’s risk of creating a safety or security threat for other reasons as well. A record may include a wide swath of misleading information; not only is a criminal record difficult to interpret, it may include arrests that were dropped because of factual innocence. Even worse, commercially prepared background checks have been found to be rife with inaccuracies. FBI background checks, which one would expect to have a higher level of accuracy, are shockingly out of date 50 percent of the time, thus routinely failing to reflect whether an arrest actually led to a conviction. The bottom line is that a criminal record can be a blunt, misleading tool to determine whether a worker poses a risk on the job.

Illegality and inaccuracy aside, the consequences to job seekers when employers refuse to hire most people with criminal records cannot be overstated. As the former acting chair of the EEOC explained:

Fears, myths and such stereotypes and biases against those with criminal records continue to be part of the . . . decision making for many employers. Business and industry suffers as a result because it is not able to benefit fully from the skills of every potential worker. For our economy to be successful, we cannot afford to waste any available talent.
4 Wave of Lawsuits Documents Routine Civil Rights and Consumer Protection Violations

After years of dormancy, the basic civil rights and consumer protection laws restricting the use of criminal records are catching a second wind. In just the past few years, private lawyers, public interest and civil rights groups, and government agencies have initiated lawsuits challenging exclusionary practices. Reflecting a trend that is expected to continue, at least five major civil rights lawsuits against large employers were filed in 2010 alone.

The lawsuits include *Arroyo v. Accenture*, which alleges that Accenture “rejects job applicants and terminates employees with criminal records, even where the criminal history . . . has no bearing on the . . . fitness or ability to perform the job.”

Accenture, a global business and technology consulting company, has more than 180,000 employees in the United States and netted $21.55 billion last year. Another major federal lawsuit, *Hudson v. First Transit, Inc.*, charges that First Transit, one of the nation’s largest transit service providers with 15,500 employees, has a blanket policy prohibiting individuals from working for the company if they have been convicted of a felony or served so much as a day in jail.

In *Mays v. Burlington Northern Santa Fe Railroad Co. (BNSF)*, BNSF was sued over its “blanket policy prohibiting any person with a felony conviction in the previous [seven] years from being employed at its facilities.” BNSF, like most major railways, has been using the commercially run e-RAILSAFE program, which provides periodic background checks on the nation’s railroad employees. This case also has the potential to impact tens of thousands of workers. BNSF alone has 38,000 employees, not including the contractors working on its railroad facilities.
Private employers are not the only ones coming under fire for their discriminatory policies. In the class action lawsuit *Johnson, et al. v. Locke*, the U.S. Census Bureau was sued under Title VII for discriminating against people with criminal records by excluding them from consideration for temporary positions with the Census. The job applicants’ complaint states that “roughly 700,000 people” were eliminated by Census’ screening practice, thus “import[ing] acute racial and ethnic disparities in the criminal justice system into the employment process.”

The EEOC also has a Title VII criminal records suit pending against the Freeman Companies, a convention and corporate events marketing company accused of rejecting job applicants based on criminal background records and credit histories. In a press release about the lawsuit, the EEOC warned that “[e]mployers . . . should be careful to avoid hiring practices that have unlawful discriminatory effects on workers.”

In addition to these recent federal lawsuits, workers across the country have filed numerous charges with the EEOC challenging employers’ use of criminal records. Although national data is unavailable from the EEOC, two non-profit organizations—NELP and Community Legal Services of Philadelphia—have filed more than a dozen EEOC charges that are pending against national employers, such as Lowe’s (approximately 238,000 employees) and Select Truckers Plus.

The EEOC may also initiate investigations under a special procedure known as a “commissioner’s charge.” In 2009, NELP and other organizations petitioned the EEOC to file a commissioner’s charge against Bank of America, which reported $2.4 trillion in assets and approximately 283,000 employees worldwide, and Manpower, which is one of the nation’s largest staffing agencies. The petition called attention to the job announcement circulated by Manpower and Bank of America broadly prohibiting workers with criminal records from applying for 600 clerical positions in 2009. The job announcement distributed by the federally-funded One Stop Career Center in the San Francisco Bay Area stated:

> “Qualified candidates must be able to pass: Background Check (no felonies or misdemeanors) . . .” (emphasis added).

In 2009, New York Attorney General Andrew Cuomo (now Governor Cuomo) entered the fray by enforcing state protections that regulate criminal background checks for employment. The Office of the Attorney General (OAG) has reached major settlements against three
companies and a private screening firm—agreements that serve as models for background check policies and procedures.

Beginning in November 2008, the OAG investigated the national electronic store chain, RadioShack, and the background check company, ChoicePoint. RadioShack is the second-largest retailer of consumer electronics in the United States, employing approximately 35,000 employees. The OAG found that RadioShack automatically rejected any individual who answered “yes” to the question, “Have you been convicted of a felony in the past 7 years,” by not allowing the individual to complete the job application.

ChoicePoint, which accounts for an estimated 20 percent of the U.S. background check industry conducting more than 10 million annually, played an integral role in designing and implementing RadioShack’s unlawful practices. It created an online application system that automatically dismissed anyone who self-disclosed a criminal record history. ChoicePoint also conducted background checks for RadioShack that reported sealed and dismissed convictions, in violation of state law.

In another settlement finalized in 2010, the OAG found that ChoicePoint had developed a matrix that rated applicants based on their criminal records for ABM Industries, one of the largest facilities services contractors in the United States with over 90,000 employees nationwide. ABM Industries obtained background checks that reported dismissed charges and infractions, in violation of state law.

In 2009 the OAG also entered into a settlement with Aramark, one of the largest food service providers in the United States with 250,000 employees worldwide. Aramark’s job announcement for temporary janitorial and food-service personnel stated:

“All Applicants must have a FULLY clean background for the past seven (7) years.” (emphasis added).

The OAG’s model settlements with RadioShack, ChoicePoint, ABM Industries, and Aramark are structured for lasting change, including components of policy reform, training of employees, and ongoing independent compliance monitoring.

In addition to this growing list of civil rights lawsuits and EEOC charges, workers have also taken employers and background check companies to court to enforce the Fair Credit Reporting Act (FCRA). FCRA regulates the commercially prepared background reports used by most
Like many, Darrell Langdon struggled with addiction in his youth. Now 52 and having raised two sons as a single father, Darrell, through his strength of character, has been sober for over twenty years. Although he has moved forward in life through hard-won rehabilitation, his 25-year-old felony conviction for possession of cocaine remains.

Darrell worked as a boiler room fireman in the Chicago Public Schools (CPS) until 1995 and then as a mortgage broker until 2008. After the market crash, Darrell reapplied to CPS to return to his roots as a boiler room engineer, his father’s career. With his excellent qualifications, he was hired pending a background check. But the decades-old conviction proved to be the mark against him. Not giving up, he was granted a “certificate of good conduct” by the court. Even with this certificate, which legally lifted the barrier to employment, CPS again rejected him. It took media scrutiny and legal support, but CPS finally reconsidered. Darrell, one of the few lucky ones, now has a job he loves.109

private employers that conduct criminal background checks. Under FCRA, if an employer rejects an applicant based on the background report, a copy of it must be provided to the applicant prior to the refusal to hire, which allows the applicant to correct any misinformation.54 According to one study, employers are routinely violating these fundamental consumer protections.55

Mirroring the upsurge in Title VII litigation, a number of FCRA lawsuits have recently been filed. The suits challenge the failure of major screening firms and employers to provide “pre-adverse-action” notices and to ensure accurate reporting.56 The defendants include HireRight Solutions, an employment screening firm that partners with companies like Monster and Oracle; Prologistix, a staffing firm; and First Transit and First Student, nationwide transit service companies; one such case settled for $20 million in 2008 against LexisNexis.57 In addition to these lawsuits filed by private parties, the Federal Trade Commission brought FCRA charges against several railroad industry entities, including Quality Terminal Services, LLC and Rail Terminal Services, LLC.58

The rise in legal actions highlights both the widespread non-compliance of major companies with federal law, and the growing interest in pursuing legal actions against employers, staffing firms, and background check companies for unlawfully excluding people with criminal records from work.
5 Craigslist Survey Reveals Flagrant Abuses by Nation’s Largest Companies

To more systematically document employer non-compliance with Title VII’s basic protections, in 2010 NELP surveyed employment ads posted on Craigslist, the widely used online community. Craigslist now operates in over 400 geographic areas in the United States and receives more than one million new job ads a month.59 The project entailed sorting through thousands of ads posted over four months in five major cities.60 This substantial pool of job listings represents a slice of the national job market, providing more insight into employer hiring policies and practices as experienced by applicants.

Although employers often remain anonymous on Craigslist (as many no-hire ads were), the survey disclosed that some of the nation’s largest employers and staffing firms post ads broadly precluding consideration of individuals with criminal records. Among the more than 300 most problematic ads on Craigslist, which represent the tip of iceberg given the limited scope of the survey, there are several major companies represented. They include Domino’s Pizza (170,000 employees worldwide), Omni Hotel (11,000 employees in North America), and Adecco USA (70,000 staff on assignment). Numerous smaller companies also excluded people with criminal records from consideration for advertised jobs.

The following sampling of blanket policies illustrates the range of problematic ads routinely posted by employers on Craigslist. They fall into four categories based on the breadth of the employer’s no-hire policy: (1) no arrests/clean or clear records; (2) no felony or misdemeanor convictions; (3) no felony convictions; and (4) no convictions within a specified timeframe.

1) No Arrests/Clean or Clear Records

Employers that post “no arrests” or “clean” or “clear” criminal records ads—the first category in the survey—likely are violating the EEOC
directive that “a blanket exclusion of people with arrest records will almost never withstand scrutiny.” Nonetheless, the practice is unexceptional; a 2010 survey of employers indicated that over 30 percent consider an arrest that did not lead to conviction to be at least “somewhat influential” in a decision to withhold a job offer. The following ad embodies one of the more flagrant violations:

“* No arrests or convictions of any kind for the past seven years * No Felony arrests or convictions of any kind for life.”

According to the EEOC, barring candidates based on arrest records can almost never be justified except in the rare case when the employer “evaluate[s] whether the arrest record reflects the applicant’s conduct.” Even where there is no direct evidence that an employer used an arrest record in an employment decision, an employer who inquires about arrest information without giving the candidate an opportunity to explain the underlying conduct violates Title VII. That’s because, as the EEOC acknowledges, “arrests alone are not reliable evidence that a person has actually committed a crime.”

**Applicant Example:** A highly qualified African American electrician with 30 years’ work experience applies for the Electrician Contractor job ad quoted above. He was erroneously arrested 20 years earlier for burglary based on mistaken identity.

Because the OMNI Energy Services Corporation job ad discourages anyone with a felony arrest “of any kind for life” from even applying, the company would exclude this candidate—despite the fact that this applicant has never actually committed an offense.

Within this category of ads are those with the more ambiguous “clean record” requirement. For example:

“We are looking for people with . . . spotless background/criminal history.”
(CORT Furniture Rental)

A job applicant could easily interpret this employment ad to mean that if she had any arrests, she would not be considered for the job opening. At the very least, this ad has a chilling effect on workers with arrest records and could justifiably trigger an EEOC investigation into the company’s hiring practices.
2) No Felony or Misdemeanor Convictions

The Craigslist survey revealed another sweeping category of blanket exclusions of people with criminal records; this time requiring that job applicants have no felony or misdemeanor convictions. As illustrated below, these job ads, including one by a FedEx Ground contractor, broadly exclude any applicant with any type of conviction over the individual's lifetime, regardless of the relationship of the conviction to the particular job.

“IN ORDER TO QUALIFY AS A DRIVER FOR FEDEX, YOU MUST HAVE THE FOLLOWING:


“Must have no previous misdemeanors or felonies” Job ad for Valet Attendant, May 12, 2010, Corinthian International Parking Services Inc. (emphasis added). 70

“*** DO NOT APPLY WITH ANY MISDEMEANORS / FELONIES ***” Job ad for Sewer Selling Technician, Feb. 10, 2010, Luskin-Clark Service Company (emphasis added). 71

Applicant Example: A highly qualified applicant was arrested five years earlier because she did not report her income when she was receiving unemployment benefits. Her husband had just died and she was struggling to feed her three young children. She agreed after her misdemeanor unemployment benefit fraud conviction to repay all monies. 72

Each of these companies would be in violation of Title VII for their rejection of this qualified candidate solely based on her isolated conviction. The commission of fraud in the unemployment system is completely unrelated to the job duties of a mechanic, a forklift operator, a valet attendant, or sewer selling technician, nor is the offense recent, repeated or sufficiently severe to pose a safety or security threat at the workplace.

3) No Felony Convictions

A subset of the prior category of job ads posted on Craigslist is the exclusion of any applicant with a felony conviction, regardless of when the offense took place, the type of felony, or the nature of the job and its relationship to the crime. Ads exemplifying this exclusion included:

“Applicants must also pass a background investigation showing no felony convictions.” Job ad for Delivery Driver, Jan. 28, 2010, Domino’s Pizza (emphasis added) 73
Applicants must also pass a background investigation showing no felony convictions.” (Domino’s Pizza)

“Must have no felony convictions” Job ad for Part-time Valet Attendant, April 21, 2010, Omni Hotel (emphasis added), 74

“No felony convictions on a criminal background check . . . .” Small Engine Technician, Feb. 4, 2010, Altaquip (emphasis added). 75

**Applicant Example:** A qualified, motivated job applicant has a drug possession conviction from 30 years ago. As a young man, he made the mistake of holding drugs for a friend. Learning from the mistake, he distanced himself from negative influences. He paid all his fines and penalties, has an extensive positive work record, and his conviction history is spotless other than his sole conviction.

The applicant in the example would be rejected from any of the jobs posted above on Craigslist. Never mind that the conviction was decades old and the worker had rehabilitated himself. The employers highlighted here would ignore these facts, thus underscoring the unreasonableness of lifetime bans—they never allow an individual to overcome his mistake nor do they recognize or encourage the worker’s rehabilitation.

**4) No Convictions Within a Specified Timeframe**

A final category of ads routinely posted on Craigslist limits exclusions to convictions within a specific, albeit protracted timeframe. While less restrictive than a lifetime ban, even these more limited exclusions can be problematic. The ads’ specified time period may be excessive, and they fail to address the relationship between the offense and job. The following advertisement exemplifies this type of exclusion:

“*Be able to pass a 7 year criminal background check (no felonies, no misdemeanors)*” Job ad for Forklift Operator, Sept. 8, 2010, Adecco USA (70,000 employees in the United States, emphasis added). 76

An absolute ban of applicants with convictions during the last seven years violates Title VII. For example, a job candidate with an isolated shoplifting or vandalism conviction from five years ago does not have a record that reflects on her ability to safely and effectively operate a forklift as required for this job. Nor is a five- or six-year-old conviction sufficiently recent in all cases to pose a security threat on the job.

Indeed, the leading research on the recurrence of crime conclusively repudiates this approach. As discussed above, even those individuals
convicted of a *felony* property offense are not likely to reoffend if they have not had any contact with the criminal justice system in the past 3.8 years. Thus, a seven-year age limit on disqualifying offenses still poses a substantial barrier that cannot be supported by the weight of the available evidence on the risk of recidivism.

**Staffing Firms**

The basic mandate of the nation’s civil rights protections is not only directed at employers. It also prohibits employee staffing firms from imposing discriminatory policies on behalf of an employer. Both the employer that made the request and the staffing firm that honored it are liable under Title VII for unlawful screening practices. The Craigslist survey uncovered a generous sampling of particularly egregious no-hire ads by staffing firms:

- “Candidates must . . . Be clear of felony convictions and criminal history (background checks will be done),” Job ad for Manufacturing position, Oct. 12, 2010, Abbott Staffing Group (staffing firm operating in southern California, emphasis added).  
- “You must not have any felony or misdemeanor convictions on your record. Period.” Passenger Van Driver, Feb. 28, 2010, Crown Services Inc. (staffing firm operating in nine states, emphasis added).  
- “All candidates must consent to a drug test and criminal background check (*no felonies or misdemeanors allowed*),” Sales Associate, Sept. 28, 2010, Peak Organization (staffing firm operating in New York City, emphasis added).

The Perimeter Staffing, Carlisle Staffing, and Abbott Staffing ads are for manufacturing or warehouse positions that involve little or no contact with the public and thus pose limited risk to public safety. There is no
reasonable justification for banning highly qualified candidates from these jobs who have, for example, non-recent misdemeanor or felony convictions. Nor should the candidates for the driver or sales associate positions be rejected by Crown Services and the Peak Organization based on any number of minor misdemeanors, such as trespassing or loitering.

As the preceding examples illustrate, openly exclusionary no-hire bans are commonplace. That employers and staffing firms continue to post such ads notwithstanding the 20-plus-year-old Title VII guidance issued by the EEOC suggests that even the nation’s largest employers are either unaware of civil rights and consumer protections for people with criminal records or are indifferent to them.

Arcadia Murillo | Chicago, Illinois
Janitor in Chicago Police Station

In 1999, Arcadia Murillo was simply in the wrong place at the wrong time. Working as a bartender, she was swept up in a police drug raid and was charged with possession of a controlled substance and refusal to cooperate with police. Luckily, within a month, the truth became apparent: Arcadia had done nothing wrong and the charges were dismissed for lack of probable cause.

In 2006, Arcadia began working for a cleaning services contractor and was assigned as a janitor at a Chicago Police Department station. Early in 2009, a new company, Triad, took over the contact and the City of Chicago performed a criminal background check. When Arcadia’s 10-year-old dismissed charges showed up, the City refused to allow Arcadia to work at the police station. No matter that Arcadia had worked hard at the job for over two years. No matter that her arrest was actually dismissed. After losing her job, without even the ability to explain the circumstances to the City, Arcadia filed a lawsuit against the City and Triad for violating state law.110
6 Recommendations

While recognizing that criminal background checks fulfill a security function, this report documents the urgent need to protect against arbitrary and discriminatory practices that undermine the integrity of these employment screening procedures. Given the proliferation of criminal background checks, the time has come to implement fairer and more accurate background check policies to balance the demand for employee screening with the basic rights of workers competing for jobs in a struggling economy. The good news is there is already momentum for reform both in the public and private sectors. Building on these advancements, the following measures would serve the interests of qualified workers with a criminal record seeking employment, while also promoting public safety and security at the workplace.

**ONE:** The federal government should aggressively enforce civil rights and consumer protections that apply to criminal background checks for employment in the public and private sectors. To vigorously enforce both Title VII and FCRA requires a comprehensive, coordinated enforcement strategy on the part of the EEOC, the FTC, the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP), and other federal enforcement agencies. Significantly, many of the large companies identified in this report have contracted with the federal government for millions of taxpayer dollars in goods and services: Accenture (with a total of $931 million in federal contracts in 2009), Bank of America, Aramark, Addeco USA, Lowe’s, OMNI Hotel, Burlington Northern Santa Fe Railroad Co., and RadioShack.

Federal contractors, like all private employers, must comply with Title VII, FCRA, and other basic federal civil rights and consumer protection laws. In addition, they are required to comply with the
federal affirmative action and civil rights mandates set forth in Executive Order 11246, which are enforced by OFCCP. This mandate imposes special obligations on federal contractors to comply with civil rights protections subject to strict penalties, including rescission of the federal contract.86

a. Coordinating with the EEOC, the key federal enforcement agencies should prioritize and implement a targeted enforcement strategy. To prioritize this critical and timely issue, the EEOC and OFCCP local offices must effectively identify criminal records cases when they come through the door and thoroughly investigate them. In turn, the local offices must coordinate nationally through the federal enforcement agencies to jointly pool resources and investigate and prosecute the highest-impact cases. To maximize impact, agencies should focus their enforcement activities on the nation’s largest employers that maintain broad employment restrictions of the type detailed in this report. Other targets should include the major staffing firms and the private screening companies, which design and implement criminal background checks for most large employers.

b. The EEOC should update the criminal background check guidances while initiating a national education campaign of the employer community that also engages other key federal enforcement agencies. The 20-year-old EEOC guidances provide a thoughtful assessment of the law. However, with the proliferation of background checks in recent years, the guidances should be resituated within today’s new realities and challenges. The EEOC should adopt new, robust guidances that reflect the latest empirical research, respond to the current integrated structure of the criminal background check industry, and promote model employer policies and worker protections.

With the support generated by a new EEOC directive, the agency should work with its partners in the federal government to launch an education campaign on criminal background checks for employment targeting both the private and public sectors. To be successful, this outreach and education initiative must also reach down locally (e.g., through the EEOC and OFCCP district offices) to employers large and small and to workers of color hardest hit by the use of criminal background checks for employment.
**TWO:** The federal government should adopt fair hiring policies regulating federal employment and contracting that serve as a model for all employers. The U.S. Attorney General recently announced a cabinet-level initiative (the Reentry Council) to coordinate “reentry” policies across the federal government. The initiative aims to improve public safety by reducing barriers that undermine opportunities for people with criminal records to be successfully reintegrated into their communities. As a core component of this effort, the federal government should become a model employer of people with criminal records, leading by example to promote hiring in the private sector and among state and local employers.

Chicago Mayor Richard Daley made a compelling case for this approach when he announced the city’s highly acclaimed reentry initiative: “We cannot ask private employers to consider hiring former prisoners unless the City practices what it preaches.” If the federal government adopted model employer policies and required its federal contractors to do the same, 20 percent of the U.S. workforce would be subject to fairer and more accurate criminal background checks for employment.

**a. Federal agencies and contractors should certify that their hiring policies fully comply with Title VII.** To move toward a model federal policy that applies to the federal workforce and its contractors—including service providers that receive federal funding to help employ people with criminal records—the first step is for each agency to scrutinize its hiring policies and certify that it complies with the EEOC’s criminal records guidances. As illustrated by the lawsuit against the U.S. Census Bureau, some federal agencies are neglecting to implement the basic protections of Title VII.

Equally important, each federal agency should ensure that its contractors strictly conform to Title VII. In practice, that means adopting contract language that incorporates the “job-related” and “business necessity” requirements of Title VII. In addition, federal contractors should be required to provide and maintain documentation of their hiring procedures, including their job announcements and “job-related” criteria that apply to criminal background checks for employment. The leadership of the Office of Personnel Management (OPM) in guiding and centralizing these reform efforts will be critical to developing a consistent and effective hiring policy across all agencies.
b. Federal agencies and contractors should adopt model hiring policies that defer the criminal background check until the end of the hiring process. Several federal agencies have adopted policies that reduce barriers to employment for people with criminal records while maintaining public safety. For example, it is not uncommon for federal agencies to wait until the final stages of the hiring process to conduct a criminal background check. This sends the message to applicants that they will be evaluated based on their qualifications for the job, rather than being segregated before they have a fair chance to establish their credentials.

The federal government could also take the next step and adopt the model fair hiring protections in place in six states and thirty cities and counties. These government entities removed from their job applications the question that requires the applicant to report a criminal record. To ensure safety and security on the job, the government employers still conduct criminal background checks in appropriate cases, but not until the final stages of the hiring process. These reforms should be adopted by federal agencies and promoted as best practices for federal contractors by the Office of Management and Budget.

c. Federal agencies and contractors should adopt more transparent procedures to ensure that workers with criminal records can fairly navigate the hiring process. While the federal government hiring process includes certain appeal rights for civil service applicants who are denied employment based on criminal records, a large proportion of the federal workforce is exempted from these protections. In addition, many workers face their toughest challenge when their FBI background checks come back with incomplete information. The workers are unclear of how to dispute the information, yet they must quickly produce corrections, often on very old and minor arrests or convictions, in order for their applications to proceed.

To address these obstacles, federal agencies should adopt the following reforms: notification to rejected workers and implementation of an appeal procedure that will allow workers to promptly challenge background check inaccuracies; and a waiver policy that permits a person with a disqualifying criminal record to produce evidence documenting rehabilitation, strong work history, and absence of risk to safety and security. A model waiver and appeal process was incorporated into the post 9/11 terrorism security laws and was recently implemented by the Transportation Security Administration.
This model process applied to nearly two million port workers and more than one million truck drivers across the United States, which greatly minimized the negative impact of criminal background checks on African American and Latino workers.99

Similar procedures should be implemented for the federal workforce and its contractors. Currently, companies that receive federal contracts are not even mandated to provide any specific notice or appeal rights to workers when they are denied employment or removed from their jobs based on criminal background checks.100 Thus, these workers are often blindsided and are left with no effective remedies to keep their jobs or compete fairly for available job openings.

THREE: State and local governments should certify that their hiring policies fully comply with federal civil rights standards and launch employer outreach and education campaigns. Few state and local governments have recently reviewed the worker protections that apply to criminal background checks for employment, despite the growing impact of background checks on the nation’s workforce. As a first step, it is critical that the human resources departments of state and local government entities evaluate their relevant policies and ensure they are in compliance with the EEOC’s criminal records guidances and require that their contractors do the same.

a. State and local enforcement agencies should play a leading role in developing a strategic plan to reform employer screening policies. Appropriate state and local enforcement agencies, including the state attorneys general offices and the fair employment and consumer protection agencies, should engage in an active education and impact litigation strategy targeting employers, staffing firms, and the background check companies. As described above, the New York Attorney General’s recent enforcement actions offer an impressive model. For example, in the RadioShack settlement, the company agreed to revise its screening policies to provide individualized assessment of convictions and the reason for disqualification to rejected applicants, and to maintain documentation of its hiring processes.101 In addition, because the nation’s largest screening firms account for the vast majority of criminal background checks, states’ attorneys general and other appropriate enforcement agencies should engage in joint and coordinated national enforcement actions against these firms with the FTC.
b. **State and local governments should adopt model fair hiring policies regulating public and private sector hiring.** After incorporating the EEOC’s guidances into their hiring processes, local and state governments should adopt the reforms that have been sweeping the country. As described above, this may include removing the job application question regarding criminal history and delaying the background check until the final hiring stage. To promote model policies in the private sector, several cities have also required employers that receive government contracts to adopt the same fair hiring practices. Some states have taken the critical next step of requiring all private sector employers to adopt specific fair hiring policies. For example, in Massachusetts, all employers with more than six employees are now prohibited from asking a job applicant to provide any criminal history information on a written application prior to the interview.

**FOUR:** The employer community, together with Craigslist, should play a leadership role in raising the profile of this critical issue and promoting best practices that properly balance the mutual interest of workers and employers in fairer and more accurate criminal background checks for employment. Ultimately, it is up to the employer community, the staffing firms, and the background check companies to step up to this national challenge. Like the model government employers described above, most companies should recognize it is in their best interest to not unreasonably limit the applicant pool in order to compete for the best-qualified workers. In turn, by promoting a fairer and open hiring process, they are sending a powerful message that they are committed to the community and diversity.

In addition, Craigslist should accept responsibility for ensuring fair employment practices in this new era when the Internet is the leading source of job postings for millions of unemployed workers. Craigslist could be a leader among online job forums by posting a disclaimer of the type of discriminatory practice described in this report and by publicizing information on its website about the EEOC’s standards regulating criminal background checks for employment. The practice has precedent as Craigslist has taken similar steps for its housing ads.
Conclusion

As both the population of people with criminal records and the demand for background checks have grown, enforcement of civil rights and consumer protections for people with criminal records has not kept pace, to the detriment of millions of workers.

Although the Title VII standards provide a fair and effective framework to evaluate criminal records for employment, the problem of unregulated criminal background checks remains endemic. Too often, employers, staffing firms, and screening firms continue to disregard civil rights and consumer protections, categorically banning people with criminal records from employment.

The recent wave of criminal records litigation and public policy advances is encouraging, but leveraging these developments to strengthen worker protections requires bold, new leadership. By taking the critical next steps—which begins by recognizing the scope of this historic national challenge and then adopting the type of corrective measures proposed in this report—millions of deserving workers will have a fairer shot at employment, allowing them to contribute to their communities and help rebuild America’s economy.
Endnotes

1. According to a recently published survey of the Society of Human Resources Management—the largest association of human resources personnel—92 percent of their members, which were mostly large employers, perform criminal background checks on some or all job candidates. See Society for Human Resources Management, Background Checking: Conducting Criminal Background Checks (Jan. 22, 2010), at 3.

2. NELP based the estimate of U.S. adults with criminal records on the following methodology. According to a 2008 survey of states, there were 92.3 million people with criminal records on file with states, including those individuals fingerprinted for serious misdemeanors and felony arrests. U.S. Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2008 (Oct. 2009), at Table 1. In some states, misdemeanor arrests for less serious crimes do not require fingerprinting; thus this figure is likely an underestimate of people with criminal records. To account for individuals who may have records in multiple states and other factors, and to arrive at a conservative national estimate, the 92.3 million figure was reduced by 30 percent (64.6 million). Thus, as a percentage of the U.S. population over the age of 18 (232,458,335 in 2009 according to the U.S. Census Bureau, Population Division, available at http://www.census.gov/popest/national/asrh/NC-EST2009-sa.html), an estimated 27.8 percent of the U.S. adult population has a criminal record on file with states. This estimate is consistent with a Department of Justice finding that about “30 percent of the Nation’s adult population” has a state rap sheet. U.S. Dept. of Justice Office of the Attorney General, The Attorney General’s Report on Criminal History Background Checks (June 2006), at 51. The rise in people with criminal records may significantly be attributable to the increased arrests associated with the “War on Drugs.” See Ryan S. King, Disparity By Geography: The War on Drugs in America’s Cities, The Sentencing Project (May 2008).

3. Employers often perform criminal background checks to limit their potential liability if an employee commits an unlawful act on the job. However, following the EEOC guidance and performing an individualized assessment of the conviction will generally satisfy the legal requirements and eliminate the risk of liability on the employer’s part. See National H.I.R.E. Network, Negligent Hiring Concerns, available at http://www.hirenetwork.org/negligent_hiring.html.

4. See Brent W. Roberts, et al., Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study, 92 Journal of Applied Psychology 1427, 1430 (2007). There is little research examining the correlation between the existence of a criminal record and the propensity to commit crimes at the workplace. However, in this study of New Zealand residents from birth to age 26, researchers found that the existence of a criminal record for 13- to 16-years-old was unrelated to engaging in “counterproductive activities at work” at age 26, including tardiness, absenteeism, disciplinary problems, violence, theft, property destruction, and substance abuse. Id. at 1427, 1429–1430.

5. Many people who have a criminal record that shows up on a background check have never been convicted of a crime; in fact, one-third of felony arrests never lead to conviction. U.S. Bureau of Justice Statistics, Felony Defendants in Large Urban Counties, 2004 (April 2008).

6. According to a study in Illinois that followed 1,600 individuals recently released from state prison, only 8 percent of those who were employed for a year committed another crime, compared to the state’s 54-percent average recidivism rate. American Correctional Assoc., 135th Congress of Correction, Presentation by Dr. Art Lurigio (Loyola University) Safer Foundation Recidivism Study (August 8, 2005).

7. The U.S. Bureau of Justice Statistics estimates that in 2006, the federal, state and local governments combined spent over $68 billion on corrections; in 1982, that figure was $9 billion. U.S. Bureau of Justice Statistics, Employment and Expenditure, available at http://bjs.ojp.usdoj.gov/content/glance/tables/exptyptab.cfm.

8. The reduction of employment rates of people with felonies and prison records results in a loss of the output of goods and services to the economy. See John Schmitt & Kris Warner, Ex-offenders and the Labor Market, Center for Economic and Policy Research (Nov. 2010), at 14.


Whites account for 69.1 percent of all arrests in the United States. See supra note 14. Whites account for over 244 million of the U.S. population of 307 million (79.6 percent of the population). See supra note 15.


Id.

The researchers calculated the number of years it took for individuals who were arrested for certain felony offenses at 16, 18, and 20 years old to have the same risk of arrest as same-aged non-offenders in the general population. Alfred Blumstein & Kiminori Nakamura, "Redemption" in an Era of Widespread Criminal Background Checks, National Institute of Justice Journal, Issue No. 263 (June 2009) at 12-13. See also Alfred Blumstein & Kiminori Nakamura, "Redemption" in the Presence of Widespread Criminal Background Checks, Criminology, Volume 47, Issue 2: 327–357 (May 2009). In another study, 18-year-olds with criminal records had a substantively similar probability of being arrested as non-offenders after not having contact with the criminal justice system for six to seven years. Megan Kurleychek, Robert Brame & Shawn Bushway, Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Recidivism? Criminology and Public Policy, Vol. 5, No.3 (2006).

A 20-year-old arrested for robbery had the same risk of arrest as a same-aged non-offender after 4.4 years. Blumstein & Nakamura, supra note 19.

See "Redemption" in an Era of Widespread Criminal Background Checks, supra note 19, at 14.

Examples of inaccuracies commonly found in commercially prepared background checks include records being wrongly attributed to individuals, multiple reporting of the same incidents, and uncorrected identity theft. See NELP & Community Legal Services of Philadelphia, Comments to Federal Trade Commission regarding FACTA Notices (Sept. 20, 2010), available at http://www.nelp.org/page/-/SCLP/2010/NELPandCLSCFRANewNoticesComments.pdf?nocdn=1. See also, Shawn Bushway, et al., Private Providers of Criminal History Records: Do You Get What You Pay For? in Barriers to Reentry: The Labor Market for Released Prisoners in Post-Industrial America (2007) (Based on a survey of on-line providers of criminal background checks, the study finds routine non-compliance with the worker protections of the Fair Credit Reporting Act.) See e.g., Leonardo Molina v. Roskam Baking Company, Case No. 09-cv-475 (filed May 26, 2009, W.D. Mich.) at First Amended Complaint. The plaintiff class represented by Lynghklip & Associates, Consumer Law Center, sued the Roskam Baking Company in Michigan. Lead plaintiff, Leonardo Molina, was terminated from his job after a background check erroneously reported a conviction and two charges. Although Molina’s record was actually clear, he was not given the opportunity to explain the mistakes on his background report.


See supra note 10, Commissioner Ishimaru at 3.

Arroyo v. Accenture, Case No. 10-civ-3013 (S.D.N.Y., filed April 8, 2010), at Complaint at 1.

Id. at 7.


See Hudson v. First Transit, Inc., Case No. C10-03158 (N.D.Cal, filed July 20, 2010), at Complaint at 1, 2, 4. The class of workers are represented by NELP and the law firms of Goldstein, Demchak, Baller, Borgen & Dardarian and Hughes Socol Piers Resnick & Dym.

Mays v. BNSF, Case No. 110-cv-00153 (N.D. Ill., filed Jan. 11, 2010), at Complaint at 3.
E-RAILSAFE, the private screening firm that operates the railroad industry’s background checks, has also been the subject of a Congressional inquiry. On February 16, 2007, the U.S. House of Representatives, Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure Protections held a hearing on the impact of background checks and security clearances on the transportation workforce focused specifically on the e-RAILSAFE program. Written testimony available at http://homeland.house.gov/Hearings/index.asp?id=11&subcommittee=10Subcommittee members. NELP sent a memo on this matter to the House Subcommittee on Transportation Security and Infrastructure Protections, available at http://www.nelp.org/page/-/SCLP/2010/Memoone-RailsafeBackgroundChecks.pdf?nocdn=1.


Id. at First Amended Complaint at 2. The U.S. Census "required nearly all job applicants who have ever been arrested to produce within 30 days the 'official court documentation' for any and all of their arrests . . . This requirement eliminated 93 percent of these applicants . . . [l]ess than 5 percent of applicants required to submit official court documentation ultimately were deemed eligible for hire." This policy operated in practice as very nearly a "no arrest or conviction history allowed" policy. Census hired more than one million temporary workers and 3.8 million applied for the temporary work. Id. at 1–2. See also Plaintiffs’ website available at http://www.censusdiscriminationlawsuit.com/index.php?option=com_content&view=frontpage&Itemid=1.

Id. at 1, 26.


Id.

There are several EEOC charges filed by workers against large employers across the nation, but because of pending negotiations and settlements, these employers are not named in this report.

NELP represents Johnny Magee, profiled in this report, who filed an EEOC charge against Lowe’s. Lowe’s operates more than 1,725 stores in the United States, Canada and Mexico and has approximately 238,000 employees. See Lowe’s website, available at http://media.lowes.com/company+overview/.

NELP represents a client who filed an EEOC charge against Select Truckers Plus, a truck driver staffing company. Select Truckers Plus posted a job announcement on October 28, 2009 listing job requirements as including "No DUI/DWI in previous 5 years[,] No Felony Convictions or time served in the previous 7 years [and] No drug related or violence related misdemeanor Charges." Job ad on file with NELP. See Select Truckers Plus website, available at http://www.truckersplus.com/main.cfm?nvlv1=1.

Bank of America is one of the world’s largest financial institutions and reported these figures in June 2010. See Bank of America Mid-Year Report 2010 at 6, available at http://phx.corporate-ir.net/ExternalFile?item=UGFyZW50SUQ9NjIoMjd8Q2hpbGRJRDotMXxUExBfPTM=6&t=1.

NELP Letter to Acting Chairman Stuart J. Ishimaru, (dated June 9, 2009), available at http://nelp.3cdn.net/aa8a86751197fa3ef22m6b5a5bc.pdf.

Figures are not specific to the U.S. See Manpower website, available at http://www.manpower.com/about/about.cfm.

See New York Correction Law §§ 752-53.


Id.


Id. See also New York Executive Law §§ 296 (15), (16); New York Correction Law §§ 752-53.


Id. at 5.

Angeles, Chicago, New York City, and Atlanta. Sampling

The job categories surveyed on Craigslist included: (1) 

NELP’s survey focused on five low-wage and/or low-skill 

See supra notes 45, 48, 50, and 52.


See Bushway, et al., supra note 22.

See Williams v. Prologistix, Case No. 110-cv-00956 (N.D. Ill., 


HireRight Solutions, et al. Case No. 10-cv-443 (N.D. Okla., 

filed July 7, 2010); Hunter v. First Transit, Case No. 1:09-cv- 

06178 (N.D. Ill.; filed Oct. 5, 2009); Joshaway v. First 

Student, Case No. 209-cv-02244 (C.D. Ill., filed Oct. 5, 2009); 

Ryals v. HireRight Solutions, et al. Case No. 3:09-cv-00625- 

RLW (E.D. Va., filed Oct. 5, 2009).

See id.; see also Williams v. LexisNexis Risk Mgmt., Case No. 3:06cv241 (E.D. Va., filed April 10, 2006).

The two lawsuits produced settlements requiring civil 

penalties of $53,000 and $24,000, respectively. See Press 

Release, Two Companies Pay Civil Penalties to Settle FTC 

Charges; Failed to Give Required Notices to Fired Workers and Rejected Job Applicants (Aug. 11, 2009), available at 


Cities, counties, or areas listed in the United States are 

available at http://www.craigslist.org/about/sites#US. 


org/about/factsheet.

NELP’s survey focused on five low-wage and/or low-skill 

industries in five major cities across the United States. 

The job categories surveyed on Craigslist included: (i) 

Customer Service; (ii) Food/Beverage/Hospitality; (iii) 

Manufacturing; (iv) Retail/Wholesale; and (v) Skilled 

Trade/Craft. See e.g., Craigslist website for list of job 
The five major cities were the San Francisco Bay Area, Los 

Angeles, Chicago, New York City, and Atlanta. Sampling 
four random month-long time periods during 2010, the 
survey found over 2500 job ads that referenced a 
criminal background check requirement. Among these 
approximately 2500 ads, over 300 included the most 

eroent and problematic type of screening criteria featured 
in this report. (Job ads on file with NELP.) If this survey 

were expanded to include all U.S. geographic areas where 

Craigslist operates and all the listed occupations over a 

more extended time period, there would certainly be 
thousands of postings by employers and staffing firms 

communicating blanket policies against hiring people 

with criminal records. Further, these findings do not take 

into account that many employers have such policies in 

place but do not communicate their hiring restrictions in 

their job postings. Thus, the results of this survey 

represent just the tip of the iceberg among the 
thousands of employers each year that have a blatant—
even documented in writing—blanket, no-hire policy.

See EEOC Arrest Record Guidance, supra note 13.

See supra note 1, at 5.

OMNI Energy Services Corp. specializes in providing 
services and rental equipment to geophysical companies and 

offshore operations. In 2009, the total revenue was 

$122.4 million and they have approximately 625 

employees. See OMNI Energy Services Corp. website, 


See EEOC Arrest Record Guidance, supra note 13.

This is because it “is generally presumed that an 

employer only asks questions which he/she deems 

relevant to the employment decision.” See id.

As noted in the EEOC Arrest Record Guidance, see id., 
numerous states have either prohibited or advised 

against pre-employment inquiries regarding arrest 

information, including New York, Hawaii, Oregon, 

Wisconsin, New Jersey, Ohio, Virginia, District of 

Columbia, California, Maryland, Minnesota, Utah, 

Washington, West Virginia, Arizona, Colorado, Idaho, 

Massachusetts, Michigan, and Mississippi.

See id.

CORT is the world’s largest provider of rental furniture 

and has more than 2,000 employees. See CORT rental 

furniture website, available at http://www.cort.com/ 

about-cort.

Fiscal year 2010 indicated $7.4 billion in revenue and a 

workforce of more than 67,000; however, these figures 

are not U.S. specific. See FedEx Ground Facts, available at 

http://about.fedex.designcdt.com/our_company/ 

company_information/fedex_ground.

Corinthian International Parking Services Inc. is a full-

service parking management company employing more 

than 400 people from San Jose to Sacramento. See 

Corinthian International Parking Services website, 

html.

Luskin-Clark Service Company is a provider of plumbing, 

heating, air conditioning, electrical and home 

improvement in Los Angeles County. See Luskin-Clark 

luskinservicecompany.com/. The website LinkedIn 

indicated that there were approximately 100 employees, 
available at http://www.linkedin.com/companies/luskin--
crack-service-company.

This example is based on one discussed in the EEOC 
guidance to illustrate the evaluation of records. See EEOC 

Arrest Record Guidance, supra note 13, at Example 2.

Domino’s Pizza has nearly 600 corporate-owned stores 

and a system of more than 5,000 domestic franchise-

owned stores; the company has approximately 170,000 

employees worldwide. See Domino’s Pizza Financial 

Tearsheet, available at http://phx.corporate-ir.net/ 

phoenix.zhtml?c=135383&p=tearsheet.
Omni Hotels has 45 luxury hotels and resorts across North America and 11,000 employees. See Omni Hotels website, available at http://www.omnihotels.com/About OmniHotels/OmniHotels.aspx. The ad was for Omni Los Angeles.

Altaquip is a service company for powered equipment and tool repairs and has 27 locations. The website for the company does not list the number of employees. See Altaquip website, available at http://www.altaquip.com/About-Us/CareerOpportunities.aspx. One website reported that Altaquip has 500 employees. See http://www.insideview.com/directory/altaquip-llc.

Adecco USA is a recruiting and staffing company. See Adecco USA website, available at http://www.adeccousa.com/Pages/Welcome.aspx.

See Blumstein & Nakamura, supra note 19.


Crown Services Inc. is a staffing firm operating in 9 Midwestern states with more than 35 offices. See Crown Services Inc. website, available at http://www.crownservices.com/about.html.


These companies were identified as having contracts with the federal government through the online database the Federal Procurement Data System – Next Generation (FPDS-NG). FPDS-NG data provides details on the procurement activities of more than 60 federal departments, available at https://www.fpds.gov/fpdsng_cms/index.php.

Executive Order 11246 prohibits federal contractors and federally-assisted construction contractors and subcontractors who have over $10,000 in government business (in one year) from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. See Facts on Executive Order 11246—Affirmative Action (Jan. 4, 2002), available at http://www.dol.gov/ofccp/reg/compliance/aa.htm.


A “federal contractor” includes companies that provide goods or services to a federal agency, receives federal funds for a construction project, or provides goods or services to another company that supplies a federal agency or receives construction funds. U.S. Dept. of Labor, OFCCP, New Contractors’ Guide (Aug. 2009) at 4, available at http://www.dol.gov/ofccp/TAguides/New_Contractors_Guide.pdf.

Nearly one in four American workers is employed by an establishment that receives federal funds for contracted work. That’s nearly 200,000 businesses with contracts totaling almost $700 billion.” Keynote Address by Patricia A. Shiu, Director of the Office of Federal Contract Compliance Programs at the U.S. Dept. of Labor (Sept. 30, 2010), available at http://www.dol.gov/ofccp/addresses/Hard_Hatted_Women.htm.


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Adopt Model Hiring Policies Reducing Barriers to Worker Background Checks: Model Worker Protections


See supra note 45, at 8-13.

See Cities Pave the Way, supra note 94.

See supra note 97.

The growing numbers of designated “exempt” workers employed by the federal government now exceeds the number of workers classified as “civil service” workers. Compared to civil service employees, the federal agencies that employ “exempt” workers are not bound by the OPM’s procedural protections that apply to criminal background checks for employment.

The FBI should work with federal agencies and contractors to improve the accuracy of the FBI rap sheets that are generated in response to criminal background check requests. As documented by the U.S. Attorney General, 50 percent of these records are incomplete because the states fail to regularly update the arrest information submitted to the FBI. See supra note 23. As a result, the entire burden of correcting the records falls on the workers, which significantly delays the hiring process and has a disparate impact on workers of color. See NELP, A Scorecard on the Post-9/11 Port Worker Background Checks: Model Worker Protections Provide a Lifeline for People of Color, While Major TSA Delays Leave Thousands Jobless During the Recession (July 2009), available at http://nelp.3cdn.net/0714d0826f3e cf7a15_70m616fwb.pdf (hereinafter A Scorecard). As proposed by the Fair and Accurate Criminal Background Checks Act (H.R. 5300), the FBI should update these records before they are released to the federal agencies. See NELP, Fairness & Accuracy in Employment Background Checks Act (H.R. 5300) Factsheet, available at http://nelp.3cdn.net/2458609645a577413b_dum6i6rb.pdf.

See Arcadia Murillo v. City of Chicago and Triad Consulting Services, Inc., Case No. 10CH36826 (Cir. Ct. Cook County, filed Aug. 25, 2010). Plaintiff is represented by Hughes Socol Piers Resnick & Dym.
BAN THE BOX

MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS

RESOURCE GUIDE
JANUARY 2014
MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS:

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In a 2011 National Employment Law Project (NELP) report, we estimated that 65 million Americans—or one in four adults—have a criminal record that may show up on a routine background check report. At the same time that the numbers of workers with criminal records have risen, the background check industry has expanded and overall, more employers are now using background checks as an employment screen than ever before. This resource guide documents the cities and counties that have recognized the devastating impact of these trends and taken steps to remove barriers to employment for qualified workers with criminal records, specifically by removing conviction history questions from job applications—a reform commonly known as “ban the box.”

As Mayor Richard Daley explained when he announced Chicago’s policy promoting fairness in employment, "Implementing this new policy won’t be easy, but it’s the right thing to do... We cannot ask private employers to consider hiring former prisoners unless the City practices what it preaches." Endorsing the value of a policy that allows workers to be judged on their merits, not on an old or unrelated conviction, the U.S. Equal Employment Opportunity Commission issued a revised guidance in April 2012 on the use of arrest and conviction records in employment under Title VII of the Civil Rights Act of 1964. In the guidance, which applies to all public and private employers, the Commission recommended as a “best practice... that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.”

This updated guide summarizes the 56 local jurisdictions across the U.S. that have adopted “ban the box” in the past nine years, including Chicago, Jacksonville, Philadelphia, San Francisco, Memphis, and Baltimore—to highlight a few. The guide provides key information for local officials and advocates to initiate reforms in their communities, including contact information, media, and campaign material links. Just in 2013, 10 cities and counties across the nation have adopted these policies emphasizing an applicant’s qualifications rather than his or her past mistakes, such as New York City, Cleveland, and Durham. Of special significance, 15 cities and counties now extend the ban the box policy to private contractors or in the case of Buffalo, Seattle, Philadelphia, and Newark, to private employers, as well. In addition, 10 states have adopted ban the box policies (see Statewide Ban the Box).

Despite today’s challenging job market, the momentum in support of ban the box hiring reforms continues to grow. In addition to this updated guide, NELP is available to provide assistance to communities seeking to join the ban the box movement. For additional information, contact Michelle Natividad Rodriguez at mrodriguez@nelp.org.

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CITY HIRING POLICIES

BOSTON, MA (ordinance applies to City and vendors)

- Banned the box
- Background check only for otherwise qualified candidates
- Background checks only required for some positions
- Policies applies to vendors/contractors doing business with the City
- Incorporates EEOC language into selection criteria
- Right to appeal denial of employment

In 2004, Boston implemented policies that limit discrimination against people with criminal records in city government positions. In July 2006, Boston expanded those policies by removing the questions about criminal history from the job application and by requiring an estimated 50,000 private vendors that do business with the City to follow the City’s hiring standards. Significantly, the revised job application begins with an anti-discrimination statement that Boston complies with all state and federal equal employment opportunity laws, while also listing “ex-offender status” as a classification protected under the civil rights laws of the City.

Under the policy, background checks are not required for all positions. Only when required by law or when the City or vendor has made a “good faith determination that the relevant position is of such sensitivity,” is a background check conducted on “otherwise qualified” applicants for a position. Often, a background check is not conducted until a conditional offer of employment has been made. Employers must also consider the age and seriousness of the offense and the “occurrences in the life of the Applicant since the crime(s).” The ordinance includes an appeal and the right to present information related to the “accuracy and/or relevancy” of the criminal record. A broad community coalition called Massachusetts Alliance to Reform CORI (MARC) supported these developments.

BOSTON RESOURCES
Boston City Council Ordinance (July 1, 2006), click here
Boston Equal Opportunity Statement, click here

BOSTON CONTACTS
Bill Kessler, Assistant Director  Chuck Wynder Jr., Executive Director
Office of Human Resources  Boston Workers Alliance
bill.kessler@cityofboston.gov  chuck@bostonworkersalliance.org

SAN FRANCISCO, CA (board of supervisors resolution applies to City and County)

- Banned the box
- Background check only for finalists for positions
- Incorporates EEOC language into selection criteria

The campaign to "ban the box" on San Francisco's applications for public employment was led by All of Us or None, a national organizing initiative of formerly incarcerated people. In 2005, the San Francisco Board of Supervisors approved a resolution initiated by All of Us or None calling for San Francisco to eliminate hiring discrimination against people with criminal records by removing the request for criminal history information on the initial job application for public employment. The resolution was implemented as a municipal hiring policy. An individual's past convictions can only be considered after an applicant has been identified as a finalist for a position. The exception is for those jobs where state or local laws expressly bar people with convictions from employment, in which case the City conducts its background review at an earlier stage of the hiring process.
In 2011, the San Francisco Human Rights Commission and the San Francisco Reentry Council recommended expanding the City’s policy to all private employers, vendors, and most housing providers. The campaign to expand the policy continues.

SAN FRANCISCO RESOURCES
San Francisco Department of Human Resources Policy, click here
San Francisco Board of Supervisors Resolution (Oct. 11, 2005), click here
San Francisco Employment Application, click here

SAN FRANCISCO CONTACTS
Ted Yamasaki, Managing Deputy Director  Jesse Stout
Human Resources Department   All of Us or None
ted.yamasaki@sfgov.org    jesse@prisonerswithchildren.org

CHICAGO, IL (Mayor’s initiative applies to City)
- Banned the box
- Background check only after conditional offer of employment
- Incorporates EEOC language into selection criteria

In May 2004, Chicago Mayor Richard Daley created the Mayoral Policy Caucus on Prisoner Reentry, bringing together government and community leaders to address the challenges facing the 20,000 people each year who return to Chicago after being released from prison. In January 2006, the Caucus issued a major report calling for broad reforms of City policy. Concurrently with the release of the report, Mayor Daley announced several major “reentry” initiatives, including reform of the City's hiring policies as recommended by the Caucus. The Mayor's press release described a new hiring policy requiring the City to "balance the nature and severity of the crime with other factors, such as the passage of time and evidence of rehabilitation . . . . Put more simply, this change means that city hiring will be fairer and more common sense."

Implementing the Mayor’s hiring policy, the Chicago Department of Human Resources has issued guidelines imposing standards on all City agencies regulating hiring decisions related to people with criminal records. For the first time, Chicago now requires all agencies to take into account the age of an individual’s criminal record, the seriousness of the offense, evidence of rehabilitation, and other mitigating factors before making hiring decisions. As part of the hiring process, the City also revised its job application in February 2007 to remove the question about criminal history. Now, after the City makes a conditional offer of employment, the applicant fills out a screening questionnaire card that requires disclosure of any criminal record.

CHICAGO RESOURCES
Mayor Daley’s Press Release (Jan. 24, 2006), click here
Report of the Mayoral Policy Caucus on Prisoner Reentry (Jan. 2006), click here
Chicago Department of Human Resources Guidelines (June 5, 2007), click here
Chicago Employment Application, click here

CHICAGO CONTACT
Soo Choi, Commissioner of Human Resources
(312) 744-4966
ST. PAUL, MN (Mayor’s directive and city council resolution apply to City)

- Banned the box
- Background check only for otherwise qualified candidates
- Background checks only required for some positions
- Incorporates EEOC language into selection criteria

In December 2006, Mayor Christopher Coleman of St. Paul directed the City’s Human Resources Department to reform its hiring process so that “all applicants have a full and fair opportunity for employment.” The City thus amended its employment application to remove questions regarding criminal history. That same month, the City Council approved a resolution calling on the City to “make a good faith determination as to which specific positions of employment are of such sensitivity and responsibility that a background check is warranted.” The resolution also mandated that background checks be performed only after an applicant is determined to be otherwise qualified for that position.

ST. PAUL RESOURCES

Mayor Coleman’s Memo to the City Council (Dec. 5, 2006), click here
Report of the Council on Crime and Justice, click here
St. Paul City Council Resolution, click here
St. Paul Employment Application, click here

ST. PAUL CONTACTS

Angie Nalezny, Director   Mark Haase, VP of Operations
Human Resources Department   Council on Crime and Justice
angie.nalezny@ci.stpaul.mn.us   hassem@crimeandjustice.org

MINNEAPOLIS, MN (city council resolution applies to City)

- Banned the box
- Background check only for otherwise qualified applicants
- Background checks only required for some positions
- Incorporates EEOC language into selection criteria

Like St. Paul, Minneapolis passed a resolution banning the box in December 2006. The Minneapolis resolution shares many characteristics with the St. Paul resolution, including banning the box, making a “good faith” determination of which positions require background checks, and performing background checks on applicants only after they have been determined to be otherwise qualified. The Council on Crime and Justice, with the support of more than 30 community organizations, was instrumental in getting both the St. Paul and Minneapolis resolutions passed.

MINNEAPOLIS RESOURCES

Minneapolis City Council Resolution, click here

MINNEAPOLIS CONTACTS

Councilmember Elizabeth Glidden   Mark Haase, VP of Operations
Minneapolis City Council   Council on Crime and Justice
elizabeth.glidden@ci.minneapolis.mn.us   hassem@crimeandjustice.org
EAST PALO ALTO, CA (administrative hiring policy applies to City)

- Banned the box

Inquiries regarding criminal histories are delayed until the applicant is a finalist.

EAST PALO ALTO RESOURCE
Application, click here

EAST PALO ALTO CONTACT
Jesse Stout
All of Us or None
jesse@prisonerswithchildren.org

OAKLAND, CA (city administrator hiring policy applies to City)

- Banned the box
- Background check only after conditional offer of employment
- Background checks only required for some positions
- Incorporates EEOC language into selection criteria
- Right to appeal denial of employment
- Provides copy of background check report

Oakland changed its job application in 2007 to eliminate questions about conviction histories. The new process did not require additional resources. Since implementing this practice, only a small number of applicants have been screened out from employment due to their criminal histories. Working with All of Us or None, the City improved its policy in 2010. The City conducts background checks on applicants after a conditional offer, but only for those positions required by law or the City has made a “good faith determination” that the position warrants it. The City also notifies the applicant of the potential adverse employment action, provides a copy of the background report, and provides the applicant an opportunity to rebut the accuracy or relevancy of the background report. Final decisions are based on job-relatedness and other EEOC factors.

OAKLAND RESOURCES
City Administrator memo (Dec. 28, 2010), click here
Letter to Asm. Dickinson regarding support of ban the box (March 28, 2012), click here

OAKLAND CONTACTS
Jesse Stout Andrea Gourdine
All of Us or None Director, Dept. of Human Resources Management
jesse@prisonerswithchildren.org (510) 238-3112

CAMBRIDGE, MA (ordinance applies to City and vendors)

- Banned the box
- Background check only for otherwise qualified applicants
- Background checks only required for some positions
- Policies applies to vendors/contractors doing business with the City
- Incorporates EEOC language into selection criteria
- Right to appeal prior to adverse determination
- Provides copy of background check report

In May 2007, Cambridge implemented policies limiting discrimination against people with criminal records in city government positions. In January 2008, the City Council passed an ordinance
extending the requirements of Cambridge’s hiring policy to private vendors that do business with the City.

Consistent with the City's hiring policy, vendors contracting with Cambridge wait to conduct a criminal background check until the job applicant is found to be "otherwise qualified" for the position. To determine the applicant's suitability for the position, vendors are required to consider a variety of factors, including "the relevance of the crime to the position sought," the age and seriousness of the crime, and evidence of rehabilitation. In addition, the Cambridge ordinance requires the vendor to notify the applicant of a potential adverse decision based on the criminal record. The employer must give the applicant a copy of the criminal record and the right to present information related to the accuracy and relevancy of the information reported.

CAMBRIDGE RESOURCE
Cambridge City Council Ordinance (Jan. 28, 2008), click here

CAMBRIDGE CONTACT
Oman Bandar, Former Special Assistant to the Mayor
bandar_omar@hotmail.com

BALTIMORE, MD (board of estimates hiring policy applies to City)
- Banned the box
- Background check only for otherwise qualified applicants
- Background checks only required for some positions

In December 2007, with the backing of Mayor Sheila Dixon, the City of Baltimore's Board of Estimates unanimously approved changes to the City's administrative hiring policy. The Board of Estimates— composed of the Mayor, President of the City Council, Comptroller, City Solicitor, and Director of Public Works—is the governing body that oversees the fiscal and administrative functions of the City. In accordance with the policy, the City removed the criminal history question from its job application. Applicants are not asked about their criminal history on the initial application. Instead, where applicable, the applicant's criminal history is reviewed at the final stages in the hiring process.

The City also implemented a policy to determine which positions qualified as "Positions of Trust" and thus require a background check. Employment applications for positions that are not positions of trust do not require applicants to disclose prior convictions or any other criminal history information.

BALTIMORE RESOURCES
Baltimore Policy on Positions of Trust (Feb. 3, 2008), click here
Baltimore Employment Application, click here

BALTIMORE CONTACT
Melissa Chalmers Broome, Senior Policy Advocate
Job Opportunities Task Force
melissa@jotf.org
AUSTIN, TX (ordinance applies to City)
  - Banned the box
  - Background check only for otherwise qualified applicants
  - Background checks only required for some positions

Following Travis County’s lead, the City approved a “Ban the Box” ordinance in October 2008. The criminal background investigation questions were removed from the on-line employment application. For non-safety/law enforcement jobs, criminal background investigations are required only for positions that have financial responsibility or work with children, the disabled or elderly. When the job falls in one of these categories, the background investigation is undertaken only after an applicant has been selected as the top candidate. For public safety/law enforcement positions, the Austin Police Department conducts the criminal background investigation. Featured in the February 2012 HR Magazine, Director Mark Washington, notes that since the City adopted this policy, more qualified candidates with criminal backgrounds—candidates who previously may have opted against completing the application due to the background questions—have applied. "There are extremely talented and qualified people who happen to be ex-offenders," Washington adds.

AUSTIN RESOURCE
Austin Ban the Box Resolution (Oct. 16, 2008), click here

AUSTIN CONTACT
Mark Washington, Director of Human Resources and Civil Services
(512) 974-3400

BERKELEY, CA (human resource department hiring policy applies to City)
  - Banned the box
  - Background check only after conditional offer of employment
  - Background checks only required for some positions
  - Incorporates EEOC language into selection criteria

In October 2008, the City of Berkeley’s Human Resources Department eliminated disclosure of conviction history information from the City’s job application at the request of City Council. Berkeley does not require disclosure of conviction history information until an applicant is selected for the position and has received a conditional offer of employment. The Human Resources Department then reviews conviction history information, which is kept confidential. The evaluation includes “an assessment of the relationship between a conviction and the functions of the position; number of convictions; time elapsed since the conviction, evidence of rehabilitation, and any other mitigating circumstances.” The City obtains conviction history from the California Department of Justice for identified public safety, recreation, and cash-handling/asset management positions only; for all other positions, conviction history self-disclosure is required. Police Department hires are exempted.

BERKELEY RESOURCES
Berkeley Hiring Policy Memo (Nov. 18, 2008), click here
Berkeley Employment Application, click here

BERKELEY CONTACTS
David Abel  Jesse Stout
Human Resources Manager  All of Us or None
(510) 981-6807  jesse@prisonerswithchildren.org
NORWICH, CT (ordinance applies to City)

- Banned the box
- Background check only after conditional offer of employment

In December 2008, Norwich’s City Council voted to move “Beyond the Box” and reduce barriers to employment for people with criminal records. A large group of advocates including Connecticut Pardon Team, A Better Way Foundation, Evergreen Family Oriented Tree/Clean Slate of New Haven, CABHN, Legal Assistance Resource Center and Greater Hartford Legal Aid worked together to ensure the City Council passed the ordinance, the first of its kind in Connecticut at that time, paving the way for other cities and the State to follow suit.

The ordinance removed the question inquiring into a person’s criminal history from the initial application for city jobs. Although the City continues to background check all employees before a binding offer of employment, it now does so only after an applicant has been interviewed and a conditional offer of employment has been made. Once an applicant has been determined to be a finalist for a position, they will be required to provide criminal conviction information.

NORWICH RESOURCE
Norwich Ordinance Section 16-11 (Dec. 1, 2008), click here

NORWICH CONTACT
Connecticut Pardon Team, Inc.
(866) 251-3810
info@connecticutpardonteam.com

NEW HAVEN, CT (ordinance applies to City and vendors)

- Banned the box
- Background check only after conditional offer of employment
- Policies applies to vendors/contractors doing business with the City
- Incorporates EEOC language into selection criteria
- Right to appeal denial of employment
- Provides copy of background check report

In February 2009, the City of New Haven’s Board of Alderwoman approved an ordinance that requires the City and its vendors to wait to conduct a criminal background check until the job applicant is selected for the position and has received a conditional offer of employment. The City’s Human Resources Department then evaluates the applicant’s criminal history, keeping all information confidential within the Department. The ordinance also provides applicants with a copy of their conviction history report and the opportunity to appeal adverse employment decisions based upon a past conviction within ten days of receiving notice of the decision not to hire.

NEW HAVEN RESOURCES
New Haven Ordinance, click here
New Haven Release of Information, click here

NEW HAVEN CONTACTS
Eric Rey, Reentry Coordinator
Mayor’s Office, Prison Reentry Initiative
EREy@newhavenct.net

Michael Fumiatti, Director of Purchasing
City of New Haven
mfumiatti@newhavenct.net
SEATTLE, WA (ordinance applies to City and private employers)

- Banned the box
- Background check only for otherwise qualified applicants
- Background checks only required for some positions
- Applies to public and private employers
- Right to appeal denial of employment
- Provides copy of background check report

In April 2009, the Personnel Director for the City of Seattle issued a memo to all department heads announcing the completion and implementation of the Citywide Personnel Rule for Criminal Background Checks. In 2013, the Seattle City Council voted to expand the ban the box policy to include private employers.

Adding to the state law that prohibits public agencies from refusing to hire someone or grant a license based solely on a criminal conviction, the new policy applies to both the City of Seattle and private employers. The ordinance prohibits employers from inquiring into an applicant’s criminal history until after the employer has identified qualified applicants. Employers are permitted to conduct criminal history investigations and may exclude individuals from employment based on the applicant’s criminal history if there is a legitimate business reason for doing so. The ordinance defines “legitimate business reason” and requires employers to consider a list of factors, including those enumerated by the EEOC. Finally, before an employer takes a negative employment decision based on an applicant’s criminal history, the employer must identify to the applicant what information they are using to make the decision and provide the applicant with a minimum of two days in which to correct or explain that information.

SEATTLE RESOURCES
Seattle Personnel Director McDermott’s Memo (April 24, 2009), click here
Seattle Personnel Rule 10.3 – Criminal Background Checks, click here
Seattle Ordinance Number 124201, click here
Seattle Office of Civil Rights Fact Sheet, click here
Seattle Job Assistance Ordinance Final Rules, click here
Seattle Job Assistance Ordinance FAQs, click here
Seattle Employers Card, English, click here

SEATTLE CONTACT
Brenda Anibarro, Policy Analyst
Seattle Office for Civil Rights
brenda.anibarro@seattle.gov

PROVIDENCE, RI (administrative hiring policy applies to City)

- Banned the box
- Background check only for otherwise qualified applicants

In 2008, the Mayor’s Policy Office began investigating the City’s hiring practices and their impact on the ability of people with criminal convictions to successfully transition back into the workforce. After consulting with NELP and HR representatives from three cities that had already successfully “banned the box,” the City agreed to change the hiring policies. In April 2009, the HR department removed the language relating to information on criminal charges from its applications. In addition, the applicant only signs a waiver for a background check once it has been determined that the candidate satisfies the minimum criteria for the position based on qualifications and ability.
HARTFORD, CT (ordinance applies to City and vendors)
- Banned the box
- Background check only after conditional offer of employment
- Background checks only required for some positions
- Policies applies to vendors/contractors doing business with the City
- Incorporates EEOC language into selection criteria
- Right to appeal denial of employment

In May 2009, Hartford’s City Council recognized that barriers to employment for people with criminal records “creat[e] permanent members of an underclass that threatens the health of the community and undermines public safety.” In response, the City Council passed an ordinance to change the hiring policy of the City and its vendors. It offers important protections to workers, including prohibiting the consideration of arrests that did not lead to conviction; delaying background checks in the hiring process; limiting background checks to specific positions; and providing applicants the opportunity to appeal adverse employment decisions.

HARTFORD RESOURCES
Hartford City Ban the Box Policy (April 13, 2009), click here
Hartford Vendor Ban the Box Policy (April 13, 2009), click here

HARTFORD CONTACT
Sarah Diamond
Clean Slate Committee
sdiamond193@gmail.com

WORCESTER, MA (ordinance applies to City and vendors)
- Banned the box
- Background check only for otherwise qualified candidates
- Background checks only required for some positions
- Policies applies to vendors/contractors doing business with the City
- Incorporates EEOC language into selection criteria
- Right to appeal denial of employment
- Provides copy of background check report upon request

In June 2009, Worcester’s City Council passed the Fair CORI Practices Ordinance. This ordinance applies to “all persons and businesses supplying goods and/or services to the city of Worcester.” Per the policy, public employers and vendors who do business with the City are prohibited from inquiring into an applicant’s criminal history on any initial employment application, and may only perform a background check once an applicant is identified as otherwise qualified. Background checks may only be performed when mandated by law, or when the city or vendor “determines that the position in question is of such sensitivity” that a review of the applicant’s criminal history is warranted. The comprehensive law also requires that the person reviewing the background report
be trained to do so, and that they apply a list of factors to be considered. Finally, applicants may appeal if an adverse decision is made based on the criminal history.

**Worcester Resource**

Worcester City Ordinance (June 23, 2009), [click here](#)

**Worcester Contact**

Steve O’Neill, Executive Director for Inter-state Organizing

Ex-Prisoners and Prisoners Organizing for Community Advancement

(508) 410-7676

[steve@exprisoners.org](mailto:steve@exprisoners.org)

**Jacksonville, FL** (ordinance applies to City)

- Banned the box
- Background check only after applicant selected for hire
- Incorporates EEOC language into selection criteria
- Right to appeal denial of employment

In 2008, the City Council adopted an ordinance reforming both its hiring procedures and its contractor bidding policies. In July 2009, the City’s Human Resources Department released the revised standard. The directive states that department heads will “not inquire about or consider criminal background check information in making a hiring decision.” Instead, “criminal information disclosure is required as part of the post-offer new hire process.” (emphasis in original). The application instructions even encourage people with a criminal record to apply for city jobs. The criminal background check screening is centralized in the Human Resources Department. Moreover, the screening process requires taking into account the specific duties of the job, the age of the offense, and rehabilitation. Denied applicants may appeal to Human Resources. Contractors are required to tally job opportunities for people with criminal records and report back to the City.

**Jacksonville Resources**

Jacksonville City Council Ordinance (Nov. 10, 2008), [click here](#)

Jacksonville Human Resources Directive (July 8, 2009), [click here](#)

Jacksonville Background Screening Summary (May 10, 2010), [click here](#)

**Jacksonville Contact**

Employee Services Department

(904) 630-1287

**Bridgeport, CT** (civil service rules apply to City)

- Banned the box
- Background check only for otherwise qualified applicants
- Incorporates EEOC language into selection criteria
- Right to appeal denial of employment

In October 2009, Bridgeport’s City Council ratified changes to the City’s civil service rules regarding criminal history investigations of applicants. Under the rules, the Personnel Director will seek information about applicants’ criminal histories only after the applicant has been found “otherwise eligible” to take the civil service examination. The initial employment application includes a disclaimer that criminal history information will be sought later in the application or examination process.
In addition to considering the criminal histories of applicants later in the hiring process, the rules require the Personnel Director to consider the following factors when making an employment decision based on a person’s criminal history: “the nature and seriousness of the offense; time elapsed since the conviction; age when convicted; the degree to which the conviction is related to the duties and responsibilities of the job and the bearing the conviction has on the applicants’ fitness and ability to perform such duties and responsibilities; evidence of rehabilitation and the interest of the City in protecting property and the welfare and safety of public and employees.” Candidates who are disqualified because of their criminal record have the right to appeal the Personnel Director’s decision to the Civil Service Commission. The Commission has the authority to “grant the appellant such relief as the Commission deems appropriate or to deny the appeal.”

**BRIDGEPORT RESOURCE**
Bridgeport Resolution Amending Civil Service Rules (Oct. 5, 2009), [click here](#)

**BRIDGEPORT CONTACT**
Nadine Nevins, Managing Attorney
Connecticut Legal Services
nnevins@connlegalservices.org

**KALAMAZOO, MI (city manager hiring policy applies to City)**
- Banned the box

In January 2010 the city manager announced that the city would no longer ask about prior criminal history on its applications for employment. This decision came after months of pressure from a newly formed coalition, spearheaded by the Community Workers Center of Kalamazoo and convened by the Michigan Organizing Project. Members of the coalition continue to demand similar changes from other local units of government and eventually from the private sector.

**KALAMAZOO CONTACT**
Michigan Organizing Project
(269) 344-2423

**MEMPHIS, TN (ordinance applies to City)**
- Banned the box
- Background check only for otherwise qualified applicants
- Incorporates EEOC language into selection criteria
- Right to appeal denial of employment
- Provides copy of background check report

In June 2010, the Memphis City Council passed an ordinance to reduce barriers to employment for the City’s estimated 8,915 citizens on probation or parole. The ordinance bans the box and, “except as otherwise dictated by state and federal law,” permits inquiry into an applicant’s criminal history only after the applicant has been determined to be otherwise qualified. However, the ordinance still requires applicants to complete a form listing their entire criminal history prior to the City conducting a background check.

If, after conducting a background investigation, the City makes an adverse hiring decision, the applicant is entitled to a copy of his or her “conviction history report with a highlight(s) of the particular conviction(s) that relate to the job’s responsibilities, thus warranting a denial of employment.” The applicant may then provide information rebutting the accuracy and/or relevance...
of the conviction history report. The ordinance includes a list of factors the City must consider when making an employment determination based on an applicant’s conviction record.

**MEMPHIS RESOURCE**
Memphis City Ordinance (May 18, 2010), [click here](#)

**MEMPHIS CONTACT**
DeAndre Brown, Executive Director
Lifeline to Success
dbrown@lifeline2success.org

**CINCINNATI, OH**  *(city council motion applies to City)*
- Banned the box
- Background check only for otherwise qualified applicants
- Incorporates EEOC language into selection criteria
- Right to appeal denial of employment
- Provides copy of background check report

In August 2010, the Cincinnati City Council passed a motion in support of fair hiring. Cincinnati’s employment applications no longer request information on an applicant’s criminal history and background checks are conducted only after a contingent offer of employment has been made. If a criminal background check is the basis for denying employment, the applicant receives a copy of all documents containing criminal record information and is given at least 10 business days to dispute or correct the included information. Finally, when considering an applicant’s criminal history in making an employment decision, the Cincinnati Human Resources Department must consider certain criteria, including whether the past offense(s) directly relate to the job responsibilities, the age of the person at the time of the offense(s), and any documentation or testimony demonstrating an applicant’s rehabilitation.

**CINCINNATI RESOURCE**
Cincinnati Motion in Support of Fair Hiring (June 9, 2010), [click here](#)

**CINCINNATI CONTACT**
Stephen Johnson Grove, Deputy Director for Policy
Ohio Justice & Policy Center
sjohnsongrove@ohiojp.org

**DETROIT, MI**  *(ordinance applies to City and vendors)*
- Banned the box
- Background check only for otherwise qualified applicants
- Policies apply to vendors/contractors doing business with the City

In September 2010, Detroit’s City Council voted unanimously to ban the box on City applications. The amendments to the Detroit City Code prohibit inquires or consideration concerning criminal convictions for City employees until an applicant is interviewed or is found to be otherwise qualified for employment by the City. The ordinance further revises the City’s job application to include a statement that “criminal convictions are not a bar to City employment, provided, that the prior criminal activity is not directly related to the position being sought.” As of July 1, 2012, the City has required business vendors and contractors to remove the conviction history question from job applications.
PHILADELPHIA, PA (ordinance applies to City and private employers)

- Banned the box
- Background check only after applicant selected
- Policies apply to public and private employers in the City

On March 31, 2011, Philadelphia became the first city to ban the box for both public and private positions. The ordinance prohibits any employer from asking about, considering, or sharing information regarding non-conviction arrests that are not pending. The ordinance further prohibits inquiry into an applicant’s conviction history “during the application process,” defined as the time beginning when an applicant inquires about the employment and ending when the employer has accepted an application, or “before and during the first interview.” Employers must then wait until after an applicant has completed an application and had a first interview before inquiring into the applicant’s conviction history. The ordinance provides an exception from these rules “if the inquiries or adverse actions prohibited [above] are specifically authorized by any other applicable law.”

WASHINGTON, DISTRICT OF COLUMBIA (ordinance applies to District)

- Banned the box
- Incorporates EEOC language into selection criteria

In December 2010, the nation’s capital joined the movement to ban the box by passing the Returning Citizens Public Employment Inclusion Act of 2010. After congressional review, the law went into effect in 2011. For non-covered positions, public employers are prohibited from inquiring into an applicant’s criminal history during the initial screening of applications. If a public employer considers an applicant’s criminal history, the applicant is permitted to provide an explanation of their history to the employer, and the employer must consider rehabilitation and other evidence of good conduct. Importantly, public employers are required to consider the beneficial public policy of ensuring access to jobs for people with a criminal record.
WASHINGTON, DC CONTACT
April Frazier, Community Reentry Coordinator
Public Defender Service
afrazier@pdsdc.org

DURHAM, NC (administrative hiring policy applies to City)
- Banned the box
- Background check only after conditional offer

In February 2011, the City of Durham removed questions about criminal history from all employment applications. Potential employees who have been given a conditional offer of employment are subject to a background check as are volunteers. Background investigations are conducted on applicants for public safety positions, financially sensitive positions, and positions in direct contact with minors before applicants are placed in finalist status.

DURHAM RESOURCES
City Application, click here
Human Resource Management Memo (April 18, 2011), click here

DURHAM CONTACT
Daryl V. Atkinson, Staff Attorney
Southern Coalition for Social Justice
daryl@scsj.org

COMPTON, CA (ordinance applies to City and contractors)
- Banned the box
- Background check only after conditional offer
- Policies applies to contractors doing business with the City
- Incorporates EEOC language into selection criteria

On April 5, 2011, the City of Compton passed a resolution to provide equal employment opportunities for people with criminal records, effective July 1, 2011. A criminal background check is delayed until after a conditional offer of employment is made. The city prohibits the consideration of any convictions that are not job-related in the course of an employment decision. Factors to consider include: (1) whether the position provides the opportunity for the commission of a similar offense; (2) whether the individual has committed other offenses since the conviction; (3) the nature and gravity of the offense and; (4) time since the offense. In order to promote model hiring policies, the City requires employers that receive local government contracts to adopt the same hiring policies.

COMPTON RESOURCES
Compton Resolution (April 5, 2011), click here
Compton Standard Operating Manual (July 1, 2011), click here

COMPTON CONTACT
Josh Kim, Staff Attorney
A New Way of Life
joshua@anewwayoflife.org
NEW YORK CITY, NY (executive order applies to City and some contractors)

- Banned the box
- Policies applies to contractors doing business with the Human Services Department

In August 2011, New York City Mayor Michael Bloomberg announced a $130 million initiative to increase the education and employment prospects for African American and Latino men. Recognizing the disparate impact of criminal records on these communities and the effect on employment, Mayor Bloomberg also signed Executive Order No. 151 banning the box. The policy prohibits City agencies from asking about an applicant’s criminal history on initial job application documents or in the initial interview. When an agency does review an applicant’s criminal history, it is limited to considering felony convictions, unsealed misdemeanor convictions, and pending charges. Agencies may request waivers to make additional inquiries. In efforts to expand the policy, the City has now extended the ban the box policy to contractors doing business with the Human Services Department. These contractors may not make inquiries about convictions until after the first interview.

NEW YORK RESOURCES
Executive Order (Aug. 4, 2011), click here
Article 23-A of the Correction Law, click here

CLEVELAND, OH POLICY (administrative hiring policy applies to City)
- Banned the box

On September 26, 2011, the City of Cleveland announced its ban the box policy. Developed in collaboration with the Ohio Justice & Policy Center, the policy removes the checkbox on city job and civil service testing applications that asks whether the applicant has a felony conviction. Background checks will now be performed only on finalists for a position.

CLEVELAND CONTACTS
Natoya Walker Minor, Chief of Public Affairs Mayor’s Office
nwalker@city.cleveland.oh.us

Stephen Johnson Grove, Deputy Director for Policy Ohio Justice & Policy Center
sjohnsongrove@ohiojpc.org
www.ohiojpc.org

RICHMOND, CA (city council resolution applies to City and vendors)
- Banned the box
- Background check only for otherwise qualified candidates
- Background checks only required for some positions
- Policy applies to vendors/contractors doing business with the City
- Incorporates EEOC language into selection criteria

On November 22, 2011, the Richmond City Council passed a measure to ban the box for city applications, spurred by the Safe Return Project-Pacific Institute, which researched the status of formerly incarcerated Richmond residents and is led by formerly incarcerated advocates.

In July 2013, the City Council voted to broadly expand the ban the box policy to companies with more than 10 employees who do business with the city, as well as their subcontractors. The new ordinance prohibits inquiry into an applicant’s criminal history at any time unless a background investigation is required by State or Federal law or the position has been defined as “sensitive.”
ATLANTIC CITY, NJ (ordinance applies to City and vendors)

- Banned the box
- Background check only after conditional offer given
- Policies applies to vendors/contractors doing business with the City
- Incorporates EEOC language into selection criteria
- Right to appeal denial of employment

Approved by Mayor Langford on December 23, 2011, Atlantic City, NJ banned the box for city positions. The ordinance also requires all vendors doing business with the City to have practices, policies and standards that are consistent with the City’s, and makes consideration of vendors’ hiring policies, practices and standards part of the criteria to be considered when awarding contracts. The ordinance permits a background check only after a conditional offer has been given, requires consideration of rehabilitation and the EEOC criteria, and gives applicants a right to appeal a denial of employment.

ATLANTIC CITY RESOURCE
City of Atlantic City, NJ Ordinance (Dec. 7, 2011), click here

CARSON, CA (city council resolution applies to City)

- Banned the box
- Incorporates EEOC language into selection criteria

On March 6, 2012, the City Council of Carson passed a resolution to support ban the box efforts. The resolution describes ban the box as delaying disclosure of past convictions until after an offer of employment is made. At that point, a separate conviction history form is collected and investigated for an individualized assessment that considers the length of time since the conviction, relevance to the position, and evidence of rehabilitation.

CARSON RESOURCE
City Council Resolution (March 6, 2012), click here

CARSON CONTACT
Josh Kim, Staff Attorney
A New Way of Life
joshua@anewwayoflife.org
SPRING LAKE, NC (administrative hiring policy applies to Town)
- Banned the box
- Incorporates EEOC language into selection criteria

Effective June 25, 2012, the Town of Spring Lake adopted a comprehensive statement of policy regarding criminal background checks for positions with the Town. According to the policy, an applicant’s conviction will be reviewed on a case-by-case basis. The policy offers one of the most comprehensive lists of factors to determine whether there is a “substantial relationship between the conviction and the position” and whether the applicant should be excluded.

SPRING LAKE RESOURCES
Application, click here
Administrative Policies and Procedures (July 16, 2012), click here

SPRING LAKE CONTACT
Daryl V. Atkinson, Staff Attorney
Southern Coalition for Social Justice
daryl@scsj.org

NEWPORT NEWS, VA (administrative hiring policy applies to City)
- Banned the box
- Incorporates EEOC language into selection criteria

In a memo dated July 13, 2012 from the City Manager, the administration outlines a plan to remove the question about conviction histories from city job applications by October 1, 2012. Exempted positions include those in public safety, child welfare, and elder care departments. The memo specifically references the EEOC guidance and the City’s policy of complying with the guidance. The City was petitioned to consider ban the box in May by Good Seed, Good Ground, a local non-profit group whose mission is to rebuild the lives of youth. Newport News is the first city in Virginia to ban the box.

NEWPORT NEWS RESOURCE
City Manager and Human Resources Manager Memo (July 13, 2012), click here

NEWPORT NEWS CONTACT
Good Seed Good Ground
(757) 244-0199
info@goodseedgoodground.org

NEWARK, NJ (ordinance applies to City, private employers, licensing, and housing)
- Banned the box
- Background check only after conditional offer
- Background checks only required for some positions
- Applies to private employers, licensing, and housing
- Incorporates EEOC language into selection criteria
- Right to appeal denial of employment
- Provides copy of background check report

On September 19, 2012, the Municipal Council passed the most comprehensive ban the box ordinance in the nation to date. The ordinance applies to the City, private employers, local licensing, and to housing as well. Inquiries into an applicant’s criminal history are delayed until a conditional
offer of employment is made by the employer, and there is a limited “lookback” period for offenses, ranging from eight years for indictable offenses and five years for disorderly persons convictions or municipal ordinance convictions. Several other components of the ordinance stand out, including: a prohibition on advertisements that limit eligibility based on the criminal record; an enforcement provision with fines for violations; and detailed mandated notices to denied applicants. The New Jersey Institute for Social Justice and the Integrated Justice Alliance worked closely with the sponsor of the ordinance, Councilmember Ron C. Rice, Jr., to help achieve this important milestone.

NEWARK RESOURCES
Ordinance #12-1630 (Sept. 19, 2012), (link pending)
Applicant Criminal Records Consideration Form, (link pending)
Notices, (link pending)

NEWARK CONTACT
Scott Nolen, Director of Equal Justice
New Jersey Institute for Social Justice
(973) 624-9400, Ext. 32
snolen@njisj.org

CARRBORO, NC (ordinance applies to Town)
- Banned the box
- Incorporates EEOC language into selection criteria

On October 16, 2012, the Carrboro Board of Alderman voted unanimously to ban the box on Town of Carrboro job applications. The Orange County Partnership to End Homelessness initially proposed the measure.

CARRBORO RESOURCES
Employment application, click here
Human Resources Memo, click here

WILMINGTON, DE (Mayoral Executive Order and city council resolution apply to City)
- Banned the box
- Background check only after conditional offer

On December 6, 2012, the Wilmington City Council passed a resolution urging the City’s Administration to ban the box on City employment applications. In response, Mayor Baker signed Executive Order 2012-3 on December 10, 2012, banning the box on initial job applications with the City. Wilmington will now conduct criminal background checks on applicants for non-uniformed positions after a conditional offer of employment has been provided.

WILMINGTON RESOURCES
- Executive Order 2013-3, click here
- City Council Resolution 12-086, click here
PITTSBURGH, PA (ordinances apply to City and contractors)

- Banned the box
- Background check only for otherwise qualified candidates
- Policies applies to vendors/contractors doing business with the City
- Right to appeal denial of employment

On December 17, 2012, the Pittsburgh City Council passed two ban the box ordinances; one that applies to city employment and one that applies to contractors. The Formerly Convicted Citizens Project worked on the campaign for two years.

PITTSBURGH RESOURCES
Ordinance 2012-0013, applies to city positions, click here
Ordinance 2012-0015, applies to contractors, click here

PITTSBURGH CONTACT
Dean Williams, Director
Formerly Convicted Citizens Project
(412) 295-8606
fccppitt@gmail.com

ATLANTA, GA (ordinance applies to City)

- Banned the box
- Background check after conditional offer

On January 1, 2013, the City of Atlanta removed the box from their application. This was an administrative action by the Commissioner of Human Resource, with Mayor Reed signing off on the action.

ATLANTA RESOURCES
Commissioner of Human Resources Memorandum, click here

ATLANTA CONTACTS
Marilynn B. Winn, Organizer
9to5
(404) 222-0037
Marilynn@9to5.org

Charmaine Davis, Georgia State Director
9to5
(404) 222-0037
Charmaine@9to5.org

TAMPA, FL (ordinance applies to City)

- Banned the box
- Background check after conditional offer
- Right to provide additional information if found ineligible

On January 14, 2013, the Mayor of Tampa signed the ban the box ordinance approved by the City Council. Advocates in Tampa continue to work on expanding the ordinance to include contractors.

TAMPA RESOURCES
Ordinance 2013-3, click here
CANTON, OH (Civil Service Commission rules)

- Banned the box
- Background check only for otherwise qualified candidates
- Incorporates EEOC language into selection criteria

The Canton Civil Service Commission has amended the civil service examination rules. Under the new amendment, the Civil Service Commission will now examine applicants and may certify as eligible a person convicted of a felony or misdemeanor who is not precluded from holding a specific position under federal or state law, provided the conviction does not bear a direct and substantial relationship to the position. To determine whether a conviction bears a direct and substantial relationship to the position, the Human Resources Director will consider a list of factors, including those detailed by the EEOC.

CANTON RESOURCES
Rule IV, Examinations, Section 15, Amendment, click here

CANTON CONTACT
Joseph Martuccio, Law Director
City of Canton
joe.martuccio@cantonohio.gov

RICHMOND, VA (ordinance applies to the City)

- Banned the box

On March 25, 2013, the Richmond City Council unanimously passed an ordinance to ban the box on City job applications. Except when required by federal or state law or for positions that the City Council, by resolution, has determined should be exempt, initial job applications may no longer inquire into an applicant’s criminal conviction history. Attached to the resolution is a document that includes those positions determined by the City Council to be exempt from the ban the box ordinance.

RICHMOND, VA RESOURCES
Resolution No. 2013-R, 87-85, click here

RICHMOND, VA CONTACT
Richard Walker, Founder & CEO
Bridging the Gap in Virginia
(804) 545-1974
rwalker@bridgingthegapinvirginia.org
KANSAS CITY, MO (ordinance applies to the City)
- Banned the box
- Background check only for otherwise qualified candidates and after interview
- Incorporates EEOC language into selection criteria

Recognizing the role of employment in reducing recidivism, Kansas City, MO, joined the movement to ban the box on April 4, 2013. Interestingly, the ordinance prohibits the City from using or accessing the following criminal records information: records of arrests not followed by valid conviction; convictions which have been annulled or expunged; pleas of guilty without conviction; and misdemeanor convictions for which no jail sentence can be imposed. Further, suspended imposition of sentence is not considered a conviction for purposes of the ordinance. While the ordinance is limited to City hiring, private employers are urged to adopt fair hiring practices that encourage the rehabilitation of people with criminal records.

KANSAS CITY RESOURCES
Rule IV, Examinations, Section 15, Amendment, click here

KANSAS CITY CONTACT
Mickey Dean, Deputy Director
Kansas City Human Relations Department.
(816) 513-1836
Mickey.Dean@kcmo.org

PORTSMOUTH, VA (administrative action applies to City)
- Banned the box

On June 2013, the Portsmouth City Manager made the administrative decision to ban the box. The City Manager notified the City Council that City employment applications would no longer request criminal history information from job applicants.

PORTSMOUTH RESOURCES
- Letter from Portsmouth Human Resources Director (July 2013), click here

PORTSMOUTH CONTACT
James Bailey, Regional Director
CURE Virginia, Inc.
(713) 582-1316
jbailey383@aol.com

BUFFALO, NY (ordinance applies to the City, vendors, and private employers)
- Banned the box
- Background check only at or after first interview
- Applies to public and private employers and vendors

On June 11, 2013, the Common Council of Buffalo banned the box for public and private employers within the city of Buffalo as well as for vendors who do business with the city. The ordinance permits consideration of a candidate's criminal history only after an application has been submitted and not before the initial interview.
BUFFALO RESOURCES
• Ordinance Amendment (June 2013), click here

BUFFALO CONTACT
Jeffrey M. Conrad, Western New York Regional Director
Center for Employment Opportunities
(716) 842-6320 ext 501
jconrad@ceoworks.org

NORFOLK, VA (administrative action applies to the City)
• Banned the box
• Incorporates EEOC language into selection criteria

On July 23, 2013, the Norfolk Assistant City Manager made a presentation to the City Council informing the Council that the City had decided to administratively ban the box on all City applications except for those positions that are deemed sensitive in nature. The City will continue with the current practice of reviewing the criminal history of all applicants by weighing the gravity of the offense, the length of time since conviction, and whether the conviction is applicable to the job.

NORFOLK RESOURCES
• Announcement of the administrative policy (July 2013, starts at 37:38 min mark), click here
• Presentation by Assistant City Manager (July 2013), click here

NORFOLK CONTACT
James Bailey, Regional Director
CURE Virginia, Inc.
(713) 582-1316
jbailey383@aol.com

PETERSBURG, VA (resolution applies to the City)
• Banned the box

On September 3, 2013, the Petersburg City Council adopted a resolution to amend the City’s job applications to remove inquiry into an applicant’s criminal history. The Council had directed the Human Resources department to provide information on ban the box. The Director of Human Resources submitted a memo that recommended the Council adopt the ban the box resolution. The City continues to use a supplemental questionnaire to obtain criminal history information from applicants applying to safety sensitive and/or security related positions.

PETERSBURG RESOURCES
• Petersburg Memo and Resolution, click here
• Petersburg Employment Application, click here
• Petersburg Supplemental Questionnaire, click here
MASSILLON, OH (civil service requirement applies to the City)
- Banned the box
- Incorporates EEOC language into selection criteria

On January 3, 2014, the Massillon Civil Service Commission voted to adopt a “ban the box” policy and disclosure requirement for the City. The City will no longer seek criminal history information from applicants on initial job applications. After the City determines the best candidates for the position, it will ask about criminal history information during the interview. The City will also continue to perform criminal background checks. While the City will consider specific factors, no appeal or waiver process is outlined in the memo explaining the policy.

MASSILLON RESOURCES
- Massillon Civil Service Commission Letter, click here

NEW ORLEANS, LA (policy applies to the City)
- Banned the box
- Background check only for otherwise qualified candidates
- Incorporates EEOC language into selection criteria
- Provides copy of background check report

On January 10, 2014, the City of New Orleans Chief Administrative Office released a policy memorandum announcing the City’s new Policy for Review of Employment Candidates’ Criminal History (Ban the Box). Wishing to safely remove barriers that impede otherwise qualified individuals from obtaining employment with the City, New Orleans will no longer request criminal history information from job applicants until after they have been interviewed and found to be otherwise qualified for the position. In addition, the applicant will receive a copy of his or her background check and has an opportunity to comment on the record prior to a final employment decision.

NEW ORLEANS RESOURCES
- New Orleans Policy Memorandum No. 129, click here

COUNTY HIRING POLICIES

ALAMEDA COUNTY
(Oakland & Berkeley, CA area; resolution applies to County)
- Banned the box
- Incorporates EEOC language into selection criteria

In October 2006, the Alameda County Board of Supervisors unanimously adopted a resolution urging the Civil Service Commission and the Department of Human Resources to implement a "pilot project . . . in order to mitigate or eliminate the negative impact against individuals who have been incarcerated or otherwise have criminal convictions to assist with the successful reintegration into the community." Beginning in March 2007, Alameda County removed the question on the job application that required all applicants to list their criminal convictions.

Self-disclosure of criminal history information does not occur until the last step of the examination process and fingerprinting for background checks is performed after a conditional offer. In addition, to protect against potential discrimination, a special unit in the Human Resources Department performs an analysis to determine if the conviction is, in fact, related to the specific functions of the job. As reported by the Interim Director of Human Resources Services in March 2012, the County has
not had any problems with the policy and “has benefited from hiring dedicated and hardworking County employees because of the policy change.”

**ALAMEDA COUNTY RESOURCES**
Alameda County Board of Supervisors Resolution (Oct. 3, 2006), [click here](#)
Alameda County Letter to Asm. Roger Dickinson (March 28, 2012), [click here](#)

**ALAMEDA COUNTY CONTACTS**
Rodney Brooks, Chief of Staff
Office of Supervisor Keith Carson
rodney.brooks@acgov.org

Jesse Stout
All of Us or None
jesse@prisonerswithchildren.org

**MULTNOMAH COUNTY**
(Portland, OR area; administrative policy applies to County)
- Banned the box
- Incorporates EEOC language into selection criteria

In October 2007, Multnomah County removed the question about criminal history from both on-line and hard-copy applications. The Multnomah County policy is similar to the policy implemented in the City and County of San Francisco. The Portland-based group, **Partnership for Safety and Justice**, was instrumental in the adoption of the county hiring policy as part of their "Think Outside of the Box" campaign.

When an applicant’s criminal history is considered, at a later stage of the hiring process, the Multnomah County policy requires an individualized determination of whether the conviction bears a rational relationship to the job. According to the policy, important factors to consider include the nature of the crime for which the applicant was convicted; any positive changes demonstrated since the conviction; the age at time of arrest; and the amount of time that has elapsed since the arrest occurred.

**MULTNOMAH COUNTY RESOURCE**
- Multnomah County Human Resources Memo (Oct. 10, 2007), [click here](#)

**MULTNOMAH COUNTY CONTACT**
Human Resources Department
(503) 988-5015 x85015

**TRAVIS COUNTY** (Austin, TX area; administrative policy applies to County)
- Banned the box
- Background check only after applicant selected for hire
- Background checks only required for some positions
- Incorporates EEOC language into selection criteria

In April 2008, acting upon the recommendation of Justice and Public Safety and the Director of Human Resources for Travis County, the Travis County Commissioner’s Court voted to remove the question about an applicant’s criminal history from county job applications. The Travis County Reentry Roundtable Report, which was completed in 2007, recommended changes to the county's
hiring practice as a key way to increase employment opportunities for people reentering the community.

In order to foster better integration of people with criminal records into the county workforce, the Human Resources Department trains hiring managers to consider "circumstances such as length of time since offense, seriousness of the offense, frequency of criminal incidents, and other mitigating factors." Additional training assists all new employees, including people with criminal records, in adapting to the workplace environment.

**TRAVIS COUNTY RESOURCES**
- Memo from Travis County Director of Human Resources (April 15, 2008), [click here](#)
- Travis County Guidelines for Hiring Ex-Offenders (April 21, 2008), [click here](#)
- Travis County Employment Application, [click here](#)

**TRAVIS COUNTY CONTACT**
Steven Huerta, Chairman
All of Us or None Texas
tac_allofusornone@yahoo.com

**CUMBERLAND COUNTY** *(Fayetteville, NC area; applies to County)*
- Banned the box

On September 6, 2011, the Cumberland County Commissioners unanimously voted to ban the box and implement a new pre-employment background check policy.

**CUMBERLAND COUNTY CONTACT**
Julean Self
Assistant Human Resources Director
jself@co.cumberland.nc.us

**MUSKEGON COUNTY** *(Northwest of Grand Rapids, MI area; applies to County)*
- Banned the box

Recognizing the need to prioritize employment opportunities for successful re-entry, the Muskegon County Board of Commissioners voted to remove inquiry into criminal history from the written application for all opportunities unless required by local, state, or federal law.

**MUSKEGON COUNTY RESOURCE**
- Resolution in Support of “Move-the-Box” Initiative Regarding Criminal Background Checks (Jan. 12, 2012), [click here](#)

**MUSKEGON COUNTY CONTACT**
Chairman Mahoney
commissioners@co.muskegon.mi.us
SANTA CLARA COUNTY (San Jose, CA area; applies to County)

- Banned the box

On May 1, 2012, the County adopted a procedure to remove the question on the job application that requires candidates to disclose criminal conviction histories. Once candidates have been tentatively selected, Human Resources will evaluate the conviction history. The Board of Supervisors supported this reform to eliminate the unnecessary disqualification of job applicants and increase the county’s hiring pool of candidates.

SANTA CLARA COUNTY RESOURCE
- Santa Clara Employment Application, click here

SANTA CLARA COUNTY CONTACTS
Supervisor Dave Cortese Reverend Jeff Moore
dave.cortese@bos.sccgov.org info@sanjosenaacp.org

DURHAM COUNTY, NC
(Durham, NC area; administrative policy applies to County)

- Banned the box
- Background check only after applicant selected for hire
- Incorporates EEOC language into selection criteria
- Right to appeal denial of employment
- Provides copy of background check report

Effective October 1, 2012, the County will not inquire into an applicant’s criminal history on an initial employment application form, unless explicitly mandated by law. The threshold for inquiry is after an applicant’s credentials have been reviewed, it has been determined that the applicant is otherwise qualified for a position, and the applicant has been recommended for hire by the department where the vacancy exists. Records of criminal arrests, dismissals, or convictions which have been expunged may not be used. The policy explicitly incorporates language from the 2012 updated EEOC guidance—for example, applicants are provided the opportunity for an individualized assessment.

DURHAM COUNTY RESOURCE
- Administrative Procedure (effective Oct. 1, 2012), click here

DURHAM COUNTY CONTACT
Daryl V. Atkinson, Staff Attorney
Southern Coalition for Social Justice
daryl@scsj.org

ADDITIONAL RESOURCES

REPORTS

“Cities Pave the Way: Promising Reentry Policies that Promote Local Hiring of People with Criminal Records” (July 2010) Strategy guide prepared by the National Employment Law Project (NELP) and the National League of Cities Institute for Youth, Education and Families that highlights local hiring models that facilitate the reentry of people with criminal records. Click here.
City of Los Angeles Personnel Department Report (Feb. 26, 2007) Report prepared for the City Council's Personnel Committee that recommends removal of criminal record questions from the City of Los Angeles' employment application. Click here.

“Ban the Box to Promote Ex-Offender Employment” (Oct. 2007) Article by Jessica S. Henry and James B. Jacobs, published in Criminology and Public Policy, Vol. 6 No. 4, 2007 at 755-762. Henry and Jacobs examine the movement to "ban the box," discuss the changes made by specific cities, pose questions about the effectiveness of the changes, and conclude that the "ban the box" is a smart societal investment. Click here.

National League of Cities Weekly Newsletter "Cities Adopt Hiring Policies to Facilitate Prisoner Reentry" (May 22, 2006) "Major cities, including Boston, Chicago and San Francisco, have recently adopted new hiring policies that would reduce barriers to municipal employment for former prisoners. While former offenders would still be kept out of certain occupations, the policies align with a new public safety agenda in which cities are creating opportunities for employment, housing and drug treatment to reduce recidivism. By focusing on crime prevention, this 'smart on crime' approach responds to the disproportionate number of former offenders re-entering society through large U.S. cities. Polls show widespread support across America for rehabilitation as a public safety strategy." Click here.

PRESENTATIONS

Putting Our Communities Back to Work: Targeted Hire and Ban the Box policies Webinar with Partnership for Working Families hosted by NELP (Nov. 15, 2013). Click here.

Making the Business Case for Reducing Barriers to Employment for Individuals with Criminal Records Webinar with New Jersey Institute for Social Justice hosted by NELP (June 14, 2013). Click here.

National League of Cities Audio Conference "Banning the Box: Facilitating the Reentry of Former Offenders into the Workforce & Community" (Jan. 18, 2007) Co-sponsored by the National Employment Law Project and the National HIRE Network. Click here.

U.S. Conference of Mayors Annual Conference "New City Hiring Policies Promote Public Safety by Reducing Barriers to Employment of People with Criminal Records" (June 4, 2006) NELP Presentation. Click here.

MEDIA COVERAGE

San Francisco Chronicle “Push to ban crime box on job applications expands” (Dec. 10, 2013) San Francisco Supervisor Jane Kim wants to make this question virtually obsolete on job applications in San Francisco: Have you been convicted of a crime? Kim is proposing to expand the city's existing ban by having it include most private employers, publicly funded housing providers and city contractors. Click here.

New York Times “A Second Chance in California” (Oct. 4, 2013) The California Legislature passed a bill in September that bars government agencies from asking job applicants about criminal convictions until the agency has determined that the applicant meets minimum qualifications for the job. This measure will help remove unfair barriers to employment that keep millions of qualified workers trapped at the margins of society. Gov. Jerry Brown should sign this sensible bill. Click here.

Los Angeles Times “To help ex-cons, ban the box” (July 3, 2013) There is a growing movement nationwide to “ban the box” from employment applications and end discrimination against people who have spent time behind bars. It is time for California to join the movement, cautiously but
deliberately. Cautiously, because employers have a right to know who their workers are and a duty to protect their businesses and workplaces; and deliberately, because we’re foolishly punishing ourselves by not welcoming safe and potentially productive people into the workplace. Click here.

The New York Times “An Unfair Barrier to Employment” (May 5, 2013) Sixty-five million Americans have criminal records that might cause them to be denied jobs, even for arrests or minor convictions that occurred in the distant past. The problem, however, has become so acute that a growing number of states and municipalities have explicitly prohibited public agencies — and in some cases, private businesses — from asking about an applicant’s criminal history until the applicant reaches the interview stage or receives a conditional job offer. Click here.

Komo News “Seattle proposal would delay criminal background checks on job applicants” (Sept. 5, 2012) “Councilman Bruce Harrell believes people with criminal backgrounds are less likely to become repeat offenders if they have a better chance of entering the workforce. His proposal would prevent most employers in the city from viewing a job applicant’s criminal record until late in the hiring process. It might seem surprising, but many local business owners are in favor of the proposed legislation.” Click here.

ESR News “Detroit Ban the Box Ordinance Requires City Vendors and Contractors to Remove Criminal Record Question on Job Applications” (July 26, 2012) Attorney Lester Rosen, founder and CEO of background check firm Employment Screening Resources (ESR) states, “We are suggesting to private employers that they also consider a ‘ban the box’ approach. Asking about criminal records early in the hiring process serves as a knock-out punch before candidates have a chance to be considered on their qualifications, and unnecessarily exposes employers to allegations they are automatically tossing out applications with a criminal record.” Rosen also says that when employers ask about a past criminal record, they “need to make an effort to not ask a broadly worded question that may encompass criminal records that are either too old or irrelevant for the job, since that can have the impact of imposing a lifetime ban on an applicant.” Click here.

The Sacramento Bee “A Job is Best Crime Prevention Program” (June 27, 2012) “The job hunt is tough for everybody these days. But imagine having a criminal record. Many employers, including cities and counties, won’t consider hiring someone with a criminal past, no matter how long ago the crime was committed, how minor the offense might have been, or how thoroughly the applicant has turned his life around.” Click here.

Detroit Fox News Channel 2 “City of Detroit Finalized New Hiring Policy for Vendors to Remove Criminal Record Question from Job Applications” (May 2, 2012) The City of Detroit is letting its contractors know that they must remove the criminal record question from their job applications by July 1, 2012. Click here.

CQ Reporter “Criminal Records and employment: Should barriers be eased for ex-prisoners?” (April 20, 2012) “Many former prisoners are turned away from jobs because of their criminal records. The federal government, more than 30 cities and at least 26 states limit the kind of criminal-background information employers can obtain or when they can request it. Advocates for ex-prisoners say such restrictions don’t go far enough in making it easier for former offenders to find work.” Click here.

National Radio Project, Making Contact “Ban the Box! The Campaign for Post-Prison Employment” (March 13, 2012) “It’s not even the crime that counts sometimes. Or the time in prison. It’s that little box on an application that asks you to reveal if you have a criminal history. Checking that box can mean the difference between failure and success.” Click here.

Gotham Gazette “City Shuts the ‘Box’ to Open Job Opportunities” (Sept. 26, 2011) “The unemployment rates for people of color already vastly exceed those of whites – averaging 16.0 percent for African Americans and 12.5 percent for Latinos nationally last year, compared with 8.7
percent for whites. In addition, workers of color are disproportionately represented in the criminal justice system . . . Moving the question until later in the process allows workers to be considered on their merits, reduces the risk that agencies would use overbroad or blanket policies that run afoul of federal and state civil rights laws, and still ensures that background checks are performed when necessary to ensure safety and security.” Click here.

San Francisco Chronicle “A Second Chance for Convicts” (July 26, 2011) “A proposal being considered by San Francisco’s Human Rights Commission [that] would . . . increase public safety in our communities - thoughtfully, humanely and for the long term. Although the proposal is still in the works, the concept is that people with arrests and convictions would no longer be rejected out of hand from a job or housing simply because of their record.” Click here.

Bloomberg “A Simple, Cost-Free Remedy for the Hard-Core Unemployed: View” (Aug. 25, 2011) “After banning the box in 2007, Minneapolis, which alone seems to have collected data on the ban’s effect, found that fewer job applicants were rejected because of a criminal conviction. . . . What’s more, considering criminal history only at the point of a job offer reduced staff time spent on screening prospective employees. Other jurisdictions would be wise to adopt the reform in their hiring practices, as would companies, voluntarily.” Click here.

New York Times “New Haven May Ease Hiring of Ex-Criminals” (Feb. 13, 2009) “If the proposal is approved, New Haven will join other cities, including San Francisco, Baltimore and Minneapolis, that have voted to remove the question [regarding criminal history] on their job applications. Proponents of the move say that people who have done their time deserve jobs, too, and the current job application question usually means they are dismissed out of hand no matter what their skills.” Click here.

New York Times Editorial “Cities That Lead the Way” (March 31, 2006) “Three cities -- Boston, Chicago and San Francisco - have taken groundbreaking steps aimed at de-emphasizing criminal histories for qualified applicants for city jobs, except in law enforcement, education and other sensitive areas where people with convictions are specifically barred by statute. . . . Taken together, the recent developments in Boston, Chicago and San Francisco symbolize a step forward in terms of fairness for law-abiding ex-offenders, who are often barred from entire occupations because of youthful mistakes and minor crimes committed in the distant past.” Click here.

CAMPAIGN MATERIALS – VIDEOS

- “Beyond the Box: The Ban the Box Movement in Rhode Island.” (March 20, 2013) Click here.


- “Rhode Island Moves to Ban the Box!” (Feb. 7, 2011) Click here.


- “Locked Up, Locked Out – Part 1 (Community Summits & Ban the Box).” All of Us or None (July 1, 2009) Click here.
The NC Justice Center has a series of interviews of people with conviction histories discussing ban the box. Click here.

CAMPAIGN MATERIALS – OTHER SUPPORTING DOCUMENTS

- **Materials in Support of Statewide Ban the Box Legislation for Cities and Counties in California 2012 and 2013.** Prepared by the National Employment Law Project and others. Includes factsheet, FAQ, and examples of letters of support from labor, law enforcement, and human resources. Click here for 2012. Click here for 2013.


- **All of Us or None’s Ban the Box Campaign Tools.** Includes best practices for hiring procedures in public employment, a sample resolution, and endorsement materials among other key resources. Prepared by All of Us or None. Click here.

TECHNICAL ASSISTANCE

For more information about city hiring policies that limit discrimination against people with criminal records, or for help developing similar policies for other cities, Contacts:

National Employment Law Project
Second Chance Labor Project
www.nelp.org

Madeline Neighly
(212) 285-3025 ext. 328
mneighly@nelp.org

Michelle Natividad Rodriguez
(510) 663-5705
mrodriguez@nelp.org

Jesse Stout
All of Us or None
(415) 255-7036
jesse@prisonerswithchildren.org
www.allofusornone.org

Roberta Meyers
Director
National H.I.R.E. Network
(212) 243-1313
rampeeples@hirenetwork.org
www.hirenetwork.org
## Summary of Highlights of Local Ban the Box Policies

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<th>Location</th>
<th>Employers Regulated</th>
<th>Background checks only for some positions</th>
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*Policies applies to contractors doing business with the Human Services Department
CENTURY CLUB
(Contributed 10 Years or More)
Shawn & Lynn Aiken
Barton & Storts
Gary R. Blume
Florence Bruemmer
Bryan Cave LLP
Carmichael & Powell PC
Chester & Shein PC
Tom Crowe
Thomas J. Davis
Dickinson Wright/Mariscal Weeks
Dominguez Law Firm PC
Farrell & Bromiel PC
Fromm Smith & Gadow PC
Aris J. Gallios
Goldman & Goldman PC
Gomez & Petitti PC
Goodman Law Firm
Gust Rosenfeld PLC
Ray Hanna
Harris Powers
& Cunningham PLLC
Hufford Horstman
Mongini Parnell & Tucker
Jaburg & Wilk, PC
Jackson White PC
Jennings Haug & Cunningham
Jennings Strouss & Salmon PLC
Lang Baker & Klain PLC
Loose Brown and Holokirk PC
Michael R. King
Low & Cohen PLLC
May Potenza Baran
& Gillespie PC
In Memory of
Daniel J. McAuliffe
Fenton J. McDonough
Murphy Schmitt
Hathaway & Wilson PLLC
Musgrove, Drutz & Kack PC
Osborn Maledon PA
Jeffrey I. Ostreicher
Leah Pallin-Hill
Perkins Coie LLP
Polsinelli PC
Paul G. Rees
Jeff Richards
James B. Rolle
Roshka DeWulf & Patten PLC
Dee-Dee Somet PC
Sanders & Parks PC
Scott & Skelly LLC
Sherman & Howard LLC
Snell & Wilmer LLP
Law Office of Stone & Davis PC
Law Offices of Larry W. Suciu PLC
Tiffany & Bosco, PA
Vakula Law Firm
Schian Walker PLC
Nicholas J. Wallwork
Warner Angle Hallam Jackson
& Formanek PLC
Joseph H. Watson
G. Van Velsor Wolf, Jr.
Walter F. “Skip” Wood

HONORED PATRONS
(Contributed Last 5 Consecutive Years)
Denise Blommel
Ronald G. Compton
Law Office of Michael Cordova PC
Crampton Law Firm PC
Curtis Goodwin Sullivan
Udall & Schwab PLC
Gabriel D. Fernandez
Robert E. Gaylord
Robert Goldwater
Hon. Hugh E. Hegyi
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Bellovin Karns PC
Lerner & Rowe
MacBan Law Offices
Allan D. NewDelman
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Lynda Shely
Slutes Sakrison & Rogers
Jimmie Dee Smith

HON. LORNA E.
LOCKWOOD PATRONS
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Bryan Cave LLP
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Ryley Carlock & Applewhite PC
Osborn Maledon PA
Gust Rosenfeld PLC

HON. THOMAS TANG
PATRONS
($2,000)
Jaburg & Wilk PC
Jennings Haug & Cunningham
Sherman & Howard LLC
HON. WALTER E. CRAIG
PATRONS
($1,100)
Warner Angle Hallam
Jackson & Formanek PLC
Sanders & Parks PC
Jackson White PC
May Potenza Baran
& Gillespie PC
Dickinson Wright/Mariscal Weeks
Brownstein Hyatt Farber Schreck
Aspey, Watkins & Diesel, PLLC
Nussbaum Gillis & Dinner PC

HON. VALDEMAR A. CORDOVA PATRONS
($650)
Carmichael & Powell PC
ASU Office of General Counsel
Bellovin & Karnas PC
Schian Walker PLC
Curtis Goodwin Sullivan
Udall & Schwab PLC
Goldman & Zwillinge PLLC
Hufford Horstman Mongini
Parnell & Tucker PC
Roshka DeWulf & Patten PLC
Brown Olcott, PLLC

HON. MARY ANNE RICHEY PATRONS
($300)
Farrell & Bromiel PC
Harris Powers & Cunningham PLLC
Scott & Skelly LLC
Low & Cohen PLLC
Fromm Smith & Gadow PC
Hartman Titus PLC
Barton & Storts
Dominguez Law Firm PC
Law Offices of Larry W. Suciu PLC
Hunter Humphrey & Yavitz PLC
Law Office of Michael Cordova PC
Goodman Law Firm
Horan Law Offices PC
Elkie Law Office PC
Vakula Law Firm
MacBan Law Offices
Chester & Shein PC
Loose Brown and Holokirk PC
Crampton Law Firm PC
Goldstein & Scopellite PC
Leonard & Felker PLC
Gordon Silver
Hildebrand Law PC
Sandweg & Ager PC
Murphy Schmitt Hathaway & Wilson
Law Office of Stone & Davis PC
Gomez & Pettiti PC
Christian K.G. Henrichsen
Slutes Sakrison & Rogers PC
Luther Law Firm
Goldman & Goldman PC
Musgrove, Drutz & Kack PC
Dee-Dee Samet PC
Theut, Theut & Theut PC
Ogletree Deakins Nash Smoak & Stewart PC

HON. KARL MANGUM PATRONS
($200)
Denise Blommel
Robert Goldwater
John T. Zastrow
Joanne Trifilo Stark
Shawn & Lynn Aiken
Allan D. NewDelman
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Daniel J. McAuliffe
Jim Cross
Robert E. Gaylord
Shirley J. McAuliffe
Glynn W. Gilcrease, Jr.
Michael R. King
Jimmie Dee Smith
John Mathew Norton
Jason Scronic
Jeff Richards
Gabriel D. Fernandez
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Fenton J. McDonough
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Osborne M. Reynolds, Jr.
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Aris J. Gallios
Gary R. Blume
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Jane Proctor
Nicholas J. Wallwork
Leah Pallin-Hill
Tom Crowe
David J. Estes
G. Van Velsor Wolf, Jr.
Joseph Ramiro-Shanahan
Howard J. Weinstein
Jerry L. Cochran
Robert Hirsh
Ronald G. Compton
Jeffrey I. Ostreicher
Lawrence F. Winthrop
John M. McVey
Tracy Essig
Bob Porter
Chief Justice Rebecca W. Berch
Hon. Hugh E. Hegyi
Joseph Kanefield
Margarita Bernal
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Jeffrey Willis
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Walter F. “Skip” Wood
Sandra Slaton
Grant Woods
Stanley G. Feldman
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Violet Lui-Frank
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