



Statement of

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“An Examination of Federal Employment Practices/Policies Towards Hiring Ex-Offenders”

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Good afternoon Chairperson Davis and Subcommittee members:

Thank you very much for the opportunity to appear before you today. I am a Staff Attorney at Community Service Society, a 160-year-old antipoverty organization in New York City. On a daily basis, I help people who encounter employment and licensure discrimination because of their criminal records, even after years of employment, education, sobriety, civic engagement, and lack of involvement with the criminal justice system. I thank you on their behalf for examining an issue vital to their individual self-fulfillment, our neighborhoods’ safety and stability, and the fairness of our society as a whole.

Today I will discuss three federally regulated industries that provide jobs accessible to people with limited education and work history but unavailable to people with criminal records, and I will also discuss New York state laws that require individual determinations—and sometimes a hearing—before someone can be denied a job or a license because of a criminal record.

Employment of people with criminal records serves a dual purpose: It dissuades the individual from re-offending, and it improves both the economy and safety of the communities where they reside. A large number of low-income individuals and families support transitional jobs for people released from incarceration so that they may gain the work experience necessary for regular employment.¹ The question is,

¹ ELISABETH BENJAMIN & JEREMY REISS, 2007 UNHEARD THIRD SURVEY OF LOW-INCOME NEW YORKERS: HEALTH, INCOME INEQUALITY, LOW WAGE WORK, AND POLICIES TO ADVANCE ECONOMIC SECURITY 35 (2008), http://www.cssny.org/pdfs/UT_Press_Release_Data.pdf. See The Unheard Third, 2007: Annual Survey of Low-Income New Yorkers, <http://www.cssny.org/research/unheardthird/>. The Unheard Third is CSS’s annual survey of

however, from where will those regular jobs come? The federal government has a role in providing the answer.

I. Three federally regulated agencies with conviction-related barriers.

A. Banking

Nearly all positions in FDIC-insured institutions, including bank tellers and administrative staff, are subject to conviction history barriers.² Generally, disqualifying crimes are those where an element involves dishonesty, fraud, larceny, or money laundering; but the FDIC has also decided to include all controlled substances crimes as well. The FDIC can, except for some enumerated federal bank fraud crimes, waive these bars if the banking institution petitions on behalf of the individual, but certain crimes cannot be waived for ten years after conviction unless the FDIC itself seeks court approval. The FDIC considers the following factors when determining whether to issue a waiver:³

1. The conviction and the underlying facts;
2. Evidence of rehabilitation, including how long ago the conviction was; the person's age at the time; and her "reputation" since;
3. The position to be held or the level of participation by the person at an insured institution;
4. The position's influence and control over the institution's management or affairs;
5. Management's ability to supervise and control the person;
6. How much of the institution the person owns;
7. Whether the institution's fidelity bond coverage applies to the person
8. The opinion of applicable federal and state regulators; and
9. Any other relevant factors

Although the FDIC's statement of policy recognizes that waivers should be granted "without extensive review" if the person will occupy clerical, maintenance, service or purely administrative positions, the waiver must first be sought, and only the

low-income New Yorkers and the only public opinion poll in the nation to regularly chronicle issues facing such individuals and families.

² 12 U.S.C. § 1829

³ Federal Deposit Insurance Corporation, FDIC Statement of Policy for Section 19 of the FDI Act (Nov. 16, 1998), available at <http://www.fdic.gov/regulations/laws/rules/5000-1300.html>.

banking institution, absent yet another waiver, can do this. Understandably, banks have little motivation to do this for low-level positions when locating a qualified applicant without a criminal record is easier.

B. Healthcare programs

All healthcare programs and health insurance plans funded directly, in whole or in part, by the federal government⁴ have both mandatory and permissive conviction bars.⁵ Most mandatory bars last for five years. In addition to convictions for program-related crimes, patient abuse or neglect, and health care fraud, people convicted of felony-level controlled substances offenses are also mandatorily barred. The permissive exclusion list is much longer, but the bars typically exist for three years. The list includes misdemeanor convictions for controlled substances and any license revocation—even licenses unrelated to health care.

There is unfortunately no statutory or regulatory guidance regarding when a permissive ban should be imposed. While regulations allow mitigating circumstances to reduce the length of exclusion,⁶ they only apply to health-related fraud. Therefore, the law provides no way to acknowledge, for example, someone with a misdemeanor-level drug conviction who has been sober and employed or in school for two years.

An administrative appeal process is available to people who are terminated or refused employment under this law,⁷ but some entities in the health care field are implementing these regulations without informing individuals of appeal procedures or distinguishing between mandatory and permissive bars. CSS has learned this first-hand when it was asked to screen current employees in its programs to increase community access to information about Medicaid and managed care.

C. Airline industry

All potential and current employees who work in secure areas of airports must undergo a fingerprint-based criminal background check. This includes screeners, mechanics, flight attendants and pilots, cleaning crews, service workers, and baggage

⁴ 42 U.S.C.A. § 1320a-7b(f).

⁵ 42 U.S.C.A. § 1320a-7.

⁶ 42 C.F.R. 1001.

⁷ 42 U.S.C.A. § 1320a-7(f).

handlers. Similar to the healthcare regulations, a number of industry-related crimes and felonies are disqualifying, but the list also includes misdemeanor convictions.⁸

Although only convictions within the past ten years automatically disqualify someone from unsecured access, convictions outside that time period may be considered.⁹ Because there is no opportunity to seek a waiver or show evidence of rehabilitation, a credentialing authority has wide discretion to deny an applicant solely upon her or his criminal record, which could be for a misdemeanor-level weapons possession conviction.

CSS has also observed this first-hand in dealing with a local, state-funded job training program—which largely focuses on moving people from welfare to work—that will not send anyone with a criminal record to an airport job because they never get hired.

II. Legal protections against employment discrimination for people with criminal records in New York.

Of all the federal employment discrimination laws, only Title VII of the Civil Rights Act of 1964 protects people with criminal records; even then, only blanket policies against hiring people with criminal records, absent a business justification, are illegal.¹⁰ In contrast, New York Corrections Law Article 23-A¹¹ and the State¹² and City¹³ Human Rights Laws require individualized determinations for each employment decision. These laws evidence New York’s strong public policy in favor of employing these individuals.

Employers cannot fire or refuse to hire someone solely because that person has a criminal record. A criminal conviction is only relevant if a *direct relationship* exists between the conviction and the prospective job or granting the license would pose an *unreasonable risk* to persons or property.¹⁴ Before denying a license under either

⁸ 49 C.F.R. § 1542.209(d)(20).

⁹ Transportation Security Administration Office of Chief Counsel, Legal Guidance on Criminal History Records Checks 5 (May 28, 2004), available at <http://www.tsa.gov/assets/pdf/CHRCMay04.pdf>.

¹⁰ Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (EEOC July 29, 1987), <http://www.eeoc.gov/policy/docs/convict2.html>.

¹¹ N.Y. CORRECT. LAW §§ 750-55.

¹² N.Y. EXEC. LAW § 296(15),(16).

¹³ N.Y. CITY ADMIN. CODE § 8-107(10),(11)

¹⁴ N.Y. CORRECT. LAW § 752

the direct relationship or unreasonable risk exceptions, however, the employer must consider the following factors:

- a. New York's public policy in favor of employing the formerly incarcerated;
- b. The job's necessary duties and responsibilities and the conviction's bearing on the applicant's fitness and ability to fulfill them;
- c. How long ago the offense occurred, how serious it was, and the applicant's age at that time;
- d. Evidence from the applicant of rehabilitation and good conduct;
- e. The legitimate interest of the employer in protecting people and property; and
- f. A Certificate of Relief from Disabilities or Certificate of Good Conduct, which create a presumption of rehabilitation.¹⁵

Over one hundred occupations require a license in New York; over half of those have a conviction-related barrier.¹⁶ State agencies must also follow Article 23-A when deciding whether to issue a license. Some agencies provide a hearing process to denied applicants; this affords the individual an opportunity to demonstrate her or his rehabilitation.

III. Conclusion

From my remarks, two concerns emerge. First, some blanket bars are rationally related to the employment sought. Permissive bars, like those in the healthcare field, and those based on misdemeanors, however, are not. Overly aggressive policing and stops-and-frisks in New York City, among other localities, has resulted in increased convictions for low-level misdemeanors. While there is no excuse for breaking the law, we know that police encounters happen more often in poor and non-white neighborhoods. That is, in fact, the reason why blanket policies against hiring people with criminal records violate Title VII: certain protected classes are stopped, charged, and convicted at a rate disproportional to their representation in the population. Is it fair to perpetuate discriminatory practices by adding employment barriers?

¹⁵ See N.Y. CORRECT. LAW §§ 700-06.

¹⁶ See generally Legal Action Center, New York State Occupational Licensing Survey (2006), <http://www.hirenetwork.org/pdfs/Occupational%20Licensing%20Survey%202006.pdf>

Second, the federal system lacks a uniform and easily accessible process by which individuals can demonstrate their rehabilitation and fitness for a particular job. Blanket policies ignore the reality of the reentry population today, many of whom can demonstrate significant personal accomplishment, growth, and stability, but nonetheless are denied, either by law or because the agency has unfettered discretion. As a related concern, the automatic bars in each industry cannot be based upon social science and criminal justice research about recidivism because each one lasts for a different period of time. Why is someone rehabilitated enough to work in the healthcare field but not the airline industry?

As a result, I urge this committee to push for a top-down executive review of conviction barriers to federal employment to determine whether they actually increase public safety; are based on real data on recidivism; and decrease the employment of non-white persons. The review should also consider ways in which to routinely consider individuals' rehabilitation; ensure fair employment decisions; and incorporate state mechanisms whereby people demonstrate rehabilitation, like certificates of relief and good conduct in New York.

The underlying concern of all laws and regulations hindering the employment of people with criminal records is the risk of recidivism and the resulting damage to persons and property. That is, given a person's record, "we should have known" a person would recidivate if working at a job related to their record. While there is certainly room for limitations linked to a rational public safety justification, when individuals are unable to find a job and recidivate, we can similarly say "we should have known."

Thank you.

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