

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

Written Testimony submitted to
Congressman Danny K. Davis
Chairman, Subcommittee on Federal Workforce, Postal Service, and the
District of Columbia

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Presented by:

Roberta Meyers-Peebles
Director of National H.I.R.E. Network
Legal Action Center
225 Varick Street, 4th Floor
New York, NY 10014
212-243-1313 ext. 135
Email: rampeebles@lac.org

Thank you Congressman Davis and committee members for holding this very important hearing to discuss the employment barriers individuals with criminal histories face when seeking employment, particularly those barriers that are a direct result of federal legislation. We appreciate Congressman Davis' leadership in addressing the roadblocks that thousands of individuals face when seeking to successfully reenter society and become gainfully employed.

The Legal Action Center (LAC) is a non-profit law and policy organization whose sole mission is to fight discrimination against people with histories of addiction, HIV/AIDS, and criminal records, and to advocate for sound public policies in these areas. For over three decades, LAC has worked to combat the stigma and prejudice that keep these individuals out of the mainstream of society. We are committed to helping people reclaim their lives, maintain their dignity, and participate fully in society as productive, responsible citizens. We do this by working to eliminate discriminatory barriers to employment, housing and social services, and protecting confidentiality. The National **H**elping **I**ndividuals with criminal records **R**e-enter through **E**mployment (H.I.R.E.) Network is a project of LAC that is committed to increasing the number and quality of employment opportunities available to people with criminal records by improving employment practices and public policies, and changing public opinion.

Unlike other countries, in the United States, the stigma that individuals with criminal histories face is essentially life-longⁱ. As of December 2003 there were as many as 71 million Americans with arrest records on file in state repositoriesⁱⁱ, many of which may have never resulted in a conviction. Only 10 states (CA, HI, IL, MA, MI, NY, OH, RI, UT, and WI) prohibit public and private employers and occupational licensing agencies from using arrests that never led to conviction.ⁱⁱⁱ There are only 14 states that have laws that prohibit employment

discrimination against qualified applicants with criminal histories. In some states, these laws only apply to public employers and occupational licensing agencies—AZ, CO, CT, FL, KY, LA, MN, NM, and WA. In only 5 states, these anti-discrimination laws pertain to public and private employers—HI, KS, NY, PA, and WI.^{iv} Now that addressing reentry is a policy priority of this nation, Congress needs to seize the opportunity and put protections in place so that qualified individuals, who benefit from the programs that are now authorized under the Second Act, actually have a fair opportunity to get employed and earn a living wage.

In states around the country, individuals with criminal histories are barred from obtaining hundreds of occupational licenses, even if their conviction(s) is not related to the work of the profession or if their record is old, or in some cases, minor. In addition to these state occupational licensing barriers, we also know of at least eight industries that are federally regulated that prohibit or limit the employment of individuals with criminal records.

- **Finance:** Convictions for offenses involving dishonesty, breach of trust, or money laundering disqualify an individual from working for institutions that are insured by the Federal Deposit Insurance Corporation, even if the job does not relate in any way to the handling of funds.^v Visit <http://www.hirenetwork.org/FDIC.html> for information about the waiver process, “*People with Criminal Records Working in Financial Institutions: The Rules on FDIC Waivers.*”
- **Insurance:** Federal law bars certain classes of felons from working in the insurance industry without having first received permission from an insurance regulatory official.^{vi}
- **Unions:** Certain classes of felons are barred, for 13 years after conviction (or the end of imprisonment if sentenced for a term of longer than 13 years), from holding any of several positions in a union or other organization that manages an employee benefit plan, including serving as an officer of the union or a director of the union’s governing board.^{vii}
- **Healthcare:** Federal law prohibits those convicted of certain crimes from providing healthcare services for which they will receive payment from Medicare,^{viii} or from working for the generic drug industry.^{ix}

- **Childcare:** Federal law requires criminal history background checks for those individuals who provide care for children.^x In addition, the Federal Child Protection Act^{xi} authorizes states to institute mandatory or voluntary fingerprinting of prospective employees in childcare fields in order to facilitate criminal background checks and exclusionary policies.
- **Prisoner Transportation:** Prisoner transportation by public or private agencies is federally regulated^{xiii} and federal law sets “minimum standards for background checks and pre-employment drug testing for potential employees including requiring criminal background checks to disqualify persons with a felony conviction or domestic violence conviction from employment.”
- **Aviation, Port, and Ground Transportation Workers:** Since September 11, 2001, numerous efforts have been made to increase security in our nation’s transportation industry. As a result, federal laws now require workers in the transportation industry to undergo a criminal background check and, in varying circumstances, to be disqualified for having a criminal record. Individuals who work in airports must be fingerprinted to get clearance to have unescorted access to airport security areas.^{xiii} All truck drivers have to undergo a criminal background check to qualify for a “hazmat material endorsement” (HME).^{xiv} The Maritime Transportation Security Act (MTSA) requires a criminal background check for all port workers to identify those who pose a “terrorism security risk.”^{xv} Port workers have to qualify for a Transportation Worker Identification Credential (TWIC) in order to have unescorted access to a secured area of a port facility or vessel. For more information on port worker TWIC requirements:
 Visit *NELP's TWIC Guide*:
<http://www.nelp.org/docUploads/TWICGuide%5F011708%5F170606%2Epdf>
TWIC Know-Your-Rights Fact Sheet: <http://www.nelp.org/docUploads/TWIC%2DEnglish%2Epdf>
- **Private Security Guards:** The Private Security Officer Employment Authorization Act of 2004^{xvi} authorizes a fingerprint-based criminal history check of state and national criminal history records to screen prospective and current private security.

The Legal Action Center has represented or advised several individuals who have been barred from working in many of the industries listed above and each of these individuals, in their own right, have done all that we as a society would expect them to do: remain crime free, change the course of their lives through education and work, and to be contributing members of society.

Some examples of individuals that have contacted the Legal Action Center for assistance include:

- A man in Florida, now in his thirties, who had been employed by a company that did debt collection activities for Citicorp for nearly two years was encouraged to apply for a Customer Service/Sales position at Citicorp for which he was qualified. He did apply and had an excellent interview with favorable response, but because he had a criminal conviction that was over 10 years old but theft related, he had to receive a Federal Deposit Insurance Corporation (FDIC) waiver to get the job. He contacted the regional FDIC office that was responsible for reviewing waiver applications and was told he could not apply. He had to get the prospective employer to apply for the waiver on his behalf. Needless to say, he did not get the job.

According to the director of the regional FDIC office that was responsible for receiving and reviewing waiver applications, they have never processed an application from an employer on behalf of an applicant with a criminal record and probably never would. This is an example of legislation that offers a waiver process that is essentially useless to any job seeker that may be qualified and capable of working in the financial industry without posing any real risk to a business. 12 U.S.C. § 1829 should be amended to allow individuals to apply on their own behalf for clearance to work in an FDIC regulated entity.

- A forty-six year old man was fired from his job as a baggage handler at John F. Kennedy airport in New York based upon a 10 year old conviction. The U.S. Department of Homeland Security refused to grant him security clearance due to his drug-related conviction without giving any consideration to all of his accomplishments since the conviction and successful rehabilitation. He struggled with substance abuse earlier in his life, but was clean for 9 years after receiving treatment and had no further contact with the criminal justice system. The airline company hired him with full knowledge of his conviction because of his strong work history and qualifications for the position. He was able to work for the airlines while his security clearance application was pending, and during that one year period he received glowing evaluations from his employer.

Nonetheless, the port director denied his application without stating any specific reasons for the denial and without acknowledging his amazing story of recovery and tremendous success in turning his life around. Unfortunately, he came to the Legal Action Center after all administrative appeal rights were exhausted, and we could not assist him. However, it brought to our attention the unfair screening practices of the Department of Homeland Security.

Under 19 C.F.R. §122.183 (which regulates the background screening process for airport workers), the port director may deny security clearance to people with certain offenses, that include but are not limited to interference with air navigation, carrying a weapon aboard an aircraft, theft, violent offenses, bribery, fraud and drug offenses “for a 5-year period, or any longer period that the port director deems appropriate for the offense in question.” Currently, Homeland Security has unfettered discretion to deny people security clearances based on their criminal record for an indefinite period, and there is no statutory provision that requires Homeland Security to consider the rehabilitation of the

individual. This statute should be amended to require the consideration of rehabilitation and successful reintegration when considering security clearance applications. In addition, the Department of Homeland Security should develop a user-friendly application process that provides instructions to individuals with criminal records on how to submit supportive evidence of rehabilitation. Most applicants can not afford legal counsel when going through this process, and thus the application should be simple and easy to understand.

- Another client was denied a nursing position because of a federal employment barrier imposed by the Department of Health and Human Services. She was convicted six years ago of misappropriations of federal funds. She was the director of a daycare owned by her mother, where funds from a federal grant that serves disadvantaged children was used by her mother for non-business purposes. After her conviction, she attended college and received her bachelors of nursing. She was approved and licensed by the state nursing agencies in both New York and Florida. She was hired by a hospital in New York and was later informed that she could not start work because she was listed on the *Inspector's General ("I.G.") List of Excluded Individuals* for ten years because of her conviction. Any person listed on the I.G.'s exclusion list can not work for employers who receive Medicaid and Medicare payment – which in essence includes all medical providers.

With the assistance of LAC, she is in the process of appealing her exclusion to an Administrative Law Judge ("ALJ"). Fortunately, the statute does permit her to request a hearing before to determine whether the exclusion period is reasonable based upon the facts in her case; however, the ALJ's scope of review is severely limited based upon the statute and evidence of rehabilitation can not be considered by the Judge. This statute should be amended to expand the scope of review by the ALJ and allow individuals to present evidence of rehabilitation to overcome this employment barrier.

Additional Recommendations

- Congress should create a federal human rights standard that encourage employers to hire qualified applicants with criminal histories and prohibits flat bans against hiring individuals with criminal records.
- Congress should prohibit employers and other non-law enforcement agencies from inquiring about or using information about arrests that did not lead to conviction or missing dispositions on criminal record reports issued by the Federal Bureau of Investigation.

- Congress should enact a federal standard based on recommendations outlined in the Equal Employment Opportunity Commission guidance on the use of background checks for employment purposes when screening applicants with arrest and conviction records. While we believe that assessing all applicants on individual bases serves the best interests of employers, applicants and the public, it may be determine that using a matrix or categorical rules to screen applicants is preferable. In such cases where categorical bans are recommended, there should be time limits based on the severity of the criminal history and how old the conviction record. Suitability criteria also should only include disqualifying offenses that are related to the job.
- Congress should require that all current and future legislation that authorizes the disqualification of individuals with criminal records includes a waiver/appeal process whereby the applicant can challenge inaccuracies in criminal record reports, present evidence of rehabilitation and other mitigating information relevant to their criminal history and rehabilitation. The applicant should always be able to present this information even if they fall within categorical time limits on eligibility.
- Congress should require all current and future legislation that authorizes the use of criminal background checks for employment related purposes to include a provision that designates an independent body to make fitness determinations rather than individual employers.

Thank you for hearing and considering our testimony. We are encouraged by your willingness to forge ahead in the spirit of the Second Chance Act to address the employment needs of individuals with criminal histories who are seeking to become contributing members of society. Please do not hesitate to consider us a resource to the committee on these matters.

ⁱ Other countries, for example the United Kingdom, have created policies that limit how long information about a person's conviction history can be used against him/her, which they call "spent convictions" (see the Rehabilitation of Offenders Act of 1974). And, other countries have also provided anti-discrimination protections to this population through its national human rights laws, for example in Australia (see the Commonwealth Consolidated Acts, Human Rights and Equal Opportunity Commission Act 1986) and Canada (see the Canadian Human Rights Act, R.S., 1985, c. H-6).

ⁱⁱ See Bureau of Justice Statistics, Background Checks for Firearms Transfers, (2005). Criminal Record Systems Statistics. <http://www.ojp.usdoj.gov/bjs/crs.htm>.

ⁱⁱⁱ Legal Action Center, *After Prison: Roadblocks to Reentry*. (2004). www.lac.org/lac.

^{iv} Id.

^v See 12 U.S.C. § 1829.

^{vi} See 18 U.S.C. § 1033(c) (2).

^{vii} See 29 U.S.C. §§ 504, 1111.

^{viii} See 42 U.S.C. § 1320a-7.

^{ix} See 21 U.S.C. § 335a.

^x See 42 U.S.C. § 13041.

^{xi} See 42 U.S.C. § 5119(a).

^{xii} See 42 U.S.C. § 13726(b).

^{xiii} Aviation and Transportation Security Act of 2001, 40 U.S.C. § 44936.

^{xiv} US Patriot Act of 2001, 49 U.S.C. § 5103a.

^{xv} Maritime Transportation Security Act of 2002, 46 U.S.C. § 70105.

^{xvi} Pub. L, No... 108-458, Tit. VI (E) § 6402.