

# CENTER FOR CIVIL JUSTICE

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*Fighting poverty through advocacy, education, and empowerment.*

August 3, 2005

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

Re: Employment Screening for Criminal Records (OLP Docket No. 100)

Dear Mr. Hertling:

Thank you for the opportunity to comment on the Attorney General's initiative to evaluate the nation's polices related to criminal background checks conducted for employment purposes and to make recommendations for reform to Congress. (70 Fed.Reg. 32849, June 6, 2005). The Center for Civil Justice is a non-profit law firm that works with low income persons and the human services organizations that serve them. We are interested in the Attorney General's report and recommendations to Congress because we have represented ex-offenders on in employment related matters, and we work at the state and local level with both public and private organizations who are working together to address barriers faced by ex-offenders as they attempt to re-enter society in a positive and productive manner.

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

Section 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004 [Pub. L. 108-458] directs the Attorney General to make recommendations to Congress related to criminal history checks for non-criminal justice purposes. Based our organization's experience advocating for the employment rights of people with criminal records, we are concerned that the large number of background checks that are now being made for employment purposes increase the risk of errors and misuse. We hope that the Attorney General will ensure that its proposals incorporate privacy, civil rights and employee protections. We are also concerned that any new federal policies not create unjustified barriers to ex-offenders and without sacrificing the public safety needs of the workplace and in communities who will be most affected if ex-offenders are unable to find work.

## **II. Specific Policy Recommendations**

### **A. Adopt Employee Protections Necessary to Compensate for the Expanded Reliance on Criminal Records**

The federal law specifically calls on the Attorney General to make recommendations

related to “privacy rights and other employee protections.” (Section 6403(d)(5)). We strongly support policies to expand procedural rights in federal laws designed to ensure that criminal records are complete and accurate while also protecting privacy.

**1. Adopt substantive worker protections defining the proper scope of federal and state employment prohibitions based on criminal records.**

The Attorney General should recommend that Congress adopt the following substantive employee protections regulating employment disqualifications in federal and state laws based on an individual’s criminal record. (Sections 6403(d)(5), (15).

- Establish threshold federal standards regulating when to apply new screening requirements and employment prohibitions based on a criminal record, taking into account public safety and security, individual and civil rights.
- Absent special circumstances, new employment prohibitions based on an individual’s criminal records should only apply prospectively, not to current workers.
- Disqualifying offenses should be time limited, and lifetime disqualifications should be eliminated except in special circumstances.
- All workers with disqualifying offenses should be provided an opportunity to establish that they have been rehabilitated and do not pose a safety or security threat.
- Employment prohibitions imposed by federal law should “directly relate” to the responsibilities of the occupation, thus especially broad categories of offenses should be more closely scrutinized (including blanket felony rules and disqualifications based non-violent crimes, including drug offenses, that disproportionately disqualify people of color).

**2. Adopt procedural rights to ensure that employment decisions are based on more complete criminal records while also protecting the individual worker’s privacy.**

We urge the Department to adopt the following recommendations to strengthen the procedures designed to ensure that criminal records are complete and reliable and private.

- Create additional safeguards against adverse employment decisions and discrimination based on incomplete criminal records, including a one-year limit on arrests without dispositions. (Sections 6403(d)(5), (8), (12)).
- Federal procedural protections should be significantly strengthened by making the FBI’s information available to all those who produce a criminal record while also clarifying that the opportunity to correct the individual’s record should be available before an adverse employment determination is made by any authorized agency or employer. (Sections 6403(d)(5)(B), (15).
- Consistent with current federal practice, fingerprints collected for employment and licensing purposes should be destroyed and not retained by the FBI. (Section 6403(d)(5)(C)

**B. Strictly Limit the Scope of Private Employer**

## **Access to Federal Criminal Record Information**

We urge the Attorney General to recommend that Congress limit, not expand, the authority of private employers to request and review national records. (Sections 6403(d)(7), (9)). Expanding the authority of private employers to request and review FBI criminal records absent state laws creates a significant potential for error and abuse by employers which will unfairly penalize the nation's workers. Thus, the employer's role should be limited to receiving the standard results of a "fitness determination" for a particular type of work from the appropriate agency that reviews the FBI criminal records pursuant to state or federal employment and licensing laws, rather than direct access to records.

### **C. Employers, Not Workers, Should Absorb the Fees Requiring or Authorizing a Criminal Records Search for Employment Purposes**

Federal laws authorizing employers to request FBI criminal records should direct that the employer pay the full costs of the fingerprinting and processing of the criminal records, while also precluding employers from seeking to recoup the fee, either directly or indirectly, from the worker's compensation. (Sections 6403(d)(7), (10)). Without such protections, working families will have difficulty paying the significant fees associated with fingerprint-based criminal records searches, especially the growing categories of entry-level workers who are now required to be fingerprinted and screened for criminal records. In addition, the absence of federal laws regulating who pays for the criminal records search often leads to fees being passed on workers and to inequitable treatment of similarly-situated individuals from different states.

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

We urge the Department to adopt recommendations which strictly limit, not expand, the functions of commercial firms as they relate to employment screening of criminal histories required by federal and state laws. Specifically, we recommend that:

- Commercially-available databases should not supplement the FBI criminal history information because there are serious questions related to their accuracy and the industry has a history of failing to comply with privacy protections. (Section 6403(d)(1)).
- Congress should revisit the FBI's recent guidance authorizing governmental agencies to outsource sensitive screening functions involving the FBI's criminal records system. (Section 6403(d)(13)).

We hope that these suggestions will help those who have completed their sentence for a crime to have access to meaningful employment opportunities and protections against misuse of their criminal records. Thank you for the opportunity to comment.

Sincerely yours,

*Terri L. Stangl*  
Terri L. Stangl  
Executive Director