

National Employment Law Project

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Mr. Frank A.S. Campbell
Deputy Assistant Attorney General
U.S. Department of Justice, Office of Legal Policy
950 Pennsylvania Avenue, N.W., Rm. 4248
Washington, D.C. 20530

Dear Mr. Campbell:

Thank you again for meeting with our organizations to discuss the major labor and civil rights issues now before the U.S. Attorney General as you prepare the agency's report and recommendations to Congress on federal policy related to criminal background checks and employment. We genuinely appreciated the productive exchange.

The undersigned organizations are writing to supplement the information we provided during the meeting and in our written comments, focusing on the proposal under consideration to expand access to the FBI's criminal records beyond the narrow categories of employers now authorized to receive the information under federal law. For the reasons described below, we urge the Attorney General to recommend that Congress maintain the current restrictions that strictly limit access to the FBI's criminal records as applied to private employers. The Attorney General should instead endorse the independent role of the federal and state agencies that are in the best position to evaluate the FBI's criminal records and vigilantly protect the privacy and civil rights of the one in five adults in the U.S. who now possess a criminal record.

- **Private employers are not qualified or trained to evaluate the detailed and often incomplete information contained in an FBI record, which unfairly penalizes the nation's workers and undermines the credibility of the screening process.**

Under current federal law, employers are only allowed access to an individual's FBI criminal record in especially limited cases for jobs that typically involve special safety and security concerns. However, even in these special situations, workers are routinely denied jobs on the basis of inaccurate and incomplete criminal history information contained in the FBI record. The many errors caused by employers who now access the FBI's criminal records provide sufficient justification not to expand the policy more broadly.

By way of illustration, employment involving access to airports is one of the few areas where the FBI's criminal records are now made directly available to employers, often producing adverse employment decisions based on inaccurate and incomplete information. In a recent case involving a Legal Action Center client, Mr. Smith (actual name withheld) was wrongly denied a position as a baggage handler at John F. Kennedy International Airport by The Port Authority of New York and New Jersey (Exhibit #1 – Mr. Smith's Rejection Letter & Criminal Record). According to the rejection letter issued by the Port Authority's Manager of Airport Security, "the CRHC obtained from the FBI indicates that you were *convicted of a criminal act*" which was not disclosed on Mr. Smith's application. (Emphasis added). However, the FBI record only indicated the arrest (for the sale of marijuana, a

felony), not the disposition of the case. In Mr. Smith's case, the day after his arrest (the only arrest on record), he pled guilty to a "violation" (a non-criminal conviction under New York law) and received a \$50 fine. Thus, the Port Authority, a large employer that routinely processes criminal background checks, wrongly interpreted Mr. Smith's incomplete FBI record as evidence of a criminal conviction.

Perhaps more than any other issue, incomplete FBI records produce routine errors by employers which significantly penalize qualified and deserving workers. Indeed, as described in a recent analysis of state criminal repository data conducted for the National Association of Professional Background Screeners, "serious problems remain in the process to link dispositional information to the proper case and charge."¹ In contrast to individual employers, independent federal or state authorities with experience conducting fitness determinations are far less likely to make major errors based on the FBI criminal records.²

- **Errors by private employers are compounded by the unedited substance and presentation of the FBI's rap sheets, which are designed for an audience of experienced criminal justice officials not individual employers.**

Even for experienced criminal justice officials, the FBI's rap sheets are often difficult to interpret because they are an unedited version of nearly all the criminal record information provided by the states. As a result, the likelihood of error by individual employers is even more significant given their limited experience deciphering the penal codes, abbreviations and definitions that are required to correctly interpret an FBI rap sheet.

Most importantly, the FBI rap sheet does not distinguish between felonies, misdemeanors and lesser categories of offenses like "violations", which is of special significance in evaluating an individual's record for employment screening purposes. Instead, the FBI's rap sheet indicates the specific offense as expressed in the state's penal code (e.g., "criminal mischief -2d") without characterizing the severity of the crime as either a felony or misdemeanor, or a violent or non-violent offense. As a result, unless the individual employers are intimately familiar with each state's penal code, they will erroneously assume that many offenses on an individual's record rise to the level of a serious felony or other more grave offenses (Exhibit #2 – Sample FBI Record).³

- **Expanded federal authority to make the FBI's criminal records broadly available would undermine state laws that preclude consideration by private employers of arrest records not leading to convictions and certain sealed and expunged records.**

Because the FBI's criminal records are not edited or otherwise sanitized, state protections expressly intended to limit employer error and abuse will be undermined in the event that the FBI's records are made more broadly available to private employers.

¹ Craig N. Winston, National Crime Information Center: A Review and Evaluation (August 3, 2005), at page 15.

²Private employers in the nursing home industry are also authorized under federal law to directly request an applicant's FBI criminal records (P.L. 105-277, Div. A, Title I, Section 1010(b)). New York recently implemented this federal authority by regulation, while expressly incorporated the state's protections against discrimination on the basis of an individual's criminal record. Despite the state's anti-discrimination protections, the Legal Action Center has verified several reports of nursing home employers who have denied jobs to qualified workers based on incomplete or inaccurate criminal history information provided as part of the FBI rap sheet.

³ In contrast, the rap sheets in some states include a summary table which lists the total arrests, total convictions, and the number of open charges according to the severity of the offense (including felony, violent felony, misdemeanors) (Exhibit #3- Sample New York State Record Cover Sheet).

Currently, there are at least eleven states that prohibit private employers from taking into consideration an individual's arrest records absent a conviction.⁴ With the goal of promoting rehabilitation of those with a criminal record, a number of other states also expunge or seal certain records that are expressly precluded from consideration by employers.⁵ However, because the FBI's records are not edited, mere arrests, sealed and expunged records will routinely appear on the FBI rap sheet. Thus, fundamental state protections will be undermined by a federal policy that broadly expands access to the FBI's criminal records by private employers.

- **Expanded federal authority to make the FBI's criminal records broadly available to individual employers would jeopardize the privacy and civil rights of hard-working families.**

We are especially concerned that the expanded authority to make the FBI's criminal records more available to private employers will violate the privacy and civil rights protections that are already seriously compromised by the exponential growth of criminal background checks and the many gaps in information that now plague the state criminal records systems.

Privacy: The FBI requires all those subjected to a criminal records request to first submit to fingerprinting, whether or not they have a criminal record. These FBI criminal records requests for employment purposes, which now exceed five million a year, will significantly increase if private employers are authorized to access the FBI's criminal records. In addition, the fingerprints required by the FBI are increasingly collected and processed by private commercial entities that are far more vulnerable to security breaches. Not surprisingly, when surveyed, the public has also expressed significant reservations with fingerprinting for employment screening purposes.⁶

Civil Rights: As the Equal Employment Opportunity Commission (EEOC) has concluded, employment decisions based on arrest information discriminate against African-Americans and Hispanics in violation of Title VII of the Civil Rights Act of 1964.⁷ Despite the EEOC's policy, the FBI's rap sheets list an individual's arrest record from every available state, regardless of the disposition of the case (and without any limitation on the age of the arrest). Thus, once the employer is provided with an individual's FBI record, the "cat is out of the bag" and discriminatory arrest information will be considered by the employer. Even the strongest and most aggressively enforced discrimination laws cannot protect against these abuses once the harm is already done.

4 The states include: California (Cal. Code Regs. Tit. 2 §7287.4 (d)(1)(A), (B); Cal. Labor §432.7 (f)(1), (2)); Connecticut (Conn. Gen. Stat. §31-51(i)); Hawaii (Haw. Rev. Stat. §378.2 (1)(A)); Illinois (Ill. Comp. Stat. 5/2-103); Massachusetts (Mass. Regs. Code tit. 804, §§3.01 and 3.02); Michigan (Mich. Comp. Law §37.2205a(1)); New York (N.Y. Exec. Law §296(16)); Ohio (Ohio Rev. Code Ann. §2953.55(A)); Utah (Utah Admin. R. 606-2-2(U)); and Wisconsin (Wis. Stat. §111.335(1)(a)).

5 According to the Legal Action Center report, *After Prison: Roadblocks to Reentry* (May 2004), 40 states allow some or all arrests that did not lead to conviction to be sealed. In 30 states, the individual can also deny the existence of certain records. (Available on-line at <http://www.lac.org/lac/main.php?view=law&subaction=2>).

6 According to a 2002 public opinion poll sponsored by the Bureau of Justice Statistics, only 37% of the those surveyed responded that it was "very acceptable" to require fingerprinting "when applying for a job, so that the employer could check for a criminal history record." Opinion Research Corporation International, *Public Attitudes Toward Uses of Criminal History Information: Summary of Findings* (Revised May, 25, 2000), at page 63.

7 See Equal Employment Opportunity Commission, *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq. (1982); EEOC Compliance Manual, Vol. II, Appendices 604-A *Conviction Records* and 604-B *Conviction Records- Statistics*; 26 Fair Empl. Prac. Cas. (BNA) 1799 (Aug. 8, 1980).

In order to uphold the basic civil rights of thousands of minority workers, we urge the Attorney General not to expand the FBI's criminal records to more individual employers. The National Black Caucus of State Legislators (NBCSL) has similarly endorsed the position that access to the FBI's rap sheets should not be expanded beyond current policy. In a resolution ratified in December 2005, NBCSL "RESOLVED, that NBCSL members support the current restrictions that prohibit access to FBI records by private employers in order to limit the significant potential for error and abuse in reviewing criminal records that undermines the employment opportunities of people with criminal records and to maintain existing state privacy and employment safeguards."⁸

* * *

In conclusion, we urge the Attorney General to recommend that Congress maintain current limits on access to the FBI's criminal records by the nation's employers, consistent with current federal law. Where necessary to protect public safety and security, additional resources should be made available to allow independent federal and state agencies to evaluate criminal records for employment purposes. Compared to individual private employers, these independent agencies are in the best position to evaluate the FBI's criminal records and vigilantly protect privacy and civil rights in this new era of vastly expanded access to sensitive individual records.

Once again, thank you for the opportunity to share our concerns and for your work on this timely report that will help shape federal policy governing the employment opportunities of millions of hard-working families.

Sincerely,

Maurice Emsellem
Policy Director
National Employment Law Project

Roberta Meyers-Peebles
Co-Director
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Of the Legal Action Center

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cc: Richard A. Hertling
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⁸ National Black Caucus of State Legislators, *Seeing Beyond: Investing in State Leadership: Improving Communities (2005-2006 Ratified Resolutions)*, Resolution No. 06-125. (Available on-line at <http://nbcsl.com/RatifiedResolutions06.pdf>). In addition, the resolution calls on the "United States Attorney General and Congress to adopt federal standards that eliminate unwarranted barriers in federal law that prohibit employment of people with criminal records and incorporate protections that take into account rehabilitation as well as the age and severity of offenses."