



# WESTERN MICHIGAN LEGAL SERVICES

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August 4, 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)  
Attorney General's Recommendations to Congress

Dear Mr. Hertling,

Thank you for soliciting comments on the Attorney General's initiative to evaluate the nation's policies related to criminal background checks conducted for employment purposes and to make recommendations for reform to Congress. (70 Fed.Reg. 32849, June 6, 2005).

Legal Aid of Western Michigan provides civil legal services to low-income people. Over the past two and a half years we have developed a special project to assist individuals with criminal convictions overcome the legal barriers that inhibit their full participation in society. As a result of this project, we have become acutely aware of the tremendous obstacles to employment faced by people with criminal records. Our experience confirms what research shows: criminal records are a major barrier to employment and self-sufficiency.

We strongly support the analysis and recommendations that are being sent to you by the National Employment Law Project. Instead of reiterating those recommendations here, we would like to take this opportunity to put a human face on the issue by profiling the impact that criminal background check policies have on our clients.

### ***Workers Denied Employment Because Their Records Contain Crimes They Did Not Commit***

Many innocent people have records for crimes they did not commit. This results in part from the way criminal record information is maintained in many state criminal record databases. In Michigan, for example, convictions are associated with all of the names ever given by a particular offender. This means that an individual whose identity was stolen or an individual

who happens to have the same name as an offender, may well have a criminal record, despite never having committed a crime. According to a report by the Federal Trade Commission, 4% of the nation's 10 million identity theft victims -- or 400,000 Americans -- have had problems with their criminal records as a result of identity theft.<sup>1</sup>

Several cases from our practice demonstrate the severe consequences of such “mistaken identity convictions:

- MJ’s name was used by YT when YT was arrested. MJ works as a nurse’s aid. Many health care employers, such as nursing homes, are prohibited under Michigan law from hiring individuals with felony records. Despite the fact that MJ has a clearance letter from the Michigan State Police, she has had great difficulty obtaining employment. Most recently she was hired by St. Mary’s Hospital in Grand Rapids, Michigan. After a criminal background check, the offer was withdrawn, despite the fact that MJ had explained the situation in advance and had given St. Mary’s a copy of the clearance letter. MJ has also been denied public housing based on YT’s record.
- RF, born 7/19/1946, has the same name as RF, born 12/2/1946. The July-born RF does not have a criminal record, while the December-born RF does have a criminal record. Because a Michigan State Police background check requires only a year of birth match, rather than an exact date of birth match, the criminal record of the December-born RF appears on the criminal record of the July-born RF. As a result, the July-born RF was denied a position working with hospice.
- IF’s criminal record lists nine convictions for crimes that were actually committed by IF’s sister, who stole IF’s identity. As a result, IF, who has a trucking license, could not find work, and was on welfare. She finally found a job working for Dean’s Transportation, but was fired as soon as the criminal background check came back. In the mean time, IF was cut off welfare for claiming that she had a job at Dean’s when in fact she did not. She could not feed her family or pay her rent.
- RS, a pharmacy student, was denied a position with CVS pharmacy because his criminal record lists several drug convictions. These convictions actually belong to RS’s cousin. RS has also had problems with his taxes because the Treasury Department believes he is incarcerated and has therefore denied him various tax credits.
- JC was denied employment as a yoga instructor by the YMCA because a routine background check showed fourteen convictions. In fact, these convictions actually belonged to JM, who had used the name JC as an alias. Despite the fact that JC and JM do not have the same name, are not of the same race, and do not have the same birthdate, JM’s convictions show up on JC’s record.

### ***Workers Denied Employment Because Their Records are Inaccurate***

In addition to workers who are denied employment as a result of “mistaken identity convictions,” other workers are denied employment because their criminal records contain errors that make the records appear more serious than they really are.

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<sup>1</sup> The report is available at <http://www.ftc.gov/os/2003/09/synovatereport.pdf>.

- CM's criminal record incorrectly showed he was convicted of rape. In fact, he was convicted of robbery. The rape conviction remained on CM's record for eleven years because CM did not know it was there. No prospective employer who ran CM's record ever showed him a copy. The employers just denied him the job.
- DW's conviction for robbery was overturned on appeal, and he was found guilty only of the lesser charge of larceny. However, now both the robbery and larceny convictions appear on his record, making it very difficult for him to find work.
- LP, a college student in her late 20s, has worked since she was 15 years old, and has never been without a job for more than a few weeks at a time. However, LP was recently convicted of conspiracy to commit unarmed robbery. Her criminal record incorrectly shows that that she was charged with murder. LP's defense attorney refused to assist LP in correcting the record, because LP still owed him money. LP has been unemployed ever since.

### ***Workers Denied Employment Because Employers Misread Criminal Records***

Criminal records can be very confusing, and even experienced attorneys can have difficulty interpreting them correctly. Unsurprisingly, many employers misread criminal records. For example, in Michigan criminal records contain three columns: one shows the crime for which the person was arrested, the second shows the crime with which the person was charged, and the third shows the crime for which the person was convicted. Many employers believe that a single crime is actually three crimes, or think that the charged crime is the crime of conviction.

- TS was charged with felony welfare fraud, but was convicted only of misdemeanor welfare fraud. TS is a nurse's aid, and is eligible to continue working in the field, because she does not have a felony and because misdemeanor welfare fraud is not a disqualifying conviction. However, TS has been unable to find work because employers incorrectly believe that she has a felony. TS's case is representative of dozens of our clients.

### ***Workers Denied Employment Because Employers Misunderstand the Law***

Laws mandating criminal background checks or establishing employment prohibitions are often complex. For example, such laws typically define certain crimes as disqualifying, while carving out exceptions for particular individuals, such as those already in the field. While it is important that any exclusionary laws be narrowly tailored to ensure that qualified workers are not necessarily excluded, the complexity of these laws can create problems. Employers are frequently uncertain about whom they can and cannot hire, and as a result refuse to hire anyone with a criminal record.

- KS, a mother of four, has worked as a nurse's aid since 1995. She has both glowing performance evaluations and a ten-year old felony for welfare fraud. KS's employer was not giving KS enough hours, and KS wanted to transfer to a different position with more stable hours. Although over 200 positions were available with the employer, KS was denied a transfer because of her conviction. While Michigan's background check law for nursing homes "grandfathers in" individuals like KS, the employer did not understand that.
- LM has a misdemeanor shoplifting ("retail fraud") conviction for stealing a coat as a

Christmas present for her father. Under Michigan's nursing home law, some misdemeanor fraud convictions are disqualifying, but misdemeanor retail fraud is not. LM cannot find work in her field as a nurse's aid because employers mistakenly believe they cannot hire her.

### ***Workers Denied Employment Despite Evidence that They Do Not Present a Threat***

While some people with criminal records present a threat, others do not. Even individuals with serious records may have been rehabilitated. In many cases, individuals will get into a bit of trouble while young, only to mature. They then discover that the mistakes of their youth will follow them the rest of their lives.

- AM, a 29-year old married mother of three, signed up for a CNA course so that she could work as a nurse's aid while pursuing her R.N. degree. School officials told her she could not take the course because she had a juvenile record. In 1990, when AM was 15, she found out that her boyfriend was also seeing her best friend. The two girls went to his house, entered through an unlocked door, and spread the boy's Playboy magazines around the kitchen table in order to get him in trouble with his mother. Instead, AM got in trouble. AM, who was not represented by an attorney, ended up with a felony adjudication for breaking and entering. AM has not been in trouble since this incident. Nevertheless, under a Michigan law that prevents people with felony convictions from working in the long-term care industry, she cannot work as a nurse's aid.
- VR was involved in selling drugs as a young man. After serving prison time, VR decided to get his life on track. For the last decade he has led a crime-free life, and most recently worked for 4 ½ years at a factory, where he had perfect attendance. When VR noticed that his name had inadvertently been left off the perfect attendance list for the last year, VR contacted human resources. In the course of reviewing VR's file, human resources staff noticed VR's ten-year-old criminal record. VR was immediately fired, despite the fact that he had been an excellent employee.
- EO was adjudicated as a juvenile of criminal sexual conduct in the first degree for sexual activity with a child under the age of 13. At the time of the offense, EO himself was only 12. EO, who is now in his early 20s, has never been in trouble again. Although EO's case was handled in juvenile court, his record is public. EO has not been able to find a job, because many employers simply will not hire anyone with sex offense on their record.
- About a decade ago, PJ, a former drug addict, got off drugs and turned her life around. Ever since then she has supported her family by working in nursing homes. She recently lost her job due to illness. When she recovered and sought work again, she found that no one would hire her because of her criminal record. Not only is PJ clearly "grandfathered in" under Michigan's nursing home law, but she has demonstrated through years of excellent employment that she's a superb caretaker.
- PA, a male caregiver with several years of experience in the direct care field, no longer receives assignments to work in nursing care facilities, due to his felony conviction. Until the passage of the law prohibiting individuals with felony convictions from working in nursing homes, PA was a highly sought after employee. There are few male nurses aides, and many of PA's male clients felt more comfortable with him than with female staff. Seven years ago

PA was in a minor car accident. Although PA only hit a parked car, he panicked because he did not have insurance. He left the scene of the accident and reported his car stolen. PA was convicted of providing a false report of a felony. PA would like to pursue further medical education, but fears that his criminal record will forever bar him from the profession.

- AB studied criminal justice in college and wanted to pursue a career as a probation officer. However, AB had two convictions for being a “minor in possession” of alcohol. Because of a Department of Corrections’ policy prohibiting individuals with criminal records from employment, AB was denied a job by the probation department, even though the probation supervisor wanted to hire her.

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As our clients’ stories show, whenever background checks are required or individuals are barred from employment based on their records, there is a real danger that qualified workers will be excluded. Criminal records are frequently inaccurate. As a result, innocent people and people with minor records are erroneously denied employment and other opportunities. Employers often do not know how to read criminal records and/or misunderstand the laws specifying which convictions are disqualifying. Finally, many individuals with criminal records are excluded from the workforce despite compelling evidence of rehabilitation.

In light of our clients’ experiences, we would like to emphasize the following recommendations:

1. Criminal background screening and employment prohibitions based on criminal records are appropriate in some fields. However, the benefits of conducting such checks or establishing such prohibitions must be weighed against the very real costs that result. In the event that background checks or record-based disqualifications are required, procedural protections must be in place to ensure that qualified workers are not denied employment.
2. Given the risk that criminal records will contain errors, employers (and similar decisions makers, such as licensing agencies and landlords) should be required to provide copies of criminal background checks to employees prior to taking any adverse action.
3. Given the risk that criminal records will contain errors, commercially available databases should not be used to supplement the FBI’s criminal history information. Even when individuals succeed in correcting criminal record errors in state or federal databases, the records in commercial databases are not automatically updated, and will often still be incorrect. It is already extremely difficult for individuals with erroneous criminal records to correct this information in state and federal databases. It can be even more difficult for individuals to correct information in commercial databases, since so many private vendors exist.
4. Employment prohibitions based on criminal records should “directly relate” to the occupation in question. Broad exclusions (e.g. all felonies) are almost never appropriate.
5. Disqualifying offenses should be time-limited, and lifetime disqualifications should be eliminated, except in exceptional circumstances.
6. All workers with disqualifying offenses should be provided an opportunity to establish that

they have been rehabilitated and can safely work in the occupation in question.

7. Consideration should be given to mechanisms that allow individuals to obtain a “certificate of employability” in cases where there may be confusion about the individual’s eligibility for employment. Such certificates would allow employers to easily verify, for example, whether an individual might be “grandfathered in” or whether an individual’s conviction is actually disqualifying.
8. Because employers often have great difficulty in interpreting criminal records, access to FBI records should be restricted. Instead, employers should receive the results of “fitness determinations” from the appropriate agency that has reviewed the FBI records pursuant to state and federal employment and licensing laws.
9. Statutes which “grandfather in” current employees should make clear that such employees are not chained to a particular job, but have the ability to seek employment with a different employer.

We appreciate the opportunity to comment on this important issue, and look forward to seeing the report.

Sincerely,

Michael Chielens  
Executive Director