



NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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August 5, 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: Criminal History Backgrounds Checks; Request for Comments
(OLP Docket No. 100)

Dear Mr. Hertling:

On behalf of the NAACP Legal Defense & Educational Fund, Inc. ("LDF"), I write in response to the Attorney General's Request for Comments to aid in the preparation of the Department of Justice's recommendations to Congress regarding federal policy related to criminal background checks. Section 6403 of the Intelligence Reform and Terrorism Prevention Act of 2004 requires the Attorney General to evaluate existing statutory authorizations, programs and procedures for the conduct of criminal history records checks for non-criminal justice purposes, and make recommendations to Congress for the purpose of improving, consolidating and standardizing those policies and procedures. As part of this process, Congress has mandated that the Department of Justice consult with interested parties to obtain public input on the issues to be addressed in the Attorney General's report to Congress.

Accordingly LDF, the nation's oldest civil rights law firm, submits this letter for the purpose of highlighting the civil rights implications of policies and procedures regulating the use and dissemination of criminal records in the non-criminal justice context. While the statute invites comments relevant to each of 15 factors the Department is to consider in compiling its recommendations, LDF limits its comments to a discussion of factors which could negatively affect the ability of African Americans to secure gainful employment. LDF believes that the Attorney General's evaluation of the efficacy of policies related to criminal background checks should not proceed without due consideration of the impact such policies have on constitutionally guaranteed rights.

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The NAACP Legal Defense and Educational Fund, Inc. (LDF) is not a part of the National Association for the Advancement of Colored People (NAACP) although LDF was founded by the NAACP and shares its commitment to equal rights. Since 1957, LDF has been a completely separate organization. Contributions are deductible for U.S. income tax purposes.

Civil Rights Implications of Criminal Background Checks in the Employment Context

The question of how best to regulate the use of criminal history information is of critical importance given the increased reliance on such information in a number of settings (including, for example, employment, housing, voting, student loans, and credit worthiness), and the substantial numbers of Americans who have a criminal record. As a result, the number of FBI criminal records requests for non-criminal justice purposes has more than doubled in the past decade.¹ At the same time, the number of Americans who have had contact with the criminal justice system has virtually exploded over the past 25 years. Incarceration rates have more than tripled since the 1980s.² At least 12 million Americans possess a felony record, an astounding eight percent of the working-age population.³

A disproportionate number of individuals with a criminal record come from low-income communities of color. Due in part to racial profiling and discriminatory sentencing schemes, racial and ethnic disparities persist at all stages of involvement with the criminal justice system. Thus, not only are African Americans more likely to be arrested than whites, but they are also more likely to be charged once arrested, and are more likely to be convicted and incarcerated when charged. These disparities are particularly salient in the context of drug offenses, where despite similar drug use rates, blacks are nearly five times as likely as whites to be arrested for drug offenses, and receive three quarters of the prison sentences for drug possession.⁴

Inequities in the criminal justice system aggravate and magnify discriminatory barriers already experienced by minorities and the poor. Recent studies demonstrate the persistence of employment discrimination against African Americans, and the dual burden that a criminal record imposes on African-American job applicants. For example, one study testing the effect of race and criminal history on the number of call backs received for entry-level employment positions found not only that whites were three times more likely to get a call back than similarly credentialed African Americans, but that whites *with* criminal records were still more likely to receive a call back than African-American applicants *without* criminal records. Further, while

¹ Gary Fields, *Ten Digit-Truth Check*, WALL STREET JOURNAL, June 7, 2005, at B1.

² U.S. DEPARTMENT OF JUSTICE, Bureau of Justice Statistics, *Correctional Populations in the United States 1997* (2000); U.S. DEPARTMENT OF JUSTICE, Bureau of Justice Statistics, *Prisoners in 2003* (2004).

³ Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003)

⁴ THE SENTENCING PROJECT, *Young Black Americans and the Criminal Justice System: Five Years Later* (1995); FEDERAL BUREAU OF INVESTIGATION, *Uniform Crime Reports: Crime in the United States* (1998).

white men with a criminal record were half as likely to receive call-backs as white men without a criminal record, black men with a criminal record were only a third as likely to receive a call back as black men without a criminal record.⁵

Criminal background check policies which fail to include protections for individuals with criminal records may compound discrimination already experienced by those with the least power in the labor market, such as unskilled and undereducated African-American men, and in the long run may decrease public safety by increasing recidivism rates.⁶ Consequently, the Attorney General's recommendations to Congress should be informed by balanced considerations of legitimate safety concerns and the public interest in allowing former offenders the opportunity to become productive members of society.

Recommendations

In light of the concerns outlined above, LDF makes the following recommendations to ensure that criminal background check policies do not unnecessarily burden minority populations.

1. Propose guidelines that employment restrictions on the basis of criminal history be reasonably related to the duties of the occupation in question.

Laws which prohibit or discourage employers from hiring people with criminal records, yet do not bear on public safety or a person's ability to do the job, defy logic as they block avenues for ex-offenders to turn their lives around and become contributing members of their communities. In addition, such laws could violate civil rights protections against discrimination in employment if they disproportionately affect African Americans and are not sufficiently justified by an employer's legitimate business goals. Accordingly, the Attorney General should propose guidelines for determining the scope of federally mandated employment restrictions that require a direct nexus between the excluded offense, and the particular requirements of the occupation. Such a nexus is required under EEOC guidelines to demonstrate that employment exclusions based on criminal records, which might otherwise have a disparate impact on

⁵ Pager, *supra* note 3.

⁶See President George W. Bush, State of the Union Address (Jan. 20, 2004) ("We know from experience that if [former prisoners] can't find work, or a home, or help, they are much more likely to commit more crimes and return to prison . . . America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life."), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

minorities under Title VII, are nonetheless justified by business necessity.⁷ The guidelines should also set limits on the length of time from conviction that an offense remains disqualifying, and limit life-time disqualifications to special circumstances, thus recognizing the decreased likelihood of re-offense the longer an individual remains crime free.

2. Adopt uniform procedural protections to allow workers the opportunity to challenge adverse employment decisions.

Guidelines should be adopted which provide procedural mechanisms allowing individuals to challenge criminal record information before an adverse employment decision is made. In other words, job applicants should be provided with their FBI criminal record as a matter of course whenever such information is requested by a public or private employer. Immediate review of criminal record information allows job applicants the opportunity to correct any errors in their criminal record before an employment determination is made.

Job applicants should also be allowed to challenge adverse employment decisions with evidence of their rehabilitation. Certain federal legislation already has such protections in place.⁸ Regulations should be adopted providing such protection in all circumstances in which federal criminal background information is released.

3. Propose restrictions on access by private employers to criminal history information.

Currently, federal law limits the ability of a private employer to access FBI criminal history information directly. Private employers authorized to consider FBI criminal records in employment determinations under federal law are generally required to have their requests for criminal history information processed by a state or federal agency. These agencies review criminal records and ascertain whether an applicant has a disqualifying offense. Private employers are informed of the agency's final determination, but are generally not permitted to review the full content of the job applicant's criminal record.

Any Executive Branch policy expanding private employers' access to criminal record information will more than likely result in increased employment discrimination against African Americans. Private employers are unlikely to have the skill or resources to parse through a criminal record generated by the FBI without making an adverse determination on the basis of

⁷ EEOC, *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964*, II EEOC Compliance Manual § 604 (Feb. 4, 1987); *see also* EEOC, *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*, II EEOC Compliance Manual § 604 (Sept. 7, 1990).

⁸*See e.g.*, Maritime Transportation Security Act of 2002, 46 U.S.C. § 70105 (c)(2).

evidence of any criminal history, including arrests or charges not resulting in conviction, or convictions for offenses unrelated to the job in question. As noted above, it has been statistically shown that when the applicant in question is African American, employers are even more likely to make adverse determinations on the basis of preconceived biases of African-American criminality. For these reasons, the Attorney General should recommend that the circumstances in which private employers have access to criminal history information be limited, and not increased.

4. Limit reliance on private sector contractors for the performance of key screening functions

In 2004 the FBI issued a policy allowing private sector contractors for the first time to perform key screening functions as agents of the government.⁹ While LDF is cognizant of the increased need for support in processing the high volume of background checks, we suggest that the Attorney General focus on ways in which to build federal and state capacity to handle these requests. LDF asks the Attorney General to keep in mind the poor track record of private contractors that have been tasked with performing criminal background checks.

For example, in the much-publicized purge of voter rolls before the 2000 presidential election, the state of Florida outsourced the review of its records to a private company that purged thousands of voters from the rolls on the basis of its mistaken identification of those voters as having a felony record. The action later became the subject of a major civil rights lawsuit, *NAACP v. Harris*, brought by LDF and other civil rights organizations. As part of the settlement of that case, the state agreed to implement new procedures to help ensure that such mistakes were prevented from happening in the future. The dissemination of inaccurate or incomplete criminal history information by a private company is not an isolated occurrence. In the absence of any national licensing or monitoring standards, private contractors are unlikely to hold themselves to the highest standards of quality control necessary to protect employees. Consequently, the Attorney General should recommend an approach that will limit government reliance on private contractors.

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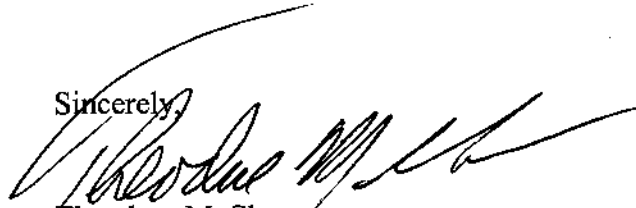
The topic of criminal history background checks is, unfortunately, of critical importance to African Americans given both the disparate impact of the criminal justice system on this group, and the disproportionate ways in which African Americans with criminal records suffer collateral civil consequences. LDF thus urges the Attorney General to ensure that his recommendations address the risk that the Department's criminal background check policies could further burden the rights of African Americans.

⁹See 69 Fed. Reg. 75243 (Dec. 16, 2004)

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Thank you in advance for your consideration. We look forward to a report which will address these critically important concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'Theodore M. Shaw', with a long, sweeping horizontal line extending to the right.

Theodore M. Shaw
President and Director-Counsel