



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: OLP Docket No. 100--Comments on the Attorney General's
Recommendations to Congress about Employment Screening for
Criminal Records**

Dear Mr. Hertling:

Thank you for this opportunity to comment on the Attorney General's report to Congress on the nation's polices related to criminal background checks conducted for employment purposes (70 Fed.Reg. 32849, June 6, 2005).

Neighborhood Legal Services of Los Angeles County ("NLS") is a non-profit legal aid organization that provides free legal assistance to low-income people in an array of legal matters, including legal issues affecting workers with past criminal convictions. NLS staffs two workers' rights clinics every week and represents low-wage workers in administrative and judicial proceedings. Last year alone, NLS saw over 1,500 low-income workers from a wide range of industries, including the garment, janitorial, construction, restaurant, and hotel industries. A major part of NLS' work involves assisting workers with criminal record expungements in order to enhance their employability. From our extensive experience providing re-entry

services to ex-offenders, we well know the hurdles such workers face in securing gainful employment and the important role that employment plays in the rehabilitation process. Based on this experience, we offer the following comments for improving and standardizing the statutory scheme for processing criminal history record checks for employment and licensing purposes.

I. Recommendations for Federal Priorities

Section 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004 [Pub. L. 108-458] requires the Attorney General to “make recommendations to Congress for improving, standardizing, and consolidating the existing statutory authorization, programs, and procedures for the conduct of criminal history record checks for non-criminal justice purposes.” In addition to 14 specific policy themes identified by Congress, the Department is authorized to make recommendations related to “any other factors that the Attorney General determines to be relevant to the subject of the report.” (Section 6403(d)(15)).

As a threshold matter, we offer the following two key concerns, which we believe should inform the response to the policy challenges identified by Congress. First, we are especially concerned about the unprecedented and increasing reliance by employers on criminal records checks for employment screening purposes. This ever-growing practice dramatically increases the risk of error and abuse of the employment screening process. Thus, to compensate for the unprecedented potential for harm to the nation’s workers, we recommend that the Attorney General give special weight in its policy proposals to the full range of privacy, civil rights and basic employee protections.

Second, new federal policies must also limit unwarranted barriers to employment for people with criminal records if they are to protect public safety effectively. Studies have shown that without gainful employment, workers with past criminal convictions are much more likely to commit more crimes and return to prison. Accordingly, policy recommendations should be carefully tailored to promote public safety both in the workplace and in those communities most burdened by crime by addressing the impact of employment prohibitions in screening laws on the economic opportunities of people with criminal records.

II. Specific Policy Recommendations

A. Expand Employee Protections to Compensate for the Increasing Reliance on Criminal Records

The Intelligence Reform and Terrorism Prevention Act of 2004 (the "Act") specifically requires the Attorney General to make recommendations related to "privacy rights and other employee protections." (Section 6403(d)(5)). We believe that policies to expand procedural rights in federal laws are necessary to ensure that criminal records are complete and accurate while also protecting privacy. In addition, policies should include substantive employee protections that determine the appropriate limits on the scope of criminal background checks.

1. Substantive worker protections are needed to define the fair appropriate scope of federal and state employment prohibitions based on criminal records.

The following substantive employee protections regulating federal and state employment disqualifications based on a worker's criminal record would guard against unfair and inappropriate barriers to employment for ex-offenders. (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 specifically 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 "substantially related" to the responsibilities of the occupation. This would result closer scrutiny of broad categories of offenses, including blanket felony rules and

disqualifications based non-violent crimes, including drug offenses, that disproportionately disqualify people of color.

2. Stronger procedural rights are necessary to ensure that employment decisions are based on complete and accurate criminal records while also protecting individual worker's privacy.

The following recommendations are designed to establish procedural safeguards to ensure that criminal records are complete and accurate and that their privacy is adequately protected.

- Create additional safeguards against adverse employment decisions and discrimination based on incomplete criminal records, including a one-year limit on arrests with no 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. Private Employer Access to Federal Criminal Record Information Should be Limited and Explicitly Defined

The authority of private employers to request and review national records should be limited, not expanded. (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" from the appropriate agency that reviews the FBI criminal records pursuant to state or federal employment and licensing laws.

C. Workers Should Not be Required to Absorb the Fees For Authorizing a Criminal Records Search for Employment Purposes

Given the prohibitive costs of criminal record searches for low-wage workers, federal laws authorizing employers to request FBI criminal records should require the employer to pay the full costs of the fingerprinting and processing of the criminal records. Such laws should also preclude employers from seeking to recoup the fee, either directly or indirectly, from the worker's compensation. (Sections 6403(d)(7), (10)).

Absent these protections, the significant fees associated with fingerprint-based criminal records searches will impose a financial hardship on working families, especially on the many new 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.

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

Given the sensitivity of the information and the high costs of error to both the worker and to society, new federal laws should strictly limit, not expand, the functions of commercial firms in legally-required employment screening of criminal histories.

- Commercially-available databases should not be used to supplement the FBI criminal history information because of serious questions related to their accuracy and the industry's systemic lack of compliance with privacy protections. (Section 6403(d)(1)).
- Because the demands to comply with new employment screening mandates require a strategic investment in the federal and state infrastructure, 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)).

Thank you for the opportunity to comment on this important initiative to help shape the nation's policies regulating employment screening for criminal records. As these policies quickly change to meet the public's concern for safety and security, we urge that meaningful employment opportunities for people with criminal records become a key priority as part of a more fair and effective regime of

criminal background checks. Such a policy not only benefits workers with past criminal convictions, but, in promoting rehabilitation over recidivism, benefit society at large.

Sincerely,

/s/

Joshua Stehlik
Supervising Attorney