

Advancing the Employment Rights of Californians with Arrest and Conviction Records

California Fair Employment and Housing Council
Hearing Testimony
August 26, 2015

Maurice Emsellem
National Employment Law Project
Oakland, California
(510) 463-5700
emsellem@nelp.org

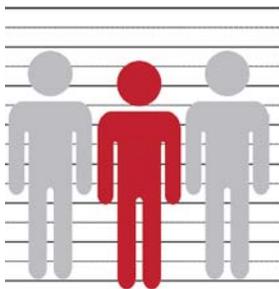


1. The Hard Facts About the Criminal Justice System



2

Almost One in Three California Adults (7 Million) Has an Arrest or Conviction Record



Nearly 90% of large employers conduct criminal background checks for employment. (Source: Society for Human Resources Management, 2012)

InstantCriminalChecks.com
InstantCriminalChecks.com Order Form

Persons You Are Investigating: *Required Information
 First Name: [] Middle Initial: [] Last Name: [] Suffix (if any): []
 Social Security Number: [] Date of Birth: [Month] [Day] [Year]

Please Select State(s) or National Criminal Check:
 Statewide Criminal Check \$24.95
 California multi-county (CA)
 - Add 2 additional states for only \$20 -
 3-State Criminal Check \$44.95
 *1st - Select 2nd State \$20 -
 *2nd - Select 3rd State FREE -

OR
 National Criminal Check \$59.95
 All 50 states plus Washington DC
 HI, AK, AZ, AR, CA, CO, CT, DC, FL, GA, HI, IL, IN, IA, KS, KY, LA, ME, MD, MI, MN, MO, MS, MT, NE, NH, NJ, NY, OH, OK, OR, PA, RI, SC, TN, TX, UT, VA, VT, WA, WI, WV

All orders include a free national sex offender search, terminal background report & most wanted check

Contact Information:
 *E-Mail Address: []
 Phone Number: []

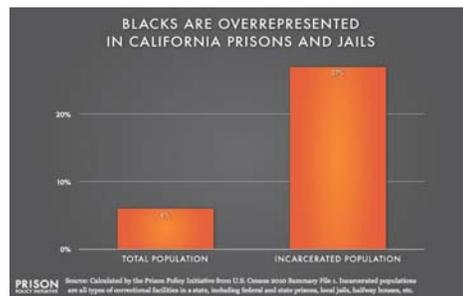
Credit Card Information:
 *Name: []
 Enter name exactly as appears on your card
 *Type of Card: [Select One]

People of Color are Disproportionately Impacted by the Criminal Justice System

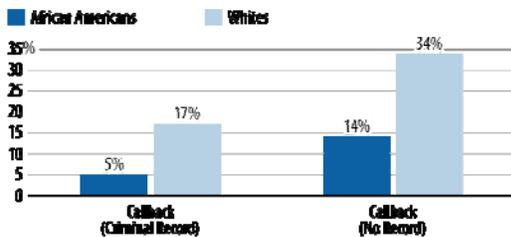


5

African Americans in California Are Most Severely Overrepresented



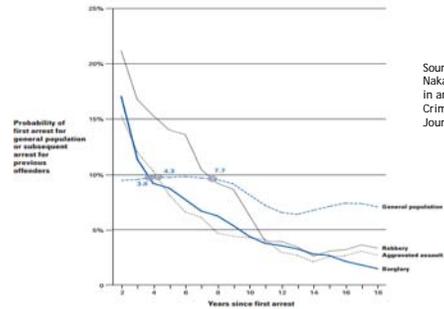
The Impact of a Criminal Record on Interview Callbacks, by Race



Source: David Pager, "The Mark of a Criminal Record," 2005.

CENTER ON BUDGET AND POLICY PRIORITIES | IMPROVING

After 4-8 Years, Offenders are No More Likely Than Non-Offenders to Be Re-Arrested



2. Federal Civil Rights Protections



The Federal Reentry Council Bolsters Federal Agency Actions

- Convened in 2011 by Attorney General Eric Holder, a wide range of Cabinet Secretaries actively coordinate and promote policies that remove barriers to reentry.
- The Employment Working Group includes the EEOC, DOL, FTC, OPM and other key federal agencies.



Federal Actions Regulating Criminal Background Checks

- Equal Employment Opportunity Commission issues criminal records guidance regulating private and public employers (April 25, 2012) and litigates against major employers (Pepsi \$3.13 million settlement)
- Department of Labor civil rights directive regulates all federally-funded workforce programs (May 25, 2012)
- Federal Trade Commission settles \$2.6 million lawsuit with HireRight under Fair Credit Reporting Act (August 8, 2012)
- Office of Federal Contract Compliance Programs civil rights guidance regulates federal contractors (January 28, 2013)
- Office of Personnel Management guidance recommends model policies for federal agencies and their contractors (May 15, 2013)

Key Features of the EEOC Arrest and Conviction Guidance (Step 1)

- "Disparate Impact" of criminal background checks triggers "business necessity" analysis.
- To establish that the practice is "job related and consistent with business necessity," the employer screen must consider the three "Green factors":
 - the nature and gravity of the offense;
 - the time that has passed since the offense;
 - the nature and essential functions of the job.
- Disqualifications based on arrests and blanket restrictions against hiring people with records generally violate Title VII.

Blanket Criminal Record Restrictions Persist, In Violation of Title VII

Felons barred from constructing Apple's campus

By Wendy Lee | Updated 7:09 pm, Saturday, April 6, 2012



San Jose Mercury News
BUSINESS

OPINION

Apple, rehabilitate thyself

By Debra J. Saunders | Published 5:00 pm, Monday, April 6, 2012

Apple rescinds policy against hiring felons for construction work

By John Lee | johnlee@mercurynews.com

Key Features of the EEOC Arrest and Conviction Guidance (Step 2)

- Provide an "individual assessment" for people excluded by the screen, including:
 - notice that the individual has been screened out due to a record;
 - an opportunity to correct the record;
 - an opportunity to present evidence of rehabilitation.
- EEOC also endorses "ban the box" and other employer "best practices."

3. Fair Chance Hiring and Criminal Justice Reform



18 States and Over 100 Localities Adopt Fair Chance Hiring and "Ban the Box" Reforms



Growing Bi-Partisan and Employer Support for Fair Chance Hiring

Major Employers Embrace "Ban the Box":



"Let's follow the growing number of our states, and cities, and private companies who've decided to ban the box on job applications so that former prisoners who have done their time and are now trying to get straight with society have a decent shot in a job interview."

—PRESIDENT OBAMA ENDORSES "BAN THE BOX"
#BanTheBox #FairChance

4. The Key California Criminal Records Protections



The Limits on Commercial Background Checks in California

- **Arrests:** Under CA consumer protection law (Civil Code § 1786), background check companies cannot report an arrest that has not led to a conviction (unless the company has verified in the last 30 days that the arrest is still open).
- **Convictions:** Except for open arrests, only convictions dating back no more than 7 years can be reported to the employer by a private screening firm's background check.
- **Copy of Report:** Under CA law, upon request workers are entitled to a copy of the report within three days from when it's provided to the employer (under federal law, workers are entitled to the background check report before an "adverse action" by the employer).

The Limits on Criminal History Records Available to Employers

- Private employers can only ask about convictions, not arrests.
- Private and public employers cannot ask about convictions that have been expunged ("dismissed") or sealed and certain marijuana convictions.
- Expungement is available for offenses that did not result in a prison sentence, provided the individual successfully completed all the terms of his probation or can demonstrate to a judge that an expungement of the record is in the "interests of justice."
- Under Prop 47, those convicted of eight low-level felonies (including simple drug possession offenses and theft of less than \$950) can have their felonies reduced to misdemeanors.



California Embraces Fair Chance Hiring and Ban the Box Reforms

State Law (AB 218)

- Covers state agencies, cities, counties, special districts.
- Must remove the criminal history question from job applications and delay the inquiry until after an individual meets the minimum qualifications for the job.

CA Local laws

- 10 cities and counties have adopted policies.
- San Francisco Fair Chance Ordinance extends to private employers (and housing), limits the inquiry until after the interview, and prohibits consideration of convictions dating back more than seven years.

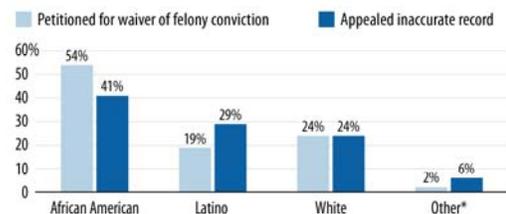
5. Recommendations for FEH Council Action



Advance a Comprehensive State Agenda, Including Regulations Governing Background Checks

- Expanding on the EEOC Guidance, issue regulations that clarify the state civil rights standards governing criminal background checks for employment (emphasizing "disparate impact" analysis, the individual assessment process, a presumption of rehabilitation, and ban the box).
- A recent study referencing the EEOC Guidance and ban the box policies concluded that: [s]uch laws give jobseekers the chance to make contact with prospective employers - contact that this study suggests is crucial to the hiring process." (Christopher Uggen, et. al., "The Edge of Stigma," *Criminology* (2014), p. 650).

Racial Impact of TSA's Port Worker Criminal Background Check Protections



*Primarily immigrants.

Source: National Employment Law Project analysis of Transportation Security Administration data.

CENTER ON BUDGET AND POLICY PRIORITIES | CBPP.ORG

Additional Measures

- Form a state Reentry Council to reduce barriers to employment of people with records by coordinating policy across the key agencies (e.g., DFEH, EDD, AG, the State Workforce Investment Board, CDCR, the California State Personnel Board).
- As authorized by state law (Gov. Code § 12944), review the impact on people of color of licensing board policies that regulate criminal background checks (e.g., HHA/CNA/EMT boards).
- As authorized by state law (Gov. Code § 12990), target state contractors to ensure that they are fully complying with the federal and state civil rights laws regulating criminal background checks.
- In collaboration with EEOC and DOL's Office of Federal Contract Compliance Programs (OFCCP), develop an employer outreach and education campaign (e.g., AGoodHire.Com).