



Advancing a Federal Fair Chance Hiring Agenda

Background Check Reforms in Over 100 Cities, Counties,
& States Pave the Way for Presidential Action

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About NELP

The National Employment Law Project is a non-partisan, not-for-profit organization that conducts research and advocates on issues affecting low-wage and unemployed workers. In partnership with grassroots and national allies, NELP promotes policies to create good jobs, enforce hard-won workplace rights, and help unemployed workers regain their economic footing.

Through its Second Chance Labor Project, NELP promotes the employment rights of people with criminal records. We seek to ensure fairer and more accurate criminal background checks and to reduce unnecessary and unfair barriers to employment.

Introduction



Almost one in three adults in the United States has a criminal record that will show up on a routine criminal background check.¹ This creates a serious barrier to employment for millions of workers, especially in communities of color hardest hit by decades of over-criminalization.

Reflecting the growing political consensus behind “smart on crime” reforms, elected officials from across the ideological spectrum have embraced “fair chance” hiring policies. These reforms restore hope and opportunity to qualified job-seekers with a criminal record who struggle against significant odds to find work and to give back to their communities. More than 100 jurisdictions, including 13 states, the District of Columbia, and 96 cities and counties, have adopted “ban the box” and other fair chance hiring reforms, often in tandem with criminal justice reform priorities.² Several major corporations have embraced fair chance hiring as well, including three of the nation’s top five retailers: Walmart, Target, and Home Depot.

The federal government should build on this momentous wave of support for public- and private-sector hiring reforms. Now is the time for President Obama to act boldly to open up employment opportunities for the large numbers of Americans who have been unfairly

locked out of the job market because of a criminal record. As the President’s “My Brother’s Keeper” Task Force recently concluded:

Our youth and communities suffer when hiring practices unnecessarily disqualify candidates based on past mistakes. We should implement reforms to promote successful reentry, including encouraging hiring practices, such as “Ban the Box,” which give applicants a fair chance and allows employers the opportunity to judge individual job candidates on their merits as they reenter the workforce.³

This paper makes the case for a federal fair-chance-hiring administrative initiative—including an Executive Order and Presidential Memorandum—that ensures that both federal agencies and federal contractors are leading the way to create job opportunities for qualified people with criminal records. In addition, as the 114th Congress convenes, this paper identifies several bipartisan legislative priorities, including the REDEEM Act (S. 2567), co-sponsored by Senators Corey Booker (D-NJ) and Rand Paul (R-KY), that would significantly advance employment opportunities for people with criminal records.

1 Over-Criminalization's Heavy Toll; Jobs Can Turn the Tide

Decades of over-criminalization and mass incarceration have taken a heavy toll, not just on the communities most directly impacted, but also on the entire U.S. economy. The tide is finally turning, however, as “smart on crime” efforts to reform the criminal justice system gain traction. These proposals recognize the critical role that employment plays in changing lives and building stronger families and communities.

An estimated 70 million adults in the U.S. have arrests or conviction records.

There are an estimated 70 million U.S. adults with arrests or convictions.⁴ Given the proliferation of employment background checks—9 out of 10 employers now conduct criminal background checks for employment⁵—millions of workers with records are finding it increasingly difficult to compete for jobs. According to a recent New York Times/CBS News poll, having a criminal record contributes to high levels of unemployment among prime-age working men—34 percent of unemployed men ages 25 to 54 have been convicted of a crime.⁶ In addition, a landmark study by Professor Devah Pager found that the likelihood of a callback for an interview for an entry-level position drops by 50 percent for applicants with a criminal record.⁷

This modern-day scarlet letter has particularly disadvantaged communities of color that have been ravaged by the “War on Drugs” and been hardest hit by unemployment. According to Pager’s research, African-American men with a conviction are 40 percent less likely than whites with a conviction to receive a job callback. A similar study documented the disproportionate impact of a criminal record on the job prospects of African-American women and Latinas.⁸

While the challenge is daunting, clearing the path to employment can make all the difference in the lives of people with criminal records. It can also significantly increase public safety. The lack of employment was the single most negative determinant of recidivism, according to a 2011 study of the formerly incarcerated.⁹



Nine in ten employers conduct criminal background checks for employment.

Given the vast numbers of people with criminal records, it is not surprising that the economy suffers as well when so many are routinely denied employment opportunities. Economists estimated that because people with felony records and formerly incarcerated people have poor job prospects, the nation’s gross domestic product in 2008 was between \$57 and \$65 billion lower than it would have been had they been gainfully employed.¹⁰

At the state and local levels, putting people with criminal records back to work can generate measurable economic returns. A 2011 study by the Economy League of Greater Philadelphia found that securing employment for 100 formerly incarcerated people would increase their combined lifetime earnings by \$55 million, increase their income tax contributions by \$1.9 million, and boost sales tax revenues by \$770,000, while saving more than \$2 million annually by keeping them out of the criminal justice system.¹¹

2 The Broad Movement for Fair Chance Hiring Reform

“Fair chance” hiring policies have rapidly taken hold in states and localities across the United States. Fair chance hiring refers to a set of hiring policies designed to ensure that applicants with criminal records are evaluated on the merits of their qualifications, not just on their criminal records.

These are the key features of a fair chance hiring policy:

- Incorporate “ban the box” policies, which remove the criminal history question from job applications and postpone the background check until later in the hiring process;
- Integrate the U.S. Equal Employment Opportunity Commission (EEOC) criminal records guidelines, which require employers to take into account the age of the offense, whether the offense is related to the job position, and evidence of rehabilitation; and
- Adopt strong standards of accuracy and transparency to maintain the integrity of the background check and protect workers against arbitrary treatment.

Fair Chance Hiring Embraced Around the Country, Showing Measurable Success

The fair chance hiring movement has captured the imagination of criminal justice reformers, faith-based leaders, and elected officials across the political spectrum. Fair chance reforms reduce bias against people with records in the hiring process. They reflect a fundamental shift in criminal justice policy that is taking place around the nation in response to the collateral damage caused by decades of over-criminalization and mass incarceration.

In less than 10 years since the movement was first launched by an organization led by formerly incarcerated people (see box), the number of jurisdictions adopting fair chance hiring has surpassed 100, including 13 states, the District of Columbia, and 96 cities and counties. (See Table 1.)

In addition to the broad geographic scope of fair chance hiring, the accelerated pace of reform has

A Movement Led by the Formerly Incarcerated Celebrates a Decade of Reform



Ten years ago, the “ban the box” movement was launched by a San Francisco–based organizing group, All of Us or None (AOUON). AOUON is a membership organization of formerly incarcerated people with chapters in California and across the United States.

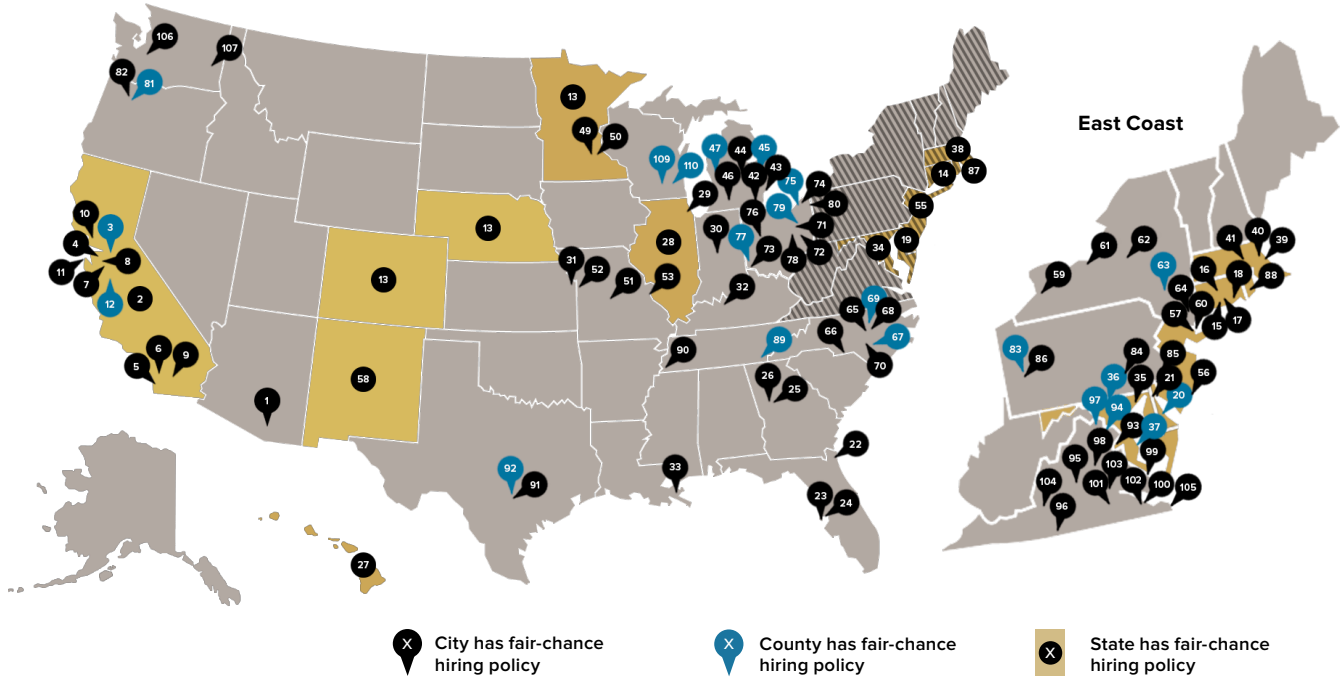
AOUON organized and educated on a major scale across San Francisco, laying out a broad platform for reform, including the full restoration of the rights of the formerly incarcerated to employment, housing, public assistance and the right to vote.

In 2005, AOUON successfully petitioned the San Francisco Board of Supervisors to adopt a resolution to remove the conviction history question from public-sector job applications. In 2006, the City and County of San Francisco adopted this policy. In 2014, AOUON and its allied organizations successfully advocated for an expanded policy, extending ban-the-box and other fair hiring protections to workers employed in the private sector. In addition, San Francisco is now one of two cities in the country that extends a fair chance in public housing.

Dorsey Nunn (photo), who is a founding member of AOUON and executive director of Legal Services for Prisoners with Children, explained the significance of the ban-the-box movement: “At issue is the question of ‘how do formerly incarcerated people get back into society?’ We’re asking for equal access. For fairness.”¹²

Federal-level reform is next on the horizon for AOUON. In a [historic meeting](#) in September 2014, national leaders of the formerly incarcerated people’s movement and senior White House and government officials discussed ending the “structural discrimination faced by people with criminal records.”¹³

Figure 1: More than 100 Cities, Counties, and States Have Adopted Fair-Chance Hiring Policies



- | | | | |
|-----------------------------|--------------------------------|----------------------------|------------------------------|
| 1. Tucson, AZ | 29. Chicago, IL | 57. Newark, NJ | 85. Philadelphia, PA |
| 2. California (state law) | 30. Indianapolis, IN | 58. New Mexico (state law) | 86. Pittsburgh, PA |
| 3. Alameda County, CA | 31. Kansas City, KS | 59. Buffalo, NY | 87. Rhode Island (state law) |
| 4. Berkeley, CA | 32. Louisville, KY | 60. New York, NY | 88. Providence, RI |
| 5. Carson, CA | 33. New Orleans, LA | 61. Rochester, NY | 89. Hamilton County, TN |
| 6. Compton, CA | 34. Maryland (state law) | 62. Syracuse, NY | 90. Memphis, TN |
| 7. East Palo Alto, CA | 35. Baltimore, MD | 63. Ulster County, NY | 91. Austin, TX |
| 8. Oakland, CA | 36. Montgomery County, MD | 64. Yonkers, NY | 92. Travis County, TX |
| 9. Pasadena, CA | 37. Prince George's County, MD | 65. Carrboro, NC | 93. Alexandria, VA |
| 10. Richmond, CA | 38. Massachusetts (state law) | 66. Charlotte, NC | 94. Arlington County, VA |
| 11. San Francisco, CA | 39. Boston, MA | 67. Cumberland County, NC | 95. Charlottesville, VA |
| 12. Santa Clara County, CA | 40. Cambridge, MA | 68. Durham City, NC | 96. Danville, VA |
| 13. Colorado (state law) | 41. Worcester, MA | 69. Durham County, NC | 97. Fairfax County, VA |
| 14. Connecticut (state law) | 42. Ann Arbor, MI | 70. Spring Lake, NC | 98. Fredericksburg, VA |
| 15. Bridgeport, CT | 43. Detroit, MI | 71. Akron, OH | 99. Newport News, VA |
| 16. Hartford, CT | 44. East Lansing, MI | 72. Canton, OH | 100. Norfolk, VA |
| 17. New Haven, CT | 45. Genesee County, MI | 73. Cincinnati, OH | 101. Petersburg, VA |
| 18. Norwich, CT | 46. Kalamazoo, MI | 74. Cleveland, OH | 102. Portsmouth, VA |
| 19. Delaware (state law) | 47. Muskegon County, MI | 75. Cuyahoga County, OH | 103. Richmond, VA |
| 20. New Castle County, DE | 48. Minnesota (state law) | 76. Dayton, OH | 104. Roanoke, VA |
| 21. Wilmington, DE | 49. Minneapolis, MN | 77. Hamilton County, OH | 105. Virginia Beach, VA |
| 22. Jacksonville, FL | 50. St. Paul, MN | 78. Massillon, OH | 106. Seattle, WA |
| 23. St. Petersburg, FL | 51. Columbia, MO | 79. Summit County, OH | 107. Spokane, WA |
| 24. Tampa, FL | 52. Kansas City, MO | 80. Youngstown, OH | 108. Washington, DC |
| 25. Atlanta, GA | 53. St. Louis, MO | 81. Multnomah County, OR | 109. Dane County, WI |
| 26. Fulton County, GA | 54. Nebraska (state law) | 82. Portland, OR | 110. Milwaukee County, WI |
| 27. Hawaii (state law) | 55. New Jersey (state law) | 83. Allegheny County, PA | |
| 28. Illinois (state law) | 56. Atlantic City, NJ | 84. Lancaster, PA | |

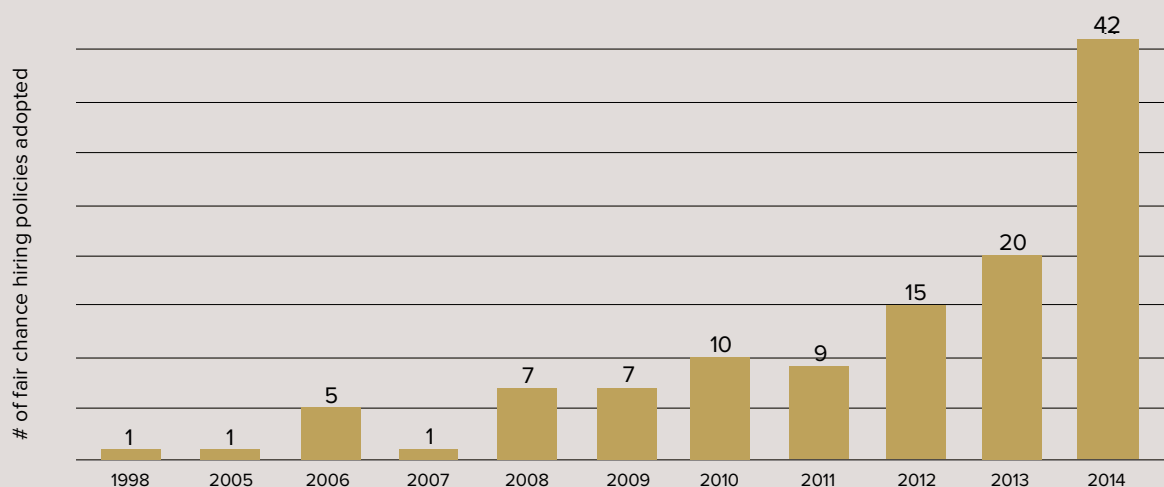
been especially promising. In just the last two years, eight states have enacted fair chance hiring policies, along with more than 50 cities and counties. Bed Bath & Beyond announced its nationwide policy in 2014, joining Target Corporation, Walmart, Home Depot, and other large employers. Today, about one-third of the U.S. population, or more than 100 million people, now live in an area where fair chance hiring is in effect.

Tracing the movement's evolution over the past decade, two major milestones are important to emphasize. First, in 2010, Massachusetts implemented statewide legislation extending fair chance hiring not just to public-sector employers but to the state's private employers as well. Massachusetts was the second state, after Hawaii, to extend the policy to private employment. Massachusetts was followed by Minnesota, Rhode Island, Illinois, and most recently, New Jersey.¹⁴ Six out of the 13 states now have fair hiring laws that apply to the private sector. Washington D.C., Baltimore, Buffalo, Chicago, Columbia (Missouri), Montgomery County (Maryland), Newark, Philadelphia, Prince George's County (Maryland), Rochester, San Francisco, and Seattle all extend fair chance hiring to the private sector as well. (See Table 1).

In addition, the movement has been embraced by elected officials across the political spectrum in states and localities where criminal justice reform has risen to the top of the policy agenda. In 2014, Nebraska became the first "red" state to remove conviction questions from public employment applications. And in August, Republican Governor Chris Christie of New Jersey signed fair chance hiring legislation. "[E]veryone deserves a second chance in New Jersey, if they've made a mistake," stated Governor Christie. "So, today, we are banning the box and ending employment discrimination."

In addition, Georgia's Republican Governor, Nathan Deal, has pledged to sign a fair chance hiring executive order. His office indicated that "[t]he governor will implement ban the box on the state level, and hope that the private sector follows suit. This will afford those with blemishes on their record a shot at a good job, which is key to preventing a return to crime." In 2014, the city councils of Louisville and Indianapolis also passed fair chance hiring policies with bi-partisan support, covering both the public sector and government contractors.

Figure 2: Number of Jurisdictions Adopting Fair-Chance Reforms Is Growing Rapidly



Note: There are more than 110 jurisdictions reflected in Figure 2 to account for some jurisdictions adopting fair chance policies multiple times

These reforms are having a measurable impact on employer hiring practices. For example, Durham, North Carolina, showed a seven-fold increase in hiring of people with a criminal record in the four years since 2010, when the city policy was first adopted. Progress has also been demonstrated in Minneapolis and Atlanta since the enactment of their fair chance hiring policies.¹⁵

Federal Government Elevates Fair Chance Hiring

The Obama Administration has been at the forefront of a broad-based movement to take stock of and remove the “collateral consequences” of over-criminalization. In January 2011, Attorney General Eric Holder convened a cabinet-level commission, called the Reentry Council, which coordinated a comprehensive federal response and set the agenda for future reform. The Reentry Council called for “mak[ing] the federal government a model employer” as a key feature of the federal agenda.¹⁶

Since the formation of the Reentry Council, the federal government has issued a series of agency pronouncements. The directives not only maximize the impact of the civil rights and consumer laws that regulate criminal background checks for employment, but also promote best practices for private-sector employers.¹⁷ First, the EEOC set the tone by issuing a strong bipartisan guidance in April 2012 clarifying the standards under Title VII of the Civil Rights Act of 1964 that regulate criminal background checks for the employer community.¹⁸ The EEOC guidance made clear that blanket prohibitions against hiring people with criminal records, such as hiring practices rejecting anyone with a prior arrest, generally violate Title VII.

The EEOC’s action was followed by directives issued by the U.S. Department of Labor that clarified the civil rights standards that apply to criminal background checks by federal contractors¹⁹ and the use of criminal history information by federally funded workforce development programs.²⁰ The U.S. Office of Personnel

Management also adopted best practices for federal contractors to improve on the fairness, accuracy and transparency of the criminal background check process.²¹

President Obama’s “My Brother’s Keeper” (MBK) initiative, formed to respond to the entrenched economic and societal challenges facing young men of color, has embraced fair chance hiring to reward rehabilitation and hard work. In May 2014, the MBK Task Force urged the federal government to “eliminate unnecessary barriers to reentry and encourage fair chance hiring options”:

Our youth and communities suffer when hiring practices unnecessarily disqualify candidates based on past mistakes. We should implement reforms to promote successful reentry, including encouraging hiring practices, such as “Ban the Box,” which give applicants a fair chance and allows employers the opportunity to judge individual job candidates on their merits as they reenter the workforce.²²

Hiring practices such as “ban the box” give all job applicants a fair chance and allow employers to judge candidates on the merits, as individuals.

The MBK Task Force urged the federal government to “launch an initiative to eliminate unnecessary barriers to giving justice-involved youth a second chance.” Specifically, the report stated that “[l]arge employers, including the Federal Government, should study the impacts of requiring disclosure of juvenile or criminal records on job applications and consider ‘banning the box.’ Federal, state, local and private actors should support public campaigns focused on eliminating forms of discrimination and bias based on past arrest or conviction records.”²³

Timeline: Fair-Chance Hiring Reform Milestones

1998

First law adopted in Hawaii to delay conviction history inquiries in hiring, which also applied to private employers.

2004

All of Us or None holds summits across California with formerly incarcerated people and allies, conceptualizing “ban the box.”

2006

At the behest of AOUON, San Francisco adopts “ban the box” for public-sector job applications.

2010

Massachusetts enacts comprehensive criminal record reform legislation, which requires private employers to delay conviction history inquiries.

JAN. 2011

Attorney General Eric Holder convenes U.S. Reentry Council to make federal government a model employer.

2012

EEOC issues guidance on use of arrests and conviction records and endorses removing conviction inquiries from job applications.

OCT. 2013

Target Corporation pledges to remove criminal history question from applications.

MAY 2014

President Obama’s “My Brother’s Keeper” (MBK) initiative endorses “ban the box.”

AUG. 2014

NJ Gov. Chris Christie signs state legislation to “ban the box” applying to private employers.

DEC. 2014

Now there are 13 states and 96 cities and counties, and Washington D.C. that have embraced fair chance hiring policies.

3 Federal Workforce and Private-Contractor Background Checks

In making the case for a federal fair hiring initiative, it helps to appreciate the background check policies and practices that apply to federal hiring and federal contractors. The analysis that follows highlights the strengths of the federal protections, including the standard policy encouraging federal agencies to delay the background check until the end of the hiring process. It also identifies the obstacles that continue to pose severe challenges for qualified and deserving workers to access federal employment and contractor positions.

The Distinct Categories of Federal and Contract Workers

The Federal Workforce: Instead of a standard civil service structure, where workers have clearly defined rights and responsibilities, today's federal workforce is far more decentralized with fewer mandated protections regulating the hiring process. Thus, while there are often federal hiring requirements set by the Office of Personnel Management (OPM), in practice each individual federal agency maintains broad discretion to adopt its own policies and practices, often with limited accountability and transparency.

Today's federal workforce is far more decentralized than a standard civil service structure, with fewer mandated protections regulating the hiring process.

First, there is the traditional category of "competitive service" workers who hold civilian positions in the federal government following an open competitive examination. These workers are screened based on "suitability" standards established by OPM, which take into account a number of important factors, including the nature of the position, the age and seriousness of any criminal conduct, and the "absence or presence of rehabilitation or efforts toward rehabilitation."²⁴

In addition, the OPM regulations encourage federal agencies to wait until the end of the hiring process to initiate the suitability determination and consider the

applicant's criminal record and other relevant conduct. Thus, the OPM regulations essentially embrace the ban-the-box approach.²⁵ Finally, there are strong procedural rights for competitive service workers to challenge a negative "fitness determination" based on the OPM's suitability standards, including the right to a statement of the "specific reasons" for the decision, the right to answer the charges, and the right to appeal a final agency decision to the Merit Systems Protection Board.²⁶ The individual employing agencies have the discretion to interpret the suitability standards and make the fitness determination, but they are required to report the results of their actions to OPM.²⁷

Federal agencies have broad discretion to adopt their own hiring policies and practices, often with limited accountability and transparency.

No other category of workers is automatically entitled to the protections of OPM's suitability, review, and appeal procedures, however. Those workers excluded from these protections include a growing number of workers "excepted" from the civil service appeal protections, as well as temporary, intermittent, and seasonal workers. Although many agencies employing excepted service workers continue to follow the OPM suitability criteria, they are under no obligation to do so. The agencies are not required to report their fitness standards to OPM or to other relevant federal oversight agencies. And OPM regulations expressly state that when temporary, intermittent, and seasonal positions last less than six months, they are not required to incorporate the OPM background investigations, which embrace ban-the-box. Instead, the employing agency "must conduct such checks as it deems appropriate to ensure the suitability of the person."²⁸

Federal Contract Workers: Large numbers of workers seeking employment with federal contractors are also subject to certain federal background check mandates. According to the Congressional Research Service, annual spending on federal contracts totals over \$540

billion annually and 22 percent of U.S. workers are employed by federal contractors or their subcontractors.²⁹ In 2004, President George W. Bush issued a directive mandating that contract employees with routine access to federal facilities complete a standardized background check.³⁰ This procedure often includes the same background check required of all other federal employees (called the National Agency Check with Inquiries, or NACI), as well as an FBI criminal background check.

Federal Security Designations and the Criminal History Question

Coupled with the standards that apply to the distinct categories of federal and contract workers, there are varying degrees of scrutiny of the individual's background based on a position's security level. The federal agencies are responsible for designating the security level for the different federal and contractor positions. There are three major security designations, starting with "non-sensitive" positions, then moving up to "public trust" positions, and finally those positions that require a "national security" clearance.³¹

- **Non-sensitive positions.** Applicants for "non-sensitive" federal or contractor positions are not asked about their criminal history information on the standard background information form they are required to complete after they have been extended a conditional offer of employment. Instead, the criminal history information is generated by OPM as part of the FBI background check conducted for all federal hires at the final stage of the hiring process.
- **Public trust and national security positions.** In contrast to "non-sensitive" positions, specific background check questions are asked of applicants for both "public trust"³² and "national security" positions. However, the OPM form recommends that these forms should not be filled out until the conditional offer of employment.

Thus, the official OPM policy with regard to the criminal history question is consistent with the ban-the-box

approach and the EEOC's best practices. However, another form, called the "Declaration of Federal Employment" (or "Optional Form 306"), is required of most federal hires and certain federal contractors. This form, which is under review by OPM,³³ interjects uncertainty and redundancy in the process because it asks about the applicant's criminal history independent of the distinct process described above that regulates hiring of non-sensitive, public trust, and national security positions.³⁴ While OPM's instructions recommend that the form not be collected until the time of the job offer, there is limited monitoring or reporting to verify that the recommendation is consistently followed by the federal agencies.

Limitations of the FBI Background Check Process

Apart from the question of when and whether the criminal history information is collected from the application, there is the fairness and accuracy of the background check process to consider. Nearly all applicants for federal employment and many federal contract workers are screened for an FBI criminal record, which takes into account nearly all arrests and convictions generated by federal, state and local law enforcement authorities.

As documented by NELP's 2013 study,³⁵ about 17 million FBI checks were conducted for employment screening purposes in 2012 alone. Despite the vast reliance on the FBI's records, the system is significantly flawed because the records are routinely out of date. Indeed, 50 percent of the records reported by the FBI lack updated information on the disposition of the arrest, even though about 30 percent of arrests never lead to a conviction. As a result, these workers are often seriously disadvantaged in seeking employment requiring an FBI rap sheet, and African-American and Latino workers are once again especially hard hit.³⁶

4 A Platform for a Federal Fair Chance Hiring Initiative

While the Reentry Council and its federal agency partners have made substantial progress in recent years, the time has come for the federal government to fully embrace fair chance hiring in both policy and practice by issuing an Executive Order that regulates federal contractors and a Presidential Memorandum that focuses on federal agency hiring practices, as well as enacting criminal justice reform legislation to address long-standing concerns.

Presidential action could make the hiring process fairer for workers with records, and restore hope to communities hit hardest by unemployment and decades of over-criminalization.

This platform recognizes that federally-funded jobs often require a high level of security and access to sensitive information.³⁷ Thus, the proposed reforms do not limit the discretion of agency officials to make hiring decisions or to take into account criminal history information in safety-sensitive cases. Instead, the measures promote fairness, transparency, and accountability in the hiring process so that qualified candidates can meaningfully compete and employers can attract the best-qualified workforce.

1. Executive Order

Maximizing his broad authority to regulate federal contractor employment practices, the president should issue a Fair Chance Hiring Executive Order that incorporates the best practices implemented by private- and public-sector employers. Consistent with the model policies adopted across the nation, which have been endorsed by both the EEOC and the Office of Federal Contract Compliance Programs (OFCCP),³⁸ the Executive Order should require private contractors to do the following:

- Remove the criminal history question from job applications and postpone the background check until a conditional offer of employment is made (i.e., “ban

the box”), except where the specific position requires a national security clearance;

- Consider only “job related” convictions and take into consideration the age of the offense, the nature of the offense, and countervailing evidence of rehabilitation, as required by the EEOC;
- Refrain from asking about an individual’s arrest record, expunged offenses, dismissals, or juvenile offenses;
- Provide a written notice to the individual when an unfavorable determination is made, explaining the reason for the decision (including the disqualifying offense);
- Provide strong notice and appeal rights for workers to challenge unfavorable determinations; and
- Strictly comply with the background check requirements of the Fair Credit Reporting Act.

To ensure compliance, OFCCP should be authorized to suspend or terminate contracts based on sufficient evidence of non-compliance or to mandate remedial procedures, including training of human resources personnel.

2. Presidential Memorandum

The Obama administration should also issue a Presidential Memorandum that directs federal agencies to correct the prejudicial aspects of the hiring standards and procedures regulating criminal background checks of applicants for federal employment. To embrace the role of a model employer and reduce unfair barriers to federal employment of people with criminal records, the Presidential Memorandum should include the following key components:

- The Office of Personnel Management (OPM) should revise the federal “suitability” regulations to comply fully with the protections of Title VII of the Civil Rights Act of 1964. Instead of the discretion now allowed to consider the age of the offense, evidence of rehabilitation, and other mitigating factors, the agencies should be required to do so;³⁹
- To promote greater transparency and accountability, all federal agencies should report their suitability

-
- criteria to OPM and verify their compliance with the EEOC guidelines.⁴⁰ Agencies should also report the appeal procedures that apply to each of the distinct categories of workers, including federal contract workers. Based on the information collected, OPM should issue a report to the president evaluating the findings and making recommendations for federal agency reform;
- OPM should eliminate the criminal history question from the “Declaration for Federal Employment” form, and federal agencies should strictly follow the OPM standard policy that they postpone the background check until the end of the hiring process;
 - All federal agencies should be directed to evaluate the “collateral consequences” of federally mandated criminal background checks for employment;
 - Federal agencies should adopt the appeal and waiver procedures modeled on the Maritime Transportation Security Act’s port-worker background check program to all federal agency licensing and employment certification mandates;⁴¹
 - The FBI should be directed to comply with existing regulations that preclude the reporting of non-serious offenses and to take additional steps to clean up the FBI background checks for employment, which severely prejudice the employment prospects of people of color;
 - The Consumer Financial Protection Bureau should publish regulations addressing the numerous routine violations of the Fair Credit Reporting Act by the background screening industry and employers, including the erroneous reporting of expunged and sealed cases;
 - Federal agencies should prepare options to require “targeted hiring” of people with criminal records on federally-funded projects⁴² and provide additional funding for “transitional jobs” that serve the needs of people who have been recently released from incarceration;
 - Federal agencies should actively promote and enforce the new federal civil rights guidances that strictly regulate the use of criminal history information by private- and public-sector employers and federally-funded workforce programs.

As supported by a growing number of organizations,⁴³ a Fair Chance Hiring Executive Order and Presidential Memorandum will increase fairness in the hiring process for workers with records who are struggling to navigate a challenging labor market. They will also restore hope to those communities hardest hit by unemployment and decades of over-criminalization.

3. Federal Legislation

The Congressional bipartisan consensus in support of criminal justice reform means that reentry issues will be high on the agenda of the 114th Congress. The following legislative priorities focusing on the employment needs of people with criminal records are especially well positioned to advance in the new Congress:

- Senators Corey Booker (D-NJ) and Rand Paul (R-KY) have introduced the REDEEM Act (S. 2567), which allows for the sealing and expungement of a range of federal juvenile and non-violent offenses, while also addressing the flaws in the FBI’s criminal records systems.
- Congressmembers Bobby Scott (D-VA) and Keith Ellison (D-MN) have introduced companion bills (H.R. 2865/H.R. 2999) to improve the integrity of the FBI background checks conducted for employment screening purposes. They require that any incomplete records be updated using the same FBI procedures that allow Brady gun checks to be successfully resolved within three days. For the Brady gun checks, the FBI has established a unit that tracks down missing disposition information, such as dismissals, before a final determination is issued; and
- To improve the fairness of employment licensing and certification requirements mandated by many federal laws, and to limit the discriminatory impact on people of color, all such laws should incorporate appeal and waiver protections modeled on the Maritime Transportation Security Act’s port-worker background check program.⁴⁴

Endnotes

1. In 2012, there were 100,596,300 subjects (“individual offenders”) according to a Bureau of Justice Statistics survey of the criminal history files within the 50 states, American Samoa, Guam, and Puerto Rico. U.S. Dept. of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2012 (Jan. 2014) at 2, <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>. To account for duplication in the survey of the state criminal record repositories (that is, individuals who may have criminal records in more than one state and deceased individuals who have not been removed from the state record systems), NELP conservatively reduced the numbers cited in the state survey by 30 percent to arrive at a total of 70,417,410 individuals with state arrest or conviction records. The U.S. Census 2012 population estimate for those 18 years and over was 240,185,952. Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and States April 1, 2010 to July 1, 2012 (U.S. Census Bureau, Population Division, June 2013, www.census.gov). Using these estimates, 29.3 percent of U.S. adults, or nearly one in three, have a criminal history on file with states. This estimate updates the 2011 estimate documented in the NELP report, 65 Million “Need Not Apply”: The Case for Reforming Background Checks for Employment, <http://www.nelp.org>. The estimate of 65 million U.S. adults with criminal records, based on 2008 data, represented 27.8 percent of the U.S. adult population at that time.
2. Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies to Reduce Unfair Barriers to Employment of People with Criminal Records Resource Guide (National Employment Law Project, Jan. 2015), <http://www.nelp.org/banthebox>.
3. My Brother’s Keeper Task Force Report to the President (May 2014), at 10.
4. National Employment Law Project/Center for Community Change, Seizing the “Ban the Box” Momentum to Advance a New Generation of Fair Chance Hiring Reforms, (Aug. 2014).
5. Society for Human Resources Management, Background Checking – The Use of Criminal Background Checks in Hiring Decisions, (2012), at 2.
6. Binyamin Appelbaum, “The Vanishing Male Worker: How America Fell Behind,” New York Times, Dec. 11, 2014.
7. Devah Pager, “The Mark of a Criminal Record,” American Journal of Sociology 108(5) (2003) at 937-975.
8. Scott Drecker, Cassia Spohn, Natalie Ortiz, Criminal Stigma, Race, Gender and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment (Final Report to the National Institute of Justice, 2010-MU-MU-004).
9. Mark T. Berg and Beth M. Huebner, “Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism,” Justice Quarterly 28(2011), at 382-410.
10. John Schmitt and Kris Warner, Ex-offenders and the Labor Market (Washington, D.C.: Center for Economic and Policy Research, 2010).
11. Economic Benefits of Employing Formerly Incarcerated Individuals in Philadelphia, (Philadelphia, PA: Economy League of Greater Philadelphia, 2011).
12. Rosenberg Foundation, “Impact Spotlight: The Movement to ‘Ban the Box’” (2014).
13. Southern Coalition for Social Justice, Press Release, “Formerly Incarcerated Leaders Have Historic Meeting with Federal Interagency Reentry Council” (Oct. 21, 2014).
14. Hawaii was the first to adopt a policy in 1998. A complete list of states and the years the policies were adopted or laws passed are: California (2013, 2010), Colorado (2012), Connecticut (2010), Delaware (2014), Hawaii (1998), Illinois (2014, 2013), Maryland (2013), Massachusetts (2010), Minnesota (2013, 2009), Nebraska (2014), New Jersey (2014), New Mexico (2010), and Rhode Island (2013). See note 2.
15. Southern Coalition for Social Justice, “The Benefits of Ban the Box: A Case Study of Durham, NC” (2014); National Employment Law Project, “Ban the Box Research Summary,” www.nelp.org/banthebox.
16. Reentry Council Agenda, at 2.
17. Federal Interagency Reentry Council “Employment Agenda Update” (June 2013).
18. U.S. Equal Employment Opportunity Commission, “EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964” (April 25, 2012).
19. U.S. Department of Labor, Office of Federal Contract Compliance Programs, “Complying with Nondiscrimination Provisions: Criminal Record Restrictions and Discrimination Based on Race and National Origin” (ADM Notice No. 306, Jan. 29, 2013).
20. U.S. Department of Labor, Employment and Training Administration, Training and Employment Guidance Letter No. 31-11 (May 25, 2012).
21. U.S. Office of Personnel Management, Memorandum for Chief Human Capital Officers from Elaine Kaplan, Acting Director, “Contractor Fitness Adjudications – Best Practices” (May 15, 2013).
22. My Brother’s Keeper Task Force Report to the President (May 2014), at 10.
23. Id. at 53.
24. 5 C.F.R. §731.202(c). However, the EEOC took issue with a specific provision of these rules. At odds with the EEOC guidelines regulating criminal background checks for employment that mandate the consideration of certain criteria, these rules leave the consideration of certain criteria to the employing agency’s discretion. See Letter from Peggy R. Mastroianni (EEOC Associate Legal Counsel) to Ana A. Mazzi (Deputy Associate Director, OPM Workplace Relations and Accountability Policy) Re: Proposed Rule on Suitability, RIN 3206-AL08 (March 19, 2007).
25. Specifically, OPM’s regulations explain that, “Agencies may begin to determine an applicant’s suitability at any time during the hiring process. Because suitability issues may not arise until late in the application/appointment process, it is generally more practical and cost-effective to first ensure that the applicant is eligible for the position, deemed by OPM or a Delegated Examining Unit to be among the best qualified, and/or within reach of selection.” 5 C.F.R. §731.103(d).
26. 5 C.F.R. §§ 731.302-731.501.
27. 5 C.R.F. § 731.206.
28. 5 C.F.R. §713.104(c).
29. U.S. Congressional Research Service, “Presidential Authority to Impose Requirements on Federal Contractors” (June 14, 2011).
30. Homeland Security Presidential Directive 12 (Aug. 27, 2004).
31. 5 C.F.R. §§ 731.106, 732.101-202.
32. Form SF 85P requires the candidate to respond to the following question and to provide details where indicated: “In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s),” not including fines of less than \$150 and offenses

- that occurred before the individual's 16th birthday. The OPM instructions indicate the form should not be filled out until the conditional offer of employment ("The U.S. Government conducts background investigations and reinvestigations to establish that applicants or incumbents either employed by the Government or working for the Government under contract, as suitable for the job and/or eligible for a public trust or sensitive position. . . . Complete this form only after a conditional offer of employment has been made.").
33. On August 14, 2014, OPM issued a Federal Register notice (70 Fed. Reg. 47694) seeking public comments on the OF306. NELP, the NAACP Legal Defense and Educational Fund, Inc., and other organizations submitted comments urging OPM to remove the redundant criminal history question from the form.
34. The question on Optional Form 306 asks whether the individual has, in the last 7 years, been "convicted, been imprisoned, been on probation, or been on parole," for "felonies, firearms or explosive violations, misdemeanors, and all other offenses." OF 306 excludes certain traffic offenses, certain offenses that occurred before the ages of 16 and 18, and expunged offenses. It also states that the "circumstances of each event you list will be considered. However, in most circumstances you can still be considered for Federal Jobs."
35. Madeline Neighly, Maurice Emsellem, Wanted Accurate FBI Background Checks for Employment (National Employment Law Project, 2013).
36. For example, federal law mandated that over two million port workers received FBI background checks for employment. Under the port worker program, 97 percent of those who challenged the accuracy of their FBI background checks were successful in doing so (or nearly 60,000 workers). NELP estimates that roughly 41 percent of these workers were African American (representing three times their share of the port worker population) and 29 percent were Latino (which is almost twice their share of the port worker population). A Scorecard on the Post-9/11 Port Worker Background Checks (National Employment Law Project, June 2009).
37. Report to the President, Suitability and Security Clearance Performance Accountability Council, "Suitability and Security Processes Review" (Feb. 2014).
38. *Infra*, notes 17 and 18.
39. *Infra*, note 22.
40. In a high-profile case involving the 2010 Census, the U.S. Department of Commerce required applicants for the temporary positions to provide their criminal history information early in the hiring process. In response to a class action lawsuit challenging the discriminatory impact of the Census Bureau policy on African American and Latino workers, it was disclosed that about 700,000 people who applied for the 1.4 million temporary Census positions had an arrest or conviction record that prevented them from being further considered for employment due to the agency's screening standards. *Johnson v. Locke*, Case No. 10-cv-3105 (S.D.N.Y., filed April 13, 2010); First Amended Class Action Complaint (S.D.N.Y., filed Aug. 5, 2010).
41. 42 U.S.C. 70105; A Scorecard on the Post-9/11 Port Worker Background Checks (National Employment Law Project, June 2009).
42. For example, the U.S. Department of Transportation approved a Project Labor Agreement entered into by the Los Angeles County Metropolitan Transportation Authority for a construction careers initiative that included hiring requirements targeting "economically disadvantaged" workers on federally-funded projects. Letter from Dorval R. Carter, Jr. (U.S. Department of Transportation) to Michelle Lopes Caldwell (Los Angeles County Metropolitan Transit Authority), dated Feb. 7, 2012.
43. The key elements of the proposed federal initiative, which are summarized below, are closely aligned with the platform of the membership organization led by formerly incarcerated people, All of Us or None (AOUON), the PICO National Network, and the Center for American Progress. All of Us or None, PICO National Network, "Formerly Incarcerated People Request an Executive Order to Ban the Box" (Sept. 2014); PICO National Network, "Fulfilling the Promise of My Brother's Keeper: Testimony and Recommendations for Reducing Violence and Providing a Second Chance from Communities Grappling with Violence and Mass Incarceration" (June 2014); Rebecca Vallas, Sharon Dietrich, "One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records" (Center for American Progress, Dec. 2014), at 35, 51.
44. 42 U.S.C. 70105; Under the port worker program implemented by TSA, 97 percent of who challenged the accuracy of the FBI background checks were successful in doing so (60,000 workers), and roughly 41 percent were African Americans (representing three times their share of the port worker population) and 29 percent were Latinos (representing almost twice their share of the port worker population). A Scorecard on the Post-9/11 Port Worker Background Checks (National Employment Law Project, June 2009).

Appendix

Table 1. Summary of Fair Chance Ban the Box Policies

Location	Employers			Background check only after conditional offer or finalists selected	EEOC criteria
	Private	Vendors	Public		
ARIZONA					
1. Tucson			X		
2. CALIFORNIA (state law)			X		
3. Alameda County			X		
4. Berkeley			X		X
5. Carson			X		
6. Compton		X	X		X
7. East Palo Alto			X		
8. Oakland			X	X	X
9. Pasadena			X		
10. Richmond		X	X		
11. San Francisco	X	X	X	X	X
12. Santa Clara County			X		
13. COLORADO (state law)			X		X
14. CONNECTICUT (state law)			X		X
15. Bridgeport			X		X
16. Hartford		X	X	X	X
17. New Haven		X	X	X	X
18. Norwich			X	X	
19. DELAWARE (state law)			X		X
20. New Castle County			X		
21. Wilmington			X	X	
FLORIDA					
22. Jacksonville			X	X	X

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Location	Employers			Background check only after conditional offer or finalists selected	EEOC criteria
	Private	Vendors	Public		
23. St. Petersburg			X		
24. Tampa			X	X	
GEORGIA					
25. Atlanta			X		
26. Fulton County			X		X
27. HAWAII (state law)	X	X	X	X	X
28. ILLINOIS (state law)	X	X	X		
29. Chicago	X	X	X	X	X
INDIANA					
30. Indianapolis		X	X		X
KANSAS					
31. Kansas City			X		X
KENTUCKY					
32. Louisville		X	X		X
LOUISIANA					
33. New Orleans			X		
34. MARYLAND (state law)	X	X	X	X	X
35. Baltimore	X	X	X		
36. Montgomery County	X	X	X		X
37. Prince George's County	X	X	X		
38. MASSACHUSETTS (state law)		X	X		
39. Boston		X	X		X
40. Cambridge		X	X		X

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Location	Employers			Background check only after conditional offer or finalists selected	EEOC criteria
	Private	Vendors	Public		
41. Worcester					
MICHIGAN			X	X	X
42. Ann Arbor		X	X		
43. Detroit			X		
44. East Lansing			X	X	
45. Genesee County			X		
46. Kalamazoo			X		
47. Muskegon County			X		
48. MINNESOTA (state law)	X	X	X	X	X
49. Minneapolis			X		X
50. St. Paul			X		X
MISSOURI					
51. Columbia	X	X	X	X	
52. Kansas City			X	X	X
53. St. Louis			X		
54. NEBRASKA (state law)			X		
55. NEW JERSEY (state law)	X	X	X		
56. Atlantic City		X	X	X	X
57. Newark	X	X	X	X	X
58. NEW MEXICO (state law)			X		X
NEW YORK					
59. Buffalo	X	X	X	X	
60. New York		X	X		
61. Rochester	X	X	X	X	

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Location	Employers			Background check only after conditional offer or finalists selected	EEOC criteria
	Private	Vendors	Public		
62. Syracuse		X	X	X	X
63. Ulster County			X		
64. Yonkers			X		
NORTH CAROLINA					
65. Carrboro			X		X
66. Charlotte			X		
67. Cumberland County					
68. Durham City					X
69. Durham County					X
70. Spring Lake					
OHIO					
71. Akron			X		X
72. Canton			X	X	X
73. Cincinnati			X		X
74. Cleveland			X		
75. Cuyahoga County			X	X	X
76. Dayton			X		X
77. Hamilton County			X		
78. Massillon			X		X
79. Summit County			X		X
80. Youngstown			X	X	
OREGON					
81. Multnomah County			X		X
82. Portland			X		

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Location	Employers			Background check only after conditional offer or finalists selected	EEOC criteria
	Private	Vendors	Public		
PENNSYLVANIA					
83. Allegheny County			X	X	X
84. Lancaster			X	X	X
85. Philadelphia	X	X	X	X	
86. Pittsburgh		X	X	X	
87. RHODE ISLAND (State law)	X	X	X		
88. Providence			X		
TENNESSEE					
89. Hamilton County					
90. Memphis			X		X
TEXAS					
91. Austin			X		
92. Travis County			X	X	X
VIRGINIA					
93. Alexandria			X	X	
94. Arlington County			X		
95. Charlottesville			X		
96. Danville			X	X	X
97. Fairfax County			X	X	
98. Fredericksburg			X	X	X
99. Newport News			X		X
100. Norfolk			X		X
101. Petersburg			X		

Table 1. Summary of Fair Chance Ban the Box Policies					
Location	Employers			Background check only after conditional offer or finalists selected	EEOC criteria
	Private	Vendors	Public		
102. Portsmouth			X		
103. Richmond			X		
104. Roanoke			X		
105. Virginia Beach			X	X	X
WASHINGTON					
106. Seattle	X	X	X		
107. Spokane			X		
108. DISTRICT OF COLUMBIA	X	X	X	X	X
WISCONSIN					
109. Dane County			X		
110. Milwaukee County			X		

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