

Testimony of
Maurice Emsellem
National Employment Law Project

Before the U.S. Congress,
House of Representatives,
Judiciary Committee, Subcommittee on
Crime, Terrorism & Homeland Security

Hearing on
Collateral Consequences of Criminal Convictions:
Barriers to Reentry for Formerly Incarcerated

June 9, 2010

Maurice Emsellem, Policy Co-Director
National Employment Law Project
405 14th Street, 14th Floor
Oakland, CA 94612
(510) 663-5700
emsellem@nelp.org

Testimony of Maurice Emsellem Before the U.S. Congress,
House of Representatives, Judiciary Committee,
Subcommittee on Crime, Terrorism and Homeland Security
June 9, 2010

Chairman Scott and members of the Committee, thank you for this opportunity to testify in support of H.R. 5300, the Fairness and Accuracy in Employment Background Checks Act, and the need for federal reform to ensure more fair and accurate criminal background checks for employment.

My name is Maurice Emsellem, and I am the Policy Co-Director for the National Employment Law Project (NELP), a non-profit research and advocacy organization that specializes in the employment rights of people with criminal records. NELP's Second Chance Labor Project seeks to protect public safety and security while supporting the rehabilitative value of work and the basic employment rights of all workers, including those with a criminal record.

At this crucial juncture in the evolution of criminal background checks for employment, it is especially important that Congress properly evaluate the impact and effectiveness of current federal policy and reform outdated laws and practices.

- The critical first step toward federal reform is to improve the integrity and reliability of the FBI's criminal background checks for employment, as required by H.R. 5300.
- Congress should also promote and reward rehabilitation by adopting "waiver" protections modeled on the federal port worker program in new laws requiring criminal background checks for employment.
- The federal government should embrace the role of a model employer, setting the example for private industry and state and local governments by reducing artificial barriers to employment of people with criminal records.
- The federal government should aggressively enforce existing civil rights and consumer protection laws that regulate criminal background checks for employment.

The good news is that there are model reentry policies already in place in federal, state and local laws that can significantly reduce unnecessary barriers to employment of people with criminal records. If incorporated more broadly into federal law and policy, as described below, these innovative reforms can go a long way to create a fairer and more effective process of criminal background checks that serves the safety and security interests of employers, workers, and the community.

I. The Scope & Impact of Criminal Background Checks for Employment

Before addressing the opportunities for reform of federal criminal background check laws and policies, it helps to appreciate the vast expansion of criminal background checks of today's workers and the extent to which this new reality impacts workers and their families.

Criminal background checks for employment have increased exponentially, especially since the September 11th attacks. In 2009, the FBI performed 5.8 million fingerprint-based background checks for employment and licensing purposes, an increase of nearly one million in the past five years.¹ While the FBI criminal background checks are mostly limited to certain occupations regulated by federal law, 73% of private employers now also report conducting criminal background checks based on information provided by the growing industry of private background check screening firms.²

The vast expansion of background checks for employment has cast a wide net that is catching millions of workers, limiting their employment opportunities.

- Nearly one in three adults (31.7%) in the United States are estimated to have a criminal record on file with the states that will show up on a routine criminal background check.³
- A large number of people who have a criminal record that shows up on a background check have never been convicted of a crime--their record is of an arrest only. In fact, about one-third of felony arrests never lead to conviction.⁴
- Over 700,000 people are released from prison each year, looking to find work in their communities and a new way of life.⁵ Three out of four individuals being released from prison have served time for non-violent offenses, including property crimes (40%) and drug offenses (37%).⁶
- African Americans account for 28.3% of all arrests in the United States, although they represent just 13% of the U.S. population.⁷ According to a Minneapolis study, African Americans are 15 times more likely than whites to be arrested for low-level offenses, but less than 20% of arrests of African Americans for these offenses result in convictions.⁸

¹ Steve Fisher, FBI, Criminal Justice Information Services Division, Office of Multimedia, Response to Information Request from Maurice Emsellem, National Employment Law Project (dated May 10, 2010).

² Society for Human Resources Management, "Background Checking: Conducting Criminal Background Checks" (January 22, 2010).

³ This estimate is based on the following methodology. According to a 2008 state survey, there were 102.8 million people with criminal records on file with the states, including serious misdemeanors and felony arrests. Bureau of Justice Statistics, *Survey of State Criminal History Systems*, 2008 (October 2009), at Table 2. To account for over counting due to individuals who may have records in multiple states and other factors, and to arrive at a conservative national estimate, we reduced this figure by 30% (72 million). Thus, as a percentage of the U.S. population over the age of 18 (209 million according to the 2000 Census, which we increased by 8.3% to reflect the average population growth over the past 10 years, totaling 227 million adults), an estimated 31.7% of the U.S. adult population has a criminal record on file with the states.

⁴ Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties*, 2004 (April 2008).

⁵ Bureau of Justice Statistics, *Prison Inmates at Midyear, 2007* (June 2008), Appendix, Table 7.

⁶ Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S., 1974-2001* (August 2005), at page 1.

⁷ U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 2008*, at Table 43.

⁸ Council on Crime and Justice, *Low Level Offenses in Minneapolis: An Analysis of Arrests and Their Outcomes* (November 2004), at page 4.

- Drug “trafficking” is the single largest category of all state felony convictions, representing 18.8% of all cases, followed by drug possession, which accounts for another 14.6% of all state felonies.⁹
- Large numbers of arrests and convictions are for especially minor crimes, primarily including drunkenness and disorderly conduct (which account for almost 10% of all arrests in the United States, or 1.32 million cases annually).¹⁰

Given the substantial impact of the criminal justice system on millions of Americans, it is important to understand how employers evaluate and use criminal records information. According to a major survey, over 60% of employers would “probably not” or “definitely not” consider a job applicant for employment once they become aware that the individual has a criminal record.¹¹ According to “employment testing” studies, workers of color with a criminal record are even less likely to even be interviewed for a job when compared with similarly situated whites.¹²

However, a growing body of research demonstrates that a prior criminal record alone is not a reliable indicator of an individual’s propensity to violate the law. Recent studies show that individuals with a prior record who have no subsequent involvement with the criminal justice system over time are no more likely than anyone else to commit another crime. Specifically, those with a prior record who have not been arrested or convicted of a crime over a period of four to seven years are statistically no more likely than someone with no prior record to commit a crime.¹³ This research should inform criminal background checks for employment, including the need for strict age limits on the use of prior criminal records.

Not surprisingly, an individual’s track record of employment is another compelling indicator of rehabilitation, which contributes to public safety.¹⁴ Those who have been employed even for a year or less are also far less likely to commit another crime. According to a study in Illinois that followed 1,600 individuals recently released from state prison, only 8% of those who were employed for a year committed another crime, compared to the state’s 54% average recidivism rate.¹⁵

⁹ Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006* (December 2009), Table 1.

¹⁰ U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 2008*, at Table 29.

¹¹ Harry Holzer, Steven Raphael, Michael Stoll, “Perceived Criminality, Criminal Background Checks and the Racial Hiring Practices of Employers,” (April 2005), at page 3.

¹² Devah Pager, “The Mark of a Criminal Record” 108 *AmJ.Soc.* 937 (2003).

¹³ Alfred Blumstein, Kiminori Nakamura, “‘Redemption’ in an Era of Widespread Criminal Background Checks,” *NIJ Journal*, Issue 263 (June 2009), at page 10; (the findings depend on the nature of the prior offense and the age of the individual); Kurlychek, et al. “Scarlet Letters & Recidivism: Does An Old Criminal Record Predict Future Criminal Behavior?” (2006).

¹⁴ Aliya Maseelall, Amanda Petteruti, Nastassia Walsh, Jason Ziedenberg, “Employment, Wages and Public Safety” (Justice Policy Institute: November 2007).

¹⁵ American Correctional Association, 135th Congress of Correction, Presentation by Dr. Art Lurigio (Loyola University) Safer Foundation Recidivism Study (August 8, 2005).

II. The Landscape of Federal Laws Authorizing FBI Criminal Background Checks

Over twenty federal laws require or authorize FBI criminal background checks for employment purposes covering millions of workers, both in the public and private sectors. These laws cover a wide range of occupations, from nursing home workers,¹⁶ workers who have “responsibility for the safety and security of children, the elderly or individuals with disabilities,”¹⁷ to school employees,¹⁸ and employees of financial institutions.¹⁹ In addition to screening for criminal records, these federal laws often prohibit individuals with certain criminal records from being employed in various occupations.

Thousands of additional federal workers and federal contract employees are also subjected to FBI background checks (called the National Agency Check with Inquiries) based on federal personnel and homeland security mandates. The positions subject to these background checks run the gamut, from food service and janitorial workers employed in federal buildings, to Census enumerators, and professional civil service employees.²⁰

Federal law also authorizes the states to obtain FBI background checks based on their state occupational and licensing laws. States often mandate screening standards for particular occupations, like school employees or nursing home workers, requiring FBI background checks to be reviewed by the state licensing agency or the employer.

After the September 11th attacks, Congress enacted criminal record prohibitions that apply to workers employed in nearly the entire transportation industry (including aviation workers, port workers and truck drivers who haul hazardous material).²¹ These laws, which are specifically intended to identify terrorism security risks, incorporated strong standards regulating the severity of disqualifying offenses (limited to selected felonies in most cases) and the age of the offense (going back 7 years for most offenses in the case of port workers and hazmat drivers).

Also significant, these federal protections, which are implemented by the Transportation Security Administration (TSA), have made an effort to remove disqualifying felonies that are especially broad to prevent unfair treatment and to more effectively screen for true security risks. Thus, TSA’s regulations no longer disqualify workers who have certain felony convictions, including drug possession, welfare fraud and bad check writing.²²

¹⁶ P.L. 105-277, Div. A., Title I, Section 101(b).

¹⁷ 42 U.S.C. Section 5119(a)(1).

¹⁸ H.R. 4472, Adam Walsh Child Protection & Safety Act (signed July 27, 2006).

¹⁹ 12 U.S.C. Section 1829(a)(1).

²⁰ Executive Order 13488; Executive Order 10450; 5 C.F.R. Part 731; Homeland Security Presidential Directive (HSPD) 12- Policy for a Common Identification Standard for Federal Employees and Contractors (2004).

²¹ USA Patriot Act of 2001, 49 U.S.C. Section 5103a (hazmat drivers); Aviation and Transportation Security Act of 2001, 40 U.S.C. Section 44936 (unescorted access to airport security areas); Maritime Transportation Security Act of 2002, 46 U.S.C. Section 70105 (secured areas of ports).

²² 72 Fed. Reg. 3600 (January 25, 2007).

Especially important, the laws regulating port workers and hazmat drivers also include a “waiver” procedure allowing those workers who do have a disqualifying offense to petition to remove the disqualification based on evidence of rehabilitation and their employment record. In addition, the federal law includes an “appeal” procedure that applies when workers have identified an error or critical missing information in criminal records generated by the FBI.

Nothing in the federal laws that authorize criminal background checks requires that the employer only consider offenses that are “job related,” which is the standard established by Equal Employment Opportunity Commission (EEOC) guidances interpreting Title VII of the Civil Rights Act of 1964, as applied to criminal background checks for employment.²³ This omission is significant since the federal laws requiring checks often apply to occupations that employ especially large numbers of minority workers who are protected by Title VII because of the demonstrated “disparate impact” of criminal background checks.

III. The Critical Significance of the Model Port Worker Protections

The recent experience with the waiver and appeal procedures in the federal port worker criminal background check program provide a powerful illustration of the effectiveness of these critical worker protections.

From late 2007 to April 2010, TSA screened the FBI records of about 1.6 million port workers pursuant to the Maritime Transportation Security Act of 2002. During that time, at least 60% of the employee petitions to “waive” their disqualifying felony offense based on evidence of rehabilitation were granted by TSA.²⁴ Were it not for this TSA waiver procedure authorized by the federal maritime law, nearly 5,000 workers would have lost their jobs and been out on the streets, unable to support their families in the midst of the worst jobs downturn since the Great Depression.

Moreover, a remarkable 96% of “appeals” filed by workers successfully challenged the accuracy of their FBI criminal records, thus overturning the initial TSA determinations denying their security clearance to work at the ports. In other words, in nearly every case (about 40,000 in all) where the workers alleged that there was a problem with the criminal record produced by the FBI – mostly reflecting the failure of the FBI record to indicate that an arrest never actually led to a disqualifying conviction - TSA agreed with the worker that the FBI records were inaccurate. Unfortunately, due to the challenge of tracking down court records and other required documentation, large numbers of workers failed to appeal their cases to TSA.

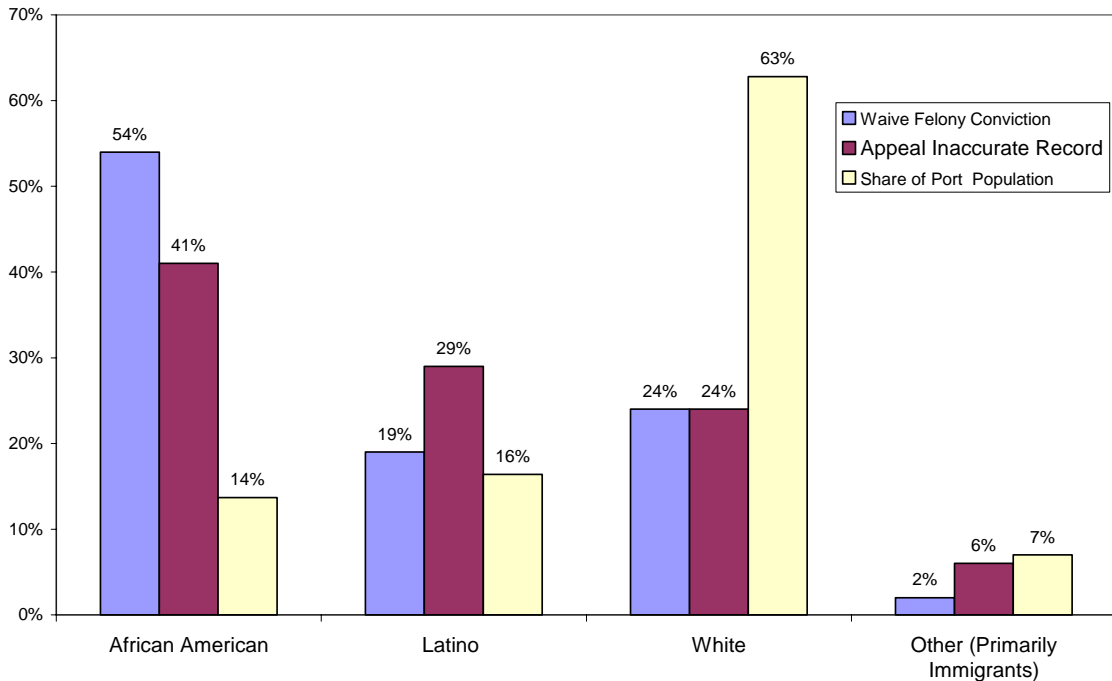
Significantly, workers of color were major beneficiaries of the federal port worker protections, according to data collected by NELP on 500 workers we represented through

²³ U.S. Equal Employment Opportunity Commission, *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964* (February 4, 1987).

²⁴ Department of Homeland Security, TWIC Dashboard (May 20, 2010).

the waiver and appeal process.²⁵ As the graphic below illustrates, African Americans appealed the accuracy of the FBI criminal records three times more than their share of the port worker population (41% compared to 14%). In addition, over half of the petitions to waive a disqualifying record were filed by African Americans, which is nearly four times their share of the port worker population.

**TWIC's Criminal Record Waiver and Appeals
Protections Significantly Benefit Workers of Color**



Thus, the federal worker protections proved to be the lifeline to employment for tens of thousands of the nation's port workers, especially workers of color. Those federal policies are also paramount to the goals of the reentry movement to reduce recidivism by removing unnecessary barriers to employment of people with criminal records.

IV. The Major Limitations of FBI Rap Sheets Produced for Employment Screening Purposes

While never originally designed to screen workers for employment, the FBI's rap sheets are now the major gateway to employment for millions of workers employed in a range of industries and occupations. Despite the growing role that FBI rap sheets play in criminal background checks for employment, there has been very limited scrutiny of this critical function performed by the FBI.

²⁵ National Employment Law Project, *A Scorecard on the Post-9/11 Port Worker Background Checks* (July 2009).

A. Incomplete FBI Rap Sheets Undermine the Integrity of the Background Check Process

By far, the most prejudicial flaw of the FBI rap sheets produced for employment purposes is the extent to which the state information reported is out-of-date or incomplete, thus undermining the integrity of the criminal background check process.

According to the 2006 report by the U.S. Attorney General, the FBI's rap sheets are "still missing final disposition information for approximately 50% of its records."²⁶ As of last year, the rate remained at 48%. This more recent figure does not take into account some reduction in incomplete records based on a small number of states that participate in a program that allows the FBI to send the state's rap sheet directly to the requesting entity in response to a criminal record inquiry.

The omissions on FBI rap sheets primarily reflect arrest information that is reported after an individual has been fingerprinted, but is never updated electronically by the state to reflect final disposition. In about half the states, at least 30% of the arrests in the past five years have no final disposition recorded, which means that the FBI's records are similarly incomplete.²⁷

This serious reporting gap exists despite federal regulations intended to ensure that the records produced by the FBI are accurate and up-to-date. Specifically, the regulations state that "[d]ispositions should be submitted by criminal justice agencies within 120 days after the disposition has occurred."²⁸ More generally, the FBI's regulations also require that the "information on individuals is kept complete, accurate and current so that all such records shall contain to the maximum extent feasible disposition of all arrests data included therein."

Unfortunately, given the gaps in reporting, workers who have never been convicted of a crime or have charges that have been dismissed are seriously prejudiced by arrest information that continues to be reported on the FBI rap sheet. When this information is reported to employers, it undermines the laws of a number of states that prohibit employers from taking into consideration an individual's arrest record absent a conviction.

It also conflicts with the EEOC's policy regulating criminal background checks for employment, potentially leading to violations of Title VII. Citing the discriminatory impact of arrest information on African Americans and Latinos, the EEOC stated "[s]ince using arrests as a disqualifying criteria can only be justified where it appears that the applicant actually engaged in the conduct for which he/she was arrested and that conduct is job

²⁶ U.S. Attorney General, *The Attorney General's Report on Criminal Background Checks* (June 2006), at page 3.

²⁷ Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2008* (October 2009), at Table 1.

²⁸ 28 C.F.R. Section 20.37.

related, the Commission further concludes that an employer will seldom be able to justify making broad general inquiries about an employee's or applicant's arrest."²⁹

In significant contrast to the FBI rap sheets produced for employment purposes, the FBI rap sheets produced for federal gun checks are far less incomplete. In the case of Brady gun checks, 65% of the missing dispositions from the state are tracked down by the FBI within three days.³⁰ If more targeted federal resources are devoted to rap sheets produced for employment purposes, there is no apparent reason why similar results could not be produced.

B. FBI's Proposed Regulation to Report "Nonserious" Offenses

Seriously compounding the problem of old arrests reported on FBI rap sheets, the FBI has proposed regulations overturning more than 30 years of policy that would allow "nonserious" offenses to also be reported on the FBI's rap sheets for employment purposes.³¹ According to the FBI, these proposed regulations are scheduled to be finalized in three months, by August 2010.³²

Nonserious offenses include juvenile arrests and convictions and many adult arrests and convictions, including anything from vagrancy, to drunkenness to many traffic violations. Under the proposed regulations, every time an individual is fingerprinted, an event that is happening far more often even in the case of juvenile arrests, the record would likely be reported on the FBI rap sheet. The current regulation (28 C.F.R. Section 20.32(b)) was the product of a 1976 lawsuit that found the FBI failed to adequately remove nonserious offenses from the rap sheets produced for non-criminal justice purposes.³³

The only justification provided for the FBI's decision to reverse 30 years of policy was the following statement: "the FBI believes that this rule provides substantial, but difficult to quantify, benefits by enhancing the reliability of background checks for non-criminal justice employment purposes. . . ." ³⁴ While the current regulations limit FBI rap sheets for non-criminal justice purposes to "serious and/or significant adult juvenile offenses," the state records now submitted to the FBI routinely include nonserious offenses.

We believe the FBI's proposed regulation is seriously misguided. Of special concern, large numbers of workers will, for the first time, have a record appear on their FBI rap sheet based solely on a non-serious offense, which is unwarranted given the limited safety and security threat posed by these offenses. Although estimates of the proposal's impact were conspicuously not included in the proposed regulation, when the FBI implemented its policy

²⁹ U.S. Equal Employment Opportunity Commission, *Policy Statement on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, EEOC Compliance Manual (Sept. 7, 1990).

³⁰ *The Attorney General's Report on Criminal Background Checks*, at page 108.

³¹ 71 Fed. Reg. 52302 (dated September 5, 2006).

³² Department of Justice, Unified Regulatory Agenda (RIN 1110-AA25) (April 26, 2010).

³³ *Tarlton v. Saxbe*, 407 F.Supp. 1083 (D.D.C. 1976).

³⁴ 71 Fed.Reg. at 52304.

excluding nonserious offenses in the 1970s, it resulted in a 33% decrease in the total number of fingerprint cards retained by the FBI.

In addition, the FBI's proposal represents a radical departure from the state policies protecting the privacy of juvenile records for non-criminal justice purposes and promoting rehabilitation. In 2006, there were more than 1.6 million arrests of people younger than 18 years old, mostly for property and other less serious offenses.³⁵ Meanwhile, most studies indicate that only one-third of youthful offenders ever commit a second offense.³⁶

To keep these sensitive juvenile records confidential and promote rehabilitation, almost all states authorize certain juvenile records to be expunged and sealed. However, the records can still be listed in the state record systems (and then reported to the FBI) unless and until the young person successfully petitions the courts to have them removed by the state.³⁷ Most states never seriously contemplated that an individual's minor juvenile offense, including mere arrests, would make its way onto the FBI's rap sheets and create a devastating stigma that will follow the individual for life, from job to job and from state to state.

The FBI's policy will also seriously undermine the civil rights of people of color, who are more likely to be arrested for many nonserious crimes. For example, while African Americans represent about 13% of the population and 28% of all those arrested in the U.S., they account for about one-third of all those arrested for disorderly conduct, vagrancy and juvenile offenses.³⁸

In a letter dated March 23, 2007, Chairman Scott and Congresswoman Maxine Waters wrote the Attorney General to express serious reservations about the proposed policy reversal. "Because of the extremely prejudicial impact that this proposed policy would have on the employment prospects of people with especially minor criminal histories, many of whom were never convicted of a crime," Mr. Scott and Ms. Waters requested the Attorney General to "delay issuance of this proposed regulation in order to allow Congressional oversight on this issue."

Given the absence of compelling evidence supporting the reliability or probative value of nonserious offenses, we urge the Committee to pursue the issue with the FBI, while also evaluating whether the FBI is actively enforcing the current regulations.

³⁵ Christopher Hartney, Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal System* (National Council on Crime and Delinquency: March 2009), at page 30.

³⁶ Bureau of Justice Statistics, *Privacy and Juvenile Justice Records: A Mid-Decade Status Report* (May 1997), at page 4.

³⁷ Indeed, even in federal court proceedings involving juveniles, where the juvenile is required to be fingerprinted, the proceedings cannot be shared for any employment purpose "except for a position immediately and directly affecting the national security." (18 U.S.C. Section 5038(a)(5)).

³⁸ U.S. Department of Justice, *Federal Bureau of Investigation, Crime in the United States, 2008*, at Table 43.

V. Federal Reform Agenda to Reduce Criminal Record Barriers to Employment

A. Enact the Fairness & Accuracy in Employment Background Checks Act

Thanks to the leadership of Chairman Scott, critical legislation to address the major limitations of the FBI's criminal records was re-introduced last month with bi-partisan support. We urge Congress to promptly enact the Fairness and Accuracy in Employment Background Checks Act (H.R. 5300), a measure that will greatly assist job applicants, employers, and government agencies that conduct background checks.

Just as the FBI tracks down incomplete arrest information when conducting Brady background checks required for the purchase of firearms, H.R. 5300 will require the FBI to update old and incomplete arrest information before it is released for employment screening purposes. The bill authorizes the FBI to collect a reasonable fee to fund this activity. And similar to the consumer protections that apply to private screening firms by the Fair Credit Reporting Act (FCRA),³⁹ the bill requires that workers subjected to the FBI's criminal background checks be provided with basic rights, including access to their criminal history records.

- Incomplete FBI records unfairly and unreasonably impede workers' access to jobs. Workers subjected to FBI background checks are routinely denied employment or the security clearance they need for their jobs due to incomplete information on their FBI rap sheets. Even for those workers who have the skills to navigate the process, correcting these errors can take weeks if not months, causing serious financial hardship to working families who must go to great lengths to track down missing information and then wait for that information to be processed.
- Incomplete FBI records disadvantage businesses that rely on ready access to qualified workers. In order to maintain an efficient and safe workforce, employers need to be given prompt, accurate and reliable information to evaluate prospective employees. When employers are forced to rely on outdated criminal history information that does not provide an accurate picture of a worker, they lose out on otherwise qualified workers of their choice or get bogged down in protracted delays that undermine the hiring process.
- Incomplete FBI records undermine security and cost the government valuable time and money. Especially since 9/11, government background checks have grown in many large industries, including most of the transportation sector as well as government jobs and large contractors doing work for the public sector. When government agencies conducting background checks rely solely on the FBI rap sheet to perform security threat assessments, it results in a grossly inefficient process where applicants are routinely denied jobs because of arrests that never resulted in conviction and that would not disqualify the worker from employment.

³⁹ 15 U.S.C. Section 1861 et seq.

Government employees then spend countless hours reviewing appeals and approving applicants who never should have been denied in the first place, if the records were kept up-to-date. For example, the TSA has granted 96% of the nearly 40,000 appeals submitted by port workers that are based on inaccurate FBI background checks required to work at any of the nation's ports. However, it took TSA several months to generate initial denial letters based on the FBI rap sheet, and then to process appeals from eligible workers.

The Fairness and Accuracy in Employment Background Checks Act takes simple, important steps to significantly improve the reliability of FBI rap sheets produced for employment or occupational licensing purposes, while creating basic consumer protections that ensure workers are guarded against potential abuses associated with the FBI's criminal background checks:

- Similar to the practice of the FBI in reviewing an individual's criminal record to purchase firearms, the FBI would be required to locate missing disposition information, to the maximum extent possible within ten days, before releasing the rap sheet for employment screening purposes. The FBI has been able to track down 65% of the missing information within three days for federal gun checks under the Brady Act.
- As required by the federal law regulating private security background checks, arrests older than one year that do not include a disposition will not be reported on an FBI rap sheet for employment purposes unless the FBI can verify that the case is still being actively prosecuted.
- The bill codifies the FBI regulations that have been in place since the 1970s providing that "nonserious" juvenile and adult offenses should not be reported on FBI rap sheets, to the extent that the rap sheets are prepared for employment screening purposes.
- Individuals subject to an employment criminal background check will have the right to receive a copy of their rap sheet, thus providing the individual with an opportunity to verify and challenge the accuracy of the information.
- The bill provides fair and timely procedures for workers to challenge inaccurate FBI records, requiring an investigation of federal, state and local criminal records.
- For those criminal records found to be incomplete by the FBI or a worker challenge, the FBI will update its records and notify the local authorities of the corrected information.
- The bill directs the Attorney General to inventory the employment restrictions based on criminal records required by federal law and policy.

- The bill authorizes the FBI to charge a reasonable fee to pay for the activities necessary to investigate and update incomplete criminal records produced for employment screening purposes.

As the *New York Times* stated in its editorial endorsing H.R. 5300, “no one should be denied a job because the government’s information is wrong.”⁴⁰ Now, with many more workers struggling to get back to work given the record rates of unemployment, it’s especially important to reform the FBI’s system of criminal background checks to give all qualified workers the chance they deserve to work and contribute to their communities.

B. Promote and Reward Rehabilitation by Adopting Federal Waiver Protections

Most federal laws that require FBI criminal background checks for employment fail to provide for any basic worker protections, thus preventing deserving workers from showing that they have been rehabilitated and moved on with their lives despite their prior record. In contrast, the latest research shows that work reduces recidivism and once a worker has stayed clear of the criminal justice system -- even for just a few years -- he or she is no more likely to commit a crime than those who have never been in trouble with the law.

To successfully promote and reward rehabilitation, federal occupational screening laws should adopt the basic protections that have applied to over 1.6 million port workers screened for a criminal record by TSA. The Maritime Transportation Security Act’s waiver procedure was a lifeline in preserving the jobs of thousands of port workers with a criminal record, especially workers of color. Indeed, TSA granted at least 60% of all waiver applications, which is proof that the system gives workers with a criminal record the real chance they need to establish they are indeed qualified for the job.

C. The Federal Government Should Embrace the Role of a Model Employer

The federal government’s hiring policies regulating criminal background checks and the requirements that apply to federal contracts for services should be fundamentally reformed. As Mayor Richard Daley explained when announcing Chicago’s model hiring policies in 2004, “We cannot ask private employers to consider hiring former prisoners unless the City practices what it preaches.”

By appropriate regulatory means, all federal employee and contractor hiring should expressly incorporate the EEOC’s Title VII standards regulating criminal background checks and other basic worker protections. This would prohibit blanket policies that preclude all employment of people with criminal records. Instead, the EEOC requires a clear and reasonable connection between the specific job at issue and the specific criminal record.

In addition, the federal government should follow the lead of several states that have recently removed the criminal history question from their applications for public

⁴⁰ Editorial, *New York Times* “Check It Again” (May 27, 2010).

employment, and delayed the inquiry into an individual's criminal record until the end of the hiring process. This hiring innovation, which has also been adopted by 21 cities and counties around the nation, helps level the playing field for workers with a criminal record without in any way compromising safety and security on the job.⁴¹

Finally, all federal agencies not subject to other hiring restrictions (such as law enforcement or defense department security requirements) should document and post their policies and procedures regulating criminal background checks on the web to ensure far more accountability and transparency when workers who have overcome past mistakes now seek productive government employment.

D. The Federal Government Should Aggressively Enforce Civil Rights & Consumer Protections

If aggressively enforced, current federal laws (including Title VII of the Civil Rights Act and the Fair Credit Reporting Act) would significantly improve the fairness and accuracy of criminal background checks for employment, both in the private and public sector.

In recent years, the EEOC has more actively promoted its guidelines regulating employment of people with criminal records to avoid the racially discriminatory effect of blanket bans on employment. The time has come to update and revise the EEOC's standards, which now date back 20 years, and aggressively enforce them through employer education and litigation.

The Federal Trade Commission's Consumer Protection Division also recently settled litigation against private screening firms that violated key features of the federal consumer protection laws. Under new leadership, the FTC is also well positioned to challenge the routine abuses of federal law requiring fair and accurate criminal background checks by private screening firms.

* * *

Thank you again for the opportunity to testify on this critical issue of concern to millions of hard-working families and their communities. We look forward to working with the Subcommittee to help develop more fair and effective federal criminal background check policies that promote and protect public safety.

⁴¹ National Employment Law Project, "New State Initiatives Adopt Model Hiring Policies Reducing Barriers to Employment of People with Criminal Records" (May 2010); National Employment Law Project, "Major U.S. Cities and Counties Adopt Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records" (Updated February 16, 2010).