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August 5, 2005

Mr. Richard A. Hertling
Deputy Assistant Attorney General
Office of Legal Policy
4234 Robert F. Kennedy Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Attorney General Report to Congress on
Criminal History Background and Employment Screening
(OLP Docket No. 100)

Dear Mr. Hertling:

We are writing in response to the Attorney General's request for comments on the Department of Justice's recommendations to Congress on federal policy related criminal records and employment screening (70 Fed. Reg. 32840, June 6, 2005).

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From 1972 to 1997

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The Legal Action Center, (LAC) is the only non-profit law and policy organization whose sole missions is to fight against discrimination for people with criminal histories, HIV/AIDS and histories of addiction, and advocate for sound policies in these areas. For three decades LAC has worked to combat the stigma and prejudice that keep these individuals out of the mainstream of society and help them reclaim their lives and participate fully in society as productive members of their communities and the economy. Four years ago, LAC created the National HIRE Network (**H**elping **I**ndividuals with criminal records **R**eenter through **E**mployment), a national clearinghouse to promote policies and employment practices that enable otherwise qualified people with criminal histories to obtain and retain employment. Due to our role as both direct service providers and policy advocates on behalf of individuals with prior involvement with the criminal justice system, we welcome the opportunity to comment on federal policy related to employment screening for criminal records.

More than 630,000 people are released from state and federal prisons every year - a population equal to Baltimore or Boston - and hundreds of thousands more leave local jails and juvenile detention facilities. Access to meaningful employment, including many jobs now regulated by state and federal screening laws, is critical to successful reentry into society. As President Bush expressed in his 2004 State of the Union

New York

153 Waverly Place New York, New York 10014
Phone: 212-243-1313 Fax: 212-675-0286
E-mail: lacinfo@lac.org
Website: www.lac.org

Washington

236 Massachusetts Avenue, NE Suite 505 Washington, DC 20002
Phone: 202-544-5478 Fax: 202-544-5712
Email: lacinfo@lac-dc.org



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Address, if former prisoners, "...can't find work, or a home, or help, they are much more likely to commit crime and return to prison... America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life." Additionally, through the recent introduction of the bi-partisan Second Chance Act, and the allocation of funds for the Prisoner Reentry Initiative, Congress has expressed its support for policies and programs that help people connect to a network of services, including employment related services, when they come out of prison or jail. Both the Administration and the Congress understand that if formerly incarcerated people are unfairly and arbitrarily barred access to employment after release, they are much more likely to return to crime, becoming an increasing risk and danger to themselves, their families and our communities. Therefore, it is necessary to ensure that new policies and laws that will affect these individuals do not diminish public safety, create further roadblocks to basic necessities, or undermine the nation's commitment to justice, fairness and a second chance.

A new federal regulation that seeks to standardize "... the existing statutory authorization, programs and procedures for the conduct of criminal history record checks for non-criminal justice purposes" may in fact create more unnecessary barriers for people with criminal records and hinder their chance to find employment. We have serious concerns that such an undertaking by the federal government may unintentionally have the effect of undermining myriad state laws that seek to enhance an individual's chances of obtaining employment by sealing or expunging certain conviction history records. We are also deeply concerned about issues of accuracy with state criminal record repositories, which would be the basis of the information contained in a federal standardized criminal database as well as the cost and accuracy in reporting conducted by commercial background check companies.

The following comments specifically address factors one, three, and six of the fifteen factors that the Department of Justice is to consider in making its recommendations to Congress.

Factor One - The Effectiveness and Efficiency of Utilizing Commercially Available Databases as a Supplement to the Integrated Automated Fingerprint Identification System Criminal History Information Checks.

During our years of work on behalf of persons with criminal histories, we have found that the information provided by credit reporting agencies about applicants' criminal backgrounds is often plagued with errors. Furthermore, we have observed an alarming incidence of credit reporting agencies not adhering to various states' laws regarding confidentiality and disclosure of certain types of criminal records. Credit reporting agencies often do not follow the Fair Credit Reporting Act's standards that require them to follow "strict procedures" to ensure accuracy when reporting a criminal record for employment purposes.¹

¹ 15 U.S.C. § 1681k(a)(2). The purpose of this provision of the Fair Credit Reporting Act is to "insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported, it is complete and up to date." 202-544-5478 Fax: 202-544-5712

New York

153 Waverly Place, New York, New York 10014
Phone: 212-243-1313 Fax: 212-675-0286
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Website: www.lac.org

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State statutes permit disclosure of otherwise sealed information to certain employers such as law enforcement and health care facilities. Different states have widely varying laws and protections concerning sealing and expungement, as well as various levels of suppression when disseminating information to different types of employers. Furthermore, a penal code violation that may carry the weight of a criminal charge of a felony or misdemeanor in one state may only be considered a non-criminal violation in another state, and vice versa. Differentiating between different states' penal code standards and criminal record protections is complicated and difficult for those already experienced in criminal justice matters. Private agencies that are inexperienced in the complexities of the myriad of state laws and policies are ill-equipped to determine which states and which employers are allowed to receive otherwise sealed information.

For example, one of our clients [See Attachment] has only non-criminal violations for disorderly conduct on his criminal record, which had been ordered sealed by the New York State Court. Nevertheless, these violations were reported by two separate major credit reporting agencies, one of which is based in California, to a New York employer in conjunction with our client's job application. Not only were these records sealed and therefore should not have been reported to an employer, but in one instance the credit reporting agency turned up sealed violations, during a search for felonies and misdemeanors.² Also, it is against the New York Fair Credit Reporting Act to report non-criminal convictions on a credit report.³ Our client lost two jobs because of this error and was out of work for over a year. While this is only one example, scenarios such as this commonly occur when credit reporting agencies run criminal background checks.

Lastly, as private enterprises, credit reporting agencies have little incentive to report information accurately to employers, and are focused more on the quantity of reports generated as opposed to their quality. Nevertheless, employers will continue to use their services regardless of its quality, and to the detriment of job applicants. While all systems presently in use are far from perfect, at least state and federal agencies have a significant degree of accountability, and means of redress are much clearer and readily available to job applicants.

Allowing credit reporting agencies access to fingerprint-based FBI reports will open the door to increased problems for job applicants and unjustified barriers to employment for persons with criminal records, without providing any tangible benefits. FBI reports are currently the most complete and accurate nation-wide repository available for criminal background information. However, the FBI database is not without its fair share of problems. Adding an unaccountable commercial middle-man is neither appropriate nor necessary to improve criminal background checks. To the contrary, allowing credit reporting agencies further access to criminal histories will only make a necessarily complicated system more troublesome and problematic.

There is no public policy goal achieved by utilizing commercial databases for criminal background checks. At their best, they are no more accurate than current state and federal

² In New York, violations are non-criminal charges; misdemeanors and felonies are criminal charges.

³ N.Y. Gen. Bus. Law § 380-j(a)(1). This provision states that no consumer reporting agency shall report or maintain in its file on a consumer information relative to an arrest or a criminal charge unless there has either been a criminal conviction for the offense or the charges are still pending.

databases. At their worst, and more commonly, they are much more rife with errors and inconsistencies than any governmental database. Either way, they are the least accountable and most difficult to rectify of all potential sources of criminal history information, and we are against their continued use for criminal background checks.

Factor Three - The Effectiveness of Utilizing State Databases.

The FBI does not presently possess independent assessments of state-level criminal activity. Essentially, the FBI maintains its criminal record repository by combining its own records on federal arrests and convictions with the states' criminal justice agencies' records regarding state crimes. Since the FBI necessarily relies on the states to supply it with information on state arrests and convictions, the quality of FBI's criminal records is largely dependent on the accuracy and quality of state criminal records.

In more than half of the states, 40% of the arrests in the past five years have no final disposition recorded, which means the FBI's systems is similarly incomplete.⁴ For example, LAC conducted a study in 1995 discovering that 87% of New York State Division of Criminal Justice Services RAP sheets contained some type of error.⁵ Because the bulk of FBI criminal record information is based upon offenses committed at a state penal level, and the FBI obtains information concerning these offenses from each state's criminal justice repository, the reliability of FBI criminal records is diminished.

There generally exists a false confidence in the accuracy of fingerprint-based criminal information databases as opposed to searches conducted using descriptive data. However, these databases have regularly shown themselves to be erroneous and incomplete. By adopting these policies, we commit ourselves to supplying employers and licensing agencies with information that has been proven erroneous and incomplete.

Additionally, state criminal justice agencies often neglect to inform the FBI that a record has been expunged or sealed. For example, a recent client of LAC was denied a teaching license on the basis of a youthful offender conviction that had been long-since expunged at the state level, but was nevertheless still listed in his FBI background check. Compounding these problems is the fact that such inconsistencies cannot be directly remedied by an individual, as the FBI only entertains requests to alter its records from state criminal justice repository. Clearly, inconsistencies between state and FBI criminal records can create unwarranted and excessive barriers to employment and licensing for persons with criminal records.

The FBI database may be the comprehensive resource currently available for criminal background checks, but that should not lead to the misconception that it is without errors and flaws. Any agency or employer conducting or obtaining criminal background checks through the federal database needs to be constantly mindful of the limitations inherent in the present system;

⁴ Bureau of Justice Statistics, *Survey of State Criminal History Information Systems*, 2001 (August 2003)

⁵ LEGAL ACTION CENTER, *STUDY OF RAP SHEET ACCURACY AND RECOMMENDATIONS TO IMPROVE CRIMINAL JUSTICE RECORDKEEPING* (1995).

otherwise qualified job applicants will be unfairly excluded from consideration. We view this as an extremely important overarching problem affecting the issue of criminal history background checks.

Factor Six - The Scope and Means of Processing Background Checks for Private Employers Utilizing Data Maintained by the Federal Bureau of Investigation that the Attorney General Should be Allowed to Authorize in Cases Where the Authority for Such Checks is not Available at the State Level.

Each state has its own laws regarding what types of employers are entitled to request and use fingerprint-based background checks for employment screening purposes. In the State of New York, for example, fingerprint-based background checks are obtainable by public employers, child care and home health care agencies, hospitals, financial institutions and museums, and schools and companies that hire school bus drivers. For public policy reasons, access to such highly sensitive information as criminal histories is limited to entities that serve vulnerable portions of the population or that safeguard significant financial assets.

It is the right of the individual state governments to legislate for the social and economic welfare of their citizens. In New York State, for example, the state legislature has chosen to create a very careful balance between protecting vulnerable populations and assets through criminal screening, and safeguarding the ability of persons with criminal records to obtain and maintain employment and contribute to society both socially and economically. Other states have opted for similar or differing balances, based upon the needs and desires of the public. Allowing private employers direct access to the FBI database by conducting direct fingerprint-based criminal background checks would result in the preemption of state laws governing these protections and would undermine state sealing laws.

Furthermore, each state has different levels of suppression regarding criminal background information; certain records are released or suppressed depending on who is requesting the background check. In order to lessen the stigma of conviction and give those with conviction records a meaningful opportunity to obtain gainful employment New York seals certain records to the public.⁶ For example, in New York, certain violations such as disorderly conduct are automatically sealed and it is illegal to report such violations to an employer on a background check. Other states, however, do not seal such charges.

Allowing employers from different states access to a standardized nationwide database will give them access to records from other states that they may not have a legal right to see in their own state. More specifically, a New York state employer running a fingerprint-based background check through the FBI can gain access to a disorderly conduct violation on a person's record in another state, even though these records are sealed in New York and by law should not be disclosed to an employer.

⁶ N.Y. Crim. Proc. Law § 160.55

In addition, different states have different policies regarding arrest records. Many states prohibit employers from inquiring about arrests that did not lead to conviction, while many others do not. In both New York and California, employers may not ask about arrests not resulting in a conviction. California even destroys such records three years after the arrest date, and New York forbids employers from adversely acting upon such information if they happen to learn of it. Contrarily, Missouri does not seal records of arrests not resulting in convictions and does not bar employers from asking about such arrests. Employers in states such as New York and California will easily obtain access to records of arrest not leading to conviction in other states that do not afford the same protections which will likely result in an increase in unwarranted bars to employment, in violation of certain states' policy initiatives.

Another problem inherent in allowing employers direct access to the FBI database is that they would then be responsible for interpreting complicated criminal history information. Each state has different classes of felonies for certain types of criminal behavior. A charge that carries the weight of a Class A felony in one state may be a Class C felony in another state. A charge that is a felony in one state may only be a misdemeanor in another state, and vice versa. A few states have opted to accord criminal charges to activity that is purely a vehicular violation in most other states. Employers may easily end up barring a job applicant due to the misinterpretation of the weight that a criminal charge carries in their own state as opposed to the weight it carries in the state from which the record originates. Compounding these issues is the sheer complexity of the actual fingerprinting process, which the average employer and commercial background check company is wholly inexperienced in conducting.

Allowing private employers access to a standardized federal background checking system will likely result in the circumvention of the public policy initiatives of legislatures in states such as New York and California, which have opted to afford persons with criminal records certain degrees of privacy and protection. It would also result in the decisions of various state legislatures to classify certain crimes with different weights and penalties.

Concluding Remarks

In summary, we are concerned that the extension of access to the federal criminal database will likely result in an increase in unnecessary employment barriers for people with criminal records. We feel that such an extension of access will inadvertently interfere with the individual states' policies and ability to legislate for the social and economic welfare of their citizens, especially those with criminal records who are trying to move on and make a better life for themselves. We are especially concerned with the accuracy of state criminal record repositories, the basis of the federal standardized database, which would only be exacerbated by allowing commercial background check companies and employers unfettered access to such information.

Thank you for giving us the opportunity to comment on this initiative by the federal government to regulate employment screening for criminal records on a national level, as well as the efficacy of utilizing state criminal databases for a national database and the prudence in allowing access by employers and commercial background check companies to such a database.

As national policies are developed to meet the increasing concern for security, the safety and stability of our communities can be improved by ensuring that qualified people with criminal records have meaningful employment opportunities at their disposal.

If you would like additional information about LAC's work on these issues or about the information presented in our comments please contact Alexa Eggleston, Director of National Policy, 202-544-5478, aeggleston@lac-dc.org or Laurie Parise, Director of the HIRE Network's Youth Reentry Project at 212-243-1313, lparise@lac.org.

Sincerely,

Alexa Eggleston
Director of National Policy
Legal Action Center

Laurie Parise
Director - Youth Reentry Project
National H.I.R.E. Network