

Testimony of
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In Support of New York City Fair Chance Act

Before the
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Thank you to Chair Mealy and to the members of the Civil Rights Committee for the opportunity to provide testimony today. My name is Tsedeye Gebreselassie and I am a Senior Staff Attorney at the National Employment Law Project. I am honored to testify in support of the New York City Fair Chance Act. With our key coalition partners VOCAL-New York, Community Service Society, Faith in New York and 32BJ SEIU, NELP is a lead organizational co-sponsor of this legislation.

The National Employment Law Project (NELP) Promotes Workers' Rights

Over forty-five years ago, NELP was founded to promote the employment rights of the working poor and unemployed. Today, NELP is one of the nation's leading voices promoting employment policies that deliver on the nation's promise of economic opportunity. From our main office here, in New York City, and from locations throughout the country, we shape model employment policies at the local, state and national levels through empirical research, legal and policy advocacy, and building alliances. One of our focus areas is to reduce employment barriers for people with prior arrests and convictions.

NELP has been a leader in the national movement for fair chance hiring reforms, commonly known as "ban the box." We have had the privilege of working on dozens of successful fair chance campaigns and providing expertise to support this legislation across the country. Through a national lens, we will highlight the relevant best practices and the most effective components of fair chance bills that have been developed, tried, and tested.

Collateral Consequences Exact a Heavy Toll, But Jobs Turn Lives Around

NELP estimates that there are 70 million U.S. adults with arrest or convictions—or about one in three adult New Yorkers.¹ The "box" on a job application is a barrier to jobs because it has a chilling effect that discourages people from applying. It also artificially narrows the applicant pool of qualified workers when employers toss out applications with the "box" checked, regardless of the applicant's qualifications or relevancy of the conviction to the job. Both the employer and job applicant lose out. Research affirms that having a criminal record reduces a call-back for a job applicant

¹ There are an estimated 100,596,300 subjects ("individual offenders") in the state criminal history files within the fifty 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 p.2, available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>. In New York, there are 7,379,600 subjects in the state criminal history file. *Id.* at Table 1. To account for duplication (individuals who may have criminal records in more than one state), NELP conservatively reduced the numbers cited in the survey by 30%. The U.S. Census 2013 population estimate for New York residents that are 18 years and over was 15,411,151. *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, 2013*, U.S. Census Bureau, Population Division (June 2014), available at www.census.gov. Using these estimates, there are approximately one in three adult New Yorkers with a criminal record on file with the state of New York.

by 50 percent.² When candidates answer “yes” to the conviction question on a job application, they are marked with a modern-day scarlet letter.

Persistent joblessness translates into economic losses with far-reaching consequences. One study found that lowered job prospects of people with felonies and formerly incarcerated people cost the U.S. economy between \$57 and \$65 billion in lost output in 2008.³ At the individual level, serving time reduces annual earnings for men by 40 percent,⁴ meaning families too often fall into a poverty trap.⁵

Conversely, new job opportunities for workers with prior records could translate into economic benefits for all. A 2011 study found that securing employment for just 100 formerly incarcerated people would increase their combined lifetime earnings by \$55 million, increase their tax contributions by \$1.9 million, and boost sales tax revenues by \$770,000, all while saving more than \$2 million annually by keeping them out of the criminal justice system.⁶

Clearing the path to employment for people with prior records not only can boost the local economy, but it can also significantly increase public safety. Stable employment has been found to be a significant factor in reducing the likelihood of reoffending.⁷ One study found that a 1 percent drop in the unemployment rate causes between a 1 to 2 percent decline in some offenses.⁸

The National Movement for Fair Chance Hiring Reform

Fair chance hiring helps to lift the stigma of the “record” and allows a person's skills and qualifications to come first. Momentum for the policy has grown exponentially, particularly in recent years. Just in 2013 and 2014, eight states passed legislation. Today, there are 13 states and over 80 U.S. localities across the country that have removed the conviction history question from the job application and delayed background checks until later in hiring.⁹ Tallying the populations in the states and local

² Devah Pager, “The Mark of a Criminal Record,” *American Journal of Sociology* 108(5), 2003: 937-975, available at http://scholar.harvard.edu/files/pager/files/pager_ajs.pdf.

³ John Schmitt and Kris Warner, “Ex-offenders and the Labor Market,” Washington, D.C.: Center for Economic and Policy Research, (2010) available at <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

⁴ Bruce Western and Becky Pettit, “Collateral Costs: Incarceration’s Effect on Economic Mobility,” Washington, D.C.: The Pew Charitable Trusts, (2010) available at http://www.pewtrusts.org/uploadedFiles/Collateral_Costs.pdf?n=8653.

⁵ John Tierney, “Prison and the Poverty Trap,” *The New York Times* (Feb. 19, 2013) at p. D1, available at http://www.nytimes.com/2013/02/19/science/long-prison-terms-eyed-as-contributing-to-poverty.html?pagewanted=all&_r=0c.

⁶ “Economic Benefits of Employing Formerly Incarcerated Individuals in Philadelphia,” Philadelphia, PA: Economy League of Greater Philadelphia (2011) available at http://economyleague.org/files/ExOffenders_Full_Report_FINAL_revised.pdf.

⁷ “Safer Foundation Three-Year Recidivism Study, 2008,” Chicago, IL (2008) available at <http://saferfoundation.org/files/documents/Safer%20Recidivism%20Study%202008%20Summary.pdf>.

⁸ Steven Raphael and Rudolf Winter-Ebmer, “Identifying the Effect of Unemployment on Crime,” *The Journal of Law and Economics*, University of Chicago Law School 44, (2001) available at <http://www.jstor.org/stable/10.1086/320275>.

⁹ NELP, *U.S. Cities, Counties, and States Adopt Fair Hiring Policies to Reduce Unfair Barriers to Employment of People with Criminal Records*, (Nov. 2014) available at <http://www.nelp.org/page/-/SCLP/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf?nocdn=1>.

cities and counties with ban-the-box, more than 100 million Americans—or one-third of the U.S. population—now live in a jurisdiction with a fair hiring policy.

The breadth of support for fair chance speaks to its commonsense appeal. Policymakers from both sides of the aisle are including fair-hiring laws as part of a “smart on crime” agenda to reduce criminal justice spending and increase public safety. In neighboring New Jersey, Governor Chris Christie signed state legislation applying to private employers. He stated: “Today we are also going further to reform our criminal justice system by signing legislation that continues with our promise and commitment to give people a second chance.”¹⁰

Federally, the U.S. Equal Employment Opportunity Commission (EEOC) endorsed removing the conviction question from the job application as a best practice in its 2012 guidance reaffirming that federal civil rights law regulates employment decisions based on arrests and convictions.¹¹ The Obama Administration’s My Brother’s Keeper Task Force also gave the movement a boost when it endorsed hiring practices “which give applicants a fair chance and allows employers the opportunity to judge individual job candidates on their merits.”¹²

The Fair Chance Act is consistent with state law, New York Correction Law Article 23-A, and with federal law, Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* In fact, it helps ensure that employers are in compliance with these prohibitions against employment discrimination based on prior convictions and arrests.

Today, with the addition of three states in 2014, there are 13 states representing nearly every region of the country that have adopted the policies: 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). Six states—Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, and Rhode Island—have removed the conviction history question on job applications for private employers.

In addition to these six states, Washington D.C. and 22 cities and counties now extend the fair chance policy to government contractors or private employers. Of these localities, Baltimore, Buffalo, Chicago, Montgomery County, Newark, Philadelphia, San Francisco, Seattle, Rochester, and Washington D.C. extend their fair chance laws to the local private employers.

¹⁰ State of New Jersey, Office of Governor, “We’re Giving People a Second Chance by Banning the Box,” Gov. Chris Christie (Aug. 11, 2014) available at <http://www.state.nj.us/governor/news/news/552014/approved/20140811g.html>.

¹¹ U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.* (April 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

¹² My Brother’s Keeper Task Force Report to the President (May 2014) at p.10, available at http://www.whitehouse.gov/sites/default/files/docs/053014_mbk_report.pdf.

Features of a Robust and Effective Fair Chance Act

New York City has the benefit of the significant experience from cities and states across the nation to shape a fair chance hiring ordinance that is both robust in its coverage, but also in its implementation.

- **Limiting Criminal Record Inquiry Until After a Conditional Offer of Employment:** The NYC Fair Chance Act limits criminal history inquiries until after the employer has decided to extend a conditional offer of employment. This is consistent with NELP's best practices recommendations for an effective fair hiring policy. In addition, this point of threshold inquiry is aligned with the EEOC's recommendations and the policy regulating most applicants for federal employment.
- **Limiting Lookback Period for Conviction Inquiry:** The legislation limits criminal record inquiries to felonies in the last 10 years and to misdemeanors in the last 5 years. Massachusetts' state law, enacted in 2010, has a similar lookback period (10 yrs for felonies; 5 yrs for misdemeanors). The rationale for a lookback period goes to the heart of fair chance policy reform. An unquestioned assumption is that the existence of a criminal record is an indicator of work performance. However, no research has correlated the existence of a prior criminal record with negative work behavior or with the commission of offenses in the workplace.

Indeed, an arrest record even has limited predictability of one's likelihood of being rearrested. Over time, the risk of re-arrest fades to the likelihood of arrest for the general population.¹³ For this reason, a limited lookback period is consistent with current research. Because an old record fails to predict negative work behavior there is little to be gained in the hiring process by revealing it; yet if the dated conviction is disclosed, it carries a stigma that is challenging for a worker to overcome. Other policies with lookbacks include Hawaii's state law (10 yrs), San Francisco's Fair Chance Ordinance (7 yrs), and Newark's local ordinance (8 yrs for felonies; 5 yrs for misdemeanors).

- **Notice and Right to Respond:** Under the legislation, the employer must provide the applicant with a copy of the background check, provide the analysis of the individualized assessment based on job-relevancy of the criminal record, and permit the applicant a reasonable time to respond—prior to an adverse action. These steps are consistent with federal consumer protection law (the Fair Credit Reporting Act), which requires that applicants receive a copy of the

¹³ Alfred Blumstein and Kiminori Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks," *Criminology* 47(2), 2009: 327-359, available at http://www.search.org/files/pdf/Redemption_Blumstein_Nakamura_2009Criminology.pdf.

commercial background check and have the opportunity to correct any inaccuracies prior to an adverse action. Consistent with the EEOC guidance, this process will also allow an applicant to provide any evidence of rehabilitation or mitigating factors to explain why he or she should not be disqualified from the position.

- **Effective Enforcement:** In order to ensure there is effective implementation and enforcement of the NYC Fair Chance Act once it becomes law, we urge adopting a robust outreach and education plan directed at workers and employers; developing a strategic enforcement plan that includes not only a complaint-driven approach, but also agency-directed investigations and the collection of research and enforcement data; providing penalties that meaningfully deter violations; and cultivating strong partnerships with other government agencies and community-based organizations.

The NYC Fair Chance Act Can Become a National Model

The momentum for fair hiring reform at the state and municipal levels has accelerated at a record pace in recent years. Yet, even with the recent exponential growth of these policies, we cannot underestimate the impact that a comprehensive NYC Fair Chance Act will have on the national movement. The passage of strong legislation here will not only benefit millions of New York City's families, but will also be a catalyst for policy reform throughout the country. Millions of Americans struggling to find work will finally have a second chance.