

National Employment Law Project

55 John Street, 7th Floor
New York, NY 10038
Tel. (212) 285-3025 • Fax (212) 285-3044
nelp@nelp.org

405 14th Street, 3d Floor
Oakland, CA 94612
Tel. (510) 663-5700

March 13, 2006

Mr. Harold M. Sklar
Assistant General Counsel
Federal Bureau of Investigation
CJIS Division
1000 Custer Hollow Road, Module E-3
Clarksburg, WV 26306

Re: FBI Docket Number 112

Dear Mr. Sklar:

We appreciate this opportunity to comment on the interim final regulations (71 Federal Register 1690-1695, January 11, 2006) implementing the new federal law (Public Law 108-458, Section 6402) which authorizes FBI criminal background checks of private security officers at the request of their employers.

The National Employment Law Project is a non-profit organization that promotes employment opportunities and labor protections for low-wage workers. Our Second Chance Labor Project works with advocates, policy makers and people with criminal records to ensure a more fair and effective system of employment screening for criminal records. The Project seeks to protect public safety and security while promoting the rehabilitative value of work and the basic employment rights of all workers, including those with criminal records.

Our comments address some of the key strengths of the FBI's interim final regulations, as well as those areas that could be significantly improved upon to more effectively protect public safety without undermining the employment opportunities of people with criminal records. In addition, our recommendations seek to strengthen the basic "employee rights" provisions of the regulations, focusing especially on the civil rights and privacy rights of the current and prospective employees who are now subject to the new private security background checks.

Part I: FBI Policy Should Promote Public Safety & Civil Rights by Limiting Overly-Broad Criminal Background Checks of Private Security Officers

As expressed in the preamble to The Private Security Office Employment Authorization Act of 2004 (Public Law 108-58, Section 6402), the new FBI screening requirements regulating private security officers are driven by the fundamental concern for security against terrorism and public safety combined with the growing reliance on private security to supplement traditional law enforcement functions.

However, if the federal regulations do not adequately protect the employment rights of people

with criminal records, they will have the counterproductive effect of undermining public safety by limiting employment opportunities of deserving workers who pose no threat to the nation's safety or security. Thus, the FBI's interim regulations should take into account the growing consensus of most policy makers and criminal justice professionals, that far more should be done to reduce recidivism – and thereby increase public safety – by creating job opportunities for the record numbers of people who possess a criminal record. President Bush, in his 2004 State of the Union address, joined in support of this cause, stating, “We know from experience that if [former prisoners] can't work, or a home, or help, they are much more likely to commit more crimes 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.”

Consistent with this concern that more employment opportunities be available to people with criminal records, the American Bar Association, adopting the recommendations of the Justice Kennedy Commission, urged federal policy makers to “limit situations in which a convicted person may be disqualified from otherwise available benefits, including employment, to the greatest extent consistent with public safety.”¹ These recommendations take on special significance as applied to laws that expand background checks of private security officers, including the FBI's interim regulations.

That is because the private security industry, which now employs one million workers,² provides unique career opportunities for entry-level employment for those who have limited job skills and education. Already, minorities represent nearly half (46%) of the private security workforce.³ And as more states and employers provide training and credentialing of private security officers -- leading to major improvements in wages and benefits as well as unionization -- private security is fast-becoming a rewarding occupation for many entry-level workers.

However, as criminal background checks of private security officers expand under the interim federal regulations and more state laws, they pose a substantial threat to the employment opportunities of people with criminal records and minority communities in particular. For example, according to a NELP survey of state private security screening laws, of those states that require criminal background checks of private security officers (35 states), most (25 states) impose *a lifetime* disqualification for *any* felony offense, no matter the age or seriousness of the offense. In contrast to these broad felony disqualifications, three out of four individuals now released from prison have served time for non-violent offenses, and 48% of non-violent offenders are African-American and another 25% are of Hispanic origin.⁴

Although no national figures exist, it is likely that hundreds of thousands of individuals are subjected to a criminal background check each year for private security officer positions. In California alone, according to the Bureau of Security and Investigative Services, FBI and state criminal

1 American Bar Association, Justice Kennedy Commission, Report with Recommendations to the ABA House of Delegates (August 2004), Recommendations at page 2 (adopted by the House of Delegates on August 4, 2004). Other leading authorities, including the bi-partisan Reentry Policy Council, the National Council of Black State Legislators and the Congressional sponsors of the Second Chance Act of 2006 (S.1934/H.R. 1704), have called for aggressive efforts to review and reform state and federal employment and licensing laws that go too far in denying employment to people with criminal records

2 Congressional Research Service, *Guarding America: Security Guards and U.S. Critical Infrastructure Protection* (November 12, 2004), at page 1.

3 According to the 2004 Current Population Survey, nearly one-third (32%) of private security guards are African-American and another 14% are Latinos, and three-quarters of all private security officers are men..

4 Bureau of Justice Statistics, “Profile of Nonviolent Offenders Exiting State Prisons” (October 2004).

background checks were processed on nearly 60,000 individuals in 2004. According to unpublished figures, two-thirds of those denied certification as a private security officer in California were disqualified solely because of a misdemeanor record. And nearly one-third of the misdemeanor records that led to disqualification were three years or older.⁵

Even when criminal background checks are authorized without imposing specific disqualifying offenses, it is clear that they still create an overly broad bias against employment. According to a leading study, there is at least a 40% chance that an employer will deny an applicant with a criminal record a job without regard to the nature or the offense or any other individual factors.⁶ Moreover, race discrimination “testing” surveys have documented that employers are far more likely to deny a job to person of color who has a criminal record compared to a similarly-situated white job applicant.⁷ These are the unfortunate realities in which all new policies that expand criminal background checks now have to be evaluated.

Recognizing these fundamental concerns, the courts have seriously questioned the legality of some private security screening laws. For example, a Connecticut law denying a security guard license to all those convicted of any felony was ruled unconstitutional in *Smith v. Fussenich*, 440 F.Supp. 1077, 1080 (D.Ct., Conn. 1977), even under the limited “rationality standard of review” of the 14th Amendment’s Equal Protection Clause. The court concluded that “the statute’s across-the-board disqualification fails to consider probable and realistic circumstances in a felon’s life, including the likelihood of rehabilitation, age at the time of conviction, and other mitigating circumstances related to the nature and degree of participation.”⁸

In light of this background, our comments to the regulations seek a more effective balance between the mutual goals of public safety, civil rights and the basic employment right of this expanding workforce.

Part II: Specific Comments & Recommendations to the FBI’s Private Security Screening Regulations

The following comments and recommendations are divided into three sections, consistent with the major provisions of the new private security screening law and regulations. They include Section A, which details recommendations applicable to all states and the FBI, Section B focusing on those states that currently have laws regulating criminal background checks of private security officers, and Section C focusing on those states where employers will now be authorized to request the FBI’s criminal records absent state occupational laws.

A. Comments & Recommendations Applicable to All States

⁵ Maurice Emsellem, Testimony Before the California Legislature, Assembly Business & Professions Committee (November 1, 2005) (available on-line at <http://www.nelp.org/docUploads/CATestimony%2Epdf>).

⁶ According to this survey of Los Angeles employers, over 40% indicated they would “probably not” or “definitely not” be willing to hire an applicant with a criminal record of any kind, compared with 20% who indicated they would consider doing so and 35% who indicated it would depend on the applicant’s crime. Harry Holzer, Stephen Raphael, Michael Stoll, “Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles,” (March 2003), at page 7.

⁷ Davah Pager, *The Mark of a Criminal Record*, 108 AmJ.Soc. 937 (2003).

⁸ In Illinois, a private detective licensing law was upheld on equal protection grounds in part because the state law included a 10-year limitation on the age of the felony offense after which time the individual is considered “presumptively rehabilitated.” *Schanuel v. Anderson*, 708 F.2d 316, 320 n. 3 (7th Cir. 1983).

1. Strengthen the “Employee Rights” to Prevent New Opportunities for Error and Abuse of Criminal Background Checks.

The “employee rights” section of the FBI’s interim regulations (28 C.F.R. Section 105.24) is critically important to educate workers and their employers about the basic protections that must accompany the expansion of criminal background checks in the private security industry.

However, as drafted, the employee rights protections are far too limited. For example, despite the significant opportunity for discrimination, the regulations do not reference the Title VII “job related” standards that apply to employment decisions based on criminal records. Instead, the recommendations require the following procedures: 1) the right, upon request by the worker, to a copy “from the authorized employer” of any information provided by the state; 2) the right to contact the state to determine the status of the criminal records search; and 3) the right to challenge the accuracy of the record.

Recommendations: Because the regulations broadly authorize many private employers to access FBI criminal history information for the first time, thus creating new opportunities for error and abuse related to this critically-sensitive information, we recommend several additional protections to strengthen the employee rights provisions.

- a. **Anti-Discrimination Protections:** Access to the FBI’s criminal history information creates significant potential for abuse of criminal background information by employers, including violations of labor and employment laws. Of special significance, the information provided as a direct result of the new private security law could lead to far more discrimination in violation of Title VII of the Civil Rights Act.

We are especially concerned with the routine situation where authorized employers are made aware of the “fact” of a felony conviction as required by the regulations, which will then be relied upon to reject the applicant for a job even if there is no effort by the employer to document that the offense is “job related” consistent with the Equal Employment Opportunity Commission’s policies and the requirements of many state laws.⁹ This is especially likely in cases involving lesser felonies, such as welfare fraud or marijuana possession, or where the age of the individual’s offense combined with clear evidence of rehabilitation rendered the felony or misdemeanor no longer “job-related.”

Thus, we strongly recommend that the “employee rights” section of the regulations require the employer to make a determination that there is a “direct” or “substantial” relationship between

⁹ EEOC, *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964*, 11 EEOC Compliance Manual Section 604 (Feb. 4, 1987); see also EEOC, *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*, 11 EEOC Compliance Manual Section 604 (Sept. 7, 1990). Margaret Colgate Love, “Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide,” (July 2005), at page 9. The report documents that more than half the states have similar language prohibiting a refusal to hire and/or issue a professional or occupational license unless the offense is “directly related” (or “substantially related” or “rationally related”) to the occupation.

the offense and the responsibilities of the job.¹⁰ As described by the EEOC, in evaluating criminal convictions that have a discriminatory impact on the basis of race, employers are specifically required to take into account the “nature and gravity of the offense,” the “time that has passed since the conviction and/or completion of the sentence,” and “the nature of the job help or sought.”¹¹

- b. Anti-Retaliation Protections:** In addition to the problem of race and ethnic discrimination based on criminal records, we are most concerned with the use of criminal history information by employers to illegally retaliate against current workers who exercise their labor and employment rights. For example, the National Labor Relations Board has repeatedly held that employers have retaliated against workers for union organizing by unlawfully targeting workers for criminal background checks.¹²

Accordingly, we recommend that the regulations adopt the following language referencing the applicable labor and employment laws, including the laws protecting against unlawful retaliation based on criminal record information: “Current or prospective employees are entitled to the rights available under the applicable state and federal labor and employment laws, including the right against retaliation by the employer for lawful activity based on an individual’s criminal record.”

- c. Process to Submit Evidence of Rehabilitation:** In addition, the employee rights provisions of the law do not include a procedure requiring the state and/or the authorized employer to take into account evidence of rehabilitation and other relevant information necessary to make a fitness determination. Such a procedure was adopted by the Transportation Security Administration, thus providing hazmat drivers with an opportunity to establish that, despite their record, they do not pose a safety or security threat (49 C.R.F. Section 1572.7).

Accordingly, the private security regulations should similarly authorize individuals to submit evidence of rehabilitation, and mitigating information related to the age and severity of the offense. The regulations should provide for a “waiver” of the state’s disqualifying offense (where the determination based on the FBI record is made by the state) or for the opportunity to submit mitigating information where the determination is made by the individual employer based on the FBI criminal record information provided by the state.

- d. Eliminate Employee Request Requirement:** The individual’s right to access the information provided by the state should not be dependent on the employer, as currently required by the regulations. The unfortunate reality is that some employers may withhold the information from workers or many workers may not request the information for fear or retaliation by their current or prospective employer. Accordingly, the Section 105.24(a) should require the state to provide

¹⁰ See, e.g., Wis. Stat. Section 111.321.N.Y. Correct. Law Section 750-756.

¹¹ EEOC *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964*, at page. 2.

¹² See, e.g., Consolidated *Biscuit Company and Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL-CIO, CLS*, 2004 NLRB LEXIS 9 (January 14, 2004) (“Given the absence of any credible explanation, I find that this background check was motivated by CBC’s hostility towards Teegardin’s union activity.”); *Jacobs Heating & Air Conditioning and Sheet Metal Workers International Association, Local Union No. 19*, 2001 NLRB 7636 (September 18, 2001) (finding a violation of the National Labor Relations Act because the employer “did its best not to hire Bazeski, Kennan, and Joseph by obtaining criminal background checks . . .”).

the information directly the employee, not just to the authorized employer. Similarly, the language requiring the employee to request the information should be removed from Section 105.25(e).

- e. **Incorporate Right to Access Individual's Rap Sheet:** The right to access the individual's record (set forth in Section 105.26(b)(5)) should be incorporated into the "employee rights" section of the regulations, supplementing Section 105.24(c) which describes the individual's right to challenge the accuracy of the record.

2. Define "Reasonable Efforts" Necessary to Gather Incomplete Disposition Information.

As the interim regulations properly recognize, "criminal history records maintained by the SIBs and the FBI frequently do not include information about the disposition of arrest records." 71 Fed. Reg. at 1691. Indeed, in more than half the states, 40% of the arrests in the past five years have no final disposition recorded.¹³ The prevalence of incomplete arrest information prejudices thousands of workers yearly who are denied employment even when their charges have been dropped or dismissed.

The new federal private security law properly limits the criminal history information provided to employers to convictions, not arrests. However, in the large number of cases where the arrest information is incomplete, the FBI's interim regulation directs the State Identification Bureaus (SIBs) to "make *reasonable efforts* to obtain such information to promote the accuracy of the record and the integrity of the application to the relevant standards." (28 C.F.R. Section 105.26©). (Emphasis added)..

Our major concern is that job applicants in those states with especially large numbers of incomplete arrest records will be unfairly penalized when the state does not respond promptly to the employer's inquiry. Indeed, the regulation also authorizes the SIBs to "advise the authorized employer that additional research is necessary before a final response can be provided." This not only delays the process, when the employer is likely to have other qualified candidates available, it also communicates prejudicial information to the employer which undermines the statute's protection limiting criminal history information to convictions.

Recommendation: To prevent these prejudicial delays and extraneous communications with the employer that may bias the hiring decision, Section 105.26© should include a 14-day time limit on the SIB's to identify incomplete arrest information. After the 14-day deadline, the SIBs' should respond to the employer request as to the existence of any convictions. The SIB's should be authorized to seek additional information for a period not to exceed 45 days. If additional inquiries produce evidence of a conviction, the SIB's should be authorized to report the additional conviction information to the employer.

3. Clarify the Employer's Obligations to Pay the Fingerprinting & Processing Fees

The federal law authorizes the FBI to impose "reasonable fees necessary for conducting the background checks" (Section 6402(d)(4)) and the States to "assess a reasonable fee on an authorized employer for the costs to the State of administering this Act" (Section 6402(d)(4)©)). Consistent with the federal law, the FBI's regulations state that: "The authorized employer must submit the fingerprints

¹³ Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2001* (August 2003), at page 2.

and appropriate state and federal fees to the SIB in the manner specified by the SIB.” (Section 105.23(b)).

Thus, the FBI’s regulations correctly clarify that the employer, not the prospective or current employee, should be responsible for the fees associated with the criminal background check. Otherwise, these fees would impose a financial hardship on the workers. For example, in California, private security officers must already pay a number of fees, including a registration fee of \$50, while they only earn an average of only \$11 an hour. The additional fees associated with fingerprinting and the state and federal background checks would total another \$60, thus absorbing nearly a full day’s pay, which is a major sacrifice for a low-wage working family.

Recommendation: While the regulation requires the employer to submit the fingerprint and processing fees, it does not protect against those situations where the employer may attempt to pass the fees on to the worker once employed. To ensure that this fundamental protection is not undermined, Section 105.23(b) should expressly provide that: “No authorized employer shall seek to obtain from a prospective or current employee, directly or indirectly, compensation in any form for the payment of the fee or any facility costs associated with obtaining the criminal history record check.” This language parallels New York’s regulations, which enforce the state’s related provisions related to FBI criminal background checks of nursing home workers.¹⁴

4. Expand the Requirement that Workers Receive a Copy of their Rap Sheet

Not unlike a credit report, a rap sheet is often inaccurate due to errors in reporting, the rise in “criminal identity theft,” and other serious problems now associated with criminal records. A key solution to these problems is for those who are subjected to criminal background checks to be more educated consumers by accessing their criminal records (just as they would their credit report) and correct any errors.

The FBI’s interim regulations recognize that those workers who receive a negative determination based on their criminal history record information (CHRI) should receive a copy of the rap sheet in order to review the information and challenge the decision if necessary. Thus, the regulations provide that the States shall provide “to an employee upon his or her request a copy of the CHRI upon which an adverse determination was predicated (Section 105.26(b)(5)). The FBI’s decision to provide the record precludes the “unnecessarily expensive and time consuming” process of submitting a separate request for the rap sheet to the FBI. (71 Fed. Reg. at 1691-92).

Recommendation: Recognizing the expansive role that criminal records now play in employment decisions, and the need for workers to be more vigilant about their rights to correct their records when they contain errors, we urge the FBI to not limit its policy to those who request a copy of the record. Instead, Section 105.26(b)(5) should make the record available to each person who receives a negative determination based on the rap sheet so as to ensure that all those with a criminal record are aware of its contents and are in a position to correct its errors, if any.

Otherwise, large numbers of workers, many of whom may never be made aware of their rights to access the record, will continue to have records on file with the state and the FBI that may contain

¹⁴ 10 NYCRR Section 400.23(d)(3).

inaccurate information. In addition, the right to challenge or correct the record (now provided by the regulations according to Section 105.24(c)) is significantly undermined by the inherent delays that accompany a separate request for the record and processing of the request by the State.

5. Define “Conviction” in the Regulations, Incorporating State Expungement & Other Forms of Post-Conviction Relief.

In the preamble to the regulations, the FBI recognizes various forms of post-conviction relief available under state laws, which includes expungement and sealing of selected offenses. Thus, the preamble states: “In light of the Act’s silence as to the impact of post-conviction relief, the legal import of the various forms of post-conviction relief shall be determined by applying the law of the convicting jurisdiction.” (71 Fed. Reg. at 1691).

While recognized in the preamble, the regulations themselves do not incorporate the FBI’s position that state laws apply to exempt some convictions from the reporting requirement. This is especially important as applied to the “fact” of an offense, which the law requires to be reported to employers in states that do not have legal standards regulating private security officers. This protection also promotes rehabilitation, which is the policy behind the many post-conviction relief statutes that automatically apply after the passage of a certain period of time provided the individual has not been subsequently convicted of a crime.

Recommendation: Section 105.22 of the regulations should add the following definition of conviction, taking into account post-conviction relief available under state laws: “Convicted includes any plea of guilty or nolo contendere, or any finding of guilt, except when the finding of guilt is subsequently overturned on appeal, pardoned or expunged according to state or federal law. In addition, where an individual is allowed to withdraw an original plea of guilty or nolo contendere and enter a plea of not guilty and the case is subsequently dismissed, the individual is no longer considered to have a conviction for purposes of this regulation.”

B. Recommendations Applicable to States with Current Standards Regulating Background Checks of Private Security Officers.

1. Clarify that Current State Laws Determine the Scope of the Information Available to Employers.

The new federal law and regulations apply more broadly than most current state private security laws to cover not just prospective employees, but current employees as well, and not just private security firms, but also those that employ private security guards in-house. However, as recognized by the regulations, the federal law does not “displace state licensing requirements for private security officers. A state retains the right to impose its own licensing requirements upon this industry.” (Section 105.21(b)). Based on this language, it is our understanding that employers cannot request an FBI criminal background check in those situations which are not expressly covered by the state’s private security law.

Recommendation: In the event that some employers could interpret the law more broadly, we urge the FBI to expand on Section 105.21(b) quoted above, as follows: “Where current state laws are more narrow in scope than the federal law (for example, limiting their coverage to prospective

employees and to private security firms), the information provided authorized employers is limited to the applicable state law.”

B. Recommendations Applicable to States That Have Not Adopted Standards Regulating Criminal Background Checks of Private Security Officers.

1. More Narrowly Define the Broadest Categories of Misdemeanor Offenses that Could Most Undermine the Employment Opportunities of People.

As described earlier, studies show that 40% of employers will fail to hire an individual who they find out has a criminal record, without considering the age of the offense, the severity of the offense, or the relationship of the offense to the job at hand. This hiring bias against people with criminal records has a significant discriminatory impact against minority groups, especially African Americans.

The vast potential for discrimination, unfairly denying employment to large numbers of people with criminal records, is seriously compounded by the broad categories of lesser offenses included in the federal private security law. They include all misdemeanor offenses less than 10 years old “involving dishonestly or false statement” (Section 105.23(e)(2)(ii)) or “involving the use or attempted use of physical force against the person of another” (Section 105.23(e)(2)(iii)). To limit this discrimination and encourage more uniformity in the treatment of workers across the states, the regulations should include federal standards and definitions regulating the broad categories offenses of the private security screening law.

Recommendation: At a minimum, the states should be required to publish a list of the specific offenses to be covered within each of the broad categories of misdemeanors set forth in the law. In doing so, the regulations should also require the states to establish that the specific offenses are indeed “directly” or “substantially” related to the position of a private security officer. The state should only include those offenses that evidence a safety or security risk, thus excluding most petty offenses. As recommended above (Section II.A.1.a.), it is especially important in these cases that the information reported to the employer include strong cautionary language urging employers to also take into account the age and severity of the offense and evidence of rehabilitation.

2. Clarify that the “Fact” of the Conviction Reported to the Employer by the State Is Limited to the Specific Offense, Not Additional Information Related to the Crime.

Consistent with the federal law, the FBI’s interim regulations require the states to notify the employer “as to the fact” (Section 105.23(e)(2)) of whether the individual has been convicted of one of the three categories of offenses (i.e., any felony, crimes “involving dishonesty or false statement,” or a crime involving the use of physical force).

However, the regulations do not clarify the level of detail to be provided the employer, which could create confusion and lack of uniformity among the states. For example, the “fact” of the conviction, read literally, could be interpreted by some states to include only an indication as to the category of the offense (e.g., the individual was convicted of a felony), not the specific offense. If adopted by a state, we believe that this approach would seriously penalize the disproportionate numbers of people who were convicted of non-violent felonies, not violent felonies.

Recommendation: The state reports to the employers should be limited to the specific conviction (including the degree or seriousness of the offense) and the date of the conviction. The state's report should also indicate which of the three specific categories the individual's offenses falls under. No additional information related to the underlying crime or the sentence should be reported to the employer.

* * *

Thank you for the opportunity to comment on the FBI's interim regulations. The final regulations will have a significant impact on the employment opportunities and employer rights of large numbers of workers now employed by the expanding private security industry.

Sincerely,

Maurice Emsellem
Policy Director