

Employee Rights and Employer Responsibilities in a New Era of Criminal Background Checks for Employment



EEOC Technical Assistance Program Seminar

September 10, 2009
Pasadena, CA

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National Employment Law Project's Second Chance Labor Project

NELP has been a leader in the movement to restore fairness to the process of criminal background checks and remove unnecessary or badly-designed barriers to the employment of people with criminal records.

NELP's Second Chance Labor Project promotes model employment policies and basic protections, such as Title VII of the Civil Rights Act of 1964, that allow qualified workers with records to attain and retain quality jobs.

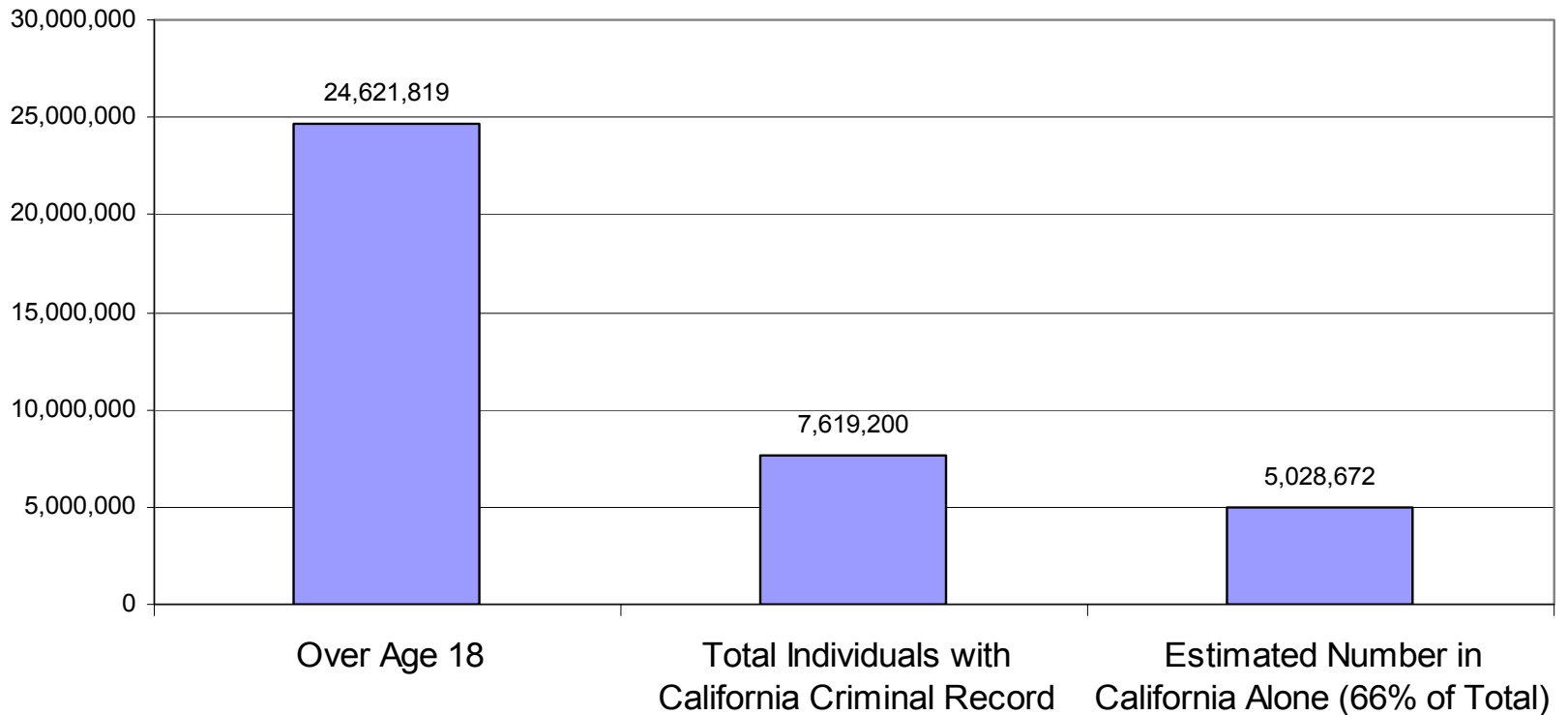


Overview

- The Employment Challenge for Individuals with Criminal Records & Impact on Communities
- Proliferation of Criminal Background Checks in Employment & Disproportionate Impact on People of Color
- The EEOC & Criminal Record Screening Protections
- California & Consumer Protection Laws that Apply to Criminal Background Checks
- Model Hiring Policies that Reduce Discrimination
- Incentives for Hiring Individuals with Criminal Records

About One in Five Adult Californians Possess a Criminal Record on File with the State

(Bureau of Justice Statistics, 2001; U.S. Census 2000)

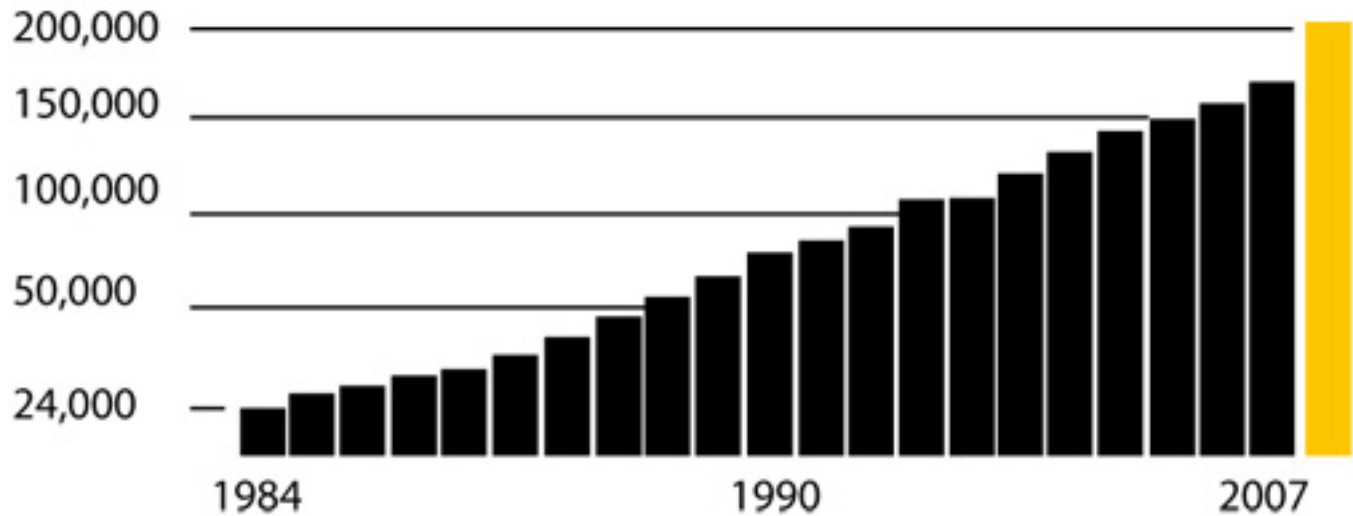




Some Hard Facts About the Criminal Justice System

- More than 700,000 people are released from U.S. prisons every year (four times more than 25 years ago).
- Nearly two-thirds released from prison served time for non-violent offenses, including drug offenses (37%) and property offenses (25%).

Rising Rates of California Imprisonment

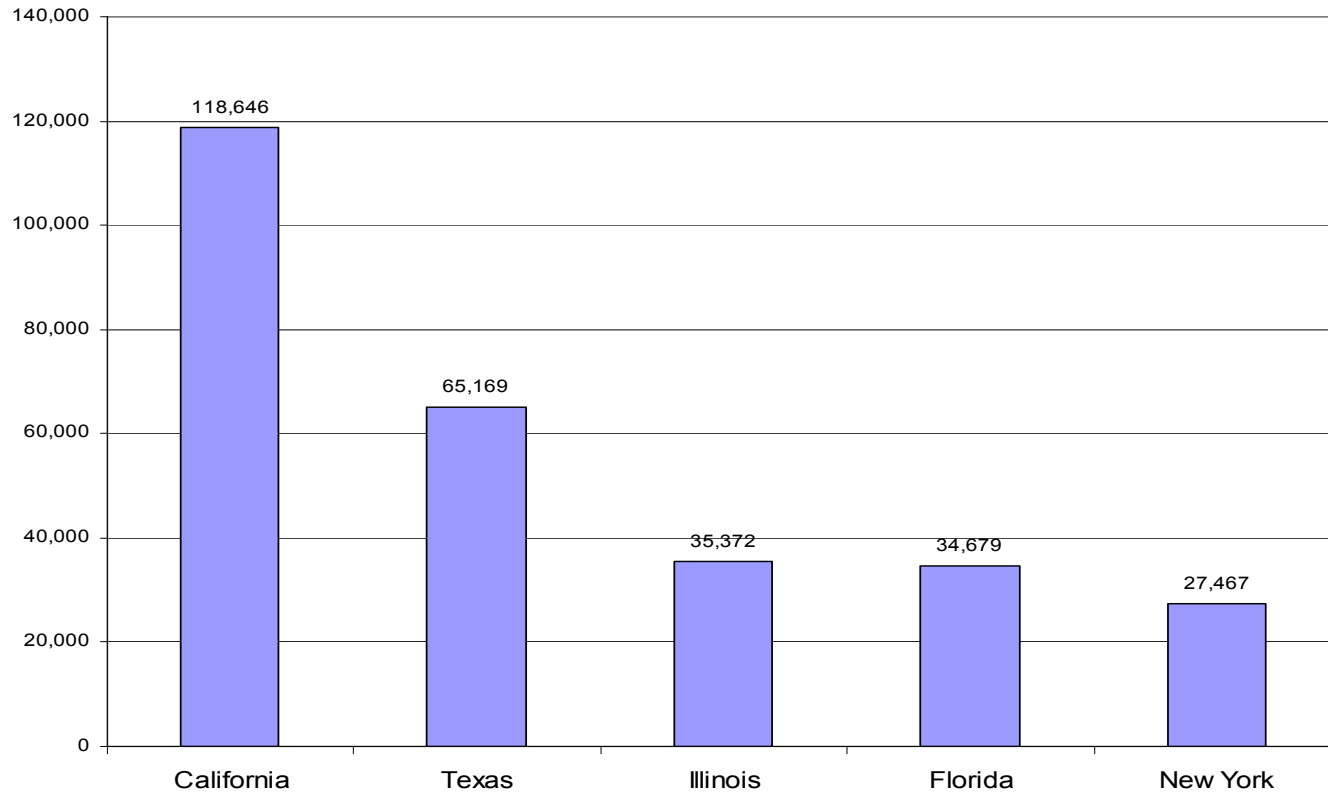


State population grew by 50%

Prison population grew from 24,000 to over 170,000 (500 percent increase)

California's "Reentry" Challenge: Nearly Double the Prisoners Released Compared to Any Other State (19.4% of Nation's Total)

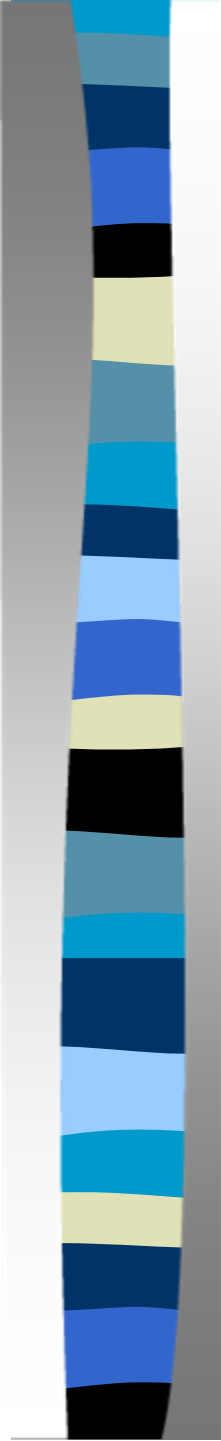
(Bureau of Justice Statistics, 2003)





People of Color Disproportionately Impacted by the Criminal Justice System

- The war on drugs contributes to the over-representation of people of color in the criminal justice system.
- African Americans comprise 14% of regular drug users, but are 37% of those arrested for drug offenses and 56% of persons in state prison for drug offenses.
- 2 out of 3 non-violent offenders released from prison each year are people of color (48% African-American, 25% Latino).



Racial Disparities in the Criminal Justice System: African Americans are Incarcerated at a Rate Six Times that of Whites

All Men and Women (ages 18 and over)

All.....	1 in 102
White.....	1 in 245
Latino.....	1 in 96
African American.....	1 in 41

Men (ages 18 and over)

All.....	1 in 54
White.....	1 in 106
Latino.....	1 in 36
African American.....	1 in 15
African American (Men ages 20 – 34)..	1 in 9

(Pew Center on the States, "One in 100: Behind Bars in America 2008")



More People of Color with Criminal Records, Combined with Increased Records Checks

■ Private Employers & Screening Firms:

- In 2004, 80% of large employers conducted criminal background checks (up 29% since 1996), often including blanket hiring prohibitions.
- Proliferation of private screening firms conducting inaccurate and inexpensive criminal background checks.

■ Federal Screening Mandates:

- Federal laws and Office of Personnel Management regulations mandate screening of millions of entry-level and skilled workers, often including few employment protections.
- In 2002, for the first time, the FBI conducted more fingerprint-based background checks for civil purposes than for criminal investigations (5 million for employment purposes).
- The FBI's rap sheets are 50% incomplete due mostly to failure of the states to report dispositions on arrests.

■ State Screening Mandates:

- State laws require criminal background checks of hundreds of entry-level occupations (including schools, transportation, private security and health care), often including blanket hiring prohibitions.



Home

Order

Order Lookup

Sample Record

Search ICC

Employee Check

FAQ

InstantCriminalChecks.com Order Form

Person You Are Investigating:

* = Required Information

*First Name:

Middle Initial:

*Last Name:

Suffix (if any):

 (Jr, Sr, III)

Social Security Number:

 - -

*Date of Birth:

[Month] [Day] [Year] Please Select Statewide, 3-State or National Criminal Check:**Statewide Criminal Check \$24.95** California multi-county (CA) [view state descriptions](#)

– Add 2 additional states for only \$20 –

3-State Criminal Check \$44.952nd –Select 2nd State \$20– 3rd –Select 3rd State FREE–

OR

National Criminal Check \$59.95 National Criminal Check[view national description](#)

46 state national search plus Washington DC:

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Contact Information:

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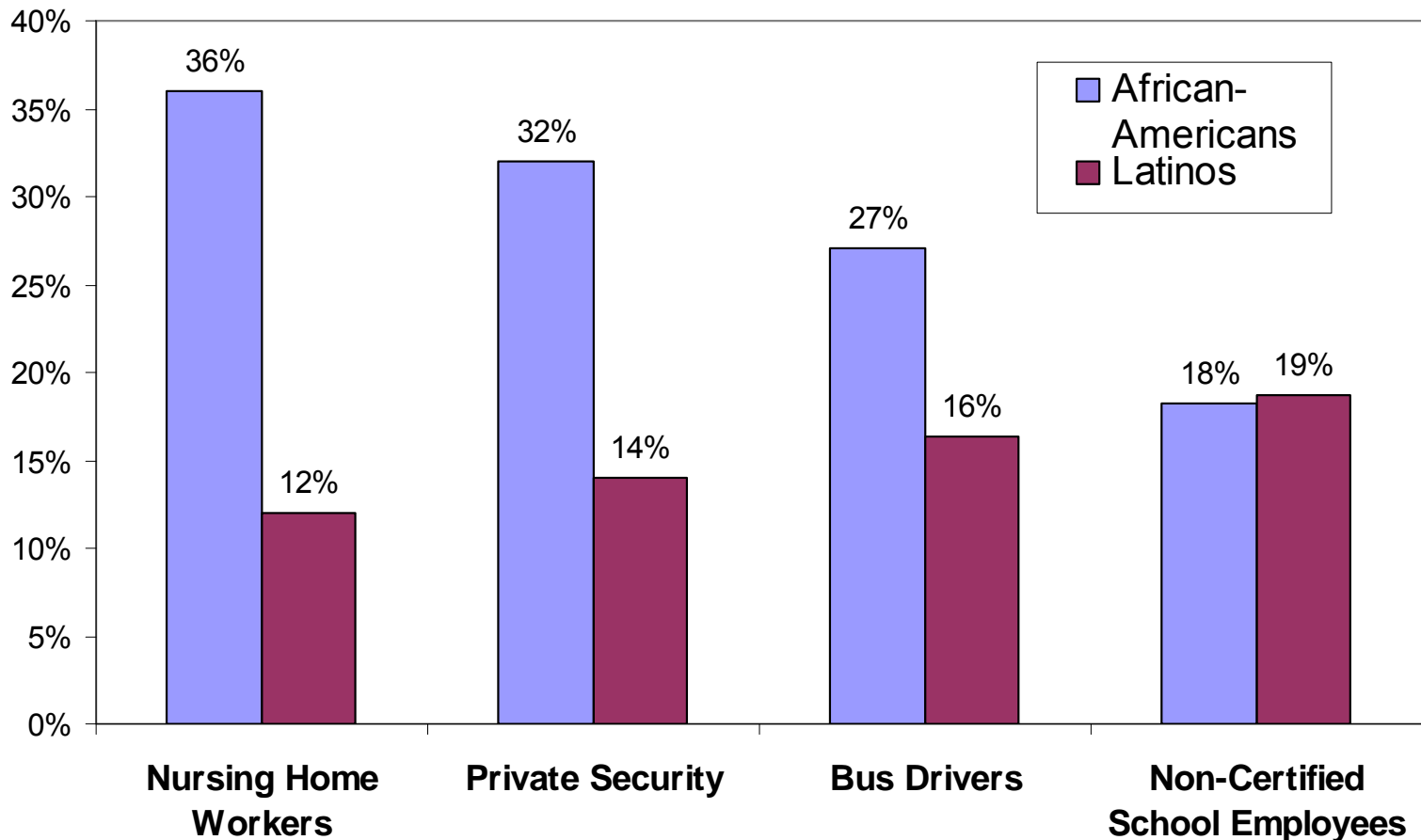
Enter name exactly as appears on your card

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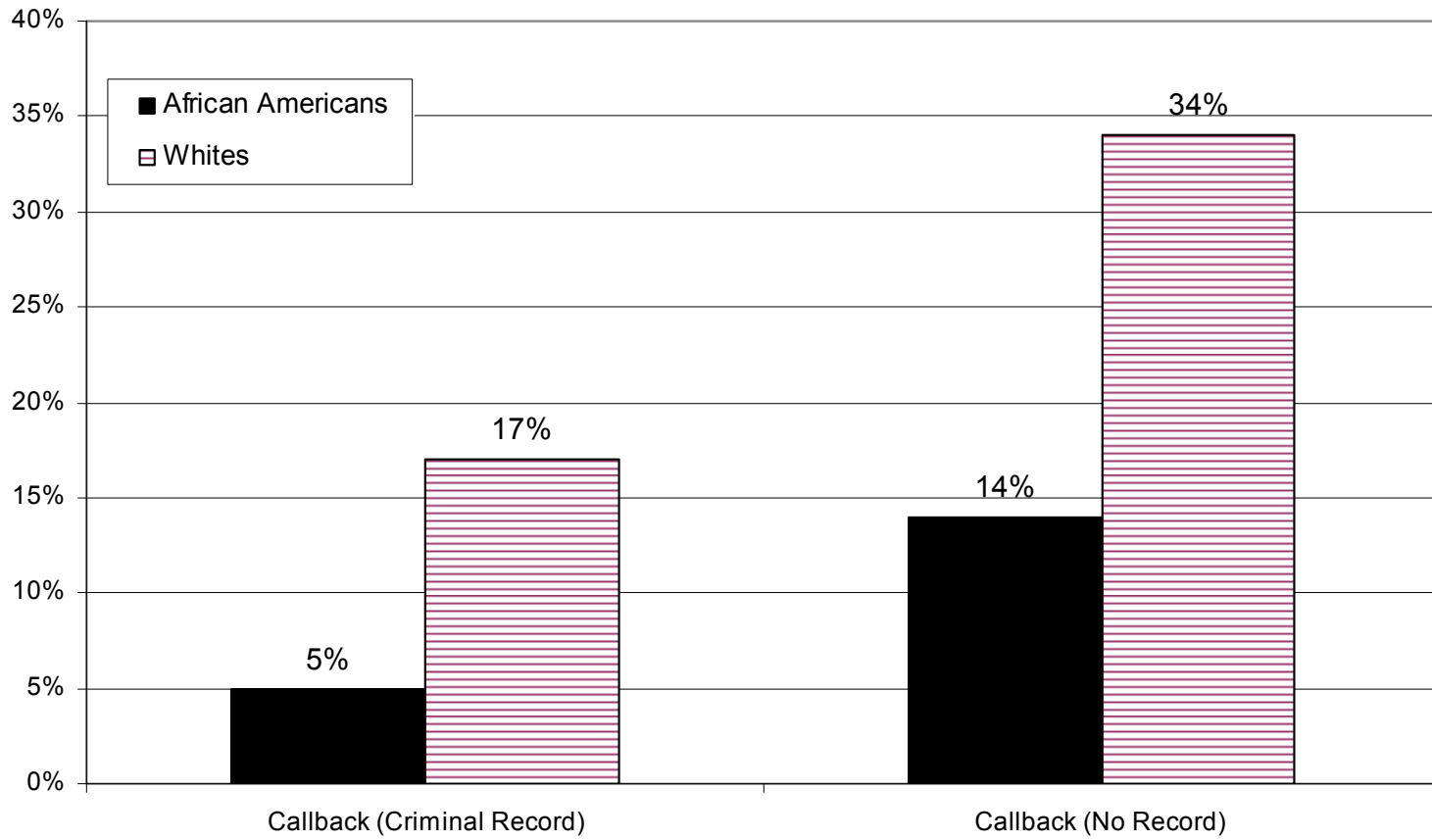
*Card Number:

Racial & Ethnic Profile of Selected "At-Risk" Industries Subject to Laws Denying Employment for Criminal Records



Employment Testing Survey Documents Impact of a Criminal Record on Interview Callbacks, by Race

(Devah Pager, "The Mark of a Criminal Record,"
American Journal of Sociology (March 2003).)





People with Prior Convictions Are Often Not Hired

A major survey of Los Angeles employers found that over 40% of employers would “probably not” or “definitely not” be willing to hire an individual with a criminal record.
(“Employer Demand for Ex-Offenders, 2003” Holtzer, Raphael, Stoll)

Recently released parolees face unemployment levels between 70-80%, compared to the 11.4% overall unemployment rate for L.A. County.
(“Back to the Community: Safe and Sound Parole Policies,”
Little Hoover Commission)

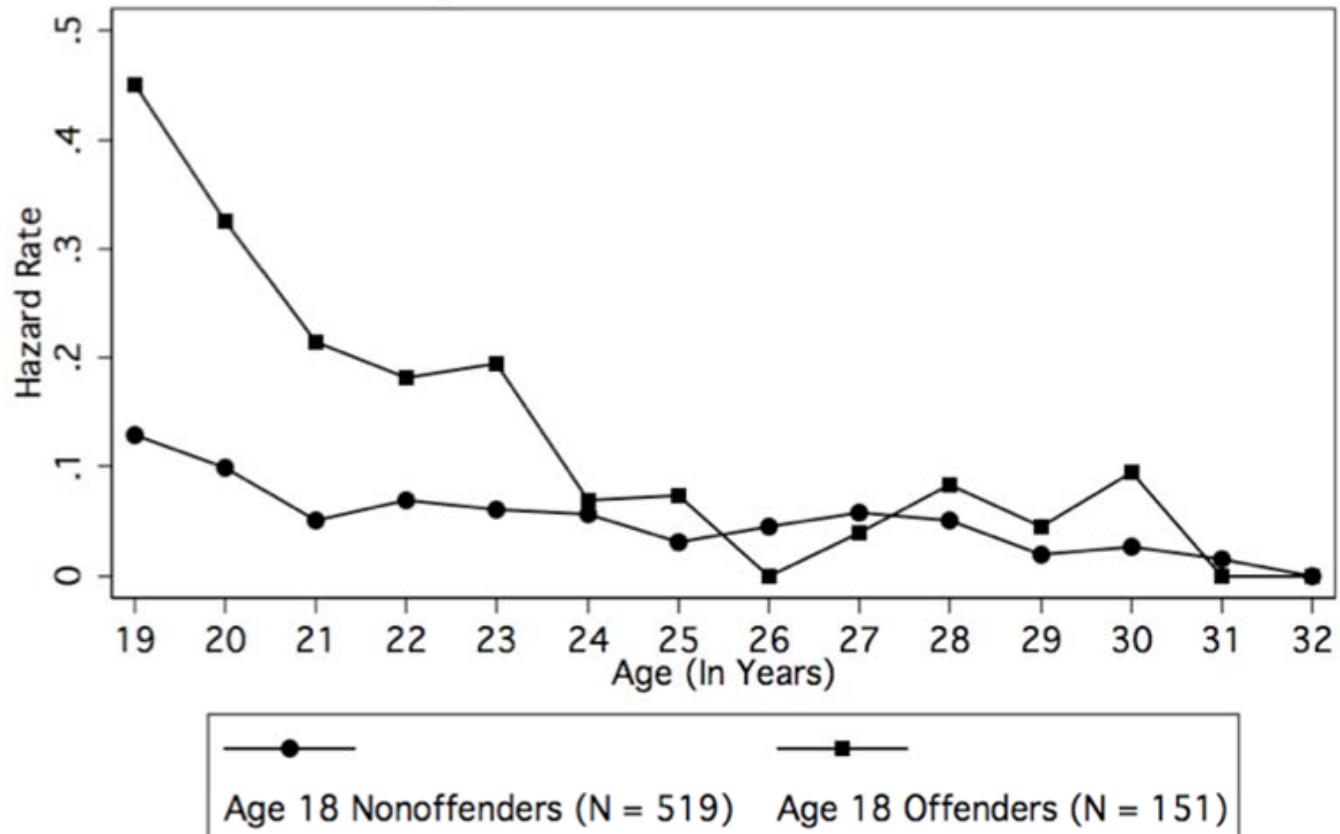


Recent Research Demonstrates that People with Arrest and Conviction Histories Do Not Present Ongoing Risk

- Carnegie Mellon researchers recently concluded that not only were offenders who had no further contact with the criminal justice system at or below the risk of arrest of non-offenders after about 5 years, but some offenses show even lower recidivism rates.
- People who had committed burglary at age 18 were as unlikely to re-offend as those who had never been arrested after 3.8 years, the same was true after 4.3 years for those who had committed aggravated assault. (Alfred Blumstein and Kiminori Nakamura, “Redemption’ in an Era of Widespread Criminal Background Checks,” 2009)
- Earlier research also demonstrated that after about 5 years, offenders were no more likely than non-offenders to be re-arrested. (Kurlychek, et al. “Scarlet Letters & Recidivism: Does An Old Criminal Record Predict Future Criminal Behavior?,” 2006)

After 5 Years, Offenders No More Likely Than Non-Offenders to Be Re-Arrested

(Kurlychek, et al. "Scarlet Letters & Recidivism: Does An Old Criminal Record Predict Future Criminal Behavior?," 2006)

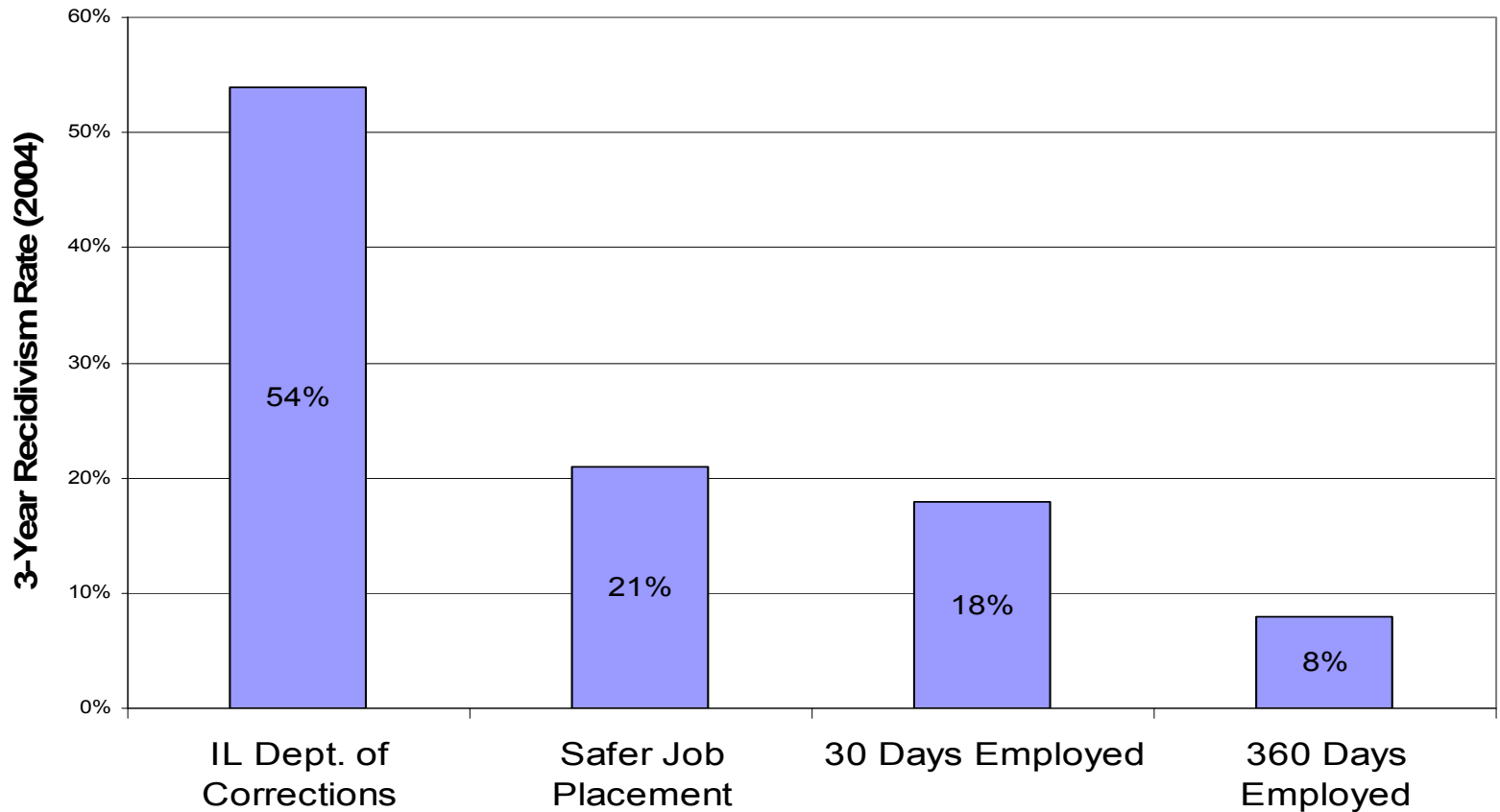




Understanding the Research Findings

- Employers should be aware that these studies look at general recidivism risks, not the risk that someone who has an arrest or conviction history will commit a work-related offense that impacts the individual's ability to perform the job or will commit an offense on the job, which is reportedly much lower.
- Limited data from employer surveys show that 95% of employers report a positive experience when hiring applicants with criminal records. (Chartered Institute of Personnel and Development, "Employing Ex-Offenders to Capture Talent," 2007)

Employment Significantly Reduces Recidivism (Results of Chicago's Safer Foundation Job Placement for 1,600 Recently Released from Prison)





EEOC Guidances on Criminal Records

- EEOC Policy Guidance on the Consideration of Arrest Records in Employment Decisions (issued 9/7/90)
 - EEOC Policy Statement on the Issue of Conviction Records (issued 2/4/87)
 - EEOC Policy Statement of the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (issued 7/29/87)
- The guidances are available on the EEOC website:
<http://www.eeoc.gov/policy/guidance.html>



Recent EEOC Activities Enforcing Criminal Record Screening Protections

- EEOC held a meeting in November 2008 on employment discrimination faced by individuals with arrest and conviction histories, to gather input for a forthcoming revised and updated policy guidance.
- EEOC has initiated investigations where federal agencies' criminal record screening policies are inconsistent with EEOC guidance in this area (Census Bureau).
- Several EEOC offices have issued “findings of cause” for discrimination based on employers' criminal record screening policies that violate Title VII and EEOC guidance.



The EEOC's Criminal Records Policies: The Basics

- “Disparate impact” presumed: The Commission has recognized that “an employer’s policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on [African American and Latino workers] in light of statistics showing that they are convicted at a disproportionately higher rate than their representation in the population.” (EEOC Policy Statement on the Issue of Conviction Records (issued 2/4/87))
- “Business necessity” required: Routine violations of Title VII are established by employer hiring practices that reject workers with an arrest record or any conviction, in the absence of a justifying business necessity.



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EEOC Policy Strictly Limits Consideration of Convictions

■ Business Necessity Defense:

Employers must justify employment decisions based on convictions, as follows:

- The conviction must be “job-related” taking into account the nature and gravity of the offense or offenses, and the nature of the job held or sought; and
- The conviction is still determinative given the time that has passed since conviction and/or completion of sentence.

■ Rejected Defenses:

Significant minority representation in the employer’s existing workforce (or the “bottom line”) is not a defense to a disparate impact claim. (*Connecticut v. Teal*, 457 U.S. 440 (1982))



EEOC Policy Typically Prohibits Employment Decisions Based on Arrests

- Even where the employer did not rely on the arrest record, any pre-employment inquiry into arrests by the employer routinely violates Title VII. (1990 EEOC Arrest Guidance)
- As recognized by the EEOC guidance, CA is among the numerous states that bars employers from inquiring about arrests that do not lead to conviction. (CA Labor Code § 432.7(a))
- To establish a “business necessity” defense to consideration of arrest information, an employer has a heavy burden to prove the following:
 - The conduct must be job-related;
 - The employer must establish that the employee actually engaged in the underlying conduct alleged in the arrest; and
 - The conduct must be relatively recent.



Employers Advised to Re-Evaluate Hiring Policies

“As a result of Title VII and notice from the EEOC, employers are well advised to review their hiring practices to ensure that they are not discriminating against members of protected classes by automatically denying employment without considering whether there is a business justification for disqualification based on the crime and the job.”

- *Employment Screening Resources (a national employment screening background firm) Top Ten Trends in the Pre-Employment Background Screening Industry for 2009*



Recent Legal Activity Enforcing Title VII and EEOC Standards for Hiring People with Criminal Records

- EEOC lawsuit filed in Michigan last year against a major staffing firm, Peplemark, Inc.
- Several EEOC charges have been filed by private and non-profit lawyers against other major employers, including Comcast, Lowe's, and Madison Square Garden.
- NELP and over a dozen allies recently asked the EEOC to investigate Manpower/Bank of America job postings that contained absolute bars to hiring individuals with arrest or conviction histories, alleging discrimination against otherwise qualified African American and Latino applicants.



California Laws that Also Apply to Employer Criminal Background Checks

- Most employers can only ask about convictions, not arrests. (Cal. Labor Code § 432.7(a))
 - Exceptions include law enforcement and certain drug arrests for positions in a health care facility or pharmacy.
- Employers are barred from asking about:
 - arrests for which a diversion program was completed (Cal. Labor Code § 432.7(a); 2 CCR § 7287.4(d)(1)(C))
 - certain marijuana-related convictions, if the conviction is over two years old (Cal. Labor Code § 432.8)
 - misdemeanor convictions that have been dismissed pursuant to Cal. Penal Code § 1203.4, or any conviction that has been sealed or expunged (e.g., juvenile records) (2 CCR § 7287.4(d)(1)(B))



Consumer Protection Laws that Apply to Criminal Background Checks

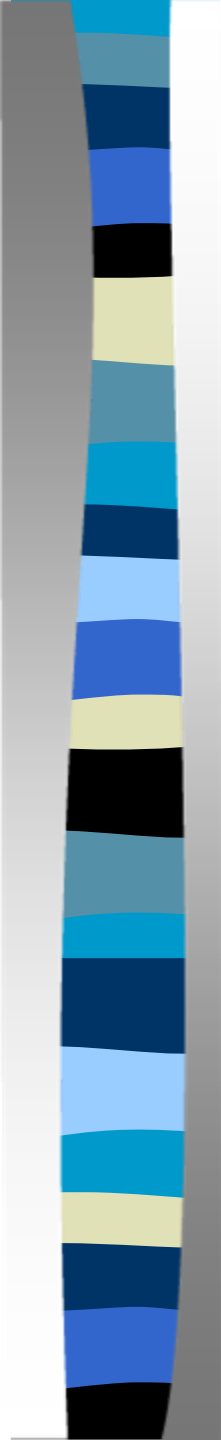
- Arrests: Under CA consumer protection laws, background check companies cannot report an arrest that has not led to a conviction (unless the company has verified in the last 30 days that the arrest is still open).
- Convictions: Under CA law, convictions dating back more than 7 years **cannot** be reported to the employer by a private screening firm.

(CA Investigative Consumer Reporting Agencies Act, CA Civil Code § 1786)



Federal and State Consumer Protection Laws: Employer Obligations

- Notice and Authorization Required: The employer requesting the report must provide clear written notice and obtain written authorization from the job applicant. (15 U.S.C. § 1681b(b)(2)(A))
- “Adverse Action” Procedures Required: If the employer plans to take “adverse action” (not hiring, firing) based on the report, the employer must provide the applicant with a **copy of the report** and a copy of the Federal Trade Commission Summary of Rights **before** the action is taken. This gives applicants the opportunity to clear up any inaccuracies in the report. If the employer goes forward with the adverse action, it must provide notice to the applicant about the adverse decision, the contact information of the reporting agency, and the applicant’s right to dispute the accuracy or completeness of the report. (15 U.S.C. §§ 1681b(b)(3) and 1681m(a))
- Copy of Report: Under CA law, workers are entitled to a copy of the report within three days of when it’s provided to the employer – even if adverse action is not contemplated. (CA Civil Code § 1786.16(b))



Beware of Common Problems with Background Checks Prepared by Private Screening Firms

- Inaccuracies: wrong grade of offense, failure to list disposition of an arrest, or that a conviction was overturned on appeal
- False positives: mismatched records of people with similar names and birthdates
- “Over-reporting” information with a disclaimer when uncertain of a match (Ex: “There is a conviction with Mr. X’s name. This may or may not be your Mr. X.”)
- Presenting information in misleading format: repeating information on the same case in upper and lower courts, listing all charges even though the majority of the charges (often the most serious) were dropped
- Reporting arrests that did not lead to conviction or convictions that are more than 7 years old (these are violations in CA)



Hiring Policies that Eliminate Potential Discrimination

- Remove the question regarding conviction history from the initial job application and move the background check process to the end of the hiring process, if at all.
 - Reduces discouragement of competent, well-qualified applicants who happen to have a past conviction.
 - Allows applicants' qualifications to guide decision making
- Centralize review of conviction history information within the Human Resources Department instead of individual hiring managers
 - Eliminates potential bias against people with convictions
 - Ensures review of criminal history information is consistent with Title VII requirements



Major U.S. Cities Lead the Way for the Private Sector

- Baltimore, Boston, Chicago, Minneapolis, New Haven, Oakland, Portland, St. Paul, San Francisco, and several other cities and counties have adopted hiring policies that promote employment of people with criminal records without compromising public safety.
- Chicago Mayor Richard Daley: “Implementing the new policy won’t be easy, but it’s the right thing to do. . . . *We cannot ask private employers to consider hiring former prisoners unless the City practices what it preaches.*”



Additional Incentives for Hiring Individuals with Criminal Records

- The Department of Labor offers a **free bonding program** for “at-risk” job applicants, including people with criminal records, indemnifying employers for loss of money or property due to an employee’s dishonesty or theft. Employers seeking bonding may call 1.877.US2.JOBS (1.877.872.5627) to locate the State Bonding Coordinator. <http://www.bonds4jobs.com>
- Employers can take advantage of the federal **Work Opportunity Tax Credit**, which allows a company to claim up to a \$2,400 tax credit for hiring an employee with a felony conviction within one year of the date of his or her conviction or release from incarceration.
http://www.edd.ca.gov/Jobs_and_Training/WOTC_Frequently_Asked_Questions.htm/
- Employers can also take advantage of state and local tax credits. CA provides tax credits for hiring “ex-offenders” and cities like San Francisco also offer tax credits for employers hiring qualified workers with criminal records.
http://www.sfgov.org/site/uploadedfiles/tax/business_zone/entzone.pdf