

Memorandum

From:	Maurice Emsellem, Policy Co-Director Michelle Natividad Rodriguez, Staff Attorney	Date:	September 12, 2011
To:	Martin Kennedy Director, Division Continuing Care Providers Survey and Certification Group CMCS/CMS	Re:	Criminal Background Check Protections for Long-Term Care Workers

SUMMARY

As recommended by the HHS Office of Inspector General, the Centers for Medicare & Medicaid Services (CMS) is developing model background check procedures for the states to apply to long-term care workers under the Affordable Care Act (P.L. 111-148; P.L. 111-152). *See Nursing Facilities Employment of Individuals with Criminal Convictions*, OEI-07-09-00110 (hereinafter *OIG Report*) at iii.

The Affordable Care Act (ACA) initiative builds on the background check pilot program of prospective direct patient access employees authorized by Section 307 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (P.L. 108-173) (hereinafter “pilot program”). The ACA expanded on the pilot program in 2010, providing \$140 million in state grants to implement new criminal background check requirements for long-term care workers.

Protecting vulnerable persons from harm is a laudable and necessary goal of background screening in the long-term care industry. However, this goal can and should be met without screening out workers with criminal records who do not pose an unacceptable risk to safety and security. To help support this effort, this memo provides the National Employment Law Project’s (NELP) recommendations to CMS for states implementing the ACA’s background check program for long-term care workers.

In summary, NELP urges CMS to adopt the following worker protections, which are discussed in detail below: (1) a robust appeals process that permits workers to challenge inaccurate records preceded by the resolution of missing dispositions; (2) a rehabilitation review process that permits workers to demonstrate that they do not pose a threat to vulnerable people in their care; (3) reasonable limitations on disqualifying offenses; and (4) reasonable limitations on the length of disqualifications.

THE POLICY CONTEXT

There is a growing bi-partisan movement in the states and at the federal level to promote public safety by reducing barriers to employment of people with arrest and conviction records.

For example, the Obama Administration recently created the Reentry Council to coordinate federal policy on the issue. Attorney General Eric Holder, Health and Human Services Secretary Kathleen Sebelius, and several other cabinet-level officials actively participate in the Reentry Council. Underscoring the need to address employment barriers, the Attorney General recently urged each state to eliminate laws that impose unnecessary burdens on people with convictions without increasing

public safety.¹ As studies have shown, providing stable employment to individuals with a criminal record lowers recidivism rates and thus increases public safety.² In addition, the Equal Employment Opportunity Commission (EEOC) held a hearing in late July on the discriminatory impact on people of color resulting from criminal background checks for employment.³

A new body of research demonstrates that a prior criminal record is often not a reliable indicator of an individual's propensity to violate the law. Questioning the overreliance on criminal records as a screening tool, these recent studies show that individuals with a prior arrest who have not been re-arrested over a period of four to seven years are statistically no more likely than someone in the general population to commit a crime.⁴ These findings strongly support strict age limits on the use of prior criminal records in employment and licensing decisions.

With an estimated 65 million U.S. adults who have a criminal record that may show up on a routine criminal background check,⁵ the time has come to closely scrutinize background checks policies, including their impact on workers, employers and the struggling economy. Overbroad exclusions of people who are qualified caregivers also have a deleterious impact on the long-term care industry given the chronic shortages of qualified workers.

In a recent paper chronicling the demand for health care workers, it was projected that the nation will require 10–12 million new and replacement direct care workers over the next 10 years.⁶ In 2007, 97 percent of states reported “serious” or “very serious” direct-care workforce shortages.⁷ Given this reality, the ACA specifically requires HHS and the Attorney General to evaluate whether the new background checks reduce the available workforce of long-term care workers. Sec. 6201 (a)(7)(A)(ii)(III).

Taking into account the high demand for long-term care workers and the concentration of people of color in the field, it is also critically important to limit the discriminatory impact of the

¹ Attorney General Holder letter to state Attorneys General (April 18, 2011), *available at* http://www.nationalreentryresourcecenter.org/documents/0000/1088/Reentry_Council_AG_Letter.pdf

² According to a study in Illinois that followed 1,600 individuals released from state prison, only 8 percent of those who were employed for a year committed another crime, compared to the state's 54-percent average recidivism rate. American Correctional Assoc., 135th Congress of Correction, Presentation by Dr. Art Lurigio (Loyola University) Safer Foundation Recidivism Study (Aug. 8, 2005).

³ EEOC Press Release, “Commission to Examine Arrest and Conviction Records as a Hiring Barrier,” (July 20, 2011), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/7-20-11.cfm>.

⁴ Alfred Blumstein, Kiminori Nakamura, “‘Redemption’ in an Era of Widespread Criminal Background Checks,” *NIJ Journal*, Issue 263 (June 2009), at p. 10; (the findings vary depending 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).

⁵ NELP, *65 Million “Need Not Apply:” The Case for Reforming Criminal Background Checks for Employment* (2011) at p. 3, *available at* www.nelp.org.

⁶ *Health care workforce: Future supply vs. demand*, Alliance for Health Reform (April 2011) at p. 4, *available at* http://www.allhealth.org/publications/Medicare/Health_Care_Workforce_104.pdf.

⁷ *The 2007 National Survey of State Initiatives on the Direct-Care Workforce* (Dec. 2009) at p. 2, *available at* <http://directcareclearinghouse.org/download/PHI-StateSweepReport%20final%2012%2009%2009.pdf>.

ACA's long-term care background check policies.⁸ Indeed, people of color represent about half of all paraprofessionals employed in the long-term care industry, and 33 percent are African American.⁹ African Americans are also far more likely to have had contact with the criminal justice system. They account for 28.3 percent of all arrests in the United States, although they represent just 12.9 percent of the population.¹⁰ African Americans also account for about half of all those convicted of certain offenses, including drug crimes, robbery and weapons possession.¹¹

Because of the overrepresentation of people of color in the criminal justice system, the EEOC issued detailed guidelines strictly regulating prohibitions against hiring people with arrest and conviction records.¹² In order to comply with Title VII of the Civil Rights Act of 1964, the EEOC specifically requires the employer to consider the following factors:

- (1) the nature and gravity of the offense or offenses;
- (2) the time that has passed since the conviction and/or completion of the sentence; and
- (3) the nature of the job held or sought.

This case-by-case approach ensures that people with criminal records are not barred from employment for youthful indiscretions, minor offenses, or more serious offenses from the distant past, while also protecting safety and security at the workplace. Licensing schemes regulating most medical professionals, including doctors and nurses, routinely utilize a case-by-case review. Thus, long-term care workers should be similarly protected when seeking paraprofessional and entry-level positions.

BACKGROUND ON STATE AND FEDERAL WORKER PROTECTIONS

I. The New Background Check Mandates of the ACA

Section 6201 of the Affordable Care Act mandates that the states receiving federal funds adopt substantive and procedural policies regulating the background check process, which include stronger worker protections than those adopted by the pilot program (Section 307, P.L. 108-173).

⁸ See, e.g., *Background Report on the U.S. Home Care & Personal Assistance Workforce and Industry, PHI* (Jan. 2011) at pp. 9-10. Minorities account for roughly half of personal care aids and home health aides are 47 percent minorities.

⁹ Institute for the Future of Aging Services, *The Long-Term Care Workforce: Can the Crisis be Fixed?* (Jan. 2007), at p. 5.

¹⁰ U.S. Dept. of Justice, Federal Bureau of Investigation, *Crime in the United States, 2009*, at Table 43. See U.S. Census Bureau, Population Division, Table 3, Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States: April 1, 2000 to July 1, 2009 (NC-EST2009-03), available at <http://www.census.gov/popest/national/asrh/NC-EST2009-srh.html>.

¹¹ Specifically, African Americans represent 44 percent of those convicted of felony drug offenses, 57 percent of robberies and 55 percent of weapons offenses. Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006* (Revised Nov. 22, 2010), at Table 3.2.

¹² The U.S. Equal Employment Opportunity Commission, *Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq. (1982), Feb. 4, 1987.

First, Section 6201(a)(4)(B)(iv) requires an “independent process” to appeal and dispute the accuracy of the background check. In contrast, Section 307(b)(2)(B) of the pilot program required an appeal process to challenge the accuracy of the background check information, but failed to strictly mandate an “independent” review procedure. Thus, to qualify for federal funding under the ACA, every state has to have in place a review process that is truly independent of the initial disqualification determination.

Second, Section 6201(a)(4)(B)(iv) requires the designated “independent process” to incorporate specific criteria to evaluate the appeals of those workers found to have disqualifying information. Of special significance, the appeal process “shall include consideration of the passage of time, extenuating circumstances, demonstration of rehabilitation, and relevancy of the particular disqualifying information with respect to the current employment of the individual.” Thus, not unlike other federal and state laws regulating criminal background checks for employment, the ACA specifically adopts a review process where workers found to have a disqualifying offense can produce evidence of rehabilitation and other mitigating factors to “waive” the disqualification.

Finally, paralleling the legislation that authorized the pilot program, the ACA defines what constitutes a “relevant crime” that disqualifies the applicant from working in long-term care. However, unlike the pilot program, the ACA requires states to provide a process by which an applicant’s disqualification can then be waived on appeal based on the mitigating circumstances described above. Section 6201(a)(6)(A) incorporates the “mandatory” and “permissive” exclusions that apply to entities and individuals that participate in Medicare programs (42 U.S.C. § 1320a-7). Significantly, neither the ACA nor the pilot program disqualified individuals convicted of drug possession, as opposed to offenses involving the “manufacture, distribution, prescription, or dispensing of a controlled substance.” 42 U.S.C. § 1320-1-7(a)(4), (b)(3). In addition, states are permitted to designate other disqualifying offenses. Sec. 6201 (a)(4)(B)(vii).

II. Appeals: Disputing the Accuracy of Background Check Information

As described above, the ACA mandates an “independent” review procedure to challenge the accuracy of the criminal background check information relied upon in making the suitability determination. The applicant’s ability to appeal inaccuracies in the record increases the overall integrity of the background check process given that errors and incomplete information routinely appear on background reports.

Of special significance, 50 percent of the FBI rap sheets produced for employment purposes have been documented to be missing final disposition information.¹³ The omissions on FBI rap sheets primarily reflect arrest information that is reported after an individual has been fingerprinted but lacks the final disposition. In many of these cases, workers were not convicted of some or all of the original charges. As a result, under the federal port worker background check program, nearly 100 percent of the appeals (over 25,000 in all) generated by incomplete FBI rap sheets were granted by the Transportation Security Administration (TSA).¹⁴

¹³ U.S. Attorney General, *The Attorney General’s Report on Criminal Background Checks* (June 2006), at p. 3.

¹⁴ National Employment Law Project, *A Scorecard on the Post-9/11 Port Worker Background Checks* (July 2009), at p. 4.

In about half the states, at least 30 percent of the arrests in the past five years have no final disposition recorded because of a failure to timely update the information, which means that both state and FBI records are similarly deficient.¹⁵ Through no fault of their own, workers who have never been convicted of a crime or who have charges that have been dismissed are prejudiced by erroneous FBI records. Thus, the opportunity to quickly and effectively resolve inaccuracies is critical, especially given the prominent role of the FBI records in the ACA background check process.

To address the problem records, several pilot program states track down the missing information before issuing the suitability determination. In Idaho and Michigan, the state agency staff that made the fitness determination sought to acquire disposition information from courts, web searches, and the applicant's self-disclosure for both in and out-of-state records. *Evaluation of the Background Check Pilot Program, Final Report*, Abt Associates (2008) (hereinafter *Pilot Program*) at 110. In Illinois, the state police was charged with obtaining the missing disposition information before forwarding the background check to the state agency to make the fitness determination. *Id.* In California, the state Department of Justice resolves the missing dispositions for all criminal record responses (including FBI reports) produced under every state licensing law before providing the information to the state agency that makes the fitness determination.¹⁶

All of the states in the pilot program—Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico, and Wisconsin—incorporated an appeal process to challenge the accuracy of the record. *Pilot Program* at 125. Several states also incorporate practical procedural steps that minimize the hurdles applicants typically encounter when attempting to resolve an inaccurate record. For example, in Illinois, if the applicant was found to have a disqualifying conviction, then he or she was sent a notification letter listing the disqualifying convictions. *Id.* at 48.

In addition, Illinois took the exemplary step of supplying a copy of the rap sheet and a waiver application to the individual. California statutorily mandates a similar approach in certain industries. For example, applicants seeking authorization to perform in-home supportive services must receive a copy of the background check. Cal. Welf. & Inst. § 12305.86. The federal consumer protection laws regulating the commercial criminal background check industry also require employers to provide the workers with a copy of the criminal record report to verify its accuracy. 15 U.S.C. § 1681b(b)(3). This protection is critical to the large numbers of workers who are often unable to acquire their criminal record for weeks or months in order to dispute its inaccuracies or demonstrate rehabilitation.

III. Rehabilitation Review Process: Providing Workers the Opportunity to Overcome Disqualifying Offenses

Appeal and rehabilitation review processes are often conflated, but it is useful to distinguish between the two protections. An appeal process narrowly focuses on whether a criminal record is accurate or incomplete. On the other hand, a robust, effective rehabilitation review process allows workers to demonstrate that they do not pose a threat to personal safety or property; that process is

¹⁵ Bureau of Justice Statistics, *Survey of State Criminal History Information Systems*, 2008 (Oct. 2009), at Table 1.

¹⁶ See *Cent. Valley Ch. 7th Step Found. v. Younger*, 214 Cal. App. 3d 145, 173 (1989) (The Court of Appeal finds that the state must seek to determine disposition of arrests before arrest information is disseminated to requesting agencies.).

especially helpful to individuals who have been convicted of offenses that occurred long ago and have since avoided any contact with the criminal justice system.

As described in the recommendations section to follow, the ACA (Section 6201(a)(4)(B)(iv)) “independent” review process should distinguish between a worker’s challenge to the accuracy of the records and what is often referred to as a “waiver” procedure challenging the disqualification determination based on a showing of mitigating factors. This would be consistent with the steps already mandated by the ACA, which requires consideration of rehabilitation and other compelling evidence that militates against disqualification based on a criminal record.

Under the federal port worker criminal background check program, the waiver process provides a compelling illustration of its value. *See* 49 C.F.R. § 1515.5. From late 2007 to April 2010, the Transportation Security Administration (TSA) screened the FBI records of about 1.6 million port workers pursuant to the Maritime Transportation Security Act of 2002.¹⁷ 46 U.S.C. §70105. During that time, at least 60 percent of the employee petitions to “waive” their disqualifying felony offense were granted by TSA based on evidence of rehabilitation.¹⁸ The TSA waiver procedure, which is separate from the “appeal” procedure challenging the accuracy of the FBI’s rap sheets, benefited over 5,000 qualified workers who would have otherwise been relegated to the ranks of the unemployed.

Significantly, workers of color were major beneficiaries of the federal port worker waiver protections, according to data collected by NELP on 500 workers.¹⁹ 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. Thus, the federal worker protections provided a lifeline to employment for thousands of the nation’s port workers, especially workers of color. The positive impact of a robust waiver procedure that takes into account rehabilitation and other mitigating factors is particularly relevant here given the significant racial diversity of the long-term care workforce.

The pilot program report noted that most stakeholders supported having a rehabilitation review process for long-term health care workers. The stakeholders acknowledged that a rehabilitation review increased the fairness of the background checks by allowing individuals an opportunity to avoid continued punishment for youthful mistakes, providing incentives for individuals to turn their lives around, and giving flexibility to officials in considering the mitigating circumstances of the offense. *See Pilot Program* at 129. Directly benefiting employers, a rehabilitation process was also viewed as broadening the pool of qualified workers. *Id.*

Of the seven pilot program states, five (Alaska, Idaho, Illinois, New Mexico, and Wisconsin) had rehabilitation review programs that allowed applicants who were initially disqualified by the background check to provide evidence that they do not pose a danger to patients or their property. The National Council on State Legislatures 2008 report on in-home direct care workers also notes that the following states have a rehabilitation process, at least for a subset of individuals with disqualifying offenses: Alabama, Arizona, Florida, Idaho, Illinois, Iowa, Kentucky, Massachusetts, Minnesota, Mississippi, New Jersey, New Mexico, New York, Oklahoma, Utah, Vermont, and Wisconsin. *See State Policies on Criminal Background Checks for Medicaid-Supported In-Home Direct Care Workers*, NCSL (Dec. 2008) (hereinafter *NCSL Report*), *State Summaries*. In the long-term care pilot

¹⁷ Department of Homeland Security, TWIC Dashboard (May 20, 2010).

¹⁸ *Id.*

¹⁹ National Employment Law Project, *A Scorecard on the Post-9/11 Port Worker Background Checks* (July 2009).

program, Illinois, New Mexico, and Wisconsin allowed applicants to request reconsideration of the results of their background check for all disqualifying offenses. *Pilot Program* at 126.

Significantly, the ACA requires consideration of several critical factors that militate against disqualification based on a criminal record, including evidence of “rehabilitation,” “extenuating circumstances,” and the relevancy of the offense to the “current employment” of the worker. At least one state, Wisconsin, has developed more specific criteria that are subsumed by these ACA factors. The additional level of specificity in Wisconsin is especially helpful both to the worker and the reviewing agency to structure the process and facilitate the appeal.²⁰ See DHS 12.12, Wis. Admin. Code.

IV. DISQUALIFYING OFFENSES

The Affordable Care Act provides a list of “mandatory” and “permissive” disqualifying offenses that apply to the federally-funded state programs. These include convictions for illegal

²⁰ Specifically, applicants who are disqualified may apply for a “Rehabilitation Review” to seek approval for employment, and the agency is mandated to consider the following factors:

- Personal reference checks and comments from employers, persons, and agencies familiar with the applicant and statements from therapists, counselors and other professionals.
- Evidence of successful adjustment to, compliance with or proof of successful completion of parole, probation, incarceration or work release privileges.
- Proof that the person has not had subsequent contacts with law enforcement agencies leading to probable cause to arrest or evidence of noncompliance leading to investigations by other regulatory enforcement agencies.
- Evidence of rehabilitation, such as public or community service, volunteer work, recognition by other public or private authorities for accomplishments or efforts or attempts at restitution, and demonstrated ability to develop positive social interaction and increased independence or autonomy of daily living.
- The amount of time between the crime, act or offense and the request for rehabilitation review, and the age of the person at the time of the offense.
- Employment history, including evidence of acceptable performance or competency in a position and dedication to the person’s profession.
- The nature and scope of the person’s contact with clients in the position requested.
- The degree to which the person would be directly supervised or working independently in the position requested.
- The opportunity presented for someone in the position to commit similar offenses.
- The number, type and pattern of offenses committed by the person.
- Successful participation in or completion of recommended rehabilitation, treatment or programs

Rehabilitation Review Application, available at <http://www.dhs.wisconsin.gov/forms/F8/F83263.pdf>.

The Panel’s mandate to consider certain factors is also key to promoting consistent results. If the review panel decides to deny approval of the rehabilitation request, the decision must explain the reasons for the denial and inform the worker that he or she may appeal by filing a written request for review within 10 days of receipt. See DHS 12.12(5)(a)(3), Wis. Admin. Code.

conduct related to the Medicare program or any state health care program (e.g., Medicaid), convictions related to patient abuse, felony convictions relating to health care fraud and felony convictions relating to controlled substances. Sec. 6201(a) and (a)(6)(A)-(B). Apart from these offenses, the states then may “specify offenses, including convictions for violent crimes, for purposes of the nationwide program.” Sec. 6201 (a)(4)(B)(vii).

However, the ACA does not mandate that states apply specific disqualification periods to these federal disqualifying offenses.²¹ In contrast, individuals and entities receiving Medicare funds are subject to the specific disqualification periods set forth in the Social Security Act (42 U.S.C. § 1320a-7). For example, under the Social Security Act criteria, those who have been convicted of a “mandatory exclusion” offense are subject to a five-year minimum period of disqualification. 42 U.S.C. § 1320a-7; 42 C.F.R. § 1001.102. Yet, the Secretary has the ability to waive the disqualification in specific circumstances for almost all of the mandatory exclusions. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. § 1001.1801.

The implementing regulations specify aggravating factors that may justify increasing the disqualification period above five years, including the existence of a pattern of offenses. *See* 42 C.F.R. § 1001.102. If the individual has a conviction after August 5, 1997 and has two disqualifying convictions, then the disqualification period is a minimum of 10 years. The disqualification period is permanent if the individual has three disqualifying convictions. *Id.*

By way of background, it is also helpful to take into account the EEOC guidelines regulating criminal background checks for employment and the court challenges to state disqualification provisions. According to the EEOC, it is incumbent upon employers to diligently evaluate both the nature and age of the offense and thus, not apply blanket criminal records restrictions.²² As described above, the latest social science research also strongly supports the conclusion that occupational restrictions should incorporate significant age limitations.

Finally, several federal and state court challenges have invalidated overbroad state licensing and employment restrictions. For example, the Massachusetts courts struck down a lifetime ban which disqualified people with convictions related to violence, sexual assault, or drug trafficking from working in health service agencies. The court found that the state “cannot bar a convicted criminal from [human health services] employment without giving him the opportunity to rebut the inference that he poses a danger to persons receiving or applying for [human health] services.”²³ The Pennsylvania Supreme Court also invalidated a statute that prohibited employment in elder care facilities for a broad range of convictions.²⁴

²¹ The ACA states that “[t]he term ‘conviction for a relevant crime’ means any Federal or State criminal conviction for—(i) any offense described in section 1128(a) of the Social Security Act (42 U.S.C. § 1320a-7).” The ACA therefore references the Social Security Act to provide the list of disqualifying offenses “described” in Section 1320a-7, not the other substantive requirements of the separate federal law.

²² The U.S. Equal Employment Opportunity Commission, *Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq. (1982), Feb. 4, 1987.

²³ *Cronin v. O’Leary*, 13 Mass. L. Rep. 405 (Mass. Super. Ct. 2001).

²⁴ *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003).

A. Regulating the Nature of Disqualifying Offenses

The Office of Inspector General's report recommended that CMS work with the states to develop a list of disqualifying offenses under the Affordable Care Act to ensure consistency across the country. *OIG Report* at iii. In response, CMS stated that it will "work with the States through the National Background Check Program to assist them in developing lists of convictions that disqualify individuals from employment, as well as defining whether any of those conviction types can be assumed to be mitigated because of the passage of time and which convictions should never be considered mitigated or rehabilitated." *Id.*

The pilot program states varied in the amount, type, and time-limitation of additional disqualifying offenses. The report found that "[g]iven the lack of knowledge on the relationship between certain types of convictions and the propensity to commit abuse, neglect, or misappropriation, most stakeholders did not have a strong opinion for a more or less stringent list of disqualifying crimes." *Pilot Program* at 118. Although some states had extensive lists of disqualifying offenses, mostly for violent crimes, sex offenses and serious property crimes, none implemented a blanket prohibition against individuals with *any* felony conviction.

Most state laws also impose disqualifications for certain drug offenses, which is important to highlight given the disparate impact of drug enforcement activities on low-income communities and communities of color. Indeed, drug "trafficking" is the single largest category of all state felony convictions, representing 18.8 percent of all cases, followed by drug possession, which accounts for another 14.6 percent of all state felonies.²⁵ People of color represent a disproportionate share of those arrested and convicted of drug offenses. For example, while African Americans account for 12.3 percent of the general population, they represent 49 percent of all those convicted of felony trafficking and 36 percent of all those convicted of drug possession.²⁶

The Affordable Care Act itself disqualifies workers convicted of certain drug felonies, not including drug possession. Recognizing the major impact of drug offenses on port workers and hazmat drivers subject to the post-9/11 criminal background checks, TSA also took the position that felony drug possession should not be considered a disqualifying offense.²⁷ In response to proposed federal regulations on the issue, TSA decided against disqualifying workers based on a conviction for simple possession of a controlled substance because the offense "generally does not involve violence against others or reveal a pattern of deception, as crimes like smuggling or bribery often do."²⁸

Also significant, the stakeholders in the pilot program generally "opposed the consideration of the original charge in the fitness determination decision." *Pilot Program* at 108. Consideration of the original charge is problematic for the reasons set forth in the EEOC guidelines regulating criminal background checks for employment. The EEOC has stressed that "a blanket exclusion of people with

²⁵ Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006* (Dec. 2009), Table 1.

²⁶ *Id.*, at Table 3.2.

²⁷ 72 Fed. Reg. 3600 (Jan. 25, 2007).

²⁸ Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License, 69 Fed. Reg. 68720, 68723 (Nov. 24, 2004) (amending 49 C.F.R. Part 1572).

arrest records will almost never withstand scrutiny.”²⁹ Recognizing the problems inherent in considering arrest records, the Illinois pilot program only considered convictions, not arrests or the original charge. *Pilot Program* at 108.

Expunged, sealed and juvenile adjudications also warrant special scrutiny by CMS and the states. As detailed in the recommendations section, the ACA does not authorize consideration of these records.³⁰ As an example in the pilot program, Illinois excluded in its applicant self-disclosure any convictions that have been expunged or juvenile adjudications. *Id.* at 47. There are sound policy reasons to exclude these records from consideration. To expunge, seal, or dismiss a conviction requires individuals to meet strict conditions set by the particular jurisdiction.³¹ States have enacted these laws to promote reentry and rehabilitation which are compelling state policies that CMS and the state licensing agencies should endorse.³²

B. Regulating the Duration of a Disqualifying Offense.

Lifetime disqualifications and other onerous requirements regulating the age of disqualifying offenses are also a special concern when applied to criminal background checks of long-term care workers. Both the EEOC guidelines and the latest empirical research strongly support reasonable age limitations on disqualifying offenses.

As described above, Professor Blumstein of Carnegie Melon University has concluded that within a narrow period of time, an individual’s “criminal record empirically may be shown to be irrelevant as a factor in a hiring decision.”³³ Tracking 18-year olds who had been arrested for a felony, Professor Blumstein found that they were no more likely to reoffend as someone in the general

²⁹ The U.S. Equal Employment Opportunity Commission, *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq., 1982, Sept. 7, 1990.

³⁰ In contrast, the provisions of the Social Security Act regulating Medicare providers and others allow the reviewing agencies to consider expunged convictions and deferral programs, but not juvenile adjudications. 42 U.S.C. § 1320a-7(i).

³¹ See e.g., Cal. Penal Code § 1203.4a: “Every defendant convicted of a misdemeanor and not granted probation shall, at any time after the lapse of one year from the date of pronouncement of judgment, if he or she has fully complied with and performed the sentence of the court, is not then serving a sentence for any offense and is not under charge of commission of any crime and has, since the pronouncement of judgment, lived an honest and upright life and has conformed to and obeyed the laws of the land, be permitted by the court to withdraw his or her plea of guilty”

³² At least 26 states purge certain convictions and 30 states seal conviction information under varying circumstances. *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information*, SEARCH (2005) at pp.82-83, available at <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>. Purging means the destruction and/or redaction of information, while sealing customarily means that the information is no longer part of the official record. All states, except Rhode Island, expunged juvenile records under certain criteria. Ashley Nellis, *Juvenile Justice: Addressing the Collateral Consequences of Convictions for Young Offenders*, The Champion (July/Aug. 2011), at p. 22, available at <http://sentencingproject.org/doc/publications/Collateral%20Consequences%20NACDL%202011.pdf>.

³³ Alfred Blumstein & Kiminori Nakamura, “‘Redemption’ in an Era of Widespread Criminal Background Checks,” *National Institute of Justice Journal*, Issue No. 263 (June 2009) at p. 14.

population if they steered clear of the criminal justice system for between 3.8 and 7.7 years, depending on the offense.³⁴

The courts have also taken issue with state laws that disqualify individuals for excessive periods of time from employment in the health care field. A Massachusetts court found that the plaintiffs, who had been convicted of violent offenses, did not clearly pose “so grave a danger and so high a risk of reoffense as to warrant a lifetime mandatory conclusive presumption of dangerousness.”³⁵ In contrast, the federal scheme regulating Medicare and state-health services adopts increasingly severe disqualifying periods for various levels of offenses, while also providing the agency with the discretion to deviate from the minimum requirements based on mitigating or exacerbating factors.

V. RECOMMENDATIONS

A. Adopt Robust Appeal Processes to Promote The Integrity of Background Checks.

To effectively implement the ACA’s “independent process” to appeal the accuracy of a state’s background check of long-term care workers, CMS should adopt the following model protections:

- 1) **The states should update any missing dispositions prior to issuing the original fitness determination.** The states should attempt to acquire disposition information from the courts and local law enforcement agencies on potentially disqualifying offenses before making the fitness determination and providing the worker with disqualification notice. Implementing this policy will minimize the hardship on workers who do not have ready-access to their paperwork on old offenses that may have occurred far from their current residence. The policy will also reduce the significant discriminatory impact of arrest records on people of color, while improving the integrity of the background check process.
- 2) **Provide written notification of the specific disqualification, a summary of the appeals process, and a copy of the individual’s rap sheet.** If the applicant is found to have a disqualifying conviction after the background check is completed and any missing disposition information is located, then the applicant should be provided written notification listing the specific disqualifying offense(s), as provided in several of the pilot program states (Alaska, Idaho, New Mexico, *see Pilot Program* at 107). Along with the written notification of the disqualifying offense, the applicant should be provided a copy of the criminal background check itself, as provided under the Illinois pilot program. These procedures parallel the requirements of the basic consumer laws

³⁴ The researchers calculated the number of years it took for individuals who were arrested for certain felony offenses at 16, 18, and 20 years old to have the same risk of arrest as same-aged individuals in the general population. The 18-year-olds arrested for burglary had the same risk of being arrested as same-aged individuals in the general population after 3.8 years had passed since the first arrest (for aggravated assault it was 4.3 years, and for robbery it was 7.7 years). If the individual was arrested initially for robbery at age 20 instead of at age 18, then it takes the person three fewer years to have the same arrest rate as the general population. *Id.* at pp. 12-13.

³⁵ *Cronin v. O’Leary*, 13 Mass. L. Rep. 405 (Mass. Super. Ct. 2001).

regulating private employers and the private screening firms that generate criminal background checks for employment.³⁶

B. Require a Waiver Process To Promote Rehabilitation and Other Mitigating Factors.

In addition to the appeals procedures described above, which ensure that the information relied upon by the states is accurate, CMS should strictly adhere to the ACA's requirements providing long-term care workers with an opportunity to waive a disqualification based on evidence of rehabilitation and other mitigating circumstances. Given the scope of the disqualifying offenses that apply to long-term care workers and the strong mandates of the ACA, a clear and robust waiver process is absolutely critical to the success of the federally-funded background check program.

- 1) **The rehabilitation/waiver process should be independent of the appeals process.** Numerous states have adopted a rehabilitation review process to allow the applicant the opportunity to substantiate that he or she is not a threat to patient safety or security. The most common process described in both the pilot program and NCSL reports entail an individual review that occurs after a disqualifying offense is identified. To maximize the impact of the mitigating factors set forth in the ACA, NELP urges CMS to require that the states maintain a separate and distinct waiver process, similar to the Wisconsin model and the approach adopted by TSA as applied to all the nation's port workers and hazmat drivers. As described above, the TSA waiver process provided a lifeline to qualified port workers with a criminal record, especially for workers of color, without compromising safety and security on the job.
- 2) **Maximize the worker's opportunity to demonstrate rehabilitation and other mitigating factors by adopting specific standards to facilitate objective decision-making.** The ACA's mandatory criteria are exemplary in their scope by taking into account "the passage of time, extenuating circumstances, demonstration of rehabilitation, and the relevancy of the particular disqualifying information with respect to the current employment of the individual." Sec. 6201(a)(4)(B)(iv). However, to further clarify these broad criteria, especially the phrases "extenuating circumstances" and "demonstration of rehabilitation," and the "relevancy" of the disqualifying offense, NELP urges CMS to provide more detailed factors, similar to the approach adopted in Wisconsin.³⁷ The Wisconsin criteria, which flow from the ACA's list of mitigating factors, significantly simplify and structure the review process both for workers and for the reviewing state agencies.

C. Require Disqualifying Offenses to be Substantially Job-Related and Time Limited.

The Affordable Care Act adopts a list of "mandatory" and "permissive" disqualifying offenses to screen out workers who pose a safety and security risk to long-term care patients. Sec. 6201(a)(4)(B)(vii). In addition, states may "specify offenses, including convictions for violent crimes, for purposes of the nationwide program." Sec. 6201(a)(6)(A)(ii). For the reasons described below,

³⁶ The Fair Credit Reporting Act states that "before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates a copy of the report." 15 U.S.C. § 1681b (b)(3)(A)(i).

³⁷ See *supra* fn. 20.

NELP urges CMS to caution states against expanding the list of federal disqualifying offenses and imposing extended periods of disqualifications.

- 1) Disqualifying offenses should “substantially relate” to the duties of long-term health workers.** Significantly, the ACA requires the states to take into account the “relevancy of the particular disqualifying information with respect to the current employment of the individual,” which provides a necessary baseline to evaluate the disqualifying offenses adopted by the states and the length of the disqualification. In addition, the EEOC’s guidelines, which require consideration of the “nature and gravity of the offense,” the “age of the offense,” and the “nature of the job help or sought,” should be specifically incorporated into the CMS standards regulating the states.

NELP urges CMS to also require that the offenses be “substantially” related to the position, especially as applied to those convictions, such as drug crimes, that have the potential to disqualify large numbers of workers of color. While African Americans account for 12.3 percent of the general population, they represent one-third of the paraprofessionals working in long-term care.³⁸ African Americans represent 44 percent of all those convicted of felony drug crimes, which is nearly four times their share of the general population.³⁹ Recognizing the decision of Congress to leave out drug possession on the list of mandatory or permissive disqualifying federal offenses, CMS should similarly discourage states from disqualifying workers convicted of drug possession, or at least strictly limit the period of the disqualification.

- 2) Remove lifetime and extended disqualification periods.** Both the ACA and the EEOC guidelines assign special weight to the passage of time since the individual was convicted as part of the fitness determination process. Thus, lifetime disqualifications are strongly disfavored and vulnerable to the type of legal challenges that were filed in Pennsylvania and Massachusetts. Finally, Professor Blumstein’s recent research on “desistance” from crime also makes a compelling case for strict limits on disqualification periods.

Thus, CMS should strongly urge states to avoid lifetime disqualifications, except in those cases where there are significant aggravating circumstances, such as where the individual has been convicted of multiple serious, job-related offenses. Provided the states have in place strong waiver protections, as recommended above, NELP supports a tiered structure similar to the federal system incorporated into the Social Security Act (*see* 42 C.F.R. § 1001.102). Under this federal scheme, the period of disqualification starts at five years for the most serious offenses, and it is progressively more severe as the number of offenses increases or certain aggravating factors are present. Under the pilot program, many state laws imposed far more extended disqualification periods, often lasting 10-15 years, or for the individual’s lifetime. Thus, CMS should take a strong position against state laws that impose either a lifetime disqualifications or disqualifications that extend back more than five to seven years absent significant

³⁸ Institute for the Future of Aging Services, *The Long-Term Care Workforce: Can the Crisis be Fixed?* (Jan. 2007), at p. 5.

³⁹ Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006* (Revised Nov. 22, 2010), at Table 3.2.

aggravating factors.

- 3) **Prohibit consideration of expunged, sealed and juvenile records.** Except for arrests that occur after the individual background check has been completed (i.e., arrests that are reported through a “rapback” procedure), under the ACA, only a “conviction” may be considered disqualifying for long-term care workers. Sec. 6201(a)(6)(A). Nor should expunged, pardoned or juvenile adjudications be considered under the ACA. Section 6201(a)(6)(A) of the ACA should be interpreted to incorporate the “offenses” set forth in 42 U.S.C. §1320a-7, not the remaining provisions. Thus, the ACA should not apply the definition of “convicted” adopted by the Social Security Act, which allows for consideration of expunged records and deferred adjudications. 42 U.S.C. §1320a-7(i).

Instead, NELP urges CMS to adopt the definition of the term “convicted” that governs the port worker background checks conducted by TSA. Specifically, “[c]onvicted means 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.” 49 C.F.R. § 1570.3. In most states, a juvenile proceeding also does not rise to the level of a “conviction” and should not be considered disqualifying by CMS. Nor are juvenile proceedings considered under 42 U.S.C. § 1320a-7(i). Supporting this position, under federal law a juvenile proceeding may only be considered for employment purposes if the individual is seeking a “position immediately and directly affecting the national security. . . .” (18 U.S.C. § 5038(a)(5)), which does not apply here.

VI. CONCLUSION

NELP appreciates the opportunity to provide input on the CMS policies regulating the federally-funded long-term care criminal background check process. NELP’s recommendations seek to ensure that the safety and security of long-term care patients is balanced with basic worker protections. At the front end, disqualifying offenses should be restricted to substantially job-related convictions and limited in time to promote rehabilitation and employment of qualified workers who no longer pose a safety or security threat on the job. In addition to strong appeal procedures to ensure that the disqualifying information is current and accurate, a robust waiver procedure is also critical to the integrity of the long-term care criminal background check process.