
The “Wild West” of Employment Background Checks

A Reform Agenda to Limit Conviction and Arrest History Abuses in the Digital Age

By: National Employment Law Project
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One in four U.S. adults – 70 million people and counting – now has a conviction or arrest history that can show up on a routine background check for employment. At the same time, more employers than ever are conducting background checks on their prospective employees by relying on private background check companies or on government databases that are often accessible on-line at the click of a mouse.

The vast proliferation of background check information has devastating consequences for the millions of workers struggling to find employment with a history of arrests or convictions,¹ and especially for workers of color. The reports produced by private companies are plagued with errors, such as including expunged convictions or failing to show that charges were dropped. Even the government systems include inaccuracies and incomplete records.

Is it possible to fight against big data and the increasing use of stale records that unnecessarily stigmatize qualified job seekers? The answer is maybe; it’s a complex problem with no quick fix or simple solution. However, with the nation finally turning its attention to the legacy of over-criminalization and mass incarceration, a special opportunity exists to tackle this and other criminal justice reform issues.

This fact sheet helps lay the groundwork for this advocacy by providing some basic information on the various forces that have produced the unprecedented reliance on

¹ There are many ways that people who face employment discrimination may interact with the criminal justice system including but not limited to, convictions, non-conviction arrests, juvenile adjudications and infractions, and border detentions.

background checks for employment. In addition, the fact sheet includes a checklist of some of the most promising laws and strategies to limit the availability of conviction and arrest history information and to hold the major players accountable.

The Forces Driving the Proliferation of Employment Background Checks

The first challenge in understanding how to limit the vast proliferation of conviction or arrest history information is to identify the specific source of the records. In today's brave new world of employment background checks, one of several sources could be the generator of the report, including a private background check company or a federal, state, or local government database.

Private Background Check Companies

Most employers that acquire background checks of job applicants do so by purchasing a commercially prepared background report from a background check company. Today, these companies mostly buy the conviction or arrest history data in bulk from various sources (called "aggregators"), including some state systems, and issue reports based solely on that data. But many of them still send "runners" to the local courthouses to manually review and verify the information provided in the bulk data.

Serious problems arise when the information purchased from these aggregators and other sources is not verified for accuracy or updated, which means that the companies routinely include information on background checks that can cost people jobs. Some of the errors and inaccuracies in these background checks include: 1) reporting the history of another person (frequently someone with a similar name); 2) revealing sealed or expunged information; 3) failing to provide the final outcome of an arrest; 4) reporting information in a misleading manner (such as reporting every court date for a single charge); and 5) erroneously reporting the seriousness of an offense (reporting a misdemeanor as a felony).

The biggest players in the industry, including Accurate Background, Inc., ADP Screening and Selection Services, First Advantage, HireRight and Sterling, are highly profitable and growing fast. In addition, there is a new frontier of Internet background check vendors that often charge cut-rate fees for questionable products. One of the largest companies, backgroundchecks.com, charges \$15 for each report if the employer signs up for at least 25 searches. The company proudly claims that "[w]ith the database of over 345 million criminal records," it "has now become the leader in the acquisition of data from across the country and the delivery or instant online access to public records."

How is this multi-billion dollar industry held accountable? The industry's trade association, called the [National Association of Professional Background Screeners](#), created an accreditation program to certify compliance with basic standards of accuracy and fairness, but only a handful of the companies signed the pledge. However, private background check companies, and the employers that purchase their reports are regulated by the federal consumer protection law – called the [Fair Credit Reporting Act](#) (FCRA) – which is the same law that applies to companies

that generate credit reports and other forms of background check information.

Under FCRA, these background check companies must ensure the accuracy of the information that they provide to employers, and employers are required to provide job seekers with a copy of the background check report to verify its accuracy before the company uses the information to deny the applicant employment. Private and public interest lawyers have collected major settlements and judgments against many of the largest background check companies for FCRA violations. Some states, like California and Texas, also go further than the federal law by precluding the release of arrest information and limiting the reporting of convictions to crimes that date back seven years. Under FCRA, there's no limit on reporting convictions, but non-conviction arrests may only be reported for seven years.

State and Local Government Databases

The next largest source of background check reports made available to employers and the public are generated by the state entities that collect arrest and conviction history from local courts and law enforcement (called the state “repositories”) and by the local courts themselves, which report information on court proceedings.

Depending on the state, the repositories provide for different levels of access to information. Some, like California, operate a “closed” system, which does not allow public access to the state's records for employment or other non-criminal justice purposes. Others, including Florida, allow for “open” access, meaning all of an individual's conviction or arrest history information is generally available for public use, including use by employers. And some states, like Washington, provide for “intermediate” access to this information, meaning the public can access conviction data, but not arrests, and must obtain the consent of the subject of the information. About half the states make their conviction or arrest history information available to the public via the Internet, usually for a fee ranging from \$1 to \$75, which generated about 18 million requests in 2011.

In any jurisdiction, an individual may go to a local court and request the court documents of any other individual, as these are public records. Increasingly, local entities, including the courts and the local-law enforcement agencies, are also selling their information to the public or providing it on-line for free. Many local agencies are also sharing their arrest information as part of larger county networks, which then sell the information in the database to employers, volunteer organizations, landlords and others. To identify the practices in your state and local area, the [National Center for State Courts](#) maintains a helpful website resource that documents the level of access to conviction or arrest history, whether the information is available on-line and the fees charged for the information.

National FBI Background Checks

Access to the FBI's national database is heavily restricted—there must be a federal or state law that specifically authorizes the non-criminal justice entity to obtain a copy of the job applicant's FBI background check. Thus, access to these records is usually reserved for state licensing boards or people seeking work directly with the government or government contractors, not

private employers.

Roughly 17 million FBI background checks were conducted for employment and licensing purposes in 2012, which is six times the number generated ten years ago. FBI background checks are required for a variety of occupations, including: people who work with children, the elderly, or people with disabilities, people working in the financial industry, port workers, and people who process mortgages. In addition to these federal requirements, states frequently require both state and federal background checks for licensed positions.

Although the FBI records are frequently considered the “gold standard” because they are national in scope and are generally less vulnerable to identity errors because they are based on an individual’s fingerprint, roughly 50 percent of the records are inaccurate according to the FBI. That’s because the FBI’s data often includes the arrest without the final outcome of the case. While federal laws require the information submitted by the states to the FBI to be accurate and provided on a timely basis, these laws are not enforced. Indeed, in about half the states, almost a third of all the arrests reported in the past five years still don’t have updated information on the disposition of the case.

A State Reform Agenda to Limit Conviction and Arrest History Abuses in the Digital Age

As one background check expert astutely observed, the current regime is like the “wild, wild west,” with more companies selling their products every day for large profits and limited accountability for their actions. While the challenges are severe – certainly, there’s no fool-proof way to put the genie back in the bottle in the age of the Internet – as described below, several states have taken constructive steps that can help shape a new regime to protect workers against some of the most significant abuses that now undermine their job search.

States Should Enact Broader Expungement and Sealing Laws

Expungement and sealing laws are the single most important remedy, as employers are not able to illegally or inappropriately consider information that they do not have. Only about half the states allow for any form of expungement of felony convictions, even for people who have not been arrested or convicted of a crime for many years. The [National Task Force on Privacy, Technology, and Criminal Justice Information](#) recommends that “information should be sealed or expunged (purged) when the record no longer services an important public safety or other public policy interest.”

Some states have also adopted “first offender” statutes, often focusing on youthful offenses or minor alcohol or drug offenses, which allow these first offenses to be expunged for individuals with no prior record. For example, in Mississippi, first offender convictions may be expunged for misdemeanors and some minor felonies after a five-year waiting period. However, several states will expunge or seal an individual’s record not just in the case of first offenders. For example, Colorado will seal many drug convictions after a waiting period lasting 3 to 10 years depending on the offense. Tennessee recently passed a law allowing certain non-violent offenses to be expunged after 5 years. Kansas authorizes all but most violent and sex offenses to be

expunged after a 3 to 5 year waiting period. (For a breakdown of state expungement and sealing laws, see this [chart](#) published by the National Association of Criminal Defense Lawyers Restoration of Rights Resource Project).

It is critically important that the process of expunging an individual's record be automatic, so that the individual is not burdened with having to hire a lawyer, pay court fees, and deal with the vagaries of the court process. In Connecticut, for example, an arrest is automatically expunged if the state decides not to prosecute the case and thirteen months have passed since the arrest. If the defendant is acquitted at trial or the charge is dismissed, all records are automatically erased after the 30-day appeal period has run out, and no fee is required of the individual. Law enforcement agencies can continue to access the records, but the public cannot.

Adopt a “Closed” State Conviction and Arrest History System that Prevents Public Disclosure of the State Records

In California, the public and commercial reporting agencies are not able to access the state records, but they are able to access public records, such as court documents. Thus, access to the state records in California is limited to positions for which a background check is required under state or federal law (for example, positions in the financial industry, child care workers, security guards, nurses, real estate agents). By definition, the state also does not make the information available on-line, which is now the practice in about half the states.

Limit the Look-Back Period When Arrests and Convictions Can Be Reported

In 2010, Massachusetts restructured access to their records, which involved making the state database available to the public and employers while imposing a strict look-back period on the offenses that can be reported. Specifically, the information available to employers and the public is limited to misdemeanors for which the applicant was convicted within the past 5 years and felonies for which the applicant was convicted within the past 10 years. In both cases, the time period begins after release from incarceration or custody, and if any conviction may be shown on an applicant's record, all convictions will be shown. Certain felony convictions, including murder, manslaughter, and sex offenses, will always appear on a background check no matter the length of time since conviction or release from custody.

Prohibit the Release of Arrests Not Leading to Convictions or Consideration by Employers of Arrest Information

A number of states (including Alaska, Indiana, Hawaii, Kentucky, and Minnesota) expressly preclude the release of information regarding arrests that did not lead to a conviction, which extends in some cases to the local courts and private background checks companies as well. Other states (including California, New York and Massachusetts) preclude employers from asking about arrest information or otherwise consider arrest information in the hiring process.

Require Background Checks Companies to Check the State System for Expunged Records

Lawmakers in Pennsylvania recognized that background check companies weren't updating their records to prevent disclosure of expunged cases. In order to help increase accuracy and make meaningful the second chance that an expungement should give, the state adopted a new procedure to provide commercial reporting agencies with updates of expunged cases. The policy, enacted in 2010, created weekly updates of cases expunged from court records. Companies that access the court records are required to check the weekly updates and comply with the rules governing the use of these records. If a company fails to access the weekly updates or to use the information correctly, the Pennsylvania courts may terminate a company's access.

Work with State Policymakers to Ensure that All Outcomes Favorable to the Person Who Was Arrested Be Reported to the State Repository in a Timely Manner

As described above, conviction or arrest histories in many states includes a great deal of information that is significantly out of date, primarily because the favorable information (including the large percentage of cases that are dismissed) is not reported in a timely manner from the local courts and law enforcement agencies to the state records systems. Advocates should work with state officials and legislators to document the delays in their states and the primary culprits, then require that systems be developed, including periodic auditing, to reduce the backlogs and correct the problem in the targeted localities.

Enact Strong Laws Requiring That the State Conviction and Arrest History Systems Be Routinely Audited

Several states have adopted laws requiring that their state conviction or arrest history systems be audited to ensure that they are accurate and up-to-date. Pennsylvania's law is especially effective. It requires the state Attorney General to annually audit the state repository and as a representative sample of all other repositories. The Pennsylvania State Police is also required to audit a percentage of local police departments to ensure that they have policies and procedures in place to accurately report conviction or arrest history. Also significant, the law authorizes the Attorney General and private parties to sue to enforce the audit requirement and to recover monetary damages, litigation and attorney's fees.

Enforce the Laws Requiring Fair and Accurate Background Checks for Employment

Workers have rights under federal and state consumer protection laws to fair and accurate background checks for employment. These laws should be aggressively enforced to hold the private background check companies and their employer clients accountable. First, it is important for the worker to obtain a copy of his or her conviction or arrest history report to verify its accuracy (including the FBI rap sheet, the state rap sheet, and the private background check company report in those cases where the employer is obligated to share the information with the worker). Second, advocates should help enforce the laws by developing relationships with

public interest lawyers in their community and private attorneys that specialize in enforcement of the Fair Credit Reporting Act and other federal and state laws that regulate the collection and reporting of conviction or arrest history.

Advocates should be aware that there can be legal obstacles to creating new laws regulating criminal background check companies and limiting the conviction or arrest history information that is made available to the public. For example, the federal Fair Credit Reporting Act may trump (or “preempt”) new state laws that seek to regulate the background check companies by going beyond the requirements of the federal law. In addition, the First Amendment to the U.S. Constitution has been raised by the media to legally challenge laws that seek to limit access to conviction or arrest history information by the public. Thus, it is very important to develop relationships with local attorneys who can help navigate the legal issues and fashion strong state laws that can withstand a possible legal challenge.