



July 1, 2016

Kimberly A. Holden  
Deputy Associate Director for Recruitment and Hiring  
U.S. Office of Personnel Management  
1900 E Street NW  
Room 6351D  
Washington, DC 20415

**Re: Proposed Rules Regarding Recruitment, Selection, and Placement  
(General) and Suitability, 81 Fed. Reg. 26173 (May 2, 2016),  
RIN: 3206-AN25**

Dear Ms. Holden:

On behalf of The Leadership Conference on Civil and Human Rights, the National Employment Law Project, the NAACP Legal Defense and Education Fund, Inc., the American Civil Liberties Union, and Legal Services for Prisoners with Children, we write to offer our strong support for the Office of Personnel Management’s (OPM) proposed rules on *Recruitment, Selection, and Placement (General) and Suitability*. We applaud the rules’ requirement that federal agencies delay inquiries into an applicant’s conviction history until the hiring agency has made a conditional offer of employment (“ban the box”). Indeed, the rules will take the federal government one step closer to becoming a “model employer” of people with records, which the Federal Interagency Reentry Council has identified as a top priority.<sup>i</sup> We also urge OPM to strengthen the proposed regulations in several key areas detailed below.

On January 31, 2014, President Obama issued a memorandum prompting OPM to update federal hiring regulations to better ensure that applicants from all segments of society, including the unemployed and persons experiencing financial hardships receive a fair opportunity to compete for federal employment.<sup>ii</sup> An estimated 70 million adults have arrests or convictions that will show up on routine background checks.<sup>iii</sup> Studies demonstrate that disclosure of a conviction record by an otherwise qualified applicant can reduce the likelihood of a callback or job offer by nearly 50 percent.<sup>iv</sup> Under current law, federal agencies can request arrest and conviction history from applicants at the beginning of the hiring process. Allowing inquiries into conviction records before assessing an individual’s qualifications creates a serious barrier to employment for millions of qualified job seekers. This modern-day scarlet letter has particularly disadvantaged communities of color that have been ravaged by the “War on Drugs” and have been hardest hit by unemployment.<sup>v</sup> Indeed, the U.S. Equal Employment Opportunity Commission (EEOC) has recognized that requiring a background check can have more of an impact on individuals of color due to the racial profiling and discriminatory practices that persist at all stages of the justice system.<sup>vi</sup>

In response to the Presidential Memorandum, OPM issued a Notice of Proposed Rulemaking (NPRM) on May 2, 2016. The new rules would ban the box in federal hiring by preventing



federal agencies from administering the “Declaration for Federal Employment” Optional Form 306 or otherwise making inquiries into an applicant’s conviction record until the conditional offer of employment. The proposed rules would potentially give millions of Americans with records a real opportunity for employment and the ability to support their families.

**I. Banning the Box on Federal Applications Will Improve Employment Opportunities and the Economy**

The “ban the box” movement, which has been embraced by 24 states and more than 100 cities and counties around the nation, was launched more than a decade ago by All of Us or None, an organization founded and led by formerly incarcerated individuals and their families. In those communities that have adopted ban the box, the laws have significantly improved the hiring rates of people with records.<sup>vii</sup> We value OPM’s leadership in building on the movement’s success, and we endorse OPM’s compelling justification that the new rules seek to “encourage applicants from all segments of society to seek federal employment, and to ensure that for most federal jobs, individuals with prior convictions or other adverse history are given the opportunity to demonstrate their knowledge, skills and ability in a fair and open competition.”<sup>viii</sup>

When inquiries into conviction histories are posed earlier in the hiring process – before the conditional offer of employment – it leads to less clarity for the agency and the job applicant regarding the rationale for the agency’s background check determination, and more opportunity for bias to enter the hiring process. The OPM proposed regulations will help ensure that use of background checks by federal employers are more efficiently, effectively, and fairly enforced. As OPM recognized, early inquiries into an applicant’s record “could have the effect of discouraging motivated, well-qualified individuals from applying for a Federal job[.]”<sup>ix</sup> thus undermining the core goal of the federal government to recruit a strong pool of qualified candidates.

By banning the box in the hiring process, the federal government is also helping to improve public safety and boost the economy. Because employment is the most important factor in decreasing recidivism,<sup>x</sup> the ban the box regulation will reduce federal barriers to successful reentry by ensuring that qualified job applicants can support themselves and their families. Thus, it will help to reverse the effects that exclusion of individuals with convictions have had on the economy. In 2014 alone, poor job prospects of formerly incarcerated individuals reduced U.S. GDP by as much as \$87 billion.<sup>xi</sup>

**II. Recommended Changes to the Proposed Rules**

While we strongly support OPM’s proposed regulations extending the criminal history inquiry until the conditional offer stage of the hiring process, we offer the following recommendations to strengthen the regulations:

**A. Eliminate the Broad Exceptions to the Proposed Rules**

We urge OPM to strike the proposed language that creates a broad “case-by-case” exception to the regulations, which threatens to significantly undermine the regulations’ impact and authority.



According to the supplemental information section of the proposed regulations, OPM will consider, on a case-by-case basis, applications from federal agencies requesting an exception to the ban the box rules for certain positions in order to provide “maximum flexibility to hiring agencies.”<sup>xiii</sup> Specifically, the proposed regulations authorize OPM to consider an exceedingly broad range of factors in making its decision, including, but not limited to, the nature of the positions filled (e.g., a law enforcement position), and whether “a clean criminal history record would be essential to the ability to perform one of the duties of the position effectively.”<sup>xiii</sup>

We have concerns about the proposed exception for several reasons. First, we question whether the collection of arrest and conviction information is necessary or warranted at the application stage of the hiring process when a comprehensive background check will be conducted at the end of the hiring process. Second, the case-by-case exception is inconsistent with current OPM policy, which delays the background check inquiry until the conditional offer of employment for most federal positions.<sup>xiv</sup> Finally, given the breadth of the factors considered under the exception, the proposed process could result in many requests from federal agencies seeking the exclusion, which could significantly drain OPM’s limited resources.

At a minimum, if OPM moves forward with language creating an exception to the new ban the box rules, the exclusion should be far more narrowly tailored to those cases - not including “public trust” and “non-sensitive” positions - where the agency can produce compelling evidence that the collection of arrest and conviction information at the end of the hiring process is clearly inadequate to address the agency’s overriding security concerns. In other words, the burden should be on the requesting agency to establish not just that the data should be collected earlier in the hiring process, but that it will provide additional credible information over and above what is generated by the comprehensive background check.

Finally, in the event that the proposed exception is adopted, OPM should ensure that the process is transparent and that it includes a genuine opportunity for public input. OPM should post federal agency requests for exceptions online on a section of its website devoted to the issue, and the public should be provided an opportunity (of not less than 90 days) to respond to the agency’s petition. The criteria for the exception should be posted online as well, along with OPM’s final decision, which should include a written statement explaining the agency’s decision.

Creating more transparency and accountability for current federal agency background check policies and practices will dispel the myth that the “Federal Government’s hiring practices prohibit employment of people with criminal records.”<sup>xv</sup> Absent a fully transparent process governing the proposed exceptions, the new rules could perpetuate the public’s perception that the federal government is not open to hiring people with records, which has a “chilling effect” on qualified people with records applying for federal positions.

## **B. Improve Transparency, Accountability, and Accuracy by Requiring Data Collection and Reporting**

The proposed rules should implement a centralized means of collecting data on the impact of OPM’s fair chance hiring policies, documenting the number of conditional offers made by the



individual federal agencies and the final hiring decisions involving persons with convictions. Data collection and reporting are important to ensuring transparency and accountability for these new policies and to detecting any gaps in implementation.

Additionally, strong standards of accuracy are critical to maintaining the integrity of the background check and protecting workers against arbitrary treatment. Having data to confirm the accuracy of the FBI background checks and that fully qualified people with records are being brought into the federal workforce is necessary to the success of the proposed regulations.<sup>xvi</sup>

### **C. Apply the Proposed Rules to “Excepted Service” Positions**

While we support OPM’s proposed rule to ban the box for competitive service applicants, we are concerned that this regulation will not extend the same fair chance hiring opportunities to the 600,000 “excepted service” positions that now constitute the largest category of federal civil servants.<sup>xvii</sup> The Code of Federal Regulations under 5 C.F.R § 6.3(a) states that OPM “in its discretion, may by regulation prescribe conditions under which excepted positions may be filled in the same manner as competitive service positions are filled[.]”<sup>xviii</sup> As such, the regulation grants OPM the authority to apply competitive service hiring standards, including the proposed rules, to excepted service positions.

Despite this clear regulatory authority, OPM does not currently apply its suitability criteria to excepted service positions. This gap is particularly troubling because agencies continue to move away from competitive service hiring toward excepted service hiring.<sup>xix</sup> As this increasingly becomes the practice, it is imperative that OPM uses its discretionary authority to apply the proposed rules to excepted service positions, which is critical to achieving the goal of the President’s Memorandum to eliminate “undue obstacles to federal employment” for the millions of qualified job seekers with records.<sup>xx</sup>

Furthermore, agencies are not required to post public notice about excepted service positions. The U.S. Merit Systems Protection Board has stated that this failure likely “narrow[s] the applicant pool and potentially lead[s] to perceptions of unfair, arbitrary, or inequitable treatment,”<sup>xxi</sup> furthering potential discrimination in federal hiring of qualified applicants with records. Thus, failing to apply the rules to excepted service positions will severely undermine the rules’ expressed intent to “ensure that applicants from all segments of society, including those with prior criminal histories, receive a fair opportunity to compete for Federal Employment.”<sup>xxii</sup>

### **D. Ensure that Federal Agencies Comply with Title VII of the Civil Rights Act of 1964 and the EEOC Guidelines Concerning the Use of Arrests and Convictions in Hiring**

While we are pleased that the proposed regulations require federal agencies to consider applicants’ conviction histories only after a conditional offer of employment, we are concerned that the proposed rules provide few protections once applicants reach that stage of the hiring process. We strongly urge OPM to include language in the rules requiring all agencies to comply with Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment



based on race, color, religion, sex and national origin,<sup>xxiii</sup> as well as the EEOC guidelines concerning the consideration of arrest and conviction records in hiring decisions.<sup>xxiv</sup>

EEOC guidelines state that an employer can disqualify an applicant based on past criminal conviction only if it is “job related and consistent with business necessity.”<sup>xxv</sup> The guidelines further provide that employers should conduct an individualized assessment of applicants with conviction histories.<sup>xxvi</sup> This offers the applicant an opportunity to explain why the conviction history should not be considered in relation to the job because either the conviction happened years ago or the applicant is rehabilitated, among a number of other reasons.

We appreciate the fact that the supplementary information section of the proposed rules state that applicants would be notified about the consideration of their criminal histories and would have “an opportunity to rebut any issue(s) that arose, and the ability to appeal any adverse suitability action to the Merit Systems Protection Board.”<sup>xxvii</sup> However, there is nothing in the proposed rules to this effect. Therefore, we urge OPM to include an individualized assessment and appeal process in the proposed rules as recommended by the EEOC guidelines.<sup>xxviii</sup>

Finally, by expressly incorporating the EEOC criteria into the proposed regulations, OPM will be correcting for a serious flaw in the “suitability” regulations that dates back to 2007, when OPM proposed amendments to the regulations.<sup>xxix</sup> According to the EEOC, the OPM regulations “do not *require* an assessment of nature and gravity of the offense” by the federal agencies making a suitability determination, which conflicts with the settled decisions of the courts and the EEOC’s guidelines regulating the use of arrest and conviction histories.<sup>xxx</sup>

**E. Revise Optional Form 306**

OPM’s proposed rules state that after federal agencies have granted an applicant a conditional offer, they may inquire about information that is included on the Declaration for Federal Employment Form, Optional Form 306 (OF 306).<sup>xxxi</sup> Question 9 of OF 306 asks whether the applicant has been convicted, imprisoned, placed on parole, or been on probation in the past seven years, including misdemeanors.<sup>xxxii</sup> Question 11 asks whether the applicant is “currently under charges for any violation of law,”<sup>xxxiii</sup> meaning the candidate must potentially list arrests and pre-conviction charges. In 2014, OPM requested, and several of our organizations submitted, comments on the data collected by the OF 306.<sup>xxxiv</sup> While OPM proposed and made no changes to the OF 306 at that time, we urge OPM to solicit additional comments on the form to ensure that it is consistent with the proposed regulations currently under consideration, as well as the EEOC guidelines.

**F. Extend Ban the Box to OPM’s Private Contractors**

As described above, the proposed ban the box regulations apply to “competitive service” workers who hold civil positions in the federal government following an open competitive process and subject to completion of a probationary period.<sup>xxxv</sup> As we note in Section II (C) above, OPM also has the authority to extend the policy to excepted service workers, which the agency should exercise in this case.



While federal agencies are not bound by the proposed regulations in their hiring of non-competitive service workers, in general they are encouraged to follow OPM’s hiring policies and practices, such as the background check “suitability” criteria,<sup>xxxvi</sup> and they routinely do so in practice. Thus, federal agencies have relatively broad authority to apply the competitive service background check standards to the private companies that they enter into contracts with to provide a broad range of services, such as construction, food service, building maintenance, and IT services. These federal contractors, which tend to be large companies operating across state lines, employ roughly one in four U.S. workers and receive more than \$700 billion in federal funding.<sup>xxxvii</sup>

In its capacity as a member of the Federal Interagency Reentry Council, OPM led an initiative that resulted in a 2013 guidance issued to federal agencies promoting “best practices” regulating the background check policies and practices of their private contractors.<sup>xxxviii</sup> The guidance urges all federal agencies to ensure that their private contractor background check policies are “transparent,” based on “sound standards” drawing on the OPM “suitability” regulations, “explain adverse fitness determinations,” and provide a “mechanism for review” allowing the individual to contest an unfavorable decision.<sup>xxxix</sup>

As made clear by the breadth of the “best practices” guidance, OPM and all other federal agencies that enter into contracts with private firms to provide goods and services are in a position to influence the terms of their contracts with the private companies, including their background check standards. Our organizations have advocated for the President to issue an Executive Order that extends ban the box to all federal contractors across the federal government.<sup>xl</sup> While such action remains under consideration, we urge OPM to set an example for all federal agencies and extend the new ban the box policy codified by the regulation to all private contractors. In addition, the “best practices” guidance should be updated by OPM to include a ban the box component, which is consistent with the position of the Office of Federal Contract Compliance Programs endorsing ban the box as applied to federal contractors.<sup>xli</sup>

Currently, nine states (Hawaii, Illinois, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont, Connecticut) and more than a dozen cities and counties (including Baltimore, Chicago, the District of Columbia, New York City, Philadelphia, San Francisco and Seattle), apply their ban the box and fair chance hiring laws to private sector employers.<sup>xlii</sup> According to the National Employment Law Project’s estimates, these private sector ban the box laws now cover 25 percent of the nation’s workforce, which means that the policy has already been adopted by a major segment of the federal contractor community.<sup>xliii</sup> Thus, by applying the ban the box regulation to its private contractors, OPM will be reinforcing the policies that many private employers have already adopted and embraced in many cases.

We applaud your leadership in ensuring that all segments of society, including the vast segment of people with records, receive equal opportunity in federal employment. We urge swift implementation of this proposed rule to prevent any more qualified applicants from being unfairly locked out of the federal job market. Thank you for the opportunity to comment on the proposed rules. If you have any questions, please contact Sakira Cook, Counsel, The Leadership Conference on Civil and Human Rights, at [cook@civilrights.org](mailto:cook@civilrights.org) or (202) 263-2894; Maurice Emsellem, Program Director, National Employment Law Project, at [memsellem@nelp.org](mailto:memsellem@nelp.org) or



510-663-5700; or Monique Dixon, Deputy Director of Policy and Senior Counsel, NAACP Legal Defense and Education Fund, at [mdixon@naacpldf.org](mailto:mdixon@naacpldf.org) or 202-682-1300.

Sincerely,

American Civil Liberties Union  
 The Leadership Conference on Civil and Human Rights  
 Legal Services for Prisoners with Children  
 NAACP Legal Defense and Education Fund  
 National Employment Law Project

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<sup>i</sup> FEDERAL INTERAGENCY REENTRY COUNCIL, EMPLOYMENT SNAPSHOT (Aug. 2015), *available at* <https://csgjusticecenter.org/wp-content/uploads/2014/06/Employment.pdf>.

<sup>ii</sup> PRESIDENTIAL MEMORANDUM, ENHANCING SAFEGUARDS TO PREVENT THE UNDUE DENIAL OF FEDERAL EMPLOYMENT OPPORTUNITIES TO THE UNEMPLOYED AND THOSE FACING FINANCIAL DIFFICULTY THROUGH NO FAULT OF THEIR OWN, 79 Fed. Reg. 7045 (Jan. 31, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/01/31/presidential-memorandum-enhancing-safeguards-prevent-undue-denial-federa>.

<sup>iii</sup> MAURICE Emsellem & Michelle Natividad Rodriguez, NATIONAL EMPLOYMENT LAW PROJECT, ADVANCING A FEDERAL FAIR CHANCE HIRING AGENDA (Jan. 2015), *available at* <http://www.nelp.org/content/uploads/2015/01/Report-Federal-Fair-Chance-Hiring-Agenda.pdf>.

<sup>iv</sup> Devah Pager, Bruce Western & Naomi Sugie, SEQUENCING DISADVANTAGE: BARRIERS TO EMPLOYMENT FACING YOUNG BLACK AND WHITE MEN WITH CRIMINAL RECORDS, 623(1) Ann Am Acad Pol Soc Sci. 195, 198 (2013) (Author Manuscript), *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3583356/pdf/nihms-439026.pdf>.

<sup>v</sup> MAURICE Emsellem & Michelle Natividad Rodriguez, NATIONAL EMPLOYMENT LAW PROJECT, ADVANCING A FEDERAL FAIR CHANCE HIRING AGENDA (Jan. 2015), *available at* <http://www.nelp.org/content/uploads/2015/01/Report-Federal-Fair-Chance-Hiring-Agenda.pdf>.

<sup>vi</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012), *available at* [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

<sup>vii</sup> THE OFFICE OF THE DISTRICT OF COLUMBIA AUDITOR, THE IMPACT OF “BAN THE BOX” IN THE DISTRICT OF COLUMBIA (June 10, 2016), *available at* [http://www.dcauditor.org/sites/default/files/FCRSA%20-%20Ban%20the%20Box%20Report\\_0.pdf](http://www.dcauditor.org/sites/default/files/FCRSA%20-%20Ban%20the%20Box%20Report_0.pdf); SOUTHERN COALITION FOR SOCIAL JUSTICE, THE BENEFITS OF BAN THE BOX: A CASE STUDY OF DURHAM, NC (2014), *available at* [http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox\\_WhitePaper-2.pdf](http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper-2.pdf).

<sup>viii</sup> 81 Fed. Reg. 26173, 26174 (May 2, 2016) (to be codified at 5 C.F.R. pts. 330 & 731).

<sup>ix</sup> FEDERAL INTERAGENCY RESOURCE COUNCIL, OVERVIEW (Aug. 2015), *available at* [https://csgjusticecenter.org/wp-content/uploads/2014/05/FIRC\\_Overview.pdf](https://csgjusticecenter.org/wp-content/uploads/2014/05/FIRC_Overview.pdf).

<sup>x</sup> MARK T. BERG & BETH M. HUEBNER, REENTRY AND THE TIES THAT BIND: AN EXAMINATION OF SOCIAL TIES, EMPLOYMENT, AND RECIDIVISM (2011), *available at* <http://www.tandfonline.com/doi/full/10.1080/07418825.2010.498383>.

<sup>xi</sup> CHERRIE BUCKNOR & ALAN BARBER, CENTER FOR ECONOMIC POLICY RESEARCH, THE PRICE WE PAY: ECONOMIC COSTS OF BARRIERS TO EMPLOYMENT FOR FORMER PRISONERS AND PEOPLE CONVICTED OF FELONIES (June 2016),



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available at

<http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf?v=5>.

xii 81 Fed.Reg. at 26174.

xiii *Id.*

xiv U.S. OFFICE OF PERSONNEL MANAGEMENT, STANDARD FORM 85P: QUESTIONNAIRE FOR PUBLIC TRUST POSITIONS, available at [https://www.opm.gov/forms/pdf\\_fill/sf85p.pdf](https://www.opm.gov/forms/pdf_fill/sf85p.pdf); U.S. OFFICE OF PERSONNEL MANAGEMENT, STANDARD FORM 85: QUESTIONNAIRE FOR NON-SENSITIVE POSITIONS (For example, the stated policy of OPM with regard to “public trust” and “non-sensitive” positions is to delay any arrest or conviction history until the conditional offer stage of the hiring process. According to Standard Forms 85 and 85P, which are the questionnaires that collect arrest and conviction history information for non-sensitive and public trust positions, OPM states that the applicant should “[c]omplete this form only after a conditional offer of employment has been made.”), available at [https://www.opm.gov/forms/pdf\\_fill/sf85.pdf](https://www.opm.gov/forms/pdf_fill/sf85.pdf).

xv FEDERAL INTERAGENCY REENTRY COUNCIL, REENTRY MYTH BUSTER ON FEDERAL HIRING POLICIES (revised Mar. 2015), available at <https://csgjusticecenter.org/wp-content/uploads/2012/11/Reentry-Council-Mythbuster-Fed-Employment.pdf>.

xvi NATIONAL EMPLOYMENT LAW PROJECT, FAULTY FBI BACKGROUND CHECKS FOR EMPLOYMENT: CORRECTING FBI RECORDS IS KEY TO CRIMINAL JUSTICE REFORM (Dec. 2015), available at <http://www.nelp.org/content/uploads/NELP-Policy-Brief-Faulty-FBI-Background-Checks-for-Employment.pdf>.

xvii U.S. OFFICE OF PERSONNEL MANAGEMENT, EMPLOYMENT (Mar. 2016), available at <https://www.fedscope.opm.gov/employment.asp>.

xviii 5 C.F.R. § 6.3(a) (2016).

xix *See, e.g.*, U.S. MERIT SYSTEMS PROTECTION BOARD, REFORMING FEDERAL HIRING: BEYOND FASTER AND CHEAPER, 31 (2006) (“Although competitive examining is still the primary single hiring authority in Government, its use is declining.”), available at <http://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=224102&version=224321&application=ACROBAT>.

xx *See* PRESIDENTIAL MEMORANDUM, ENHANCING SAFEGUARDS TO PREVENT THE UNDUE DENIAL OF FEDERAL EMPLOYMENT OPPORTUNITIES TO THE UNEMPLOYED AND THOSE FACING FINANCIAL DIFFICULTY THROUGH NO FAULT OF THEIR OWN, 79 Fed. Reg. 7045 (Jan. 31, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/01/31/presidential-memorandum-enhancing-safeguards-prevent-undue-denial-federa>.

xxi *See, e.g.*, U.S. MERIT SYSTEMS PROTECTION BOARD, REFORMING FEDERAL HIRING: BEYOND FASTER AND CHEAPER, 33-34 (2006), available at <http://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=224102&version=224321&application=ACROBAT>.

xxii 81 Fed.Reg. at 26173.

xxiii 42 U.S.C. § 2000e-2 (2012).

xxiv U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012) (The EEOC guidelines, which implement Title VII of the Civil Rights Act of 1964, state that federal agency officials should be directed to take into account the age of the offense, the nature of the offense, and whether the offense is directly related to the job; and to conduct an “individualized assessment” providing the candidate an opportunity to present evidence of rehabilitation and verify the accuracy of the record.), available at [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

xxv *Id.*

xxvi *Id.*





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xxvii See 81 Fed. Reg. at 26174.

xxviii U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012), available at [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

xxix See 5 C.F.R. § 731.202 (2016).

xxx LETTER TO ANNA MAZZI, OPM DEPUTY ASSOCIATE DIRECTOR, FROM PEGGY MASTROIANNI, EEOC ASSOCIATE LEGAL COUNSEL (Mar. 19, 2007), available at [https://www.eeoc.gov/eeoc/foia/letters/2007/arrest\\_and\\_conviction\\_records.html](https://www.eeoc.gov/eeoc/foia/letters/2007/arrest_and_conviction_records.html).[https://www.eeoc.gov/eeoc/foia/letters/2007/arrest\\_and\\_conviction\\_records.html](https://www.eeoc.gov/eeoc/foia/letters/2007/arrest_and_conviction_records.html).

xxxi 81 Fed. Reg. at 26175.

xxxii U.S. OFFICE OF PERSONNEL MANAGEMENT, OPTIONAL FORM 306: DECLARATION FOR FEDERAL EMPLOYMENT, available at [https://www.opm.gov/forms/pdf\\_fill/of0306.pdf](https://www.opm.gov/forms/pdf_fill/of0306.pdf).

xxxiii *Id.*

xxxiv *Id.*

xxxv See 81 Fed. Reg. 25174.

xxxvi See 5 C.F.R. § 731.202.

xxxvii LETTER FROM NATIONAL EMPLOYMENT LAW PROJECT, ET AL., TO PRESIDENT BARACK OBAMA (Apr. 25, 2016), available at <http://www.nelp.org/content/uploads/Letter-President-Obama-Federal-Contractor-Fair-Chance-Ban-the-Box.pdf>.

xxxviii U.S. OFFICE OF CAPITAL OFFICERS COUNCIL, CONTRACTOR FITNESS ADJUDICATION: BEST PRACTICES (May 15, 2013), available at <https://www.chcoc.gov/content/contractor-fitness-adjudication-%E2%80%93-best-practices>.

xxxix *Id.*

xl *E.g.*, ALEXI MCCAMMOND, POLITICO, HOW EFFECTIVE IS 'BAN THE BOX' IN HELPING EX-OFFENDERS GET A JOB? (June 16, 2016 9:28 AM) ("Like the EEOC, OFCCP recommends that contractors, as a general rule, refrain from inquiring about convictions on job applications. Further, OFCCP recommends, if and when contractors make such inquiries, the inquiries are limited to convictions for which exclusion would be job-related for the position in question and consistent with business necessity."), available at <http://www.politico.com/story/2016/06/how-effective-is-ban-the-box-in-helping-ex-offenders-get-a-job-224418>; ADVOCACY LETTER FROM WADE HENDERSON, ET. AL., PRESIDENT & CEO OF THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, TO PRESIDENT BARACK OBAMA (Mar. 26, 2015), available at <http://civilrightsdocs.info/pdf/Fair-Chance-Initiative.pdf>; NEW YORK TIMES, EDITORIAL, REMOVE UNFAIR BARRIERS TO EMPLOYMENT (Feb. 27, 2015), available at <http://www.nytimes.com/2015/02/28/opinion/remove-unfair-barriers-to-employment.html>.

xli U.S. DEPARTMENT OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, DIR 2013-02 (Jan. 29, 2013) ("Like the EEOC, OFCCP recommends that contractors, as a general rule, refrain from inquiring about convictions on job applications. Further, OFCCP recommends, if and when contractors make such inquiries, the inquiries are limited to convictions for which exclusion would be job-related for the position in question and consistent with business necessity."), available at

xlii MAURICE Emsellem & Michelle Natividad Rodriguez, NATIONAL EMPLOYMENT LAW PROJECT, ADVANCING A FEDERAL FAIR CHANCE HIRING AGENDA (Jan. 2015), available at [https://www.dol.gov/ofccp/regs/compliance/directives/Dir306\\_508c.pdf](https://www.dol.gov/ofccp/regs/compliance/directives/Dir306_508c.pdf).

xliii *Id.*