



# A Healthy Balance

Expanding Health Care Job Opportunities  
for Californians with a Criminal Record  
While Ensuring Patient Safety and Security

*May 2014 | Madeline Neighly, Maurice Emsellem, Anastasia Christman*

# NELP

National Employment  
Law Project

## **National Employment Law Project**

The National Employment Law Project (NELP) is a non-profit research and advocacy organization that partners with local communities to secure the promise of economic opportunity for today's workers, including the one in four adults in the U.S. who has a criminal record.

For more information, please visit [www.nelp.org](http://www.nelp.org).

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# Executive Summary

The rapidly growing health care industry presents a major economic opportunity for the nation and for states such as California. Health care and related occupations are expected to account for half of California's top 20 fastest-growing fields between 2010 and 2020.

There is especially strong and growing demand for entry-level health care workers. The number of home health aides employed to care for the state's aging population, for example, is projected to increase by over 50 percent by 2020. Employment for personal care aides, emergency medical technicians, and paramedics is expected to significantly expand as well.

Entry-level health care jobs offer opportunity to job-seekers with limited skills and education. It is critical that these job opportunities be available to all qualified workers, including workers from underserved ethnically and racially diverse communities, who possess the cultural competency to deliver quality care to their communities. Unfortunately, too many job seekers from these communities are shut out of such job opportunities because of a criminal record, despite the fact that the vast majority of arrests in California, especially of people of color, are for non-violent offenses.

The critical question explored in this report is whether these viable entry-level health care occupations will be available to qualified workers with a criminal record, who now constitute one in four adult Californians. This report uses legal and empirical research coupled with interviews of stakeholders to document and evaluate the role that criminal background checks play in limiting access to health care jobs in California. Although much more work remains to be done, the report's findings and recommendations, which are summarized below, help lay the groundwork for a more informed debate of the issues and of the most promising options to help remove unnecessary barriers to employment of people with a criminal record.

## Findings

### 1. The Promising Jobs Outlook for Health Care Careers Presents Diversity Challenges and Opportunities

- Half of the state's 20 fastest-growing fields are health care-related occupations, mostly including entry-level positions that are available to workers with limited skills and education. For instance, by 2020, the number of home health aides will increase by more than 52 percent, personal care aides by almost 43 percent, paramedics by 42 percent, and occupational therapy assistants by 35 percent, with workers to fill entry-level positions being especially in demand.
- California has pioneered some especially successful programs to increase the diversity of the health care workforce, often drawing from young people in those communities hardest hit by unemployment. Especially noteworthy is the Emergency Medical Service Corps (EMS Corps) established by the Alameda County Public Health Department in 2011, and the Bay Area's Health Care Career Connection, which both provide training, mentorship, and paid internships for young people from low-income communities.

### 2. Communities of Color Are More Harshly Affected by Employment Barriers Created by Criminal Records Screening

- More than one in four Californians—or eight million adults—has a criminal record on file with the state, which is a by-product of the decades of over-criminalization and policing in low-income communities of color.
- While the alarming number of people in California with a criminal record means that all communities are impacted, not all communities are affected equally. African Americans make up less than 7 percent of the state's population but accounted for almost 20 percent of all felony arrests and 15 percent of all misdemeanor arrests in 2012. Latinos represent 4 in 10 of all Californians arrested for a felony or misdemeanor, which is slightly higher than their overall representation among the state's population.
- As with their adult counterparts, youth of color are vastly overrepresented in the criminal justice system. In 2011, whites represented about one-fourth of all juveniles arrested for a felony or misdemeanor offense, while Latinos accounted for about 55 percent and African Americans represented another 17 percent.
- Most arrests in the state are for non-violent offenses that often pose no safety or security concerns for health care consumers or employers. In 2012, over 77 percent of all arrests of African Americans in California were for non-violent offenses, and 81 percent of all arrests of Latinos were for non-violent offenses.

### 3. Civil Rights and Consumer Protection Laws Strictly Regulate Criminal Background Checks

- The federal government, including U.S. Attorney General Eric Holder, the U.S. Equal Employment Opportunity Commission and the U.S. Department of Labor, have taken bold steps in the past two years to reduce barriers to employment of people with a criminal record by enforcing the civil rights and consumer laws that apply to all private employers, public employers, federal contractors and federally-funded workforce development programs.
- California has some of the nation's strongest employment laws requiring more fair criminal background checks for employment. For example, California law limits background check companies from reporting conviction histories that date back more than seven years, and a new "ban the box" law takes effect in July 2014 that prohibits public employers, including county hospitals and other health care facilities, from inquiring into a job applicant's conviction history on the initial application.

### 4. The Fastest-Growing Health Care Occupations Fail to Include Basic Worker Protections that Govern Most of the State's Occupational Licensing Laws

- Criminal background checks required by state law apply to all but a handful of the entry-level health care occupations that are most in demand in California, including three of the five fastest-growing health care occupations (home health aides, personal care aides, and emergency medical technicians). As such, it is important that state policies and regulations not unduly limit the ability of all Californians to fairly compete for and access these health care occupations.
- From July 2011 to December 2013, over half a million workers were screened by the California Department of Justice for a criminal background check while seeking to be certified or licensed for health care occupations, including especially large numbers of allied health professionals, certified nurse assistants, home health aides, nurses, and pharmacy workers.
- Like most other occupations requiring a criminal background check by the state, the majority of health care occupations that require a fingerprint background check for certification or licensure are governed by the Department of Consumer Affairs and the California Business and Professions Code, which includes robust worker protections. However, three of the entry-level health care growth occupations are not covered by the core worker protections of the Business and Professions Code, including certified nurse assistants, home health aides, and emergency medical technicians and paramedics.
- In contrast to all the other occupations with licensing boards regulated by the Department of Consumer Affairs, certified nurse assistant, home health aide, and

emergency medical technician applicants face lifetime disqualification for more than 50 specified convictions, including some misdemeanors. Also of serious concern, these and other health care occupations that fall outside of the Business and Professions Code do not uniformly take into account evidence of rehabilitation by the worker or provide for strong appeal procedures.

- Certified enrollment counselors who are responsible for Affordable Care Act outreach and enrollment to targeted communities also have a special set of background check rules. While they may be initially denied certification by Covered California for a broad set of offenses, they are provided with a strong appeal process allowing the applicants to have their disqualifying offense waived if they can produce sufficient evidence of rehabilitation and other mitigating circumstances.
- Workers seeking to obtain a license or certification for health care occupations often have a hard time navigating the background check process and experience significant delays, which can seriously compromise their job prospects.

## 5. Kaiser Permanente, the State's Largest Health Care Employer, Has Taken Helpful Steps to Reduce Barriers to Employment of People with Criminal Records

- In many respects, Kaiser Permanente's policies provide a helpful model for other private and public health care employers to follow. Of special significance, Kaiser Permanente limits its background check inquiry to criminal convictions that occurred within the past seven years, which is consistent with California state law, and to mostly serious offenses, not lesser offenses like disorderly conduct. Kaiser Permanente is planning to implement additional changes by the end of 2014, including elimination of criminal background check questions from the candidates' "submission of interest," which is the first step in the application process.

## Recommendations

- The California Legislature should work to remove unnecessary barriers to certification and licensing of health care occupations.
  - The legislature should evaluate the laws governing certified nurse assistant, home health aide, and emergency medical technician licensure and certification. The goal must be elimination of lifetime disqualifications and creation of a standardized requirement that the boards consider mitigating circumstances and rehabilitation evidence when determining licensure or certification eligibility. A bill (SB 1384) is currently pending that would make important changes to the process for certified nurse assistants by removing most lifetime disqualifications and providing an opportunity for applicants to submit rehabilitation evidence.

- To promote and reward rehabilitation and reintegration on the part of Californians who have a criminal record, the legislature should pass AB 2396, to preclude consideration of convictions that have been dismissed pursuant to state law when determining licensing and certification eligibility.
  - As recommended by the Select Committee on the Status of Boys and Men of Color, the legislature should fund internships in the health care field for students from medically underserved communities, and support training and placement programs for justice-involved youth. The legislature should pass AB 2060, which would establish a fund for vocational training, stipends, and apprenticeships drawing from savings generated by criminal justice reforms that reduce recidivism.
- The state licensing boards and agencies must clear the way to opportunity for all Californians.
    - In addition to legislative changes, the boards may take executive action to remove unnecessary barriers to employment. Most importantly, the Department of Public Health should not require certified police records from applicants as it is duplicative and unnecessary, the Employment Development Department should aggressively enforce its criminal records guidance regulating federally-funded workforce development programs, and the Department of Fair Employment and Housing should issue a state criminal records directive for private and public sector employers that incorporates the standards adopted by the Equal Employment Opportunity Commission.
    - The boards should track and publish information on processing delays to identify areas in which changes may be made.
    - Clear and transparent outreach material describing the specific background check requirements of health care certification and licensing boards and agencies must be made available both online and in paper form. The boards should work with community colleges and service providers to ensure that all Californians know the areas of opportunities and likely barriers in health care occupations.
  - Employers must ensure that their workforce is best prepared to deliver high quality services to the community.
    - Health care employers should aggressively train and monitor their human resources personnel to comply with the criminal records guidance of the U.S. Equal Employment Opportunity Commission (EEOC) and adopt the EEOC best practices, which include “banning the box” and delaying inquiry and review of job applicants’ conviction histories.
    - Employers should work to actively engage the communities they serve and ensure opportunities for all Californians. Employers should work with reentry programs and other job training providers to ensure diversity within their workforce.

# I. Introduction

Increasingly, Americans coast to coast see the rapidly changing health care industry as both an economic and public health opportunity. Like the nation as a whole, California expects to see strong job growth in its health care occupations over the next several years.<sup>1</sup> Economists predict 5.7 million new jobs in health care occupations between 2010 and 2020, accounting for nearly 30 percent of all new jobs in the U.S. economy.<sup>2</sup> Similarly, Californians anticipate that health care occupations will account for half of the state's top 20 fastest-growing fields between 2010 and 2020.<sup>3</sup> And entry-level health care positions—those jobs available to large numbers of Californians entering positions with limited skills and education—are especially in demand. For example, the number of home health aides employed to care for the state's aging population is projected to increase by over 50 percent by 2020, while employment for personal care aides, emergency medical technicians, and paramedics is expected to expand significantly as well.

For this industry to succeed in keeping Californians healthy and contributing to a vibrant new economy, it is critical that these job opportunities be available to all qualified workers. The Golden State is ranked 20<sup>th</sup> for health service to low-income populations,<sup>4</sup> and much of the projected growth in health care demand will come from aging members of the many diverse ethnic and racial populations here. More than 80 percent of the state's projected population growth in the next 15 years will be due to a growth in the state's Latino population.<sup>5</sup> Thus, caretakers and health care personnel must come from within our communities, and we must be recruiting and hiring people with the cultural competency to deliver quality care. Unfortunately, all too many of our community members who seek to enter health care occupations to provide services to their underserved community are shut out of these opportunities because of a criminal record. California runs the risk of missing out on an opportunity to build a strong health care industry that takes

*Californians anticipate that health care occupations will account for half of the state's top 20 fastest-growing fields between 2010 and 2020.*

advantage of the skills of all its residents by rejecting these applicants out of hand, while hundreds of thousands of Californians who are ready to work find themselves sidelined and unemployed.

The critical question explored in this report is whether these viable entry-level occupations will be available to qualified workers with a criminal record, who now constitute one in four adult Californians. This is an especially important issue for low-income communities of color and young people struggling to find gainful employment. Now, during this period of growth in the industry, is the right time for a thoughtful analysis of employment barriers so that policymakers can ensure that qualified workers are treated more fairly in the process of hiring for health care occupations without compromising patient safety and workplace security.

In particular, implementation of the Affordable Care Act offers a new opportunity to evaluate the screening requirements that apply to a broad range of health care positions. At the national level, federal officials, including the U.S. Attorney General, have taken bold new steps challenging all employers, the states, and the federal government itself to revisit their criminal background check policies, laws, and regulations that disadvantage workers of color and unnecessarily block qualified workers from jobs and licenses. President Obama is calling for new “ladders to jobs and economic opportunity” targeting the limited job prospects of boys and young men color in his much-heralded “My Brother’s Keeper” initiative.<sup>6</sup> And California has been at the forefront of this equity movement with a focus on health care specifically, as the legislature’s Select Committee on Boys and Men of Color and the state’s workforce development system prioritize efforts to ensure that trained personnel are available to meet the new demand for health care workers.

As part of these efforts, this report uses legal and empirical research coupled with interviews of stakeholders to document and evaluate the role that criminal background checks play in limiting access to health care jobs in California. Although much more work remains to be done, the report’s findings and recommendations help lay the groundwork for a more informed debate of the issues and of the most promising options to help remove unnecessary barriers to employment of people with a criminal record.<sup>7</sup>

## II. Equity Concerns and the Outlook for Entry-Level Health Care Jobs

**I**t is important to begin this analysis with a brief disclaimer and definition of terms. This report adheres to an expansive view of the occupations that are covered under the rubric of the “health care workforce.” Not only are those who provide direct care covered, like doctors and nurses, but it also includes the 60 percent of the health care jobs that are considered “allied health professionals,” such as medical technicians, medical assistants, and physical therapists. More broadly still, there are large numbers of workers employed in medical billing or as health care education and outreach workers who are also considered health care workers for the purposes of this report.

### A. The Promising Jobs Outlook

According to estimates from California’s Employment Development Department (EDD), the increased need for health care providers is not situated at the top of the economic and educational pyramid, but is instead focused on more entry-level positions. For instance, EDD predicts that by 2020, the number of home health aides will increase by more than 52 percent, personal care aides by almost 43 percent, paramedics by 42 percent, and occupational therapy assistants by 35 percent.<sup>8</sup> In fact, ten of the top 20 fastest-growing occupations in California are in the health care field, with home health aides ranked as the second-fastest growing occupation, and personal care aides and emergency medical technicians and paramedics ranking sixth and seventh, respectively. In many cases, these are not just the jobs with the fastest growth expected, but they are also the ones

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with the largest absolute number of projected job openings from 2010 to 2010, as in the case of personal care aides and home health aides.<sup>9</sup>

Feeding this exceptional growth is an aging population and slow population growth. More Americans have increased health care needs as they age, and there are fewer young people to provide that necessary care. In addition, as health care costs continue

**Table 1. Fastest Growing Healthcare Occupations in California by Percentage Change, 2010-2020**

	<i>Title</i>	<i>Percent Change</i>	<i>Median Hourly Wage</i>
1.	Biomedical Engineer	67.5	\$47.39
2.	Home Health Aide	52.4	\$10.65
3.	Personal Care Aide (IHSS)	42.6	\$10.43
4.	Emergency Medical Technician / Paramedic (EMT / EMT-P)	42.1	\$14.03
5.	Marriage and Family Therapist	39.3	\$22.26
6.	Diagnostic Medical Sonographer	37.7	\$40.97
7.	Occupational Therapist Assistant	35.0	\$32.81
8.	Pharmacy Technician	33.1	\$18.51
9.	Pharmacy Aide	32.1	\$11.77
10.	Medical Equipment Repairers	31.4	\$26.16

 *State requires background check.*

**Table 2. Health Care Occupations Projected to Grow the Most in California by Number of Positions, 2010-2010**

	<i>Title</i>	<i>Total Job Openings</i>	<i>Median Hourly Wage</i>
1.	Personal Care Aide	163,900	\$10.34
2.	Registered Nurse	99,800	\$44.48
3.	Home Health Aides	39,900	\$10.65
4.	Certified Nurse Assistant	38,800	\$12.90
5.	Medical Secretary	33,500	\$17.23
6.	Licensed Vocational Nurse	31,700	\$24.93

 *State requires background check.*

to rise and an elderly population requires assistance with basic health care functions, work is increasingly being delegated to lower-paid and lower-skilled workers. In particular, the increase in home health aide positions<sup>10</sup> may be linked to a move away from costly hospital stays, a desire to receive care in one's own home, and the increased health outcomes of maintaining one's social network with in-home care.

## B. Equity and Diversity Challenges

The increased demand for entry-level health care workers creates opportunities for those previously left out of the workforce, including low-income communities of color and young people seeking a promising career in a nation still recovering from the Great Recession. While entry-level health care jobs have tended to have some level of racial and ethnic diversity,<sup>11</sup> some of the state's most marginalized communities have been locked out of health care jobs so that the diversity of the state is not adequately reflected in the workforce.<sup>12</sup> Furthermore, as higher-paid positions come with ever-higher educational and credentialing requirements, diversity decreases significantly, such that patients seeking the highest level of medical care are still likely to be treated by a disproportionately white and male population. In many doctors' offices, monolingual medical staffs depend on bilingual support staff to translate for their patients.<sup>13</sup> Ensuring access to entry-level health care jobs for diverse populations can help position those workers for advancement within their chosen field.

Fortunately, in California, this challenge has not gone unnoticed. To alleviate the workforce shortages in California health care occupations and combat inequality in health care services, two major initiatives were established in recent years, including the California Workforce Investment Board's Health Care Development Council (HWDC) and the Governor's Let's Get Healthy California Task Force. According to the HWDC's "shared prosperity" state plan for 2012 to 2017, the workforce system must "[e]nsure that California's health workforce is representative of the population and geographic areas and can provide quality, culturally responsive and appropriate services to our growing, emerging majority populations."<sup>14</sup>

*Recruitment and support for more providers and allied health professionals of color is essential to expand training for a health care workforce that can proactively identify and address health issues facing underserved communities.*

*- Assembly Select Committee on the Status of Boys and Men of Color*

*“Cultural competency is crucial to closing disparities in health and education. Services that are respectful of and responsive to the beliefs, practices, and cultural and linguistic needs of diverse communities are needed to help bring about positive outcomes. Communities and their education and health care systems must be able to address the needs of their diverse populations without cultural differences hindering the conversation and delivery of services.”*

*-Investing in Boys and Men of Color:  
The Promise and Opportunity*

*[www.rwjf.org/content/dam/farm/reports/issue\\_brief/2013/rwjf404345](http://www.rwjf.org/content/dam/farm/reports/issue_brief/2013/rwjf404345)*

At the same time, the legislature’s Select Committee on the Status of Boys and Men of Color has been especially focused on the need to open employment opportunities for people with a criminal record, particularly in the health care sector. The Committee’s comprehensive platform for state action includes a number of especially relevant recommendations, including a measure calling on the state’s health care and workforce development systems to promote entry-level positions in the health care field that target boys and men of color.<sup>15</sup> As explained in the Select Committee’s platform, “[r]ecruitment and support for more providers and allied health professionals of color is essential to expand training for a health care workforce that can proactively identify and address health issues facing underserved communities.”<sup>16</sup>

## C.Pioneering Health Care Training Programs

California has also pioneered a number of programs that train and place young people from disadvantaged communities in health care occupations, including young adults who have had contact with the criminal justice system. Especially noteworthy is the Emergency Medical Service Corps (EMS Corps) established by the Alameda County Public Health Department in 2011. EMS Corps is “a highly selective, rigorous academy that trains aspiring emergency medical professionals who are from the community,”<sup>17</sup> and was created to “increase the number of underrepresented emergency medical technicians through youth development, mentorship, and job training.”<sup>18</sup>

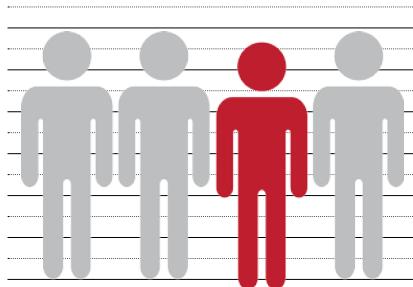
The program provides a five-month paid stipend program targeting young men from the ages of 18 to 24, and includes life coaching, mentorship, and tutoring along with emergency medical technician (EMT) training and other support. The EMS Corps has been a significant success in the community, with over 90 percent of the trainees going on to further educational opportunities, internships, or careers in the emergency medical field.<sup>19</sup> Despite the success of the EMS Corps, the program’s impact on underserved youth is limited by the state’s broad state criminal background check requirements that govern the EMT certification process. In 2012, legislation was introduced (SB1378) to address the overly restrictive EMT

background checks ([Section V.B.2.b.iii](#)) and require that they take into account rehabilitation, not just the individual's criminal history.

Other model programs train and place young people in well-paying health care positions, including the Bay Area's Health Care Career Connection, the most established program in California. It provides comprehensive, paid, full-time educational internships (250 in 2013) preparing young people from disadvantaged backgrounds for a range of health care occupations that are most in demand. For example, the internships included placements in health care information technology (electronic records), health education and community outreach, positions with public health departments working in child health and nutrition, and as EMTs.<sup>20</sup> Another successful program is Cedars-Sinai's Youth Employment and Development Careers Academy, which is based in Los Angeles. It introduces high school juniors and seniors to the health care field, allowing them to earn high school credit while working with Cedars-Sinai employee mentors over the course of a year.<sup>21</sup>

### III. Having a Criminal Record Severely Impacts Career Opportunities

**Figure 1. Eight Million Californians—One in Four Adults—Has a Criminal Record**



While there is much opportunity in the health care industry, potential workers with a criminal record may not even be able to reach the first rung of the health care career ladder. For example, while certified nurse assistant (CNA) and home health aide (HHA) are two of the positions most available to workers with limited educational achievement and work experience, they also have some of the highest criminal record barriers to certification, including lifetime disqualifications for over 50 enumerated offenses. In the following section, we map the impact of the criminal justice system on California's communities, laying the foundation for a discussion of the collateral consequences of licensing and employment restrictions on the state's communities of color.

#### A. One in Four Californians Has a Criminal Record

In addition to the challenges they may face as members of disadvantaged communities or young workers without significant educational or workplace credentials, workers with a criminal record must overcome the devastating stigma and formidable legal barriers associated with having a record. Roughly one in four U.S. adults—70 million Americans—has a criminal record on file that may be reported on a routine background check, a by-product of the decades of over-criminalization and policing in low-income communities of color.<sup>22</sup> The California statistics are consistent with the national experience: approximately 28 percent of all adults in California—eight million people—have a criminal record on file with the state.<sup>23</sup>

Indeed, California in particular has suffered from the effect of over-criminalization of its population. Due to severe overcrowding, a federal court found that the provision of medical and mental health care within the state's prisons was constitutionally inadequate. The court has required the state to reduce prison populations to 137.5 percent of design capacity, meaning that roughly 40,000 prisoners needed to be removed from California's prisons.

In 2011, Governor Jerry Brown signed California's Public Safety Realignment bill (AB 109), which redirects tens of thousands of lower-level offenders from the state prisons to the counties and creates new opportunities to provide reentry services, treatment, and other "smart on crime" alternatives to incarceration. Also in 2011, the Governor proposed closing all the state's youth correctional facilities, and now the number of youth incarcerated by the Division of Juvenile Justice is just 672<sup>24</sup>, compared to a high of 10,000 in 1996.<sup>25</sup> This shift in policy makes eliminating employment barriers all the more important. With extensive research showing that access to gainful employment is an important element in limiting recidivism and diverting youth from the criminal justice system, ensuring access to jobs like those being created in the health care industry should be a key component of economic and community development plans.

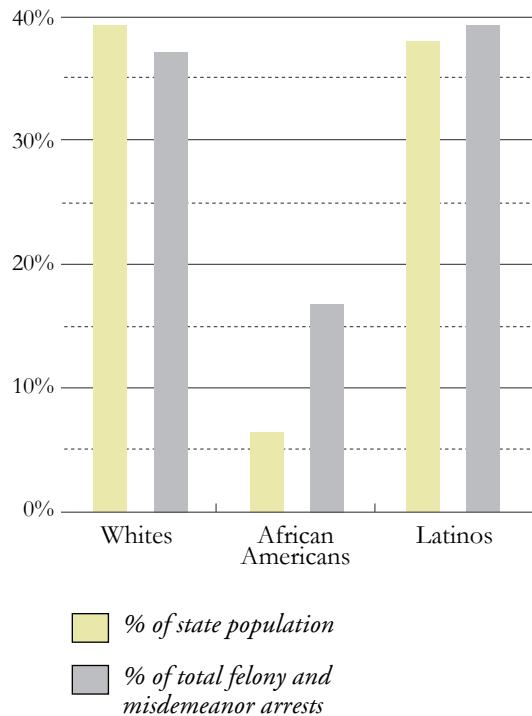
## B. Communities of Color are Particularly Impacted

While the alarming number of people in California with a criminal record means that all communities are impacted, not all communities are affected equally. African Americans make up less than 7 percent of the state's population but accounted for almost 20 percent of all felony arrests and 15 percent of all misdemeanor arrests in 2012. Latinos represent 4 in 10 of all Californians arrested for a felony or misdemeanor, which is slightly higher than their overall representation among the state's population.<sup>26</sup>

What is also striking for the purposes of this report, which focuses on the employment prospects of people with a criminal record, is the fact that most arrests in the state are for non-violent offenses, including drug offenses. In 2012, over 77 percent of all arrests of African Americans in California were for non-violent offenses, and 81 percent of all arrests of Latinos were for non-violent offenses.<sup>27</sup> Unfortunately, state data are not available to determine the rate of convictions by race and ethnicity. However, both African Americans and Latinos make up the vast majority (70.4 percent in 2012) of those serving time in prison, and these communities are most harmed by the collateral costs of having a prison record.<sup>28</sup>

Not only are African American and Latino Californians more likely to have a criminal record than white Californians, employers treat African American and Latino job applicants with a criminal record more harshly than they treat white job applicants. A landmark 2003 study found that white job applicants with a criminal record were

**Figure 2. African Americans and Latinos Disproportionately Arrested**



more than three times more likely to get a job callback than similarly educated and experienced African Americans. Even more shocking, white job applicants with a criminal record were more likely to get a job callback than similarly situated African Americans **without** a criminal record.<sup>29</sup> A recent study expanding on those results found that Latino job seekers were significantly less likely to receive a callback than matched white male job seekers.<sup>30</sup> For female job seekers, African American women and women with a criminal record were also much less likely to receive a callback than white women or women without a criminal record.<sup>31</sup>

While people of color are already far more represented in the criminal justice system, the fact that the state is growing even more diverse raises serious equity concerns well into the future. Indeed, while a slight majority of Californians are now people of color, 70 percent of the state's young people (aged 25 and under) are people of color, according to the 2010 Census. As with their adult counterparts, African American youth are vastly overrepresented in the juvenile justice system. In fact, the overrepresentation of African Americans and Latinos in the criminal justice system is even starker at the juvenile level. In 2011, whites represented about one-fourth of all juveniles arrested for a felony or misdemeanor offense, while Latinos accounted for about 55 percent and African Americans represented another 17 percent.<sup>32</sup> California cannot run the risk of locking out the future generation of Californians from the labor market, which is why it is imperative to closely scrutinize the interaction of a criminal record with the employment prospects of young people of color.

# IV. Laws Regulating Employment Background Checks:

## From Tough-on-Crime to Smart-on-Crime

For decades, policymakers operated on a premise of being “tough on crime,” and as a result, state costs for corrections increased at a rate second only to Medicaid, while efforts at violence prevention were starved of funds, and communities—especially low-income communities of color—suffered immensely.<sup>33</sup>

In California and the nation as a whole, policymakers are shifting from a position of being “tough on crime” to strategies designed to be “smart on crime” instead. They are recognizing that the massive increase in people with a criminal record, the disparate impact of the failed “War on Drugs” and other harsh sentencing and policing strategies, and overbroad restrictions on employment of people with a criminal record have reduced public safety and destabilized families and communities. Every element of the system is ripe for reform, from secondary education to sentencing recommendations, and as part of the process, many leaders at the federal, state, and local levels are pursuing policies to ensure that people with a criminal record are able to fairly compete for jobs for which they are qualified.

The pace is being set by the nation’s top law enforcement official, U.S. Attorney General Eric Holder, who has taken bold steps to address the “collateral consequences” of a criminal record on the hiring process and the proliferation of criminal background checks for employment. In 2011, Attorney General Holder convened the Federal Interagency Reentry Council, signifying an executive branch commitment to coordinating reentry efforts and advancing effective reentry policies. Attorney

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General Holder also sent a letter to all state attorneys general urging them to eliminate unnecessary state-imposed collateral consequences that place burdens on people with a criminal record but do not increase public safety.<sup>34</sup> The Reentry Council has also prioritized making the federal government a model employer of people with a criminal record, and working to remove unnecessary barriers to employment at the federal level.<sup>35</sup>

Several federal agencies and their state-level counterparts have made significant advances in reforming laws and policies that regulate the employment of people with a criminal record in order to ensure that all workers have the opportunity to compete fairly for jobs. While these laws and policies are not specific to health care occupations, they apply to the health care industry because they govern all public and private employers, including federal contractors, and apply to all federally-funded workforce development programs.

## A. Employment Anti-Discrimination Law

The federal civil rights law that prohibits employment discrimination—Title VII of the Civil Rights Act of 1964—provides the core worker protections regulating criminal background checks for employment. Because criminal background checks have a “disparate impact” on people of color, the use of arrest and conviction records in hiring decisions implicates federal anti-discrimination law and triggers increased scrutiny of employer practices.

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In 2012, the U.S. Equal Employment Opportunity Commission (EEOC) took a strong stand on the issue by clarifying what the law requires of private employers, public employers, and the states that impose occupational restrictions on people with a criminal record. Specifically, the EEOC released an updated guidance on the use of arrest and conviction records in employment decisions. Passed by bipartisan vote, the updated guidance affirms that public and private employers that automatically exclude people with a criminal record from all employment opportunities violate federal civil rights law. As detailed in the guidance, employers may only deny employment based on criminal history if the record is “job related and consistent with business necessity.” Instead of overly restrictive

policies that deny employment to all job seekers with a criminal record, the employer must consider several factors, including (1) the nature and gravity of the offense or conduct; (2) the time that has passed; and (3) the nature of the job held or sought.<sup>36</sup>

Of special significance to this analysis, the EEOC's guidance also clarifies that state laws that prohibit people with a record from working in certain occupations, like those regulating health care workers, are also subject to close scrutiny because of their disproportionate impact on communities of color. Thus, "if an employer's exclusionary policy or practice is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability."<sup>37</sup> The EEOC also provided a set of best practices for employers to follow to help ensure strong compliance with the law. One key to compliance with federal anti-discrimination law offered by the guidance is the use of an individualized assessment, including consideration of evidence of rehabilitation, to ensure that exclusions are not overbroad.

In a separate directive regulating all of the nation's federal contractors, the U.S. Department of Labor (DOL) took a similarly strong position regarding criminal records and hiring. The directive, issued in early 2013 by DOL's Office of Federal Contract Compliance Programs (OFCCP),<sup>38</sup> is especially relevant to health care employers, many of which contract with the federal government to provide health care services in their communities. Like the EEOC guidance, the OFCCP directive describes the "job related" standards regulating criminal background checks and endorses best practices for federal contractors to follow.<sup>39</sup>

## B. Civil Rights Protections Regulating Workforce Programs

Shortly after the EEOC released its criminal records guidance, the Department of Labor furthered the ability of all workers to compete fairly for jobs by directing all of the nation's federally-funded workforce development programs to ensure that federally-funded workforce services are available to all workers, including workers with a criminal record.<sup>40</sup>

As a result, all Workforce Investment Act (WIA)-funded programs, including the nation's 3,000 One-Stop Career Centers, must take a series of specific steps to prevent the posting of job ads by employers that limit hiring of people with a criminal record and to ensure that people with a criminal record are not denied access to all available job training and placement services. To reinforce the significance of this federal civil rights mandate within the state, California's Employment Development Department supplemented the federal directive with its own policy specifically targeted to California's WIA-funded programs.<sup>41</sup>

## C. Consumer Protections Regulating Employers and Background Check Companies

In addition to the civil rights protections described above, federal and state consumer protection laws are implicated when employers obtain commercially prepared background checks on prospective employees. The vast majority of employers, including California's largest health care employers, rely on commercially-prepared background checks. Given widespread inaccuracies in these reports, adherence to basic consumer protection laws is essential to ensuring that the background check process is fair and that the records are accurate.

Under the federal Fair Credit Reporting Act (FCRA), an employer must provide a job applicant notice that it will be requesting a criminal background check and obtain the applicant's consent.<sup>42</sup> Once the employer receives the criminal background check, it must provide a copy to the job applicant prior to taking an adverse action against the applicant so that the individual may challenge any inaccuracies. Given the devastating impact incorrect criminal history records have on job seekers and the many inaccuracies that plague background checks, providing applicants with a chance to challenge and correct misinformation is very important. Unfortunately, many employers do not provide enough time for applicants to successfully challenge inaccurate reports prior to hiring another candidate.<sup>43</sup>

California also has a state law—the strongest in the nation—that regulates commercially-prepared criminal background checks. The law, called the Investigative Consumer Reporting Agencies Act (ICRAA), includes additional restrictions on the distribution of criminal history information.<sup>44</sup> Specifically, ICRAA prohibits the reporting of arrests that did not lead to conviction and, most importantly, the commercial background check cannot include information on any conviction that dates back more than seven years. While ICRAA applies only to commercially-prepared background checks, the California legislature extended similar protections to state and federal background checks in 2013.<sup>45</sup>

The new law requires all state agencies that conduct fingerprint-based criminal background checks for certification or licensing purposes to provide the applicant with a copy of the background report if the information is the basis for an adverse action by the agency. In the health care context, this means that all applicants for licensed positions—from CNAs to surgeons—are entitled to a copy of the fingerprint-based background check required by the licensing board if they are denied licensure or certification. Like the consumer laws that regulate private employers, this new law ensures that the individual has an opportunity to verify the accuracy of the information and adequately prepare for an appeal.

## D. Additional California Fair Hiring Protections

In addition to the protections for the fair use of background checks for workers with a criminal record, California is also among a growing number of cities, counties, and states that have adopted fair chance ordinances to ensure that qualified job applicants are able to compete for employment. Known as “ban the box,” these policies remove questions about criminal history from job applications so that people are judged first on their qualifications. If employers must ask about convictions, they can ask later in the hiring process.

In 2013, California banned the box for all public employers with the passage of AB 218, which takes effect July 1, 2014. This policy applies to many city and county health care facilities, as well as other state and local health care providers. Beyond removing questions regarding conviction history from initial job applications, the law requires employers to determine first whether an applicant meets the job qualifications before making any inquiry into the applicant’s criminal history. While the state law does not extend to private employers, San Francisco recently enacted a fair chance ordinance that applies to all private employers, including health care facilities, and the city of Richmond enacted an ordinance that extends the policy to vendors and contractors. Both the EEOC and OFCCP have endorsed “ban the box” as a best practice for employers to fully comply with federal anti-discrimination laws; thus, private employers are well advised to consider the policy to comply with their Title VII responsibilities.<sup>46</sup>

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## V. Health Care Occupations: The Legal Landscape of Employment Restrictions and Model Policies in California

**I**n order to assess the current landscape of employment barriers for people with a criminal record in health care occupations in California, we undertook a review of the federal and state laws that apply specifically to health care-related employment and licensing. We supplemented this analysis with interviews of advocates who represent workers navigating the state's health care background check requirements. To help put this legal survey in perspective, we focused on the background check requirements imposed on the entry-level health care occupations that are most in demand in California.

As described in detail below, we found that the wide range of licensed health care occupations in California are governed by myriad boards, many of which use a unified set of rules put forth by the Business and Professions Code concerning the consideration of criminal records in licensing decisions, and some of which do not. The clarity with which disqualifying convictions are identified varies, as does the information available describing the processes by which an applicant may appeal a denial. Furthermore, our investigation found that, all too often, the barriers are most onerous and unclear for entry-level jobs, while fairer and clearer processes apply to work higher on the career ladder. This impedes the ability of workers with records to start on the pathway to a long-term health care career.

Our analysis revealed the following results:

1. While state laws are the primary source of authority regulating criminal background checks of the California health care workforce, federal laws also impose certain minimum criminal record disqualifications on workers employed by federally-funded health care programs. The federal laws provide helpful appeal processes that apply to grant-funded long-term-care employers.
2. Criminal background checks required by state law apply to all but a handful of the entry-level health care occupations that are most in demand in California, including three of the five fastest-growing health occupations (HHAs, personal care aides, and EMTs). As such, it is important that state policies and regulations not unduly limit the ability of all Californians to fairly compete for and access these health care occupations.
3. From July 2011 to December 2013, more than 500,000 workers were screened by the California Department of Justice for a criminal background while seeking to be certified or licensed for health care occupations, including especially large numbers of allied health professionals, CNAs and HHAs, nurses, and pharmacy workers.
4. Like most other occupations requiring a criminal background check by the state, the majority of health care occupations that require a fingerprint background check for certification or licensure are governed by the Department of Consumer Affairs and the California Business and Professions Code (BPC), which includes robust worker protections. However, two of the entry-level health care positions projected to grow most—CNAs and HHAs—are certified through the Department of Public Health, while EMTs, also a fast growing occupation, are licensed by the Emergency Medical Services Authority. Neither the Emergency Medical Services Authority (EMSA) nor the Department of Public Health (DPH) are governed by the BPC worker protections. In contrast to the occupations with licensing boards governed by the BPC protections, CNA, HHA, and EMT applicants face lifetime disqualification for more than 50 specified convictions, including some misdemeanors. Also of special concern, these and other health care occupations that fall outside of the BPC do not uniformly take into account evidence of rehabilitation by the worker or provide for strong appeal procedures.
5. Workers seeking to obtain a license or certification for health care occupations often have a hard time navigating the background check process and experience significant delays, which can seriously compromise their job prospects.

## A. Federal Laws Regulating Health Care Occupations

While state laws are the primary source of authority regulating criminal background checks of the California health care workforce, federal laws impose certain minimum requirements as well.

### 1. Federally-Funded Health Care Program Mandates

Federal law excludes individuals with certain criminal histories from participating as a provider in any health care program funded in whole or in part by the U.S. government.<sup>47</sup> There are four categories of convictions that require mandatory disqualification under the law, and several categories of convictions for which a provider may be disqualified.<sup>48</sup>

If a provider has a conviction for program-related offenses, such as patient abuse or neglect in connection with the delivery of a health care service, or a felony relating to health care fraud or controlled substances, the provider is prohibited from participating in federally-funded health care programs for a minimum of five years. If the provider has another previous conviction for a non-mandatorily disqualifying offense, she is barred from the program for a minimum of 10 years. If the provider has two or more previous convictions for a mandatorily disqualifying offense, she is barred from participating in the program for life.<sup>49</sup>

### 2. Long-Term-Care Worker Protections

The Affordable Care Act (ACA) establishes a program for states to receive matching funds from the federal government—up to \$3 million per state—in order to implement a background check program of the state’s long-term-care providers.<sup>50</sup> This program complements the laws in California and other states that regulate long-term-care workers. To be eligible for the federal funds, states must require state and federal background checks of long-term-care providers, test methods for “rap back” capabilities by which law enforcement report any subsequent arrest or conviction of a long-term-care provider, ensure privacy and security safeguards, monitor compliance by providers, and, most importantly, include an independent dispute and appeal process.<sup>51</sup>

The appeal process mandated by ACA permits the applicant to dispute the accuracy of his or her background record—a vital protection when 50 percent of the FBI’s records are missing final disposition information.<sup>52</sup> In addition, the ACA requires the state to provide an independent process by which the provisional employee found to have a disqualifying criminal record can appeal the denial and request “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.”<sup>53</sup> This individualized assessment is in line with the best practices promoted by the EEOC in its 2012 guidance on consideration of arrest and conviction records, and ensures that qualified long-term-care providers who do not pose a safety risk are able to obtain and maintain care-provider positions.

To assist states with implementation of the background check requirements, the Centers for Medicare and Medicaid Services (CMS) created a National Background Check Program and Long Term Care Criminal Convictions Work Group. In December 2012, the Work Group released a report with options and recommendations for states on how to construct and implement a background check program in compliance with ACA.<sup>54</sup>

The consolidated option provided by the Work Group regarding convictions and rehabilitation factors includes many important features and is a solid model for creating a safe and fair background check policy for long-term-care providers and other health care workers. Based on extensive review of current research regarding risk, recidivism, and redemption, the Work Group set minimum disqualification time periods and recommends that no offense lead to permanent or lifetime disqualification. The Work Group also recommends that prospective employees be given the right to apply for a “variance” at any time during the disqualification period, and outlines the mitigating factors to be considered (including passage of time, extenuating circumstances, demonstration of rehabilitation, and relevancy of the particular disqualifying information with respect to the current employment of the individual).<sup>55</sup>

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## B. California’s Health Care Background Checks

To understand the scope of state laws governing the licensure and certification of people with criminal records, NELP reviewed the California laws and regulations that apply to background check requirements of health care positions.

To help put this legal analysis in some context, NELP conducted an in-depth review of 25 health care positions that require a bachelor's degree or less to assess not only the background check requirements but also the job growth outlook and median wages of these positions. Of the 25 positions we reviewed, all but six of the occupations require a fingerprint-based background check or self-disclosure, and include criminal records disqualifications. As a result of the disqualifications based on conviction history, these job opportunities are out of reach for large numbers of workers who lack advanced educational achievement, many of whom come from low-income neighborhoods and communities of color. The median wages for these positions range from less than \$11 per hour for home health aides to over \$48 per hour for dental hygienists. (See [Appendix 1](#).)

## 1. The Impact on Entry-Level Workers

We found that criminal background checks are mandated for all but a handful of the entry-level health care occupations that are most in demand in California, including three of the top five fastest-growing occupations (HHAs, personal care aides, and EMTs). (See [Tables 1 and 2](#).) Similarly, criminal background checks are required for nearly all the health care occupations that employ the most workers in California, as reflected in Appendix 1. The fact that the largest occupations in the health care field today and in the future come with high barriers to employment highlights the need for state policymakers to closely scrutinize current and proposed laws and regulations to ensure that unnecessary barriers do not unduly exclude Californians while providing no additional safety or security to health care consumers.

**Table 3. State of California and FBI Background Checks for Health Care Licenses and Certificates**

<i>Field</i>	<i># of Background Checks</i>
Allied Health	33,852
Medical Board of California	17,458
Department of Social Services	362,504
Department of Public Health – CNA/HHA	18,489
Board of Registered Nursing	72,951
Board of Pharmacy	26,587
Elder Care	53,470

Although the state data are limited, the California Department of Justice documents the total number of fingerprint-based background checks requested for applicants seeking licensure or certification by boards that govern health care workers. From July 2011 to December 2013, the State of California processed more than 500,000 fingerprint-based background checks for health care-related positions.<sup>56</sup> (Table 3.) Often these include a search of both the state criminal records system as well as the FBI's national criminal records database.

## 2. State Law Criminal Records Restrictions and Worker Protections

In reviewing the California laws and regulations, NELP found wide variety in both the disqualifying convictions and the processes by which an applicant receives notice and can appeal or challenge her disqualification. Specifically, certification and licensing regulated by the boards that comprise the Department of Consumer Affairs<sup>57</sup> are subject to California's Business and Professions Code (BPC), which has uniform language on the consideration of conviction history in licensing decisions. Despite the uniform language, many of the covered boards place additional restrictions on licensees, and many boards use slightly different language, which could undermine the intended uniformity and consistency of the BPC. In contrast, certification and licensing boards not regulated by the BPC have no uniform language on consideration of conviction history, lack consistency in process, and do not include the same appeal protections.

### *a. Boards Governed by the Business and Professions Code Have Consistent Worker Protections*

As noted above, there are some differences in background check disqualifications among the boards governed by the Business and Professions Code (BPC). However, sections of the code that apply to all boards under the Department of Consumer Affairs create a shared baseline of consistency.

#### **i. Health Care Workers Subject to Fingerprint-Based Criminal History Searches.**

Of the 18 health care related boards that are under the jurisdiction of the Department of Consumer Affairs, 15 are required by law to obtain a full set of fingerprints from license applicants in order to conduct criminal history record checks.<sup>58</sup> The three health care-related boards not mandated to obtain fingerprints from license seekers are the Dental Board, the Dental Hygiene Committee, and the State Board of Chiropractic Examiners. Despite the exclusion of these boards from the mandate of the BPC law, all three still require fingerprint background checks of licensees as a matter of agency policy or as required by a separate law.<sup>59</sup>

#### **ii. The Basic Protections Regulating Most Health Care Background Checks.**

Applicants for a license or certificate from a board subject to the BPC may be

denied if the applicant has been convicted of a crime.<sup>60</sup> Significantly, however, the law does not mandate that certain offenses are automatically disqualifying. Instead, each board is required to develop criteria to aid its determination of “whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates” and should thus be disqualifying.<sup>61</sup>

Furthermore, the law states that an applicant will not be denied licensure for a felony conviction if she has obtained a Certificate of Rehabilitation or for a misdemeanor conviction if she “has met all applicable requirements of the criteria of rehabilitation developed by the board to evaluate the rehabilitation of a person when considering a denial of a license.”<sup>62</sup> Each board must also develop criteria to evaluate the rehabilitation of persons denied a license due to their conviction history, and consider “all competent evidence of rehabilitation” provided by applicants and licensees.<sup>63</sup> Finally, if an applicant is denied a license, the board must file and serve a “statement of issues” and notify the applicant of the reason for the denial and the right to a hearing.<sup>64</sup>

Of special concern, the BPC allows the state licensing boards and agencies to consider all “expunged” records, which undermines the goal of promoting and rewarding rehabilitation by permitting people with a criminal record to “clean” their record. In California, an individual who has completed his or her term of probation or met other specific qualifying conditions can petition the court to have the record dismissed, which then releases the individual from “all penalties and disabilities resulting from the offense of which he or she was convicted.” Under the law, an individual’s record is “dismissed” by the court, but is not actually removed or expunged from the criminal records database.

Also of concern, the BPC permits consideration of “acts” by the individual that could rise to the level of disqualifying conduct.<sup>65</sup> However, California law prohibits the inquiry into records of arrest that did not result in a conviction on initial job applications.<sup>66</sup> None of the licensing and certification applications reviewed by NELP requested non-conviction arrest information, in compliance with state law. And it is unclear how the boards investigate an applicant’s acts of misconduct to determine suitability.

### **iii. Additional Permissive and Required Disqualifications Due to Convictions.**

There are many BPC sections that also restrict access to licensure and certification by people with a criminal record. For example, 11 separate BPC provisions include board-specific language permitting denial, suspension, or revocation of a health care-related license or certificate because of a job-related conviction.<sup>67</sup> While most of the codes use the exact same language (i.e., “conviction of a crime substantially related to the qualifications, functions, and duties of the specific license”), others expand the prohibition to include “any offense substantially related” and one board permits exclusion for “conviction of any felony, misdemeanor, infraction,

or municipal code violation, or liability in an administrative or civil action, that is substantially related to the qualifications, functions, or duties of a certificate holder.”<sup>68</sup>

In addition to the permissive disqualifications for convictions that are substantially related to the job functions, certain licensing boards specify that it is permissible to deny licensure because of drug-related convictions.<sup>69</sup> The Board of Pharmacy is mandated to take action against license holders guilty of unprofessional conduct, which includes conviction of a crime that is substantially related to the license as well as convictions related to drug offenses—likely due to the substantially related nature of drug offenses to pharmacy occupations.<sup>70</sup> In addition, boards may require denial or revocation of a license if the licensee has been convicted of a sex offense.<sup>71</sup>

#### **iv. Rehabilitation and the Right to Appeal a Negative Determination.**

In addition to the general protections regulating the consideration of conviction information, the BPC also guarantees the due process rights of applicants denied a license by the 18 health care boards and agencies covered by the law. Specifically, the boards must notify the applicant that the license or certificate is denied, including the reason for the denial, and inform the applicant of her right to a hearing. Denied applicants must request a hearing within 60 days after service of the notice of denial or the right to a hearing is waived and the denial becomes permanent.<sup>72</sup> In addition, the applicant is entitled to a statement of issues specifying the statutes and rules with which the applicant must show compliance at a hearing.<sup>73</sup> The statement of issues must be written in ordinary language and explain the reasons why the board is withholding licensure so that the applicant is able to prepare a response.<sup>74</sup>

As discussed above, the BPC requires all boards to develop criteria to evaluate the rehabilitation of applicants denied a license due to a conviction history. In addition, the boards must “take into account all competent evidence of rehabilitation furnished by the applicant or licensee” when denying, revoking, or suspending a license.<sup>75</sup>

In addition to the minimum requirements of the BPC, the specific law regulating the Board of Vocational Nursing and Psychiatric Technicians (BVNPT) provides broader protections that take into account the individual’s rehabilitation. Specifically, the BVNPT sends a statement to denied applicants and licensees facing revocation that:

- Evaluates evidence of rehabilitation submitted by the applicant, if any;
- Provides the board’s criteria relating to rehabilitation, which take into account the age and severity of the offense, and the evidence relating to participation in treatment or other rehabilitation programs;

- If the board’s decision was based on the applicant’s prior criminal conviction, justifies the board’s denial of a license and conveys the reasons why the prior criminal conviction is substantially related to the qualifications, functions, or duties of a licensed vocational nurse.<sup>76</sup>

The BVNPT model is, in many ways, a best practice that should be codified and shared by all California licensing boards, including those not subject to the BPC.

*b. The Major Health Care Occupations Not Regulated by the Business and Professions Code*

While the Business and Professions Code (BPC) governs most of the licensing bodies in the health care industry in California, it does not cover several of the occupations that are most in demand and employ the largest numbers of workers. Specifically, the basic protections of the BPC do not cover the Emergency Medical Services Authority (EMSA), which licenses ambulance drivers, emergency medical technicians (EMT), and paramedics (EMT-P); nor do they apply to licenses issued by the Department of Public Health (DPH), which covers home health aides (HHA), certified nurse assistants (CNA) (Aide and Technician Certification Section), and medical and clinical lab technicians and scientists (Laboratory Field Services).

Thus, in contrast to the 18 health care boards and agencies covered by the Business and Professions Code, the EMSA and DPH are not mandated to develop criteria to evaluate whether convictions are substantially related to the job duties, and lack standardized due process and appeals requirements.

**i. Home Health Aides and Certified Nurse Assistants.**

In contrast to the discretionary exclusions included in BPC that permit boards to deny licensure if an applicant has a criminal conviction that is substantially related to the qualifications, functions, and duties of the licensed occupation, there are over 50 convictions that create lifetime disqualifications for HHA applicants<sup>77</sup> and CNA applicants.<sup>78</sup> In addition to imposing over 50 mandatory and lifetime disqualifying convictions, if an HHA or CNA applicant has a conviction for any other crime that is found to be substantially related to the qualifications, functions, and duties of the occupation, the board may deny the certification. However, for these non-mandatory disqualifications only, the board must also consider the following mitigating factors:

1. The nature and seriousness of the offense under consideration and its relationship to the person’s employment duties and responsibilities;
2. Activities since conviction, including employment or participation in therapy or education, that would indicate changed behavior;

3. The time that has elapsed since the commission of the conduct or offense;
4. The extent to which the person has complied with any terms of parole, probation, restitution, or any other sanction lawfully imposed against the person;
5. Any evidence of rehabilitation, including character references, submitted by the person;
6. Employment history and current employer recommendations;
7. Circumstances surrounding the commission of the offense that would demonstrate the unlikelihood of repetition;
8. Granting by the Governor of a full and unconditional pardon;
9. A certificate of rehabilitation for a superior court.<sup>79</sup>

If the board denies an application for certification, the board must provide the applicant with a written notification stating the reasons for the determination and the applicant's right to appeal the determination.<sup>80</sup> Importantly, applicants may only appeal discretionary disqualifications imposed by the board; applicants denied certification due to a conviction enumerated in the law have no right to appeal except to challenge the accuracy of the record.<sup>81</sup>

## **ii. Comparison: Certified Nurse Assistants and Licensed Vocational Nurses.**

A comparison of the laws that regulate certified nurse assistants versus those applicable to licensed vocational nurses (LVN) highlights the differences between boards regulated by the Business and Professions Code, as LVNs are, and those that do not operate under the BPC rubric. Importantly, a CNA is the most entry-level nursing position, with many CNAs eventually advancing into LVN and other health care positions where they earn more money. A CNA license can be the first rung on the career ladder to a well-paid and successful health care career.

Perhaps the most important distinction between the criminal background check requirements for CNA and LVN licensing is the fact that there are over 50 offenses, including misdemeanors like petty theft, that mandatorily exclude CNA applicants from receiving certification for life. All other criminal convictions are "discretionary" disqualifiers, meaning that a CNA applicant may still be denied certification despite not having one of the listed convictions. In contrast, the Board of Vocational Nursing and Psychiatric Technicians (BVNPT) retains the discretion to determine which offenses should disqualify applicants for LVN licensure and is required to draft criteria to determine what convictions are substantially related to the occupational duties.

Also significant, an individual who is disqualified from receiving a CNA certification for a discretionary offense is required to provide the board with a certified copy of

the judgment for each and every conviction, which is an onerous and sometimes insurmountable barrier for certification seekers.<sup>82</sup> This requirement is not mirrored in the Business and Profession Code. In addition to the disqualifications, the appeal procedures differ for CNA and LVN applicants. While both boards are required to provide applicants a written notice of denial, CNA applicants must respond within 20 days, while LVN applicants have 60 days to request a hearing.

One notable feature of the CNA certification process is the fact that the board has made an effort to caution those considering CNA training and certification that a criminal record can undermine their efforts. Specifically, the board has prominently posted a disclaimer on its website stating: “All CNA/HHA applicants should review this list [of more than 50 disqualifying offenses] carefully to avoid wasting their time, effort and money by training, testing and submission of fingerprints since they cannot receive the required criminal background check clearance if they have been convicted of any of these violations.”<sup>83</sup>

By mandatorily excluding so many convictions without appropriate individualized assessments, the overbroad CNA restrictions potentially block highly qualified and dedicated people from entering a health care occupation. As discussed in [Section III](#), this is likely to have a disparate impact, blocking disproportionately more people of color from entering health care occupations as CNAs than it does white CNA applicants. By failing to include an individualized assessment that takes into account rehabilitation, the law requiring mandatory disqualification of CNA applicants is not consistent with the EEOC’s best practices.

### **iii. Emergency Medical Technicians.**

Demand for EMTs is projected to increase by 42 percent through 2020, faster than all but three other health care occupations. While the educational requirements for EMT positions are relatively limited—only completion of a high school education—the criminal background check requirements are quite restrictive.

By law, EMTs must be denied certification for a broad range of offenses, including any theft-related misdemeanors dating back less than five years.<sup>84</sup> In addition, candidates may be denied certification for an even broader list of offenses, including an act of “intentional dishonesty” dating back seven years. Of special concern, there is no express provision in the law allowing the individual to appeal a negative determination based on evidence of rehabilitation or other mitigating circumstances. In addition, while there are both mandatory and discretionary criminal conviction disqualifications for EMTs, information on disqualifying convictions is not readily available online. To find the list of disqualifying offenses, it is necessary to review multiple regulations in the California Code of Regulations, which is unrealistic to expect of most candidates for EMT certification.<sup>85</sup>

#### **iv. “Covered California” Outreach and Enrollment**

##### **Counselors.**

Under the Affordable Care Act (ACA), federal funding was provided to help community groups hire workers, called Certified Enrollment Counselors (or “assistors”), to conduct outreach to targeted communities and to enroll individuals for insurance. The state’s program, which is called Covered California, projects that 21,000 workers will be hired by local non-profit organizations and certified by the state to qualify for employment. The federal law includes strong mandates that the assistors represent the diversity of the communities most in need of health care. Covered California recently issued detailed regulations governing the criminal background check process.<sup>86</sup>

Any crime of “moral turpitude that is substantially related to the qualifications, functions, or duties of the job”<sup>87</sup> will disqualify an applicant from becoming a Certified Enrollment Counselor. While this standard can clearly encompass a broad range of crimes, Covered California has indicated that it will likely not deem driving under the influence (DUI), drug possession, and petty vandalism as disqualifying offenses.

The regulations adopted by Covered California include strong protections allowing the applicants to have the disqualifying offense waived if they produce sufficient evidence of mitigating circumstances, including “the nature of the job held or sought, the age of the offense, the nature and gravity of the offense, and any evidence of rehabilitation including evidence provided by the individual, including but not limited to participation in treatment programs.”<sup>88</sup> Also significant, the agency’s notices informing the applicant of its decision and the appeal forms are especially clear and helpful to workers seeking to navigate the appeal process and submit evidence of rehabilitation.<sup>89</sup>

### **3. Key Concerns with the Review Process**

In addition to researching the laws regulating health care background checks in California, NELP interviewed advocates that specialize in representing workers with a criminal record who have navigated the licensure denial and appeal process. In addition to the concern that communities of color are disproportionately locked out of these jobs due to overly restrictive criminal records screens, the advocates cited delays and inefficiencies in the process that can severely prejudice the individual’s job prospects, and a lack of clarity of screening requirements as chief among their concerns.

*For license applicants with a criminal record, it is common for the entire process to take one to two years, although individuals are often notified by the agency that the process will take four to six months.*

## **Model Policy:**

### Limit mandatory and lifetime disqualifying offenses

*For all licensed positions within California, an applicant may be denied a license if he has a conviction for a crime that is “substantially related to the qualifications, functions, or duties of the business or profession for which the application is made.”<sup>90</sup> In addition to this overarching law, there are many laws and regulations in California that specify convictions leading to mandatory or discretionary disqualification for various licenses. While some offenses may be “substantially related” to job duties, lifetime disqualifications without a provision for an individualized assessment that considers rehabilitation and mitigation circumstances may lead to qualified candidates being denied licensure despite the prior conviction no longer being relevant.*

*Consistent with the laws that regulate most of the state licensing boards and with the recommendations of the federal long-term-care working group, the state should remove all lifetime disqualifying offenses. Instead, an applicant’s conviction history should be reviewed to determine if any offense is job-related, and each applicant should be provided with an individualized assessment that includes evaluation of evidence of rehabilitation or mitigating circumstances submitted by the applicant.*

#### a. Excessive Delays

A key concern was that the review process for people with a criminal record can be especially delayed. It can take six months to a year for the agency or board to review the applicant’s criminal history and make the initial determination whether the individual qualifies for the requested license. The agency or board then provides the applicant with notification of the denial, and it can take several more months to schedule a hearing if the applicant appeals. Finally, additional time is then required for the case to be decided. Thus, it is common for the entire process to take one to two years, although individuals are often notified by the agency that the process will take four to six months. The California Attorney General’s office handles the hearing and appeals for the licensing boards, and it is the Attorney General that issues the “statement of issues” in order to start the appeals process running. As such, the delays may be due in part to both the board and the Attorney General’s office.

#### b. Waste and Inefficiencies

Certain agencies, including the Department of Social Services (DSS), which processes the large number of people who apply each year to work in community care facilities and as in-home supportive service providers, impose significant additional burdens on the

workers that, according to advocates, are often wasteful and inefficient. For example, instead of approving the licenses for those who have less serious offenses, DSS requires anyone with more than a minor traffic offense to file for an exemption with the Community Care Licensing Division.

By law, DSS also requires the workers to obtain a certified copy of the judgment of conviction<sup>91</sup> and, though not required by law, a copy of the police report for each conviction, which is extremely time consuming and burdensome. In addition, advocates note that police reports are not accessible publicly in court files, even to the defendant in a case. As such, individuals cannot obtain police reports from the court but must hope that the report was a part of any discovery in the case and has been maintained by their attorney. If an individual goes directly to the police for a copy of the report, she may find that the report has been destroyed (for cases over seven years). If the report has not been destroyed, the individual will only be provided a redacted copy, meaning that the agency will still have to request a complete report from the police department despite making the individual do so in advance. Nothing is gained by demanding a copy of the police report from the applicant, and it often proves to be an insurmountable hurdle for the applicant.

### *c. Unclear Screening Requirements*

For certain occupations, the boards and state agencies have not provided the public with enough information to determine what offenses are considered disqualifying or what standards and procedures apply to review the process. While we take issue with the overbroad restrictions and lack of individualized assessment for CNA/HHA applicants, the fact that the information is readily available is very helpful for job seekers and those exploring health care career options. In contrast, while there are both mandatory and discretionary criminal conviction disqualifications for emergency medical technicians and paramedics (EMT/EMT-P), information on disqualifying convictions is not readily available online. To find the list of disqualifying offenses for EMT/EMT-P positions, an applicant needs to review multiple regulations in the California Code<sup>92</sup>—an insurmountable burden for most Californians seeking entry-level health care careers.

## VI. Employer Practices

**A**pplicants for health care jobs typically find themselves subject not only to state licensing restrictions, but also to background checks conducted by private employers. While background checks may be one part of ensuring a qualified workforce, employers must be sure to protect the due process and civil rights of job applicants and ensure that their criminal records policies are not overly broad and unnecessarily exclusionary.

### A. Kaiser Permanente’s Background Check Model

In order to more fully appreciate the role that criminal background checks play in hiring for health care-related positions, it is necessary to look beyond the federal and state laws and policies that regulate the industry and explore what takes place on the ground with the state’s health care employers.

As the largest health care employer in the state, Kaiser Permanente provided information on its current background check process for this report.

Kaiser Permanente is reviewing its criminal background check process. It is slating additional changes by the end of 2014, including elimination of criminal background check questions from the candidates’ “submission of interest,” which is the first step in the application process. Kaiser Permanente’s input may be valuable for other employers and for policymakers to consider.

In many respects, Kaiser Permanente’s policies provide a helpful model for other private and public health care employers to follow. Of special significance, Kaiser Permanente limits its background check inquiry to criminal convictions that occurred within the past seven years, which is consistent with California state law, and to mostly serious offenses, not lesser offenses like disorderly conduct. In addition, Kaiser Permanente does not apply a “matrix” of specific disqualifying offenses, and the individual is provided the opportunity to explain his or her record before a final determination is made regarding a potential disqualifying offense.

## 1. Kaiser Permanente Positions Most in Demand

For a larger employer like Kaiser Permanente, which is unionized and provides competitive wages and benefits, there is no shortage of experienced applicants competing for the positions it posts each year. In Kaiser Permanente's hospital facilities, the non-clinical positions most in demand for entry-level job candidates are "environmental services" staff that clean and maintain the facilities, receptionists, and administrative clerical positions. On the clinical side, the entry-level positions for which Kaiser Permanente hires the most are medical assistants, lab assistants, pharmacy technicians, and phlebotomists. Thus, while the level of skill and education required for many of the positions most in demand are not especially limiting, the challenge for most people applying for Kaiser Permanente positions is the volume of high-quality individuals competing for a Kaiser Permanente position.

## 2. The Background Check Process

To apply for a position at Kaiser Permanente, the individual creates an account online that includes his or her profile, qualifications, and skills. When a particular position of interest to the individual is posted, he or she provides a "submission of interest" for the position. While Kaiser Permanente currently requests criminal history information from the applicant as part of the "submission of interest" process (a practice the company plans to eliminate by the end of 2014), the more formal criminal background check does not take place until Kaiser Permanente has extended a conditional offer of employment to the individual.

Consistent with the requirements of the consumer laws regulating employers and background check companies, Kaiser Permanente provides the individual with a consent form to sign because the criminal background check is initiated by an outside vendor. The form also describes the individual's right to receive a copy of the criminal history report and the other requirements of the consumer laws. Consistent with the state law that regulates background checks prepared by private companies for employers, Kaiser Permanente limits the background check to convictions that occurred within the past seven years and does not include arrests that did not lead to conviction (pending cases are included), infractions, or cases that have been dismissed. Background checks required by state law for licensing or certification are conducted by the State of California Department of Justice. Because Kaiser Permanente is a recipient of federal funding, it must also check the Fraud and Abuse Control Information System (FACIS) to determine if care providers are prohibited from receiving federal funds because of sanctions or discipline imposed by a government body.

Importantly, Kaiser Permanente recruiters review the background check report provided by the vendor—it is not reviewed by the hiring managers. Kaiser Permanente does not

apply a specific “matrix” of disqualifying offenses as part of the screening process, and instead it evaluates each applicant’s information individually and takes into account the job functions of the specific position. Kaiser Permanente seeks to screen out individuals with a violent offense on their record, or those applicants with a theft or robbery offense. Depending on the nature of the position, more minor offenses like drunk or disorderly conduct or driving under the influence (DUI) are often not considered disqualifying, depending upon the circumstances.

If there is a conviction of concern to the recruiter or an open arrest, the recruiter follows a structured process to engage with the individual about the nature of the offense and to solicit other explanatory information. As required by the consumer protection laws, if the offense disqualifies the individual from the position, Kaiser Permanente will issue an “adverse action” letter, allowing the individual to challenge the accuracy of the information.

### 3. Additional Considerations

After the EEOC issued its 2012 criminal records guidance, Kaiser Permanente conducted additional training of its recruiters throughout its facilities to review the federal standards. In addition to the substantive criminal history information reviewed by Kaiser Permanente, Kaiser Permanente also evaluates the criminal history information provided by the individual to determine if it is consistent with the information provided by the vendor’s report. Kaiser Permanente will provide the individual with an opportunity to explain any relevant discrepancies. Those background check reports by the state licensing and occupational boards do not include the specifics of the criminal history report. Instead, the board will only indicate if the license has been denied or revoked.

## VII. Recommendations for Legislative, Executive, and Employer Action

This report has taken a detailed look at the role that criminal background checks play in limiting opportunities for qualified Californians to access health care-related occupations. In the process, we have raised a broad spectrum of issues covering the many strengths and limitations of the current laws and policies. What follows are several recommendations that seek to reduce the major findings of the report into manageable next steps for action by the legislature, the state licensing boards and agencies, employers, workforce development officials, community-based organizations, and other key constituents.

### A. Legislative Action

The analysis of the state criminal background checks restrictions regulating health care occupations identified several barriers to employment that could be reduced without compromising safety or security in the workplace. As U.S. Attorney General Eric Holder urged in a letter to state officials, the “collateral consequences” in state laws that “impose burdens on individuals convicted of crimes without increasing public safety should be eliminated.”<sup>93</sup> The following recommendations will further these goals.

## 1. Remove Unnecessary Blanket Restrictions

The first priority should be to remove lifetime criminal records disqualifications in state laws that fail to expressly take into account mitigating circumstances and the person's rehabilitation efforts. The Business and Professions Code (BPC), which regulates most of the state's licensing boards and many health care occupations, does not include lifetime disqualifications for offenses and should be the model for other boards to follow.

For example, under the law regulating certified nurse assistants (CNAs), which is administered by a non-BPC-regulated board, applicants for licensure are automatically disqualified for their lifetime even for a relatively non-serious offense, like misdemeanor intent to commit theft by fraud or misdemeanor petty theft. This is not the case for licensed vocational nurses (LVNs) and other health care positions regulated by the BPC. The legislature should start with the background check laws covering those health care occupations that are in especially high demand, including CNAs, HHAs, EMTs, personal care aides, and pharmacy aides, and work to remove unnecessary barriers. Lifetime disqualifications are not supported by current research on risk and recidivism. Instead of protecting patients, they may lock qualified community members out of viable health care careers.

This necessary reform to the state laws will not compromise the safety or security of health care consumers because the state agencies will continue to screen out those convicted of serious and job-related offenses. Given that roughly three-quarters of all arrests are for non-violent offenses, and that people of color are disproportionately impacted by disqualifications for non-serious and non-violent offenses, these blanket restrictions are especially problematic. Thus, as urged by the EEOC, the law should provide for a more individualized approach that will reduce the extreme negative impact of the screening process on people of color and for those qualified individuals seeking training in health care careers who have succeeded in turning their lives around.

## 2. Conform with Accepted State Background Check Standards

All the health care boards and agencies that do not fully conform with the standards regulating the majority of state licensing boards—including the right to a fair and timely appeal in particular—should be expressly required to do so (including the Department of Public Health and the Emergency Medical Services Authority).

## 3. Promote and Reward Rehabilitation

In order to promote and reward rehabilitation by people who have been caught up in the criminal justice system, the state licensing laws regulating health care worker background checks should preclude consideration of convictions that have been “expunged” by the courts (under Penal Code Sections 1203.4, 1203.4a, and 1203.41), which is

consistent with a bill (AB 2396) now pending before the legislature. Under certain compelling circumstances, there should also be a “presumption of rehabilitation” as part of the licensing process (SB 1384, which is also pending before the legislature, applies this principal to the licensing laws regulating CNAs). Another helpful measure before the legislature that promotes rehabilitation is AB 1756, which would eliminate unnecessary administrative fees required to seal juvenile records.

#### **4. Fund Health Care Career Training and Internship Programs**

As recommended by the Health Workforce Development Council and the Select Committee on the Status of Boys and Men of Color, the legislature should fund internships in health care occupations for students from medically underserved communities, and support model training and placement programs, such as the EMT Corps, Health Career Connection, and the Cedar Sinai Youth Employment and Careers Academy. Another key source of funding for these and other successful initiatives could come from a bill pending before the legislature (AB 2060), which would generate support from the \$81 million Recidivism Reduction Fund for reentry workforce training programs.

#### **5. Leverage Government Contract Funds to Employ People with Criminal Records from Underserved Communities**

The state, as well as the counties, cities, and special districts of California, expend extremely large sums on contracts with private vendors to provide health care services in the community. The use of these funds often provide for contracting preferences or contract mandates that regulate the vendor’s employment practices. We urge these public agencies, especially the county health departments and hospitals, to leverage these public dollars to ensure that their private contractors hire people from their communities, including people with a criminal record.

The Alameda County Public Health Department, which doubles as the county’s EMS authority responsible for contracting with ambulance companies, has leveraged its \$100 million contracts to secure commitments from its contractor, Paramedics, Inc., to hire people from the EMS Corps program that serves large numbers of young people with criminal records.<sup>94</sup>

### **B. Executive Action**

NELP also recommends a number of constructive actions that should be taken by state licensing boards and by the state workforce development system to increase employment opportunities for people with a criminal record. While changes to state laws would

represent real progress in removing unnecessary barriers to employment of people in health care occupations, the state boards and agencies that conduct criminal background checks can also act on their own to significantly improve the process for thousands of workers.

### 1. Health Care Boards and Agencies Should Remove Unnecessary Background Check Barriers and Reward Rehabilitation

The state health care boards and agencies should systematically review their regulations and policies and remove restrictions that deny licensure or certification based on old and lesser offenses that are not directly relevant to the job. The boards should ensure that applicants are provided a clear opportunity to present evidence of rehabilitation and other mitigating factors. For example, Covered California recently passed regulations and published helpful forms and notices that go a long way to clarify that the large numbers of “certified enrollment counselors” hired under the Affordable Care Act are treated fairly when they are screened for a criminal record.<sup>95</sup>

### 2. Reduce Excessive Processing and Appeal Delays

The state health care boards and agencies, together with the California Attorney General, should track and publish data on the timeliness of initial background check determinations and appeals. State officials should evaluate how to reduce excessive delays, and isolate policies and practices that impose unnecessary and burdensome mandates. For example, the Department of Social Services should no longer require that workers seek an exemption for all offenses other than minor traffic violations, and it should eliminate the requirement that applicants produce a police report for each and every conviction.

### 3. Develop Clear and Transparent Public Outreach and Education Materials

In interviews with advocates, community organizations, and workforce development programs that help train and place people in health care occupations, the overriding concern was that licensing boards and state agencies often fail to provide clear and transparent explanations of their standards and educational material suitable to a broad audience with limited understanding of the licensing process. As a result, it is not uncommon for workers to suffer the time and expense of training for a particular occupation only to learn too late of standards that disqualify the worker from licensure. At the same time, many people who indeed would qualify for licensure end up not applying because they assume, incorrectly, that they would be ineligible for certification for an old or minor record.

The agency that processes background checks for certified nurse assistants and home health aides has taken one approach, which is to prominently post a disclaimer on its website stating: “All CNA/HHA applicants should review this list [of more than 50 disqualifying offenses] carefully to avoid wasting their time, effort and money by training, testing and submission of fingerprints since they cannot receive the required criminal background check clearance if they have been convicted of any of these violations.”<sup>96</sup> Although such postings are a helpful first step in some cases, what is needed is a more comprehensive outreach strategy that communicates the screening requirements in simple terms while also portraying the stories and faces of individuals from diverse communities who have made it through the screening process. We applaud those agencies, including Covered California, that have developed especially helpful notices and forms to ensure that people with a criminal record and all community members are able to navigate the appeals process.

## C. State Agencies Should Enforce the Worker Protections Regulating Employers, Government Contractors, and Workforce Development Programs

The good news revealed in this report is that there are now several strong federal and state policy directives that clearly communicate that private employers, public employers, government contractors, and federally-funded workforce development programs must take seriously their obligations under federal civil rights law to limit discrimination based on a criminal record. However, the state can do much more to ensure that these directives are communicated broadly and aggressively enforced in the health care industry.

### 1. Target Workforce Development Programs

While the Employment Development Department (EDD) took the critical first step of issuing a criminal records guidance to the state’s Workforce Investment Act (WIA)-funded programs, it is clear that the state’s federally-funded job training and placement programs have not adequately implemented the specific mandates, which require notice to employers, workers, and job training contractors of the civil rights protections regulating criminal background checks for employment. Thus, we urge EDD to partner with the State Workforce Investment Board to audit the WIA-funded programs and take aggressive action to ensure compliance with the civil rights directive, focusing first on the WIA-funded programs that provide training and placement for health care occupations.

## **2. Target Private Health Care Employers and Government Contractors**

The state's health care employers, especially the major facilities and research institutions that receive federal contracts, must faithfully follow the EEOC criminal records guidelines requiring them to consider the age and seriousness of an individual's offense, the relationship of the offense to the specific responsibilities of the job, and any evidence that the individual has been rehabilitated. While the EEOC is taking action to educate the employer community and enforce the law, California's civil rights agency, the Department of Fair Employment and Housing (DFEH), should similarly interpret the state laws to regulate criminal background checks for employment that have a "disparate impact" on people of color. DFEH could follow the lead of the Pennsylvania Human Rights Commission, which adopted state-specific guidelines modeled on the EEOC's criminal records directive.<sup>97</sup>

## **3. Apply State Training Dollars to Support Model Health Care Training Programs**

The State Workforce Investment Board and EDD should make every effort to support successful health care training programs, including the EMS Corps and Health Care Connection, with federal and state workforce development funds. In 2013, the legislature created the California Career Pathways Trust, which provided \$250 million to support K-12 programs and community colleges in the creation of regional and integrated career pathway programs. To the maximum extent possible, these funds and others should be targeted to health care training and placement programs that reach those communities especially impacted by the criminal justice system.

## **D. Employer Action**

### **1. Embrace the Strong Civil Rights and Consumer Protections Regulating Criminal Background Checks for Employment**

Ultimately, it is the responsibility of the state's employers to make the final hiring decisions that will determine whether the promise of economic opportunity and a diverse health care workforce is realized for large numbers of Californians, including the one in four Californians with a criminal record. The EEOC criminal records standards described above and the strong California consumer laws regulating criminal background create the framework necessary to treat applicants for employment with a criminal record fairly.

Some health care employers, like Kaiser Permanente, are deluged with job applications, while other employers struggle to find enough qualified applicants to keep up with the growing demand. In either case, employers must strictly adhere to the civil rights and consumer protections regulating criminal background checks by providing regular and detailed training of human resources staff of the polices and strong oversight and monitoring. Health care employers can and should go further, however, and embrace their role as a community leader by seeking opportunities to provide quality jobs to disadvantaged community members.

## **2. Adopt Best Practices that Reward Health Care Employers with Qualified and Dedicated Workers from the Community**

Fortunately, there are examples of hiring practices adopted by employers in California and around the nation that serve as helpful best practices for others to follow. These examples, profiled below, have successfully served the employers' bottom line of recruiting qualified and dedicated health care workers while also advancing the interests of the diverse communities served.

### *a. Johns Hopkins Hospital Recruits People with Records from the Community*

The most celebrated example of a health care employer that has committed itself to recruiting people with a criminal record from the community is Johns Hopkins Health Systems, which is located in East Baltimore, a community hard hit by over-criminalization and unemployment. Under the leadership of Pamela Paulk, the vice president of human resources, Johns Hopkins created a program in 2000 to give back to the community by working with homeless shelters and reentry programs to recruit people with criminal records for employment.<sup>98</sup> The initiative has been an overwhelming success and the pride of the hospital's HR program.

The hospital has maintained some data on the impact of hiring people with a criminal record. According to one follow up study surveying 79 employees with a criminal record hired between 2000 and 2005, 73 were still employed at Johns Hopkins in 2005, a better retention rate than found for employees without a criminal record. In a second follow up study of applicants hired between 2003 and 2006, Johns Hopkins hired 41 percent of applicants with a criminal record who applied. By 2009, 43 percent were still employed by Johns Hopkins Health Systems, again a better retention rate than employees without a criminal record. Thus, people with a criminal record stay longer as valuable employees than those without a criminal record.

Also significant, Johns Hopkins reports zero problematic terminations of people who were hired with a criminal record, and Ms. Pault cites the employees hired under the program as many of the most dedicated and hard-working members of the hospital staff. In addition to the motivation of the workers, the program attributes much of its success to the early support provided many of the workers, including paid internships and career coach services.

#### *b. Kaiser Permanente Integrates Fair Background Check Standards*

Although it was beyond the scope of this analysis to interview health care employers across the state, the state's largest health care employer—Kaiser Permanente—agreed to be interviewed and share its criminal background check screening practices, which are summarized above (Section VI). Although Kaiser Permanente does not have dedicated community recruitment program like the Johns Hopkins initiative described above, there are a number of features of the Kaiser Permanente hiring process that are well worth modeling by other California health care employers.

Of special significance, Kaiser Permanente limits its background checks to convictions that occurred within the past seven years, which is consistent with the California consumer protection law. Kaiser Permanente also focuses mostly on serious offenses, not lesser offenses like disorderly conduct or DUI, and the recruiters provide applicants with an opportunity to explain their records before a final determination is made regarding a potential disqualifying offense. After the EEOC's criminal records guidelines were issued in 2012, Kaiser Permanente also instituted a training regime of the recruiters and human resources staff to ensure compliance with the federal mandates. The company has also announced its intention to remove questions of an applicant's conviction history on the "submission of interest."

### **3. Remove Criminal Background Check Questions from the Application, Delaying Inquiry into an Applicant's Conviction History**

The state's health care employers should consider the full range of model policies adopted by both private and public sector employers to improve compliance with anti-discrimination law and encourage application by people with a criminal record. Perhaps the most effective fair hiring policy is what is commonly referred to a "ban the box," which in practice means that employers eliminate criminal conviction questions from their job applications and delay any background check until the end of the hiring process.

Significantly, to help ensure compliance with employer obligations under the federal anti-discrimination laws, the EEOC endorsed the policy, stating: “As a best practice, and consistent with applicable laws, the Commission recommends that employers do not ask about convictions on job applications . . .”<sup>99</sup> Consistent with the EEOC’s recommendation, Kaiser Permanente will be changing its policy to delay the criminal history inquiry until later in the hiring process. Moreover, under the new California ban-the-box law, all public sector employers must adopt the policy, which includes the county hospitals and other publicly-funded health care facilities. Those health care employees that are required by law to have a background check are exempt, but a large number of workers employed in health care facilities are not subject to state law background check requirements and would thus not be exempt from the ban-the-box provision. In addition, San Francisco has expressly extended its policy to all private employers, which would cover most of the state’s largest health care employers that are also located in the city.

## VIII. Conclusion

**C**alifornia is facing an unprecedented growth in the number and diversity of its citizens requiring health care, creating a historic opportunity to ensure that all communities benefit both as health care consumers and as health care providers. The state is primed to take advantage of this growth but must do so in a way that embraces the moment by serving its most marginalized communities. Reducing unnecessary barriers to the employment of people with a criminal record in health care occupations will not only strengthen families and communities by providing good jobs to people frequently excluded from the labor force, it will improve the quality of service provided to the community. All the key constituencies, including the state legislature, state and local government entities, and private employers, play a critical role in maximizing the employment opportunities of all the state's workers, including the one in four Californians with a criminal record.

# Endnotes

- 1 U.S. Dep’t of Labor, Employment Training Agency, *Using Registered Apprenticeship to Build and Fill Healthcare Career Paths: A response to critical healthcare workforce needs and healthcare reform*, at 1, available at [http://www.dolleta.gov/oa/pdf/apprenticeship\\_build\\_healthcare\\_paths.pdf](http://www.dolleta.gov/oa/pdf/apprenticeship_build_healthcare_paths.pdf).
- 2 U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, available at <http://www.bls.gov/ooh/About/Projections-Overview.htm> [hereinafter DOL Occupational Outlook].
- 3 Cal. Employment Dev. Dep’t, *Top 100 Fastest Growing Occupations in CA, 2010-2010*, available at <http://www.labormarketinfo.edd.ca.gov/OccGuides/FastGrowingOcc.aspx> [hereinafter California Top 100 Fastest Growing Occupations].
- 4 Cathy Schoen, et. al., *Health Care in the Two Americas: Findings from the Scorecard on State Health System Performance for Low-Income Populations, 2013* (Sept. 2013), available at <http://www.commonwealthfund.org/Publications/Fund-Reports/2013/Sep/Low-Income-Scorecard.aspx?page=all>
- 5 California’s total population is projected to increase by 15 million between 2000 and 2030, growing from 34 million to 49 million people. More than 80 percent of this projected increase is expected to come from growth in the Hispanic/Latino population. The number of Latino Californians is expected to double from roughly 11 million to approximately 22 million. The number of Asian Californians is project to grow substantially as well from 3.7 million to more than 6 million. The size of the African American population is projected to grow slowly in the coming decades, increasing from roughly 2.2 to 2.5 million between 2005 and 2030. By contrast, the number of White non-Hispanic Californians is projected to remain stable at roughly 16 million. With the exception of Whites, all racial and ethnic groups are expected to have population growth over the next decades in California. Univ. of Cal., San Francisco Center for Health Professions, *Diversity in California’s Health Professions: Current Status & Emerging Trends* (March 2008) available at [http://www.calendow.org/uploadFiles/Publications/By-Topic/Culturally\\_Competent\\_Health\\_Systems/Workforce\\_Diversity/Diversity%20in%20California's%20Health%20Professions%20Current%20Status%20and%20Emerging%20Trends.pdf](http://www.calendow.org/uploadFiles/Publications/By-Topic/Culturally_Competent_Health_Systems/Workforce_Diversity/Diversity%20in%20California's%20Health%20Professions%20Current%20Status%20and%20Emerging%20Trends.pdf) [hereinafter UCSF Diversity in Health Professions].
- 6 The White House, *Factsheet: Opportunity for all: President Obama Launches My Brother’s Keeper Initiative to Build Ladders of Opportunity For Boys and Young Men of Color* (February 2014), available at <http://www.whitehouse.gov/the-press-office/2014/02/27/fact-sheet-opportunity-all-president-obama-launches-my-brother-s-keeper>.
- 7 Univ. of Cal., San Francisco and The George Washington University Joint Center for Political and Economic Studies, *The Affordable Care Act: Creating Job Opportunities for Racially and Ethnically Diverse Populations*, available at <http://www.jointcenter.org/sites/default/files/upload/research/files/Frogner%20and%20Spetz%20-%20The%20Affordable%20Care%20Act%20-%2011.5.2013.pdf>.
- 8 *California Top 100 Fastest Growing Occupations*, *supra* note 3.
- 9 Cal. Employment Dev. Dep’t, *California Occupations With the Most Job Openings 2010-2020* (June 2012), available at [http://www.lasc.edu/faculty\\_staff/planning-research/documents/California%20-%20Occupations%20with%20Most%20Job%20Openings%202010-2020.pdf](http://www.lasc.edu/faculty_staff/planning-research/documents/California%20-%20Occupations%20with%20Most%20Job%20Openings%202010-2020.pdf).
- 10 Home health aide positions are expected to grow by 706,300 nationally and are in the 99<sup>th</sup> percentile for fastest growing occupations and 90<sup>th</sup> percentile for most jobs numerically in California. *Department of Labor Occupational Outlook*, *supra* note 2. UCSF Diversity in Health Professions, *supra* note 5.
- 11 *Id.*
- 12 Racial and gender disparities exist among California’s health care professionals. As reported by the UCSF Center for Health Professions, “it is evident that the highest paid health occupations are the least racially and ethnically diverse while the lowest paid health occupations are the most racially and ethnically diverse.” In addition to being racially and ethnically homogeneous, the highest paid professions – medicine and dentistry – are predominantly male. *Id.* at xvi-xvii.
- 13 Tim Bates, et. al., “California’s Health Care Workforce: Readiness for the ACA Era,” Center for the Health Professions, 2011.
- 14 Cal. Workforce Inv. Board, Health Workforce Council, *Report on the Health Workforce Development Needs: Findings and Recommendations* (Jan. 2013, draft version), available at [http://www.cwib.ca.gov/res/docs/special\\_committees/hwdc/meeting\\_materials/2013/HWDC%20Report%20-%20Draft%2012113.pdf](http://www.cwib.ca.gov/res/docs/special_committees/hwdc/meeting_materials/2013/HWDC%20Report%20-%20Draft%2012113.pdf).
- 15 Assembly Select Committee on the Status of Boys and Men or Color, “Claiming the Promise of Health and Success for Boys and Men of Color in California: Final Report and Policy Platform for State Action (2012-2018),” Recommendation 2.16, at 30.
- 16 *Id.*
- 17 Alameda County Public Health Dep’t, Emergency Medical Services Corps (EMS Corps), available at <http://www.acphd.org/ems-corps.aspx>. See also the following video for a profile of the program, its participants, and the participating employer: <http://www.rwjf.org/en/about-rwjf/newsroom/newsroom-content/2014/01/ems-corps-video.html>.
- 18 Alameda County Health Care Serv. Agency, Emergency Medical Services Division, *EMS Corps: From the Community Ready to Serve*, available at <http://www.acphd.org>.

- [org/media/322662/ems corps\\_trifold\\_5\\_10\\_13\\_v1\\_highres.pdf](http://oag.ca.gov/media/322662/ems corps_trifold_5_10_13_v1_highres.pdf).
- 19 Alameda County Public Health Dep't, Emergency Medical Services Corps (EMS Corps), available at <http://www.acphd.org/cms-corps.aspx>.
- 20 Health Career Connection, available at <http://www.healthcareers.org/>.
- 21 Cedars-Sinai Youth Employment and Development, available at <http://www.cedars-sinai.edu/Community-Outreach/Programs/Youth-Employment-and-Development.aspx>.
- 22 In 2011, NELP released a report that found that 65 million U.S. adults have an arrest or conviction record on file. Michelle Natividad Rodriguez and Maurice Emsellem, *65 Million ‘Need Not Apply’: The Case for Reforming Criminal Background Checks for Employment* (2011), available at [http://www.nelp.org/page/-/SCLP/2011/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf). In 2014, using updated information, NELP found that the number of U.S. adults with an arrest or conviction record had increased to 70 million. As the general population had also increased during this time, the percent of U.S. adults has remained steady, while the actual number has increased. U.S. Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2012* (Jan. 2014) at Table 1, available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>. U.S. Census Bureau, Population Division, available at <http://www.census.gov/population/age/data/2012comp.html>.
- 23 NELP based the estimate of Californian adults with criminal records on the following methodology. According to a 2012 survey of states, there were 11.4 million people with criminal records on file with the state of California. U.S. Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2010 (January 2014), at Table 1, available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>. To account for individuals who may no longer reside in the state and other factors, and to arrive at a conservative estimate, the 11.4 million figure was reduced by 30 percent (8 million). Thus, as a percentage of the California population over the age of 18 (28,765,908 in 2012 according to the U.S. Census Bureau, State & County QuickFacts, available at <http://quickfacts.census.gov/qfd/states/06000.html>), an estimated 27.8 percent of the California adult population has a criminal record on file with the state.
- 24 Cal. Div. of Juvenile Justice, Information System – Obits, *Monthly Facility Population Report as of April 30, 2014*, available at [http://www.cdcr.ca.gov/Reports\\_Research/docs/research/Monthly\\_Population\\_Tables\\_2014/04\\_2014\\_Monthly.pdf](http://www.cdcr.ca.gov/Reports_Research/docs/research/Monthly_Population_Tables_2014/04_2014_Monthly.pdf).
- 25 Sierra Health Foundation, “The Sierra Foundation’s Positive Youth Justice Initiative” (Briefing Paper, April 2012), at 2.
- 26 U.S. Census Bureau, State & County QuickFacts, available at <http://quickfacts.census.gov/qfd/states/06000.html> and State of California Department of Justice, CJSC Statistics: Arrests, available at <http://oag.ca.gov/crime/cjsc/stats/arrests>.
- 27 In 2012, there were 429,807 felony arrests, 792,297 misdemeanor arrests, and 16,392 status offenses arrests, for a total of 1,238,496 arrests. Of those, 206,697 were arrests of African Americans, 458543 were arrests of whites, 494,958 were arrests of Latinos, and 78,298 were arrests of people classified as “other.” Of the arrests of African Americans, 46,796 or 22.6 percent were for offenses that are classified as “violent” and 159,901 or 77.4 percent were for offenses that are classified as “non-violent”. For white arrestees, 68,624 or 15 percent of all arrests of whites were for “violent” offenses and 389,919 or 85 percent were for “non-violent” offenses. For Latino arrestees, 92,880 or 18.8 percent were arrested for “violent” offenses and 402,078 or 81.2 percent were arrested for “non-violent” offenses. The state of California designates certain felony offenses as “violent offenses” in addition to those arrests, we included all felony and misdemeanor sex offenses and felony and misdemeanor weapons arrests in the “violent” arrest category. The “non-violent” arrest category includes felony property offenses, felony drug offenses, other non-categorized felony offenses except for weapons offenses, and all misdemeanor offenses except for misdemeanor assault and battery, weapons, and sex offenses.
- <http://oag.ca.gov/crime/cjsc/stats/arrests>. Importantly, if a person is arrested for multiple offenses, only the most serious charge is counted. See Data Characteristics and Known Limitations, available at [http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/stats/data\\_arrests.pdf](http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/stats/data_arrests.pdf).
- 28 Cal. Dep’t of Corr., Prison Census Data as of December 31, 2014 (February 2013), available at [http://www.cdcr.ca.gov/reports\\_research/offender\\_information\\_services\\_branch/annual/censusd1212.pdf](http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/annual/censusd1212.pdf).
- 29 Pager, Devah. *The Mark of a Criminal Record* (March 2003), available at [https://www.princeton.edu/~pager/pager\\_ajs.pdf](https://www.princeton.edu/~pager/pager_ajs.pdf).
- 30 S.H. Decker, C. Spohn, N.R. Ortiz, & E. Hedberg, *Criminal Stigma, Race, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment* (2014), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/244756.pdf>.
- 31 *Id.*
- 32 Cal. Dep’t of Justice, Criminal Justice Statistics Center, “2011 Juvenile Justice in California,” Table 3, available at <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/misc/jj11/preface.pdf>.
- 33 U.S. Dep’t of Justice, *Smart on Crime: Reforming the Criminal Justice System for the 21<sup>st</sup> Century* (August 2013), available at <http://www.justice.gov/ag/smart-on-crime.pdf>.
- 34 U.S. Attorney General, letter to The Honorable William H. Sorrell, Attorney General of the State of Vermont (April 2011), available at <http://onlawyering.com/wp-content/uploads/2011/05/VT-Attorney-General-Sorrell.0001-1.pdf>.

- 35      Federal Interagency Reentry Council, <http://csgjusticenter.org/nrc/projects/firc/>.
- 36      U.S. Equal Employment Opportunity Comm'n, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq. No 915.002 (April 2012), available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) [hereinafter EEOC Guidance].
- 37      *Id.*
- 38      U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, *Complying with Nondiscrimination Provisions: Criminal Record Restrictions and Discrimination Based on Race and National Origin*, DIR 2013-02 (Jan. 2013), available at <http://www.dol.gov/ofccp/regs/compliance/directives/dir306.htm>.
- 39      *Id.*
- 40      U.S. Dep't of Labor, Employment & Training Administration, *Update on Complying with Nondiscrimination Provision: Criminal Record Restrictions and Disparate Impact Based on Race and National Origin, Training and Employment Guidance Letter No. 31-11* (May 2012), available at [http://wdr.dol.gov/directives/attach/TEGL/TEGL\\_31-11.PDF](http://wdr.dol.gov/directives/attach/TEGL/TEGL_31-11.PDF).
- 41      Cal. Employment Dev. Dep't, *Criminal Record Restrictions and Impact Based on Race and Nationality*, Directive Number WSD12-9 (Sept. 2012), available at [http://www.edd.ca.gov/Jobs\\_and\\_training/pubs/wsd12-9.pdf](http://www.edd.ca.gov/Jobs_and_training/pubs/wsd12-9.pdf).
- 42      15 U.S.C. § 1681 et seq.
- 43      Persis Yu, *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses* (April 2012), available at <http://www.ncl.org/images/pdf/pr-reports/broken-records-report.pdf>.
- 44      Cal. Civ. Code § 1786 et seq.
- 45      Cal. Penal Code § 11105(t).
- 46      EEOC Guidance, *supra* note 36 at 13-14. ("As a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.")
- 47      42 U.S.C. § 1320a-7b(f).
- 48      42 U.S.C. § 1320a-7. The mandatory disqualifications under 42 USC § 1320a-7 include (1) conviction of program-related crimes; (2) convictions relating to patient abuse; (3) felony convictions relating to health care fraud; and (4) felony convictions relating to controlled substances. The permissive disqualifications include: (1) convictions relating to fraud; (2) convictions relating to obstruction of an investigation or audit; (3) misdemeanor convictions relating to controlled substances; (4) license revocation or suspension; (5) exclusion or suspension under Federal or State health care program; (6) claims for excessive charges or unnecessary services and failure of certain organizations to furnish medically necessary claims;
- 49      (7) fraud, kickbacks, and other prohibited activities; (8) entities controlled by a sanctioned individual; (9) failure to disclose required information; (10) failure to supply requested information on subcontractors and suppliers; (11) failure to supply payment information; (12) failure to grant immediate access; (13) failure to take corrective action; (14) default on health education loan or scholarship obligations; (15) individuals controlling a sanctioned entity; and (16) making false statements or misrepresentations of material facts.
- 50      42 U.S.C. § 1320a-7.
- 51      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). 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. The funds authorized by ACA are available to states who did not participate in the pilot program.
- 52      Dep't of Health & Human Serv., Centers for Medicare & Medicaid Services, *Nationwide Program for National and State Background Checks for Direct Patient Access Employees of Long Term Care Facilities and Providers* (April 2011) [hereinafter CMS Report].
- 53      Madeline Neighly and Maurice Emsellem, *Wanted: Accurate FBI Background Checks for Employment* (2013), available at [www.nelp.org/accurateFBIrecords](http://www.nelp.org/accurateFBIrecords).
- 54      Patient Protection and Affordable Care Act of 2010 § 6201(a)(4)(B)(iv), 42 U.S.C. § 1320-7l.
- 55      CMS Report, *supra* note 51.
- 56      *Id.*
- 57      Cal. Bureau of Criminal Information and Analysis, FY 11/12 Statistical Report #4, Federal Level CORI Requests; Cal. Bureau of Criminal Information and Analysis, FY 12/13 Statistical Report #4, Federal Level CORI Requests; Cal. Bureau of Criminal Information and Analysis, FY 13/14 Statistical Report #3, State Level CORI Requests. The requests include 33,852 for Allied Health positions, 17,458 from the Medical Board, 362,504 from the Department of Social Services / California Community Licensing board that licenses many adult and senior care programs, 18,489 requests for CNA/HHA licenses, 72,951 requests from the Board of Registered Nursing, 26,587 requests from the Board of Pharmacy, and 53,470 requests from Elder Care employees and volunteers. The total number of these requests is 585,311 but the CCL and Elder Care background checks may be over-inclusive of non-health care positions.
- 58      Cal. Bus. & Prof. Code § 101. The Department of Consumer Affairs is comprised of 40 named boards. The 18 health care-related boards include The Dental Board of California, The Medical Board of California, The State Board of Optometry, The California State Board of Pharmacy, The Board of Registered Nursing, The Board of Vocational Nursing and Psychiatric

- Technicians, The Respiratory Care Board of California, The Acupuncture Board, The Board of Psychology, The California Board of Podiatric Medicine, The Physical Therapy Board of California, The Physician Assistant Committee, The Speech-Language Pathology and Audiology Board, The California Board of Occupational Therapy, The Osteopathic Medicine Board of California, The Naturopathic Medicine Committee, The Dental Hygiene Committee of California, and The State Board of Chiropractic Examiners.
- 58 Cal. Bus. & Prof. Code § 144. The following boards are not required to obtain fingerprints from applicants for the purposes of conducting criminal history records checks under section 144: The Dental Board of California, The Dental Hygiene Committee of California, and The State Board of Chiropractic Examiners. These boards have nonetheless imposed background check requirements on licensees.
- 59 The Dental Board of California requires each applicant for licensure as a dentist to provide fingerprints for submission for a state and federal background check. Cal. Bus. & Prof. Code § 1629. Equally, applicants for licensure as a dental hygienist must furnish fingerprint images for submission to state and federal criminal justice agencies. Cal. Bus. & Prof. Code § 1916. While there is no code requiring fingerprint-based background checks for chiropractors, the Board of Chiropractic Examiners requires all applicants for a chiropractic license to provide fingerprints for a background check. “Check Sheet for the ‘Application for a Chiropractic License’” available at [http://www.chiro.ca.gov/forms\\_pubs/chiro\\_app.pdf](http://www.chiro.ca.gov/forms_pubs/chiro_app.pdf).
- 60 Cal. Bus. & Prof. Code § 480.
- 61 Cal. Bus. & Prof. Code § 481.
- 62 Cal. Bus. & Prof. Code § 480.
- 63 Cal. Bus. & Prof. Code § 482.
- 64 Cal. Bus. & Prof. Code § 485.
- 65 Cal. Bus. & Prof. Code § 480.
- 66 Cal. Bus. & Prof. Code § 461.
- 67 The codes regulating licensure for hemodialysis technician (Cal. Bus. & Prof. Code § 1247.66), speech-language pathologist or audiologist (Cal. Bus. & Prof. Code § 2533), respiratory therapist (Cal. Bus. & Prof. Code § 3705), acupuncture therapist (Cal. Bus. & Prof. Code § 4955), and marriage and family therapist (Cal. Bus. & Prof. Code § 4982) permit denial of a license based on the “conviction of a crime substantially related to the qualifications, functions, and duties” of the licensee in question. The code regulating licensure of occupational therapists and occupational therapist assistants (Cal. Bus. & Prof. Code § 2570.28) permits the denial of a license due to a “conviction of a crime or any offense substantially related to the qualifications, functions, or duties of a licensee,” while the codes regulating nurses (Cal. Bus. & Prof. Code § 2761) and optometrists (Cal. Bus. & Prof. Code § 3110) permit the denial of a license based on a “conviction of a felony or of any other offense substantially related to the qualifications, functions, and duties” of the licensee in question.
- 68 Cal. Bus. & Prof. Code § 4603 (massage therapist).
- 69 Cal. Bus. & Prof. Code § 1247.66 (hemodialysis technician); Cal. Bus. & Prof. Code § 1952 (dentist or dental assistant); Cal. Bus. & Prof. Code BPC § 2237 (physicians and surgeons); Cal. Bus. & Prof. Code § 2533 (speech-language pathologist and audiologist); Cal. Bus. & Prof. Code § 3110 (optometrist); and Cal. Bus. & Prof. Code § 3750.5 (respiratory therapist).
- 70 Cal. Bus. & Prof. Code § 4301.
- 71 See Cal. Bus. & Prof. Code § 2221 (physicians and surgeons) and Cal. Bus. & Prof. Code § 3110 (optometrists).
- 72 Cal. Bus. & Prof. Code § 485.
- 73 Cal. Gov’t Code § 11504.
- 74 Cal. Gov’t Code § 11503.
- 75 Cal. Bus. & Prof. Code § 482.
- 76 Cal. Bus. & Prof. Code §§ 2897 and 4522.
- 77 Cal. Health & Safety Code § 1736.5.
- 78 Cal. Health & Safety Code § 1337.9.
- 79 Cal. Health & Safety Code § 1736.5(c)(2) provides the factors to be considered when determining the eligibility for home health aide applicants. The factors to be considered when determining whether to disqualify a certified nurse assistant’s application are substantially the same, although the first factor is “the nature and seriousness of the conduct or crime under consideration and its relationship to their employment duties and responsibilities.” Cal. Health & Safety Code § 1337.9(d).
- 80 Cal. Health & Safety Code § 1736.5(f); Cal. Health & Safety Code § 1337.9(g).
- 81 Cal. Health & Safety Code § 1736.5(f); Cal. Health & Safety Code § 1337.9(g).
- 82 Cal. Health & Safety Code § 1338.5.
- 83 <http://www.cdph.ca.gov/certlic/occupations/Documents/ATCS%2098-4.pdf>
- 84 22 C.C.R. § 10021.3.
- 85 22 C.C.R. § 100214.3, 22 C.C.R. § 100174.
- 86 10 C.C.R. § 6456(e)(1).
- 87 *Id.*
- 88 10 C.C.R. § 6456(e)(2).
- 89 Greenlining Institute, National Employment Law Project, *Navigating Covered California Background Check Requirements: A Manual for Certified Enrollment Counselor Applicants* (Sept. 2013), at Appendix C, available at <http://greenlining.org/wp-content/uploads/2013/09/GLI-NELP-NCCBCR-Manual.pdf>.
- 90 Cal. Bus. & Prof. Code § 480.
- 91 Cal. Health & Safety Code § 1338.5.
- 92 22 C.C.R. § 100214.3, 22 C.C.R. § 100174.

- 93 U.S. Attorney General, letter to The Honorable William H. Sorrell, Attorney General of the State of Vermont (April 2011), available at <http://onlawyering.com/wp-content/uploads/2011/05/VT-Attorney-General-Sorrell.0001-1.pdf>.
- 94 “County Tries Turning Juvenile Offenders Into EMTs,” *NPR All Things Considered* (July 27, 2011), available at <http://www.npr.org/2011/07/27/138761686/calif-county-tries-turning-juvenile-offenders-into-emts>.
- 95 Greenlining Institute, National Employment Law Project, *Navigating Covered California Background Check Requirements: A Manual for Certified Enrollment Counselor Applicants* (Sept. 2013), at Appendix C, available at <http://greenlining.org/wp-content/uploads/2013/09/GLI-NELP-NCCBCR-Manual.pdf>.
- 96 <http://www.cdph.ca.gov/certlic/occupations/Documents/ATCS%2098-4.pdf>.
- 97 Pennsylvania Human Rights Commission, “Policy Guidance Concerning the Disparate Impact Discrimination Implications of a Denial of Employment Based on a Criminal Record,” available at [http://www.pilcop.org/wp-content/uploads/2012/04/PHRC\\_guide.pdf](http://www.pilcop.org/wp-content/uploads/2012/04/PHRC_guide.pdf)
- 98 Pastforward: Progressive Placement. Pamela Paulk Video, available at [http://www.pastforwardmd.org/index.cfm?page=profile\\_pamela](http://www.pastforwardmd.org/index.cfm?page=profile_pamela).
- 99 EEOC *Guidance*, *supra* note 36 at 13-14.

**Appendix: In-Depth Review of California Health Care Occupations Requiring a Bachelor's Degree or Less**

<i>Occupation</i>	<i>State / FBI Criminal Background Checks</i>	<i>Licensing Board or Agency</i>	<i>Disqualifying Convictions</i>	<i>Wages (hourly median)*</i>	<i>Job Growth Outlook 2010-2020*</i>
Ambulance Driver (not EMT)	Yes	Emergency Medical Services Authority (EMSA)	Mandatory & discretionary	\$12.60	n/a
Cardiovascular / Electro-cardiograph Technologist / Technician	No	n/a	n/a	\$27.58	Much faster than average Numeric change: 900 Percent change: 25.0
Certified Enrollment Counselor	Yes	California Health Benefit Exchange	Mandatory & discretionary	n/a	n/a
Dental Assistant	Yes	Dept. of Consumer Affairs, Dental Board	Mandatory & discretionary	\$17.32	Slower than average Numeric change: 5,300 Percent change: 12.1
Dental Hygienist	Yes	Dept. of Consumer Affairs, Dental Board	Mandatory & discretionary	\$48.02	Average growth Numeric change: 3,400 Percent change: 17.1
Dental Lab Technician	No	Dept. of Consumer Affairs, Commission on Dental Accreditation		\$19.17	Slower than average Numeric change: 100 Percent change: 2.2
Diagnostic Medical Sonographer		National certification process excludes individuals because of criminal history but does not provide list of disqualifying crimes or process for appeal or waiver. They will conduct a "pre-application review" of your criminal history for \$125. American Registered Diagnostic Medical Sonographer		\$40.97	Much faster than average Numeric change: 2,000 Percent change: 37.7
Dietetic Technician	No	Registered but unlicensed		\$15.03	Average growth Numeric change: 300 Percent change: 15.8
Dietitian / Nutritionist	No	Registered but unlicensed.		\$33.56	Much faster than average Numeric change: 1,400 Percent change: 20.0
Emergency Medical Technician (EMT) / Paramedic	Yes	Emergency Medical Services Authority (EMSA)	Mandatory & discretionary	\$14.03	Much faster than average Numeric change: 6,700 Percent change: 42.1
Home Health Aide	Yes	Dept. of Public Health, Aide & Technician Cert.	Mandatory & discretionary	\$10.65	Much faster than average Numeric change: 32,000 Percent change: 52.4
Licensed Vocational Nurse	Yes	Dept. of Consumer Affairs, Board of Vocational Nursing & Psychiatric Technicians	Discretionary	\$24.93	Much faster than average Numeric change: 14,500 Percent change: 22.5

Medical and Clinical Lab Technician (hemodialysis technician)	Yes	Dept. of Public Health, Laboratory Field Services Personnel Licensing & Certification	Discretionary	\$19.93	Average growth Numeric change: 2,500 Percent change: 14.8
Clinical Lab Scientist	No but must disclose	Dept. of Public Health, Laboratory Field Services Personnel Licensing & Certification	n/a	\$38.73	Slower than average Numeric change: 1,400 Percent change: 11.9
Medical Assistant	No	n/a	n/a	\$15.79	Average growth Numeric change: 18,100 Percent change: 22.4
Medical Secretary	No	n/a	n/a	\$17.23	Much faster than average Numeric change: 23,100 Percent change: 29.5
Certified Nurse Assistant	Yes	Dept. of Public Health, Aide & Technician Cert.	Mandatory & discretionary	\$12.90	n/a
Occupational Therapist Assistant	Yes	Dept. of Consumer Affairs, Board of Occupational Therapy	Discretionary	\$32.81	n/a
Optician, dispensing	Yes	Dept. of Consumer Affairs, Medical Board of California	Discretionary	\$17.86	Average growth Numeric change: 1,100 Percent change: 17.7
Pharmacy Technician	Yes	Dept. of Consumer Affairs, Board of Pharmacy	Discretionary	\$18.51	Much faster than average Numeric change: 9,600 Percent change: 33.1
Physical Therapist Assistant	Yes	Dept. of Consumer Affairs, Physical Therapy Board	Mandatory & discretionary	\$29.64	Much faster than average Numeric change: 1,400 Percent change: 30.4
Physical Therapist Aide / Technician	No	n/a	n/a	\$12.63	Much faster than average Numeric change: 1,900 Percent change: 29.7
Psychiatric Tech	Yes	Dept. of Consumer Affairs, Board of Vocational Nursing & Psychiatric Technicians	Discretionary	\$25.65	Much faster than average Numeric change: 1,900 Percent change: 21.3
Registered Nurse	Yes	Dept. of Consumer Affairs, Board of Registered Nursing	Discretionary	\$44.48	n/a
Respiratory Therapist	Yes	Dept. of Consumer Affairs, Respiratory Care Board	Discretionary	\$35.28	Much faster than average Numeric change: 3,700 Percent change: 26.1





National Employment  
Law Project

75 Maiden Lane, Suite 601,  
New York, NY 10038  
212-285-3025  
[www.nelp.org](http://www.nelp.org)