

Faulty FBI Background Checks for Employment: Correcting FBI Records Is Key to Criminal Justice Reform

As a bipartisan conversation about criminal justice reform continues into 2016, stakeholders are focused on the crucial role of employment in reducing recidivism and enabling people with records to support themselves and their families. Leaders in Congress are taking up long-standing problems with inaccurate and incomplete FBI records that create needless barriers to employment, while also more closely scrutinizing the FBI's limited response to the issue.

Background Checks for Employment

NELP estimates that there are 70 million people in the United States—nearly one in three adults—who have arrest or conviction records that can show up on a routine background check for employment.¹ With nearly 90 percent of employers conducting background checks on some or all job candidates, a record creates a serious barrier to employment for millions of workers. Indiscriminate use of background checks also undermines employers' ability to recruit and retain qualified workers from a broad and diverse talent pool.

The Problem of Faulty FBI Background Checks for Employment

For workers who have a record and must navigate criminal background checks for employment, FBI background checks—run on 17 million workers in 2012—create a daunting barrier to employment. As NELP documented in a 2013 report, [Wanted: Accurate FBI Background Checks for Employment](#), nearly half of FBI rap sheets failed to include information on the outcome of a case after an arrest—for example, whether a charge was dismissed or otherwise disposed of without a conviction, or if a record was expunged. These routine omissions seriously prejudice the employment prospects of an estimated 600,000 workers every year.

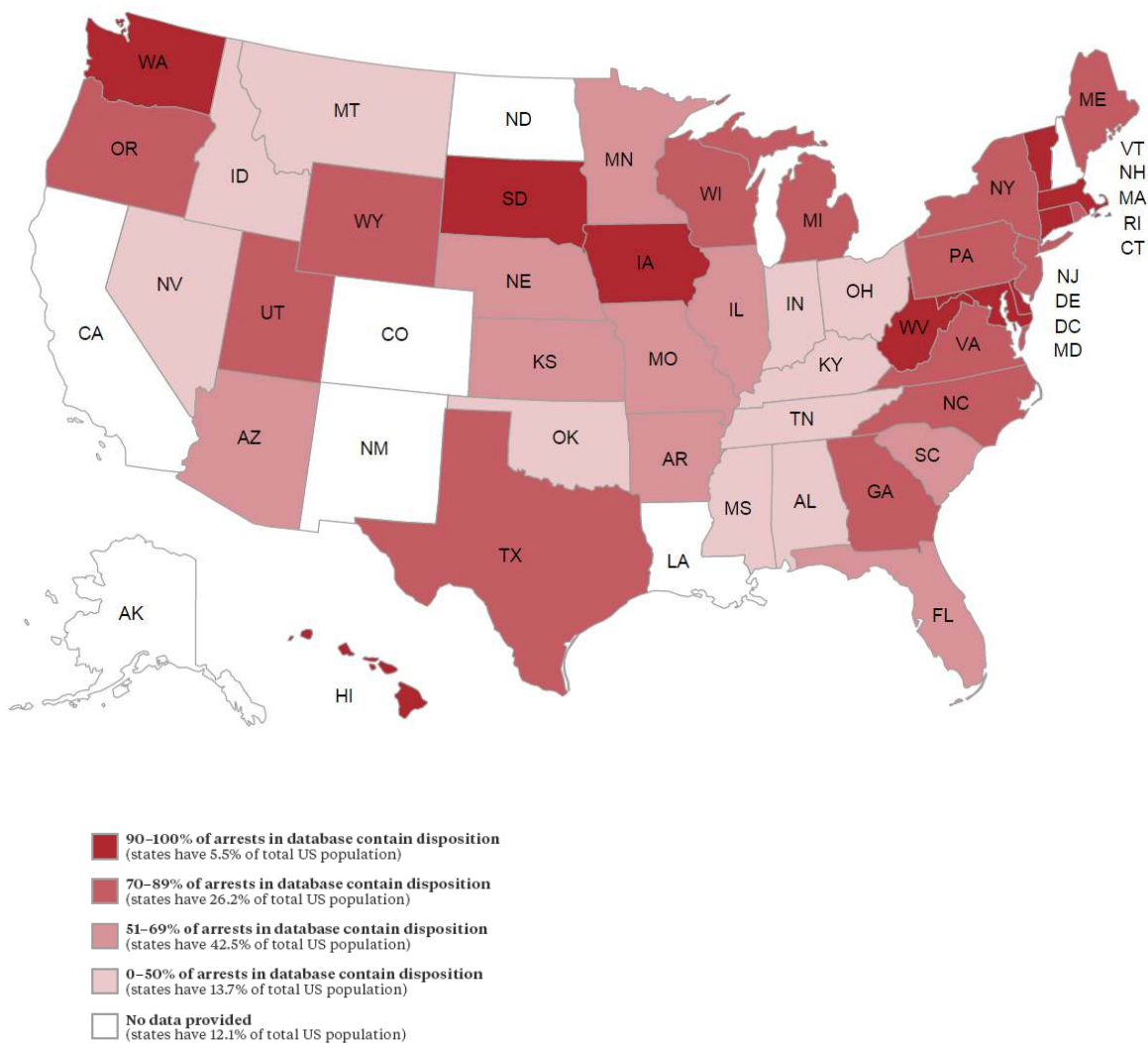
According to recent figures released by the FBI in response to an inquiry from Senators Charles Grassley (R-IA) and Patrick Leahy (D-VT), the number of background checks conducted for non-criminal justice purposes—including for employment and licensing—has increased markedly from 2010 to 2014.² The number of checks performed grew by 29 percent, with a record 30 million checks performed in 2014.³

In February 2015, the Government Accountability Office (GAO) released a report evaluating the FBI's criminal background checks for employment. The report confirmed the challenges facing job applicants due to incomplete FBI records, and recommended actions to improve the completeness of the records.⁴ As the GAO report concluded, states are making only limited progress in reporting updated information to the FBI, which means that the FBI

criminal records database that employers rely on does not provide a reliable assessment of many job applicants' records.

The U.S. Department of Justice's Bureau of Justice Statistics' (BJS) latest data on state arrests reported to the FBI database shows that about half the states failed to include complete disposition information in at least 25 percent of their cases, and 10 states did not have updated information in 50 percent or more of their cases. (See Table 1 below). Despite the formation in 2009 of a Disposition Task Force and an FBI state auditing regime, only a small number of states improved their performance from 2006 to 2012, while 10 states fell further behind, with their reporting rates actually worsening.⁵ The GAO report also noted that the FBI's Disposition Task Force has taken some actions to remedy the problem, but "the task force does not have plans with time frames for completing remaining goals, such as examining and recommending improvements in national standards for collecting and reporting disposition information."

Figure 1: State Criminal Records Repositories Are Missing Disposition Information



People of color are especially disadvantaged by faulty FBI records, because they are consistently arrested at higher rates than whites, and large numbers of their arrests never lead to a conviction. Another NELP report, analyzing the impact of the FBI background checks conducted on two million port workers after the September 11 attacks ([Scorecard on the Post-911 Port Worker Background Checks](#)), found that African-Americans were almost three times more likely to appeal an inaccurate FBI record than non-black workers. Illustrating the depth of the problem, the Transportation Security Administration (TSA) agreed in over 90 percent of the appeals that the FBI records were indeed inaccurate, thus preserving the jobs of over 50,000 U.S. port workers who took advantage of the TSA appeal process.

Reforms Target Employment Barriers and Faulty FBI Background Checks

After decades of “tough on crime” law enforcement, advocates and policymakers on both sides of the aisle agree that serious reform of the criminal justice system is needed to reduce the numbers of people needlessly locked up in jails and prison. Appropriately, attention also has shifted to reentry challenges and the numerous collateral consequences for those with criminal records, including major barriers to employment that an arrest or conviction record often poses.

As a result, federal policymakers have advanced several proposals that can go a long way toward reducing the hiring stigma associated with a criminal record, including “ban the box” legislation (S. 2021/H.R. 3470, the bipartisan Fair Chance Act, introduced in September 2015), remedies to help people expunge and seal their records (S. 675/H.R. 1672, the REDEEM Act), and reform of the FBI background checks for employment (H.R. 2865, the Fairness and Accuracy in Employment Background Checks Act of 2013).

Notably, Senator Charles Grassley, who chairs the Senate Judiciary Committee with jurisdiction over law enforcement issues, identified faulty FBI records as a priority for federal criminal justice reform. In an April 2015 speech at the National Press Club, he stated:

We’re seeing studies that show 32 percent of American adults have criminal records if arrest records are included. . . . [I]f an employer uses the [FBI] database for hiring purposes, the records can be inaccurate and old. And, just as bad, the database includes arrest records that never resulted in a conviction. It’s unfair that an arrest—not resulting in a conviction—is included in a criminal background check. And, while there is a process by which people can contest their records being in the database, there are flaws in that process that need to be looked and changed.⁶

Reflecting the bipartisan support for reform of faulty FBI background checks, Senator Grassley and Senator Leahy, the ranking minority member of the Judiciary Committee, wrote to FBI Director James Comey in June 2015, requesting detailed information on FBI background checks. The joint letter cautions that “this issue takes on special significance given the growing numbers of federal and state laws requiring criminal background checks for employment and licensing purposes, and more importantly the growing number of people who now have criminal records.”

In addition to the increased level of Congressional oversight of FBI practices, bipartisan federal legislation has been introduced to address the problems associated with faulty FBI background checks for employment. Senators Corey Booker (D-NJ) and Rand Paul (R-KY) re-introduced the **REDEEM Act** in March 2015 (S. 675/H.R. 1672), drawing on legislation first developed by Congressman Bobby Scott (H.R. 2865, the Fairness and Accuracy in Criminal Background Checks Act), to address the serious gaps in the FBI background checks process.

The REDEEM Act includes the following key provisions:

1. Requires the FBI to take no more than 10 days to track down any missing federal, state, and local disposition information before releasing FBI background checks for employment and licensing purposes (which is the same procedure that applies to guns checks under the Brady Handgun Violence Prevention Act of 1993);
2. Precludes the reporting of arrest information that is more than two years old if there is no disposition attached to that record;
3. Precludes the reporting of “non-serious” offenses on the FBI rap sheets for employment, including juvenile offenses, loitering, and other minor crimes;⁷
4. Ensures that all federal and state employment background checks that require FBI records provide an automatic right to a copy of the rap sheet and a robust appeals process;⁸
5. Exempts certain law enforcement, national security, and other public-trust positions from these provisions;
6. Defrays any costs associated with these measures by imposing a reasonable fee on the entities seeking FBI background check information (the current fee is \$12.75 to \$14.75, which is down from \$22 to \$24 in 2006);⁹ and
7. Requires the attorney general to issue a report documenting and evaluating the impact of the law.

Most recently, Senator Grassley and colleagues of both parties introduced the **Sentencing Reform and Corrections Act** of 2015 (S. 2123), a long-overdue bipartisan proposal to address several problems within the criminal justice system that have led to decades of over-criminalization and over-incarceration, especially in communities of color. The legislation includes provisions that would reduce certain mandatory minimum sentences, make some resentencing changes retroactive, and address recidivism and reentry.

In addition to these proposed reforms, S. 2123 recognizes that Americans who have paid their debt to society need to be able to find gainful employment in order to lead productive lives as full members of society. It does so by incorporating several of the provisions of the REDEEM Act, including some of the FBI background check protections and the rules expanding sealing and expungement of federal juvenile and lower-level adult offenses. However, S. 2123 only covers federal criminal records reported on the FBI rap sheet, not the

bulk of the records that are generated by state and local law enforcement entities. In essence, the bill's FBI provision can be viewed as a pilot program, which extends protections and procedures similar to those in the Brady Act to any inaccurate and incomplete records generated by only *federal* law enforcement entities.

The FBI Should Comply with Existing Law

The FBI's response to the letter from Senators Grassley and Leahy, referenced above, raises the following questions about the agency's oversight of the critical protections now on the books to hold the states accountable and ensure that workers are treated fairly during the FBI background check process.

Auditing Practices: The FBI has an auditing process to track states' compliance with federal requirement that they provide updated information in a timely fashion, but according to the FBI letter, the process "does not include direct data quality review to document state-level rates of criminal history records missing disposition information." In 2014, only 14 states were audited to determine if they complied with the federal standards requiring reporting of updated criminal history information, and 11 of them were found to be non-compliant.

Subsequent Enforcement Actions: In response to the FBI regulations requiring the states to submit updated information within 120 days of disposition and to maintain accurate and current records,¹⁰ the FBI indicated that it "may initiate a progressive series of actions which could include notifying higher authorities and requesting their assistance in correcting the deficiencies." Despite the consistently poor state performance reported in Table 1 below, the FBI letter failed to indicate whether it has taken such action against any states to date.

Public Requests to Correct Records: In response to questions citing the GAO's concern that state agencies are not providing job applicants with information about how to correct or complete their FBI records, the FBI failed to indicate that any steps have been taken other than to educate the state "agency on the requirements and direct the agency on how to locate Compact Council brochures . . . on the FBI Web site." The lack of public education about how to address a record with missing or incorrect information is reflected by the relatively small number of people who took advantage of the FBI process to correct their faulty records. The FBI reported that only 980 requests were received in 2014 to correct an FBI record, and an estimated 500 were updated. (NELP estimates that 1.8 million workers a year are subject to FBI background checks that include inaccurate or incomplete information.¹¹)

Locating Missing Information for Brady Gun Checks: When FBI checks are performed for Brady gun-check purposes, the FBI has a special unit (the NICS Section¹²) that tracks down missing disposition information before making a final determination. The process, which is extended to employment background checks under bipartisan Senate bills (S. 2123, S. 675), has proven especially effective at expeditiously locating missing information. According to the FBI, of the 8.25 million checks processed by the NICS Section, 2.85 million required additional research (35 percent), and data was located on 2.6 million of these cases within the required three-day timeframe (92 percent).

Reporting Non-Serious Offenses: While the FBI regulations¹³ indicate that the FBI should not report "non-serious" offenses on the rap sheets produced for employment and licensing

purposes, in response to a question regarding enforcement of the provisions, the FBI stated: “The FBI no longer vets arrest charges received from submitting criminal justice agencies to determine if they are serious or nonserious offenses as defined under their respective state laws.” In addition, the letter states that “[t]he FBI has not conducted any formal audits or analysis related to the collection and distribution of information related to nonserious offenses.”

Thus, in addition to the legislative reform proposals endorsed above, we urge Congress take strong steps to address the FBI’s limited enforcement of the existing protections regulating FBI background checks for employment. First, Congress should hold oversight hearings clarifying the gaps in the FBI’s enforcement of the regulations requiring the states to produce disposition information within 120 days, and requiring the FBI to screen out nonserious offenses from the FBI rap sheets produced for employment and licensing purposes. In addition, absent adequate assurances that the FBI will correct the deficiencies, Congress should codify the existing regulations in statute and adopt other necessary reforms to the FBI background check process.

Conclusion

Recent legislative proposals have the potential to alleviate some of the harshest damage of the past decades of over-incarceration, including by reducing barriers to reentry. Flawed FBI background checks only exacerbate this problem, and we can and should expect better information from a federal law enforcement agency whose data should be considered the gold standard. The FBI background check provisions of the Sentencing Reform and Corrections Act of 2015 are a positive first step. In addition, Congress should maximize the opportunity presented by the current bipartisan consensus on the need for criminal justice reform, to advance a comprehensive solution as proposed by the REDEEM Act, while also ensuring that key existing protections governing FBI background checks are codified in statute and aggressively enforced. ■

Table 1: Percent of State Arrests with Updated Dispositions

State	2006	2012	Percent Change
	% of arrests in database that have final dispositions recorded		
Alabama	---	34	n/a
Alaska	---	---	n/a
Arizona	64	63	-1
Arkansas	78	66	-12
California	---	---	n/a
Colorado	23	unknown	n/a
Connecticut	95	97	+2
Delaware	87	99	+12
DC	---		n/a
Florida	59	69	+10
Georgia	71	70	-1
Hawaii	95	94	-1
Idaho	61	49	-12
Illinois	---	69	n/a
Indiana	45	47	+2
Iowa	95	96	+1
Kansas	56	57	+1
Kentucky	30	40	+10
Louisiana	23	---	n/a
Maine	---	81	n/a
Maryland	84	97	+13
Massachusetts	99	99	0
Michigan	80	85	+5
Minnesota	---	66	n/a
Mississippi	14	13	-1
Missouri	81	67	-14
Montana	45	47	+2
Nebraska	60	62	+2
Nevada	33	45	+12
New Hampshire	---		n/a
New Jersey	90	84	-6
New Mexico	22	---	n/a
New York	87	89	+2
North Carolina	---	85	n/a
North Dakota	82		n/a
Ohio	50	50	0
Oklahoma	33	39	+6
Oregon	---	86	n/a
Pennsylvania	65	74	+9
Rhode Island	---	75	n/a
South Carolina	67	66	-1
South Dakota	95	95	0

Tennessee	40	50	+10
Texas	na	82	n/a
Utah	68	72	+4
Vermont	---	92	n/a
Virginia	85	87	+2
Washington	---	95	n/a
West Virginia	50	90	+40
Wisconsin	93	81	-12
Wyoming	82	84	+2

Source: U.S. Department of Justice, Bureau of Justice Statistics, "Survey of State Criminal History Information Systems, 2012" at Table 1.

Endnotes

- ¹NELP, “Advancing a Federal Fair Chance Hiring Agenda: Background Check Reforms in Over 100 Cities, Counties & States Pave the Way for Presidential Action,” (Jan. 2015, www.nelp.org/publication/advancing-a-federal-fair-chance-hiring-agenda/) at fn. 2 and Jo Craven McGinty, “How Many Americans Have a Police Record? Probably More Than You Think,” Wall Street Journal (August 7, 2015, <http://www.wsj.com/articles/how-many-americans-have-a-police-record-probably-more-than-you-think-1438939802>).
- ² Letter from Jeremy M. Wiltz, Deputy Assistant Director, Information Services Branch, Criminal Justice Information Services Division, Federal Bureau of Investigation to Senators Leahy and Grassley (Sept. 21, 2015).
- ³ The 30 million background checks performed in 2014 includes checks performed for all non-criminal justice purposes, including for immigration purposes as well as for employment and licensing purposes. NELP has previously calculated that employment and licensing checks represent the vast majority of the total number on non-criminal justice background checks performed. See NELP, “Wanted: Accurate FBI Background Checks for Employment (July 2013, <http://www.nelp.org/publication/wanted-accurate-fbi-background-checks-for-employment/>) at fn. 6.
- ⁴ Government Accountability Office, “Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used For Employment-Related Background Checks,” Report 15-162 (February 2015, <http://www.gao.gov/products/GAO-15-162>).
- ⁵ US Department of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2006, <https://www.ncjrs.gov/pdffiles1/bjs/grants/224889.pdf> and U.S. Department of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2012, <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>.
- ⁶ Grassley Statement at the National Press Club Newsmakers News Conference (April 27, 2015, <http://www.grassley.senate.gov/news/news-releases/grassley-statement-national-press-club-newsmakers-news-conference>). In a similar vein, on April 14, 2010, Rep. Lamar Smith, Ranking Member on the House Judiciary Committee, sent a letter (on file with NELP) to Attorney General Eric Holder requesting that the Department of Justice address the “chronically poor quality” of the FBI criminal history records. The letter also stated that “individuals should not be expected to bear the burden of correcting and perfecting the FBI’s criminal history records.”
- ⁷ Although federal regulations require the FBI to exclude “nonserious” arrests and convictions from its database, the FBI has reported that it has stopped vetting records it receives from the states to determine if they should be included in the FBI database. See Joe Palazzolo, “FBI No Longer Checks Its Records for ‘Nonserious’ Crimes,” Wall Street Journal (October 12, 2015, <http://blogs.wsj.com/law/2015/10/12/fbi-no-longer-checks-its-records-for-nonserious-crimes/>).
- ⁸ NELP, “Wanted: Accurate FBI Background Checks for Employment (July 2013, <http://www.nelp.org/publication/wanted-accurate-fbi-background-checks-for-employment/>).
- ⁹ 79 FR 207 pg. 63943 (Oct. 27, 2014, <http://www.federalregister.com/Browse/Document/usa/na/fr/2014/10/27/2014-25524>) and Attorney General’s Report on Criminal History Background Checks (June 2006, http://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf).
- ¹⁰ 28 CFR 20.37, available at <https://www.law.cornell.edu/cfr/text/28/20.37>.
- ¹¹ NELP, “Wanted: Accurate FBI Background Checks for Employment (July 2013, <http://www.nelp.org/publication/wanted-accurate-fbi-background-checks-for-employment/>) at p. 10.
- ¹² See website for the FBI’s National Instant Criminal Background Check System, available at <https://www.fbi.gov/about-us/cjis/nics>.
- ¹³ 28 CFR 20.32(b), available at <https://www.law.cornell.edu/cfr/text/28/20.32>.