

Fiscal Year 2023

# Second Chances Part I: Federal Employment for Workers With Past Arrests or Convictions



**U.S. Equal Employment Opportunity Commission**

Research, Evaluation, & Applied Data Division | Office of Federal Operations

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## Executive Summary

In June 2021, President Biden signed Executive Order 14035 to advance diversity, equity, inclusion, and accessibility in the Federal workforce. This order called for an evaluation and expansion of Federal employment opportunities for formerly incarcerated persons.

Before this executive order, in fiscal year (FY) 2020, the U.S. Equal Employment Opportunity Commission (EEOC) formed a task force to identify vulnerable workers and determine ways to better serve them. The EEOC identified formerly incarcerated persons as one category of vulnerable workers due to the challenges they face in securing employment after their incarceration. In the FY 2017-2021 Strategic Enforcement Plan, the EEOC identified the use of background checks related to arrest and conviction records as among its national substantive area priorities because African Americans and Latinos are disproportionately incarcerated.

This report comes from the EEOC's Reports and Evaluations Division at the Office of Federal Operations (OFO). It asks two related questions:

- 1) How likely are people with prior arrests or convictions to work in the Federal sector?
- 2) Could regulating the timing of background checks during the recruitment process (e.g., ban-the-box policies) protect those applicants with a prior arrest or conviction from discrimination?

### How Likely Are People With Prior Arrests or Convictions to Work in the Federal Sector?

In answering the first question, this report first notes the lack of systematic data collection tracking employment outcomes for workers with prior records of incarceration. Using a **nationally representative survey with data from 2003 through 2017**, this report finds that people with prior records were nearly half as likely to be Federally employed compared to those without such records. This gap suggests that there were roughly 300,000 fewer previously formerly incarcerated workers in the Federal workforce than expected.

The current study does not have sufficient data to fully assess the causes of lower rates of Federal employment for individuals with a history of incarceration during the 2003 to 2017 time period. For instance, it is possible that people with incarceration records erroneously believe they are barred from Federal employment and self-select out of the applicant pool. It is also possible that hiring managers are less likely to hire applicants with any kind of record -incarceration, arrest, or conviction. Additional research directly examining the hiring practices of Federal agencies towards workers with a record is necessary to better understand how employment for these community members could be increased.

The lack of available data constrains the ability to measure Federal employment for workers with conviction, arrest, or incarceration records. Therefore, one high-value

policy change would be to track the number of Federal workers with arrest or conviction records over time. Existing data could be leveraged to generate such a measure. For example, researchers could use data from the Defense Counterintelligence and Security Agency (DCSA)—the central processor of background investigations for the Federal government—to determine the proportion of Federal employees that had a background check return an arrest or conviction record.<sup>1</sup> Tracking this statistic over time would allow the EEOC and other Federal agencies to assess how successful different policies and procedures are in expanding Federal employment opportunities to formerly incarcerated persons. The EEOC should coordinate with the Office of Personnel Management (OPM) and the DCSA to gather data on suitability adjudications, with a focus on the characteristics of applicants whom employers deem to be appropriate to hire for a given position.

### **Could Ban-the-Box Policies Protect Applicants With a Prior History of Arrest or Conviction From Discrimination?**

To answer the second question, this study looks to lessons learned from outside the Federal sector. Researchers examined data on complaints filed with the EEOC where complainants alleged that their past exposure to the criminal legal system was improperly adjudicated. The results show that so-called **ban-the-box policies, which generally prohibit criminal background checks until after a conditional job offer is made, led to significantly more and more meritorious complaints filed per month.** Specifically, ban-the-box policies made it more likely that investigators were able to find enough evidence to proceed further in the complaint process. Without additional data and analysis, it is difficult to determine the exact cause behind these results. It is possible that, after ban-the-box timing restrictions were imposed, employers engaged in more discrimination based on arrest and conviction records. However, it may also be the case that applicants were more aware of their protections after timing restrictions were implemented.

Title 5 of the Code of Federal Regulations regarding Recruitment, Selection, and Placement (General) and Suitability (5 CFR parts 330 and 731) prohibit Federal employers from collecting criminal history information, unless an exception has been granted until after until after a conditional job offer has been made and accepted.<sup>2</sup>

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<sup>1</sup> The central reciprocity system managed by DCSA does not capture data on the status of every individual investigated (i.e., applicant, Federal employee, contractor). It also does not currently capture affiliation across all populations (e.g., is the applicant hired, when a Federal employee leaves service and in some cases, why they leave service). It's possible this type of data may be available in a successor system.

<sup>2</sup> OPM is in the process of implementing the Fair Chance to Compete for Jobs Act which will change placement of this requirement with respect to the timing of collection of criminal history information within the regulations. See Notice of Proposed Rulemaking:

<https://www.federalregister.gov/documents/2022/04/27/2022-08975/fair-chance-to-compete-for-jobs>.

The analysis presented in this study suggests that such a policy may be helpful in enforcing Title VII and should be continued. These recruitment rules were expanded to Federal contractors in December 2021, which may improve Title VII monitoring and enforcement even more.<sup>3</sup>

To ensure adherence to best practices, recruiters should follow these rules and regulations, and the EEOC should conduct follow-up research to ensure Federal employers are following best practices. Applicants should also be made aware of their rights regarding the accuracy of background checks and the appropriate uses of arrest and conviction records in employment decisions.

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<sup>3</sup> The Fair Chance to Compete for Jobs Act of 2019 expanded the populations covered, including contractors. However, it still be implemented through rule changes in the Code of Federal Regulations. <https://www.govinfo.gov/link/plaw/116/public/92>.

## Background on the Employment of Formerly Incarcerated Workers

In June 2021, President Biden signed Executive Order (EO) 14035 to advance diversity, equity, inclusion, and accessibility in the Federal workforce. This order called for an evaluation and expansion of Federal employment opportunities for formerly incarcerated persons (Executive Order No. 14035, 2021).

Even before EO 14035 was issued, in Fall 2019, the U.S. Equal Employment Opportunity Commission (EEOC) formed a task force to identify vulnerable workers and determine ways to better serve them. Formerly incarcerated persons were among those identified as vulnerable workers due to their difficulty in securing employment after their incarceration, which includes pre-trial detention and post-conviction incarceration. The task force built upon 2012 guidance on the use of arrest and conviction records in employment decisions. Furthermore, because Black and Latino people are disproportionately incarcerated, the EEOC identified the use of criminal background checks as among its national substantive area priorities in the FY 2017-2021 Strategic Enforcement Plan. The analysis contained throughout this report assesses Federal employment for formerly incarcerated people and the policies that promote or frustrate Federal work for these community members.

Prior incarceration impacts many U.S. citizens' abilities to find employment. When formerly incarcerated community members find stable jobs, they promote public safety and break cycles of economic hardship for future generations of Americans. Yet in 2017, 622,400 people were released from state and Federal prisons (Bronson, 2019), and many of them faced challenges reentering the workforce (Couloute & Kopf, 2018). Additionally, the costs imposed by the judicial system are not borne equally by all. Research estimates that 8 percent of all adults and one-third (33 percent) of African American men had a felony record as of 2010 (Shannon et al., 2017). Another study found that African American adults were nearly 6 times more likely to be incarcerated than White adults in 2018, while Hispanic adults were about 3 times as likely to be incarcerated compared to White adults (The Sentencing Project, 2018). These data likely represent a conservative estimate of racial disparities in the criminal legal system given that the studies described above do not include individuals who were arrested or convicted but did not serve time in jail or prison for a felony.

Substantial evidence suggests that applicants with arrest or conviction records face many barriers to employment. For example, individuals with arrest or conviction records have much lower employment rates than those without these records.<sup>4</sup> Mueller-Smith and Schnepel (2021) found that, for first-time felony defendants, avoiding a felony conviction through diversion (i.e., wherein public officials choose to pause, terminate,

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<sup>4</sup> Some examples of this evidence include Pager (2003, 2007), Holzer et al. (2007), Pager et al. (2009), Decker (2015), Agan & Starr (2017), Leasure & Anderson (2017), and Leasure (2019).

or divert someone's progression through the justice system) halved recidivism (re-offending) rates, increased quarterly employment by 53 percent (or 18 percentage points), and increased quarterly earnings by 64 percent. In other words, a person who avoids a felony conviction works almost two more years and earns about \$60,000 more than if they had been convicted. While some employers worry about the performance of workers with arrest or conviction records, a five-year study involving almost 500 ex-offenders found lower turnover rates among ex-offenders compared to non-offenders (Paulk, 2016).

Research has also shown that a lack of employment for the formerly incarcerated community members harms national productivity and increases recidivism, racial income inequality, and crime rates (Abraham & Kearney, 2020; Schnepel, 2018). Research has shown that people released from prison into counties during better economic conditions returned to prison at significantly lower rates than individuals released into counties experiencing economic downturns (Yang, 2017). Employment is a key part of returning to and reintegrating into communities—decreasing not only the likelihood of reoffending but also overreliance on public assistance programs.<sup>5</sup> Prior research has focused almost exclusively on private and state employers, while employment in local and Federal agencies for formerly incarcerated persons remains understudied.

Another area of interest to the EEOC is credit history, which may be a factor in suitability determinations, depending upon the risk and sensitivity of the position in question. Credit histories are governed by many of the same processes and rules as criminal histories, especially in the Federal sector. However, criminal histories and credit histories may play different roles in the Federal hiring process than in the private sector, due to a more uniform process for criminal background checks and different potential liabilities, including national security considerations. Since EEOC researchers could not obtain data on credit history, this report focuses solely on the impact of past exposure to the criminal legal system. Despite the lack of data to study the impact of credit histories on the Federal hiring process, many of the patterns and policies considered in the criminal history context have parallels to credit history, as shown in previous research (Bartik & Nelson, 2018; Dobbie et al., 2020).

This report presents evidence that, from 2003 to 2017, the Federal sector may have had higher barriers to employment for formerly incarcerated workers than elsewhere in the economy. However, this report also shows that delaying arrest and conviction record inquiries in the hiring process may provide the EEOC more opportunity to protect these applicants.

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<sup>5</sup> For additional details and estimates see Kling (2006), Raphael & Weiman (2007), and Redcross et al. (2011).

A related READD report, [Second Chances Part II: History of Criminal Conduct and Suitability for Federal Employment](#), served to take up the “Next Steps” offered at the end of this present report.

### **Rules for Hiring Workers with Arrest or Conviction Records**

Several laws and regulations govern the use of past arrests or convictions in Federal employment decisions. Federal agencies collect the information to conduct background investigations on their job candidates. The hiring agency enters information concerning the processing of candidates' investigations into a centralized database, which is managed by the Defense Counterintelligence and Security Agency (DCSA). The hiring agency, following the adjudication of information received from the background investigation, reports determinations to Office of Personal Management (OPM). The information collected regarding the prior arrests or conviction is the OPM Form OF-306, which specifically asks: “During the last 7 years, have you been convicted, been imprisoned, been on probation, or been on parole?”

### **Appropriate Use of Arrest and Conviction Records Under Title VII**

The EEOC has a long history of combating discrimination caused by employers' use of arrest or conviction records in employment decisions—with decisions dating back to the 1970s.<sup>6</sup> While having a prior arrest or conviction is not a protected category under Title VII, discrimination based on race, color, religion, sex, and national origin are prohibited. The EEOC has issued multiple policy statements on the appropriate consideration of arrest or conviction records in employment decisions.<sup>7</sup> The most recent and comprehensive of these guidance documents was EEOC Enforcement Guidance, Consideration of Arrest and Conviction Guidance in Employment Decisions, Apr. 25, 2012 (Arrest/Conviction Guidance). The Arrest/Conviction Guidance clarifies how an employer's use of an individual's criminal history in making employment decisions may

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<sup>6</sup> EEOC Decision No. 72-1497 (1972) (challenged an arrest or conviction record exclusion policy based on “serious crimes”); EEOC Decision No. 74-89 (1974) (challenged a policy where a felony conviction was considered an adverse factor that would lead to disqualification); EEOC Decision No. 78-03 (1977) (challenged an exclusion policy based on felony or misdemeanor convictions involving moral turpitude or the use of drugs); EEOC Decision No. 78-35 (1978) (concluded that an employee's discharge was reasonable given his pattern of criminal behavior and the severity and recentness of his arrest and conviction).

<sup>7</sup> EEOC Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964 (Feb. 4, 1987; EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (July 29, 1987; EEOC Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII (Sept. 7, 1990); EEOC Compliance Manual Section 15: Race & Color Discrimination § 15-VI.B.2 (April 19, 2006), <https://www.eeoc.gov/policy/docs/race-color.pdf>.