



The 2009 American Recovery and Reinvestment Act (ARRA) provides \$5 billion through the Weatherization Assistance Program (WAP) under the U.S. Department of Energy (DOE) to help weatherize one million low-income family homes—marking a tremendous increase from \$227.2 and \$250 million for WAP in FYs 2008 and 2009, respectively.¹ This unprecedented allocation represents one of ARRA’s most important investments in equity. Low-income families, many of color, live in the nation’s oldest and most energy inefficient housing stock. As a result, our most vulnerable families are those most impacted by rising energy costs. With an estimated 87,000 jobs that will be created through WAP, many, including people with criminal records who are typically among the most difficult to employ, stand to benefit from new employment opportunities.

In this paper, the National Employment Law Project, with help from the Ella Baker Center for Human Rights and PolicyLink, provides the necessary information to enable efficient and equitable hiring using WAP funds. This paper fills an important void by clearly explaining the laws regulating who can access these jobs, particularly as it pertains to people with criminal records, a population that faces significant barriers to securing employment. Due to fears, concerns regarding liability, blatant acts of discrimination, and plain confusion, people with criminal records struggle with successfully finding steady and meaningful employment, thus making reintegrating into society especially difficult. Yet, they are hardly the only ones hurt by these systemic failures. Their families and the communities where they reside also suffer.

This paper is intended to serve as an easy-to-use resource for agencies that oversee WAP programs, contractors, and education and training providers. Community organizations and advocates can also use the paper to promote fair opportunities for people with criminal records in the emerging green sector. The approaches presented can help all these groups in their work to overcome systemic barriers and fundamentally transform the opportunities of people with criminal records in society and build healthy communities of opportunity for all.

The Weatherization Assistance Program: Building an Inclusive Green Economy

While the significant infusion of ARRA funding presents an opportunity to build a stronger, more inclusive green economy, administrative and political barriers have hampered the ability to spend such a large sum quickly. At the time of this writing, only 5 percent of the planned units have been weatherized.² Fortunately, in recent months, the pace of weatherization work has picked up as local communities have begun to draw down funds and engage contractors. However, time is of the essence—all WAP funds must be obligated by September 30, 2010 with a spending deadline of March 2012.³ Additionally, DOE requires states to have 30 percent of planned units completed before drawing down the remaining 50 percent of WAP funds.

Given these deadlines and spending requirements, it is imperative that community action agencies and municipalities that are administering the ARRA WAP programs work in concert with other community organizations and contractors on this historic push to bring energy savings and economic opportunity to low-income Americans, including disadvantaged youth and adults and those with criminal records.

Recognizing the unprecedented opportunity to boost the economy by employing thousands of workers, the Obama administration directed federal officials to “maximize the economic benefits of a Recovery Act-funded investment . . . by supporting projects that seek to ensure that the people who live in the local community get the job opportunities that accompany the investment.”⁴ And while DOE does not determine the hiring policies of state and local agencies that run the program, several jurisdictions have taken the Obama administration’s guidance seriously, forging agreements and training opportunities to guarantee local hiring of all segments of the community, including people with criminal records.⁵

For example, building on laws passed in Maine and West Virginia, the Chicagoland Green Collar Jobs Initiative is developing an open-source comprehensive weatherization curriculum, which includes a focus on successfully integrating workers with a history of a criminal record and is endorsed by leading city training providers and civic organizations.⁶ With support from Green For All, local government officials and key stakeholders in Portland, Oregon have signed a “Community Workforce Agreement on Standards and Community Benefits” in the Clean Energy Works Portland Pilot Program. Their efforts have put into place a 470-home pilot program, to be scaled up to 100,000 qualifying homes countywide.⁷ The Portland agreement establishes a goal to hire 80 percent of employees from the local community. Additional provisions stipulate that 30 percent of all those hired under the program represent low-income communities, including “formerly incarcerated individuals seeking new opportunities for responsible citizenship and economic self-sufficiency.”⁸ Equally important, the agreement, which is endorsed by multiple city council resolutions, creates strong standards regulating both the quality of the jobs and the product.

Despite the early success of such efforts, many community leaders across the country report that men and women with criminal records are facing barriers in accessing the training and the jobs created by the WAP and other green job-related ARRA programs, potentially in violation of federal antidiscrimination law. Such structural barriers stem from a lack of clarity and general misinformation regarding employment law and employer liability. This is especially true in situations where WAP funds are administered by local governments. Often, human resource departments in local government preclude people with criminal records from specific professions through background checks for criminal records, deeming the applicants inappropriate without any consideration of their work experience, type of offense, time served, and time since

last offense—all key public safety indicators that determine the likelihood of re-offending.⁹ In addition, many local agencies do not require contractors, who hire weatherization workers, to consider any of these factors either. As the following approaches show, it is possible to maintain public safety and uphold current rules and regulations while giving employment opportunities to people with criminal records.

Breaking Down Barriers to Employment of People with Criminal Records

According to an analysis by NELP researchers conducted in 2008, nearly one in three adults in the United States (31.7%) were estimated to have a criminal record on file with the states that will show up on a routine criminal background check.¹⁰ As is expected, when U.S. incarceration rates continue to rise, so do the number of people with a record of criminal history. And those with a criminal history are impacted by the more frequent use of background checks.¹¹ Nationally, background checks are one of the foremost systemic barriers limiting people with criminal records from gainfully participating in the regular labor market.¹² The severity of this is amplified by racial, ethnic, and gender disparities both in the criminal justice system and among workers with criminal records. Men of color, particularly African American men, have higher incarceration rates and, as people with criminal records, tend to have a harder time finding work and earning equal pay when compared to their white counterparts.¹³ Addressing these inequities requires innovative strategies at all levels of government.

As part of the major new federal investment in green jobs made possible by the Recovery Act, the Obama administration has made significant resources available to regions populated by large numbers of low-income people, people of color, and people with criminal records. Indeed, the new “Pathways Out of Poverty” program received \$150 million of Recovery Act funds for green job training. Of the 38 awards in federal grants to local groups, 27 of the training programs specifically targeted people with a criminal record.¹⁴

As in the case of the Portland agreement, WAP local hiring initiatives can also help break down the significant barriers to employment caused by a local resident’s criminal record. To be sure, given that weatherization services are often performed on inhabited homes, there are necessarily concerns related to the safety and security of residents receiving the benefits of WAP. Those concerns, however, can be addressed while ensuring employment of people with criminal records; their ability to work is also a matter of public safety.¹⁵ To address both sets of needs, local agencies and contractors should provide appropriate employment opportunities to people with criminal records, while balancing the safety and security of those whose homes are weatherized with WAP funds. Doing this requires local governments and their contractors to have an understanding of federal law and policies regulating criminal background checks.

The Basic Protections Regulating Criminal Background Checks for Employment

As local governments and their contractors embark on hiring large numbers of workers to perform weatherization services under the WAP program, it is important to take into account the basic worker protections that apply to criminal background checks for employment.

First, while local officials and WAP contractors are free to conduct criminal background checks for employment, federal laws do not specifically limit people with criminal records from working as part of the WAP program.¹⁶ Second, and most important, federal civil rights laws create strict standards regulating

criminal background checks for employment. Finally, government officials and their WAP contractors should be aware of the full range of tax credits and other programs that help promote employment of people with criminal records and limit exposure to liability.

Federal Civil Rights Laws

Title VII of the Civil Rights Act of 1964, as enforced by the Equal Employment Opportunity Commission (EEOC), prohibits discrimination in employment based on race, gender, national origin, and other categories.¹⁷

Given that African Americans and Latinos are disproportionately represented in the criminal justice system, the EEOC has recognized that when employers improperly use arrest and criminal records to screen out otherwise eligible workers, the background checks have a “disparate impact” on African Americans and Latinos. Because of this disparate impact, the EEOC will pursue complaints against employers which fire or do not hire workers because of a criminal record that is not directly related to their job duties.¹⁸ Because arrests are allegations only, the EEOC has determined that “a blanket exclusion of people with arrest records will almost never withstand scrutiny.”¹⁹

Employers may consider an applicant’s criminal record when making an employment decision. However, the federal civil rights law requires employers to make an individual, case-by-case inquiry and consider:

1. The nature and gravity of the offense or offenses;
2. The time that has passed since the conviction and/or completion of the sentence; and
3. The nature of the job held or sought.²⁰

Under these standards, a WAP contractor’s policy of excluding *all* applicants with a criminal record will very likely violate the federal anti-discrimination law. Instead, the policy has to be properly tailored to the circumstances of the job. A criminal record may be a bar to employment only when it is directly related to the job duties, and the employer has considered the length of time since conviction. Thus, an old criminal record, especially for a non-violent offense, should not disqualify a worker from employment in a WAP position. WAP-funded positions involving work in a crew that is strictly supervised should also be considered distinct from a position involving regular unsupervised access to an individual’s home. Finally, many weatherization positions may involve very limited contact with the general public, as in the case of work performed on unoccupied homes. These positions should not be denied to most workers based on their criminal record.

To best ensure that the hiring process for WAP workers is fair and complies with federal law, the following factors should be considered when making employment decisions:

1. ARRA guidance encourages the employment of low-income communities and those most adversely affected by the recession;
2. The specific duties and responsibilities necessarily related to the employment sought;
3. The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his or her fitness or ability to perform one or more such duties or responsibilities;
4. The time which has elapsed since the occurrence of the criminal offense or offenses;
5. The age of the person at the time of the occurrence of the criminal offense or offenses;

6. The seriousness of the offense or offenses;
7. Any information produced by the person demonstrating his or her rehabilitation and good conduct; and
8. The legitimate interest in protecting property, and the safety and welfare of specific individuals or the general public.

Federal Consumer Protection Laws

The federal Fair Credit Reporting Act (FCRA) regulates the creation, distribution, and notification requirements for commercially prepared background reports that are relied on by most private employers that conduct criminal records checks. In addition to providing consumer protections, FCRA imposes requirements on employers who utilize commercially prepared background checks when making employment decisions.

Under FCRA, if an employer is not going to hire an applicant—or take any other “adverse action”—based on information included in the background report, a copy of the commercially prepared background check must be provided to the applicant prior to the employer taking the adverse action.²¹ This advance notice gives the applicant time to contest misinformation that is often associated with criminal background check reports.

“Negligent Hiring” Liability

Many employers are concerned about potential liability for negligent hiring if they employ people with a criminal record. According to the National H.I.R.E. Network, although state standards may differ, “the key to determining liability is usually whether the employer could have foreseen the crime specifically, whether the employee had a history or propensity for harmful behavior and, most importantly, whether the employer knew or should have known of the employee’s propensities.”²²

Thus, a background check that follows EEOC guidance of considering the relationship between the applicant’s past conviction(s) and the position sought, as well as the length of time since conviction, will “generally satisfy the legal requirements *and eliminate the risk of liability on the employer’s part*”²³ (emphasis added). While legal judgments against employers based on hiring someone with a criminal record are very rare, the law is clear that a fair screening process adopted by the employer is the best strategy to avoid liability.

In addition to the above, New York, California, Nevada, New Jersey, Connecticut, and Illinois have legislated administrative certificates of rehabilitation to ease the burden of employer liability and foster the hiring of people with criminal records. These certificates “restore some or all of the legal rights and privileges lost as a result of conviction, and in some cases, provide evidence of good character.”²⁴ While New York, Illinois, and Connecticut legally appear to have the most far reaching certificates—none have maximized the potential of this tool. Nonetheless, local agencies, employers, and advocates in these states should use such certificates to maximize hiring and other regions should consider developing similar measures.

Federal Bonding Program

Employers can further insulate themselves from risk by utilizing the federal bonding program. The Federal Bonding Program, established in 1966 by the Department of Labor, provides “Fidelity Bonds that guarantee honesty for ‘at-risk’, hard-to-place job seekers,” including people with criminal records.²⁵ Under the bonding program, at-risk employees are bonded for “\$5,000 to \$25,000 coverage for a six-month period with no deductible amount,” meaning the employer gets 100 percent coverage with no out-of-pocket cost.²⁶

Work Opportunity Tax Credit

In addition, the federal Work Opportunity Tax Credit incentivizes the hiring of individuals from 12 target populations, including “qualified ex-felons,” into the private sector.²⁷ Under the program, employers are eligible for \$2,400 for each qualified new adult hire.²⁸ To be eligible, adult employees must work a minimum of 120 to 400 hours per year.²⁹ For details on which states offer these tax credits and information on related resources, please visit the National H.I.R.E. Network’s website.³⁰

Conclusion

The historic opportunity made possible by the Recovery Act offers those who have been hit first and worst by the recession a chance to fully participate in rebuilding our nation’s economy in a way that improves their economic condition and the well-being of the planet. Prioritizing the employment needs of people with criminal records and utilizing the strategies and tools mentioned in this paper can be a useful first step towards ending discrimination while at the same time fulfilling the promise offered by the Recovery Act and the WAP.

¹ U.S. Department of Energy, Energy Efficiency and Renewable Energy. Weatherization Assistance Program. 2009 Recovery Act — Frequently Asked Questions about Weatherization – The 2009 Recovery Act and Weatherization http://apps1.eere.energy.gov/weatherization/recovery_act_faqs.cfm#funding.

² Associated Press. “STIMULUS WATCH: Weatherizing Program Falling Short.” (March 27, 2010) <http://www.nytimes.com/aponline/2010/03/27/us/AP-US-Stimulus-Weatherization.html>.

³ Green For All. “The American Recovery & Reinvestment Act: Understanding the Weatherization Assistance Program.” (October 15, 2009) [http://www.greenforall.org/resources/reports-research/wap/?searchterm=weatherization assistance program](http://www.greenforall.org/resources/reports-research/wap/?searchterm=weatherization%20assistance%20program).

⁴ U.S. Office of Management and Budget, Memorandum for the Heads of Departments and Agencies, “Updated Implementation Guidance for the American Recovery and Reinvestment Act of 2009” (April 3, 2009), at page 5.

⁵ Sierra Club, BlueGreen Alliance, LiUNA!, “Building Energy Efficiency: Unions Train a New Generation of Workers in Green Jobs (available on-line at <http://www.sierraclub.org/greenjobs/downloads/weatherization.pdf>).

⁶ Chicagoland Green Collar Jobs Initiative. “Chicagoland Basic Weatherization Curriculum,” 2009 (available on-line at <http://greencollarchicago.org/uploads/Green%20Collar-Final%20Draft%20Chicago%20Weatherization%20Curriculum1.pdf>)

⁷ Green For All. “Clean Energy Works Portland: A National Model for Energy-Efficiency Retrofits,” 2010 (available on-line at <http://www.greenforall.org/what-we-do/cities-initiative/portland/clean-energy-works-portland>).

⁸ Ibid.

⁹ Alfred Blumstein and Kiminori Nakamura. “‘Redemption’ in an Era of Widespread Criminal Background Checks.” National Institute of Justice, Issue No. 263 (available on-line at <http://www.ncjrs.gov/pdffiles1/nij/226872.pdf>).

¹⁰ Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated: Hearing before the House Committee on the Judiciary, 111th Cong., (2010) (testimony of Maurice Emsellem).

This estimate is based on the following methodology. According to a 2008 state survey, there were 102.8 million people with criminal records on file with the states, including serious misdemeanors and felony arrests. Bureau of Justice Statistics, Survey of State Criminal History Systems, 2008 (October 2009), at Table 2. To account for over counting due to individuals who may have records in multiple states and other factors, and to arrive at a conservative national estimate, we reduced this figure by 30% (72 million). Thus, as a percentage of the U.S. population over the age of 18 (209 million according to the 2000 Census, which we increased by 8.3% to reflect the average population growth over the past 10 years, totaling 227 million adults), an estimated 31.7% of the U.S. adult population has a criminal record on file with the states.

¹¹ H. Holzer, S. Raphael, and M. Stoll. "The Urban Institute Reentry Roundtable Discussion Paper: Employment Barriers Facing Ex-Offenders," May 19-20, 2003.

¹² H. Holzer, S. Raphael, and M. Stoll. "How Willing Are Employers to Hire Ex-Offenders?" *Focus*, Vol. 23, No. 2, Summer 2004; H. Holzer, S. Raphael, and M. Stoll. "The Urban Institute Reentry Roundtable Discussion Paper: Employment Barriers Facing Ex-Offenders," May 19-20, 2003.

¹³ Pager, Devah. "The Mark of a Criminal Record." *American Journal of Sociology*, Volume 108 Number 5, March 2003: 937–75; H. Holzer, S. Raphael, and M. Stoll. "The Urban Institute Reentry Roundtable Discussion Paper: Employment Barriers Facing Ex-Offenders," May 19-20, 2003.

¹⁴ U.S. Department of Labor, Employment and Training Administration. "American Recovery and Reinvestment Act of 2009: Pathways Out of Poverty Grant Fact Sheets."

http://www.doleta.gov/pdf/Summaries_for_Pathways_Out_Poverty_updated_20100203_NoPhone.pdf.

¹⁵ The Center for Employment Opportunities Comprehensive Prisoner Reentry Program. "The Power of Work," March 2006.

¹⁶ Email correspondence with the U.S. Department of Energy between Carole Gates, U.S. DOE Golden Field Office and Marc Philpart, PolicyLink, May 28, 2010.

¹⁷ More information is available at www.eeoc.gov.

¹⁸ The U.S. Equal Employment Opportunity Commission, EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., 1982, February 4, 1987.

¹⁹ The U.S. Equal Employment Opportunity Commission, Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., 1982, September 7, 1990.

²⁰ Policy Statement on the Issue of Conviction Records.

²¹ 15 U.S.C. § 1681b(b)(3).

²² National H.I.R.E. Network. "Negligent Hiring Concerns," available at http://www.hirenetwork.org/negligent_hiring.html.

²³ *Ibid.*

²⁴ Love, Margaret and Frazier, April. "Certificates of Rehabilitation and Other Forms of Relief from the Collateral Consequences of Conviction: A Survey of State Laws." *American Bar Association Commission on Effective Criminal Sanctions*, September 19, 2006.

²⁵ The Federal Bonding Program, a U.S. Department of Labor Initiative, *Home Page*, <http://bonds4jobs.com/>.

²⁶ The Federal Bonding Program, a U.S. Department of Labor Initiative, *Highlights of the Federal Bonding Program*, <http://bonds4jobs.com/highlights.html>.

²⁷ U.S. Department of Labor, Employment and Training Administration, *Work Opportunity Tax Credit*, <http://www.doleta.gov/business/Incentives/opptax/>.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ The National H.I.R.E. Network. "State Tax Incentives to Benefit Employers Who Hire People with Criminal Records," available at http://www.hirenetwork.org/state_tax_credits.htm

For more information about the employment rights of people with criminal records, please contact:

The National Employment Law Project

Attention: Madeline Neighly / Maurice Emsellem
405 14th Street, Suite 1400
Oakland, CA 94612
Telephone (510) 663-5707
Fax (510) 663-2028
mneighly@NELP.org / memsellem@nelp.org

For more information about green jobs and equitable workforce development, please contact:

PolicyLink

Attention: Marc Philpart / Ruben Lizardo
1438 Webster Street, Suite 303
Oakland, CA 94612
Telephone (510) 663-2333
Fax (510) 663-9684
marc@policylink.org / rlizardo@policylink.org

The Ella Baker Center for Human Rights

Attention: Ian Kim
344 40th Street
Oakland, CA 94609
Telephone (510) 428.3939 x225
Fax (510) 428.3940
ian@ellabakercenter.org