

AGENCY: OFFICE OF PERSONNEL MANAGEMENT

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AGENCY INFORMATION COLLECTION ACTIVITIES; PROPOSALS, SUBMISSIONS, AND APPROVALS:
DECLARATION FOR FEDERAL EMPLOYMENT

The Washington Lawyers' Committee for Civil Rights and Urban Affairs, the Public Interest Law Center, and the Lawyers' Committee for Civil Rights Under Law¹ oppose the Office of Personnel Management's ("OPM") proposed rule change that would require applicants for federal employment to disclose that they have successfully completed court or judge specified requirements in exchange for criminal charges against them being dismissed—often referred to as "diversion." According to the Notice of Proposed Rulemaking, the information will be used "to determine a person's acceptability for Federal and Federal contractor employment." OPM has offered no explanation of how this information is relevant to eligibility for government employment or employment with a government contractor. Instead, required disclosure of completion of a diversion program will likely chill or exclude eligible and qualified applicants, create confusion about what must be disclosed, and will further racial inequities, disparately impacting African-American applicants. Required disclosure subverts the important and demonstrably successful purposes of diversion programs, essentially negates state court decision-making, and runs counter to bipartisan federal policy.

I. The Proposal Thwarts the Valuable Purpose of Diversion Programs

Diversion programs are a critically important element of many state criminal justice systems. They allow a person accused of a crime to avoid a criminal prosecution by completing certain requirements, such as community service. Although diversion programs vary across the

¹ Founded in 1968, The Washington Lawyers' Committee for Civil Rights and Urban Affairs works to create legal, economic and social equity through litigation, client and public education and public policy advocacy. While we fight discrimination against all people, we recognize the central role that current and historic race discrimination plays in sustaining inequity and recognize the critical importance of identifying, exposing, combating and dismantling the systems that sustain racial oppression.

The Public Interest Law Center, part of the national consortium of affiliates of the Lawyers' Committee for Civil Rights Under Law, uses high-impact legal strategies to advance the civil, social, and economic rights of communities in the Philadelphia region facing discrimination, inequality, and poverty. Through its Fair Employment Opportunities Project, the Law Center uses litigation, community education, and advocacy to address the widespread discriminatory use of criminal background checks in hiring which creates nearly insurmountable barriers for large numbers of individuals of color in obtaining the employment they need to lead stable and sustainable lives and contribute to their families and communities.

The principle mission of the Lawyers' Committee for Civil Rights Under Law is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity – work that continues to be vital today.

country, they typically are available only to those accused of non-violent crimes who have no criminal record.

By definition, applicants who have criminal charges dismissed in exchange for completing court-ordered requirements (diversion) have been found by a judge to have demonstrated—on the basis of their record and the facts of underlying the criminal charges—that they should not be convicted of a crime and should not bear the life-long consequences of a criminal conviction. They have adhered to a program designed to demonstrate a readiness and ability to participate in society. Their success enables them to avoid a host of negative consequences of a criminal conviction, including un- or under-employment and housing instability.

Additionally, the explanation of the change in OPM's Notice and Request for Comments suggests that it may have an even more far-ranging effect than disclosure of having completed a diversion program, explaining that, through the rule change, "OPM is proposing to add a requirement to **admit charges** for which one has been placed into a pretrial intervention or diversionary program or the like." Presumably, this means that an applicant for employment must identify the charges brought against the person. This is in itself problematic, because prosecutors may enumerate a litany of charges, most of which are dropped or used to negotiate a plea. They therefore may have been over-charged, and the charges may not reflect the lack of gravity of the allegedly wrongful act(s). The individual may not remember all of the charges, and may therefore not be able to give a complete answer to the question. Or, because of the range of types of diversion programs across state and local criminal systems, the applicant may not know whether the particular program they participated in is one that must be disclosed. This understandable confusion may result in additional negative consequences for having failed to disclose having required information.

Finally, if OPM is actually requiring the individual to "admit" to those charges—which the person may have contested and which have never been proven—OPM is abusing its power as a large employer, to extort from an individual that which the justice system was unwilling or unable to do. Generally, people who are offered diversion are told that, if they simply abide by terms set by a judge—such as completing community service, undergoing substance abuse treatment, or simply remaining crime free for a period of time—the charges against them will be dismissed and they will not be convicted of a crime. In many diversion programs, the person is not required to admit guilt and a judge never makes a finding of guilt. With this understanding, many people who are offered diversion engage in a cost-benefit analysis and decide to complete diversion rather than engage in the lengthy, disruptive and risky process of contesting the charges against them. They avoid missing work for court appearances, are relieved of the anxiety of criminal charges hanging over their heads, and eliminate the risk of a criminal conviction. People who make this choice rely on the promise made by a judge and, in many instances, a prosecutor, that the charges will be wiped from their record. They give up their right to contest the charges against them on the good faith belief in this promise. Thus, by requiring disclosure of successful completion of a diversion program, the proposed OPM rule takes away the clean slate that the diversion option offered and upon which many relied in agreeing to give up their right to contest the charges.

II. The proposed rule does not address any existing problem, need or legitimate goal.

Other than referring to a “gap” in the current rule, the proposed revision does not identify a problem the change is intended to address, resolve a shortcoming in the current rule that adversely impacts the federal government as an employer, or further an articulated governmental interest or goal.² In proposing the rule change, OPM has not provided any data that ties successful completion of a diversion program to suitability for any and all federal employment. Indeed, there is no such link. To the contrary, as discussed below, programs that lead to employment will reduce recidivism. That is the goal of diversion: to enable persons accused of low level crimes to move on and lead crime-free lives, without being saddled with the life-long consequences of criminal convictions, including their adverse impact on employment prospects.

III. The proposed rule change will have a negative, unfair and disproportionate effect on African-American applicants for federal employment.

It is well established that African Americans are more likely to be arrested and charged with crimes than their white peers, and face discrimination at each stage of the criminal justice system, including during pleas bargaining.³ These disparities are influenced by a broad array of factors that compound one another: disparities in the way communities of color are policed; disparities in resource allocation; discrimination in employment; and bias on the part of police officers and prosecutors. As a consequence, African Americans are more likely to be ensnared in the criminal justice system and may face a higher bar before being given the opportunity to have their case dismissed in exchange for completing court ordered terms. Examples of disparate and over-policing abound:

- A report of the United States Department of Health and Human Services found a “significantly higher likelihood of having ever been arrested among blacks, when compared to whites, even after accounting for a range of delinquent behaviors.”⁴ A study of arrests reported to the FBI between 2011 and 2012 revealed that African Americans were more likely to be arrested than other racial groups in almost every city for almost every type of crime. At least 70 police departments arrested African Americans at a rate 10 times higher than other groups.⁵

² In this regard, the Notice simply notes that, under the current rule, persons who have successfully completed diversion currently may not have to “report the details of the offense” and the change closes that “gap.” However, as explained above, the ability not to disclose the charged offense is among the results that diversion programs are designed to achieve, in exchange for which the applicant gives up the right to contest the charge. Nowhere does OPM justify a need for any, much less all federal employers and their contractors, to know the details of an alleged offense that has not been proven and which was to have been removed from the individual’s record in order for that person to continue to engage in, and contribute to, their community.

³ See, generally, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Color Blindness* (rev. ed. 2012); Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* (2007).

⁴ Understanding Racial and Ethnic Disparities in Arrest: The Role of Individual, Home, School and Community Characteristics; <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5509345/>

⁵ Brad Heath, *Racial gap in U.S. arrest rates: ‘Staggering disparity,’* USA TODAY, November 18, 2014, available at

- In its investigation of the Baltimore Police Department, the United States Department of Justice determined that there were large racial disparities in pedestrian and vehicle stops throughout Baltimore. Officers also searched African Americans at higher rates during these stops, even though searches of African Americans were less likely to find contraband than searches of people from other racial backgrounds. The Department of Justice found that these disparities in search rates could not be explained by characteristics other than race. Baltimore officers also arrested African Americans at much higher rates than their white peers. The discriminatory pattern of arrests was particularly apparent in warrantless arrests for discretionary misdemeanor offenses such as disorderly conduct and failing to obey an officer's order and arrests for drug possession, the types of offenses for which diversion often is offered.⁶
- A recent report by the ACLU of Pennsylvania showed that, in every neighborhood in Philadelphia, Black pedestrians were stopped by police officers out of proportion to their percentage of the local population. The racial disparities in stops are widest in neighborhoods in which Black Philadelphians make up a lower percentage of the population and that the disparities cannot be explained by factors other than race.⁷
- In a study of enforcement of the District of Columbia's fare evasion statute, the Washington Lawyers' Committee for Civil Rights and Urban Affairs found that 91% of citations for failing to pay the fare on Washington DC's public transportation system were given to African Americans, despite the fact that African Americans comprise only approximately 50% of the population of Washington, DC.⁸
- A 2014 report by the Vera Institute that analyzed criminal cases in New York concluded that, after controlling for the influence of other factors (like charge seriousness or prior records), Black defendants were unfairly treated in charging decisions, detention decisions and in plea bargaining:
 - 10% more likely than similarly-situated white defendants to be detained after arraignment;
 - 20% more likely than similarly-situated white defendants to be detained after arraignment for misdemeanor person offenses;

<https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/>

⁶ United States Department of Justice, Civil Rights Division, *Investigation of the Baltimore City Police Department*, August 10, 2016, available at <https://www.justice.gov/crt/file/883296/download>.

⁷ Pl.'s Ninth Report to Ct. and Monitor on Stop and Frisk Practices, *Bailey v. Philadelphia* C.A. No. 10-592 (E.D. Pa. 2010).

⁸ Washington Lawyers' Committee for Civil Rights and Urban Affairs, *UNFAIR: Disparities in Fare Evasion Enforcement by Metro Police*, available at https://www.washlaw.org/pdf/2018_09_13_unfair_disparity_fair_evasion_enforcement_report.PDF.

- 13% more likely than similarly-situated white defendants to receive custodial sentence offers;
- 27% more likely than similarly-situated white defendants to receive a custodial sentence offer in cases involving drug misdemeanors;
- 19% more likely than similarly-situated white defendants to receive a punitive sentence offer in cases involving misdemeanor marijuana.⁹
- A similar study of criminal cases in Wisconsin found “significant racial disparities” during the plea-bargaining process: white defendants were 25% more likely than Black defendants to have their principal initial charge dropped or reduced to a lesser crime and that, as a result, white defendants who initially faced felony charges are less likely than black defendants to be convicted of a felony. Similarly, white defendants initially charged with misdemeanors are more likely than Black defendants to be convicted for crimes carrying no possible incarceration or not being convicted at all.¹⁰

In sum, because African-American applicants for federal employment are more likely than their white peers to have been arrested, are more likely to be charged, and are more likely to be detained after arrest (which increased the pressure to accept a plea bargain), and are more likely to receive diversion for charges that would have been dismissed outright or not brought at all against white defendants, this rule change will disproportionately affect otherwise qualified African-American applicants.

This disproportionate effect is significant given the fact that the federal government is a large employer of African Americans. OPM’s most recent data show that 18.15% of the federal work force is Black,¹¹ much larger than the 13.4 % of the United States population that identify as Black or African American.¹² If successful completion of diversion is negatively considered when considering suitability for employment, it will have a greater proportionate impact on persons of color. Given the wide range of federal employment opportunities throughout the country, the likely outcome of deterring or excluding applicants of color deprives many of a hard-earned opportunity to achieve a stable economic foothold. This effect will be deeply felt in the Washington, DC region, where the federal government is the largest single employer,

⁹ See Besiki Luka Kutateladze & Nancy R. Andiloro, *Prosecution and Racial Justice in New York County: Technical Report*, VERA INSTITUTE OF JUSTICE, Jan. 2014, available at https://storage.googleapis.com/vera-web-assets/downloads/Publications/race-and-prosecution-in-manhattan/legacy_downloads/race-and-prosecution-manhattan-technical.pdf.

¹⁰ Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, BOSTON COLLEGE L.R., Vol. 59, 2018.

¹¹ OPM.Gov, Profile of Federal Civilian Non-Postal Employees, available at <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/profile-of-federal-civilian-non-postal-employees/>

¹² United States Census Bureau, Quick Facts, available at <https://www.census.gov/quickfacts/fact/table/US/RHI225217#RHI225217>

accounting for about 1 out of every 10 jobs in the area.¹³

IV. The proposed rule change undermines bipartisan criminal legal system reform efforts.

In introducing the First Step Act, bipartisan legislation intended to give those impacted by the criminal legal system “a second chance at life after they have served their time,” President Trump acknowledged the importance of the principles that underlie diversion by remarking, “Americans from across the political spectrum can unite around prison reform legislation that will reduce crime while giving our fellow citizens a chance at redemption. So if something happens and they make a mistake, they get a second chance at life.”¹⁴

Requiring an individual to disclose prior involvement with the criminal system, despite successful completion of a diversion program in determining suitability for employment, undermines this goal and does not achieve any offsetting purpose. Indeed, preserving the clean slate afforded by diversion programs, thereby facilitating employment, will enhance public safety as well as individual stability. Multiple studies indicate that employment following contact with the criminal legal system lowers recidivism rates. For example, one study analyzing a five-year data set of people released from the Indiana Department of Corrections concluded that “an offender’s education and post-release employment were significantly and statistically correlated with recidivism, regardless of the offender’s classification.”¹⁵ A 2015 study that evaluated the impact of enhanced job-readiness training and job-search assistance programs on reducing recidivism rates found that “training designed to quickly place former inmates in jobs significantly decrease[s] the likelihood that ex-offenders with nonviolent histories will be rearrested.”¹⁶ An analysis of the impact of employment opportunities on recidivism among 1.7 million people released from a California prison between 1993 and 2008 similarly concluded that “increases in construction and manufacturing [employment] opportunities at the time of release are associated with significant reductions in recidivism.”¹⁷ Higher wages also are correlated with lower risks of recidivism. For example, a 2017 study on the impact of local labor market conditions on recidivism concluded that “being released to a county with higher low-skilled wages significantly decreases the risk of recidivism” and that this “impact of higher wages . . . is

¹³ Government of the District of Columbia Office of Revenue Analysis, DC economic Indicators, February 2019, available at <https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/EIFeb2019.pdf>.

¹⁴ Remarks by President Trump on H.R. 5682, the FIRST STEP Act, Nov. 14, 2018, available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-h-r-5682-first-step-act/>.

¹⁵ John M. Nally, et al., *Post-release recidivism and employment among different types of released offenders: a 5-year follow-up study in the United States*, INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE SCIENCES, Vol. 9, 2014, available at <http://www.sascv.org/ijcjs/pdfs/nallyetalijcjs2014vol9issue1.pdf>.

¹⁶ Aaron Yelowitz & Christopher Bollinger, *Prison-to-Work: The benefits of intensive job-search assistance for former inmates*, MANHATTAN INSTITUTE, Civic Report No. 96, March 2015, available at https://media4.manhattan-institute.org/sites/default/files/cr_96.pdf.

¹⁷ Kevin T. Schnepel, *Good jobs and recidivism*, THE ECONOMIC JOURNAL, Vol. 128 (Feb. 2016), available at <https://onlinelibrary.wiley.com/doi/epdf/10.1111/econj.12415>.

larger for both black offenders and first-time offenders.”¹⁸

President Trump acknowledged in particular the importance of employment after contact with the criminal justice system in explaining why his administration was supporting the First Step Act. He observed that American society as a whole is “better off when former inmates can receive and reenter society,” and that his administration’s “pledge to hire American includes those leaving prison and looking for a very fresh start.”¹⁹ Requiring applicants to disclose that they successfully completed diversion subverts the important aims of this bipartisan effort.

CONCLUSION

Requiring applicants for federal service to disclose their successful completion of a diversion program and the dismissed charges that occasioned participation in the program makes no sense. OPM does not even attempt to articulate a need to which the change responds, nor does it provide any reason for the change. The proposed requirement is not supported by analysis or data; yet its consequences are real and potentially widespread. The inevitable result will be to reduce significant employment opportunities for persons who have had relatively minor run-ins with the criminal system, sow confusion, and disproportionately harm African Americans who are employed in the federal workforce at a higher rate than persons who are white. It is disturbing that OPM would undertake a policy that directly undermines a critical tool that state criminal system use to constructively resolve minor offenses, and that runs directly counter to congressional and administration policy regarding criminal system reform. We urge OPM to abandon its misguided proposal.

¹⁸ See Crystal S. Yang, *Local labor markets and criminal recidivism*, JOURNAL OF PUBLIC ECONOMICS, Vol. 147, March 2017, available at <https://www.sciencedirect.com/science/article/abs/pii/S0047272716302067>.

¹⁹ Remarks by President Trump on H.R. 5682, the FIRST STEP Act, Nov. 14, 2018, available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-h-r-5682-first-step-act/>.