

April 23, 2019

Ms. Donna McLeod, Program Manager
National Bureau of Background Investigations
U.S. Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Dear Ms. McLeod:



Washington Legislative
Office
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Susan Herman
President

Anthony Romero
Executive Director

Ronald Newman
*National Political
Director*

On behalf of the American Civil Liberties Union (ACLU), we write in opposition to the February 22, 2019, proposed changes¹ to the Office of Personnel Management's (OPM) Declaration for Federal Employment Form (OF306), a form used in federal hiring that is completed by those seeking employment with the federal government and federal contractors. We have particular concerns with the proposal to require prospective employees to disclose their participation in pretrial diversion programs.

With more than three million members, activists, and supporters, the ACLU is a nonpartisan public interest organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, DC to protect the principles of freedom and equality set forth in the Constitution and in our nation's civil rights laws.

The ACLU is advancing a smart justice strategy that seeks to reduce the number of people and racial disparities reflected in the criminal justice system. Our agenda includes eliminating barriers for those with criminal records and other interactions with the system. Therefore, we strongly object to a federal government inquiry into someone's participation in a diversion program for hiring purposes. This question presents a needless barrier to employment opportunities with the federal government and federal contractors.

¹ 84 Fed. Reg. 5733 (Feb. 22, 2019),
<https://www.federalregister.gov/documents/2019/02/22/2019-03056/submission-for-revision-of-a-previously-approved-information-collection-declaration-for-federal>.

Pretrial Diversion Should Not be a Barrier to Federal Employment

The ACLU strongly objects to amending Question 9 in federal hiring questionnaire OF306, by “add[ing] a requirement to admit charges for which one has been placed into a pretrial intervention or diversionary program or the like.”² Question 9 is currently limited to inquiries around incarceration, probation, and parole, making an admission about diversion a significant departure from the status quo. Diversion programs allow prosecutors to use their discretion to redirect people out of the criminal justice system, allowing them to complete alternative community-based programs that often allow mental health treatment, restitution, or community service. Once a diversion program has been successfully completed, there is no conviction. As the ACLU of Kansas acknowledges in its 2017 report on local diversion programs, “th[is] is especially important,” as “conviction[s] can mean lifetime consequences of unemployment and restricted access to services.”³

A federal hiring inquiry into a person’s participation in a diversion program is inconsistent with the very purpose of such a program. A person participates in a diversion program to avoid the unemployment and other consequences of a criminal record. To be clear, participation in pretrial diversion is not a conviction. With one in three American adults possessing a criminal record,⁴ accessing the workforce is already difficult for a significant number of people. That access should not be made more difficult by the federal government, which currently employs 2.1 million people.⁵

Pretrial Diversion Inquiry is Inconsistent with Model Employer Practices

The federal government must recognize that the economy and workforce is strengthened when those with criminal records are not excluded from it. Economists estimate that the United States loses between \$78 and \$87 billion dollars’ worth of goods and services by barring those with criminal histories from the workforce.⁶ Private employers have found that retention rates for those with criminal records are higher than those without. As the ACLU offered in its report, *Back to Business*, “when companies break down these barriers to employment and provide second chances, they can have a positive impact on the lives of individuals, the trajectory of

² Id.

³ ACLU of Kansas, CHOOSING INCARCERATION: KANSAS PROSECUTORS’ REFUSAL TO USE DIVERSION AND THE COST TO COMMUNITIES, Dec. 2017 (updated Jan. 2018), https://www.aclukansas.org/sites/default/files/field_documents/choosing_incarceration_-_aclu_report_on_diversion_in_kansas_-_updated_january_2018_0.pdf.

⁴ ACLU, BACK TO BUSINESS: HOW HIRING FORMERLY INCARCERATED JOB SEEKERS BENEFITS YOUR COMPANY (2017), https://www.aclu.org/sites/default/files/field_document/060917-trone-reportweb_0.pdf.

⁵ CRS, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB (March 25, 2019), <https://fas.org/sgp/crs/misc/R43590.pdf>.

⁶ ACLU, *supra* note 4.

families, on the health of their businesses, and on the growth of the American economy.”⁷ This private sector success is realized when companies “ban the box” and eliminate criminal record questions on job applications.

The federal government should permanently “ban the box” as congressional efforts like the Fair Chance Act⁸ would require. The ACLU supports this bipartisan legislation offered by Representatives Elijah Cummings (D-MD) and Doug Collins (R-GA) and Senators Corey Booker (D-NJ) and Ron Johnson (R-WI), which requires the federal government and federal contractors to delay criminal history inquiries until a conditional offer of employment has been made. At this point in the hiring process, it would be appropriate for questionnaire OF306 to be offered. However, in inquiring about criminal convictions, a prospective federal employee should not be asked about their participation in a pretrial program. Pretrial diversion participation is not a conviction and should not be considered relevant in evaluating a person’s candidacy for federal employment.

Pretrial Diversion Inquiry Will Disproportionately Impact People of Color

People of color are disproportionately impacted by criminal background checks for employment because they are disproportionately represented in the criminal justice system. Almost 50% of Black males will be arrested by the time they are 23 years old in the United States.⁹ And many arrests never lead to conviction. For example, between 2009 and 2013, just half of adult misdemeanor arrests in New York City resulted in conviction.¹⁰ Black males are six times more likely to be incarcerated than white males and 2.5 times more likely than Latino males.¹¹ These statistics suggest that 1 out of 3 Black males and 1 out of 6 Latino males born today will go to prison in their lifetime.¹² Even though people of color make up about 30% of the United States’ population, they are 60% of those incarcerated.¹³

⁷ Id.

⁸ H.R. 1076, S. 387 (116th Cong.).

⁹ Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records As College Diplomas*, BRENNAN CENTER FOR JUSTICE (Nov. 17, 2015), <https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas>.

¹⁰ Rebecca Vallas and Sharon Dietrich, ONE STRIKE AND YOU’RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS, CAP (Dec. 2014),

<https://cdn.americanprogress.org/wpcontent/uploads/2014/12/VallasCriminalRecordsReport.pdf>.

¹¹ The Sentencing Project, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (Aug. 2013), <https://www.sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf>.

¹² Id.

¹³ Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, CAP, Mar. 13, 2012,

<https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/>.

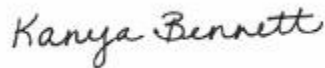
With a disproportionate number of people of color impacted by the criminal justice system, this population will be disproportionately impacted by the federal government's inquiry into pretrial diversion participation. About 37% of people of color rely on the federal government for employment,¹⁴ so an inquiry into pretrial diversion participation may compromise this significant statistic. For example, Black people make up about 12% of the country's population, but are about 18% of the federal workforce.¹⁵ An employment practice that disproportionately impacts employees of color is inconsistent with the protections provided by Title VII of the Civil Rights Act.¹⁶ In this instance, a federal hiring inquiry into pretrial diversion participation will disproportionately impact people of color, creating conflict with Title VII. Therefore, the federal government should refrain from requiring such a disclosure.

Thank you for considering these concerns with the proposed changes to the Office of Personnel Management's Declaration for Federal Employment Form (OF306). If you have any questions, please contact Kanya Bennett, ACLU Senior Legislative Counsel, at kbennett@aclu.org.

Sincerely,



Ronald Newman
National Political Director



Kanya Bennett
Senior Legislative Counsel

¹⁴ OPM, *Data, Analysis & Documentation, Federal Employment Reports: Profile of Federal Civilian Non-Postal Employees* (Sept. 30, 2017), <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/profile-of-federal-civilian-non-postal-employees/>.

¹⁵ Anne Branigin, *Black Federal Employees Disproportionately Affected as Government Shutdown Ties for the Longest Ever*, Jan. 11, 2019, <https://www.theroot.com/black-federal-employees-disproportionately-affected-as-1831672069>.

¹⁶ 42 U.S.C. §§ 2000e, et seq.