



# Beyond The Record

**A Justice-Oriented Approach  
to Background Checks**

**JOHN JAY COLLEGE  
INSTITUTE FOR JUSTICE  
AND OPPORTUNITY**

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NY** THE CITY  
UNIVERSITY  
OF  
NEW YORK

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The John Jay College Institute for Justice and Opportunity (the Institute), formerly known as the *Prisoner Reentry Institute*, is a center of research and action at the John Jay College of Criminal Justice/CUNY. The Institute is committed to providing opportunities for people to live successfully in the community after involvement with the criminal legal system. Capitalizing on its position within a large public university and recognizing the transformational power of education, much of its work focuses on increasing access to higher education and career pathways for people with conviction histories. The Institute's comprehensive and strategic approach includes direct service, research, technical assistance, and policy advocacy.

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# About the John Jay College Institute for Justice and Opportunity

The John Jay College Institute for Justice and Opportunity champions institutional, structural, and personal transformation. The Institute's mission is to create opportunities and eliminate barriers for people to live successfully in the community after involvement with the criminal legal system. We are deeply committed to increasing access to higher education and pathways to satisfying careers. We advocate for the right to education, housing, employment, healthcare, and other human rights too often denied people with conviction records.

In 2020, after fifteen years as the Prisoner Reentry Institute, we changed our name to the John Jay College Institute for Justice and Opportunity. Our new name more accurately reflects our work, our values, our aspirations, and our commitment to person-first language.

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# About This Guide

## What is in this Guide?

We designed this guide to help anyone who uses background checks bring a critical lens to their process so that we can move toward a more equitable future. It contains information about the negative impact of a conviction record, and how background checks often perpetuate the racial disparities within our country's criminal legal system. It also provides guidance on steps you can take to lessen the disproportionate impact your process may have on any candidate or applicant with a conviction record, especially Black and Latinx candidates.

With a deeper understanding of the context of background checks, and how your organization uses them, we hope this guide can help you update your process to broaden your pool of qualified applicants and allow for equal access to opportunity. While this is not a legal guide, you will find helpful information about some of the laws related to background checks, which are largely designed to prevent discrimination.

## Who is this Guide for?

Background checks are used in a variety of contexts, and we designed this guide with that in mind. The information contained here is relevant to anyone who uses background checks to evaluate candidates or applicants, including but not limited to employers, educators, education and employment program operators, licensing bodies, and housing providers.

The guidance about city and state laws are specific to New York and may not be true elsewhere, but the general tips and guidance apply universally.

## Language Conventions

### Our words have weight.

How we write and talk about mass incarceration has the power to influence policy, as well as the quality of life of those most affected by the system's injustices. As criminal legal system reform receives increasing attention and support, the language used to describe the people impacted by the system — and the system itself — must also be reconsidered. In this guide, we've adopted the term criminal legal system in place of criminal justice system, a language choice that reflects the growing acknowledgement that our systems of criminalization, policing, prosecution, and punishment are often far from just.<sup>1</sup> We've adopted terminology that more accurately refers to the legal practice of this system.

In a powerful letter to partners and allies, the late Eddie Ellis<sup>2</sup> wrote, "We think that by insisting on being called 'people' we reaffirm our right to be recognized as human beings, not animals, inmates, prisoners or offenders."<sup>3</sup> We too urge the use of person-first language<sup>4</sup> in all discussions related to the experiences of people impacted by the criminal legal system. Person-first language avoids the conscious or subconscious nominalization of someone based on a single characteristic.<sup>5</sup> Words like *criminal*, *convict*, *felon*, *inmate*, and *prisoner* are powerful. They have the ability to restrict people to categories that do not speak to their larger human identity and reinforce existing stereotypes about people with conviction histories.<sup>6</sup>

In this guide, we omit the stigmatizing word *criminal* from *criminal background check*. We use the phrase *conviction record* instead of *criminal record* to describe anyone with a conviction.

We refer to people who are subject to background checks as *candidates* and *applicants*. That may not perfectly describe the situation in which you are assessing the use of background checks, but we aim to use a universal term to describe the ubiquitous ways that background checks are used.

# A Context for Understanding Our Criminal Legal System

## The Deep Roots and Devastating Impact of Mass Incarceration in America

In the past forty years, the number of people incarcerated in the United States climbed 500%, with over 2.2 million people currently incarcerated.<sup>7</sup> This unprecedented exponential growth — a reflection of a criminal legal system that treats incarceration as a first resort — is unmatched by any other country in the world. Not only do our incarceration numbers tower over our international peers with comparable crime rates, they are also higher than those of totalitarian regimes and countries that grapple with violence on a scale unseen in the United States. Even our most seemingly progressive states, with the lowest incarceration rates, have more people behind bars per capita than most countries in the world.<sup>8</sup>

Mass criminalization in the United States has a complex history beginning in a period of political turbulence and social transformation in the 1960s and 70s. But it was the rapid shift to so-called tough-on-crime laws in the early 1980s that ushered in sentencing changes and expanded the use of incarceration above all else.<sup>9</sup> Many of these harsh laws — an evolution of Nixon’s “war on drugs,” designed to exploit racial hostility and quell the progress of the Civil Rights Movement — remain in effect today, supplemented by newer ones.

The numbers below illuminate the devastating impact of decades of mass criminalization policies in the United States, at the individual and community level.

The impact of criminal legal system involvement continues long after a sentence has ended, causing the millions of people marked with a conviction — many of them wrongfully, or due to circumstances beyond their control — to endure a perpetual punishment. In thirty-four states, people who are on parole or probation can’t vote, and in twelve states, a person with a felony conviction can never vote again.<sup>15</sup> A conviction record may also affect a person’s eligibility for federal benefits, and the extensive use of background checks are an obstacle to employment, housing, and education.<sup>16</sup>



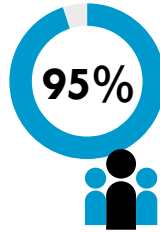
**The United States incarcerates more people per capita than any other nation in the world.**<sup>10</sup>



Between 1980 and 2019 there were 10,884,240 arrests, ultimately leading to **745,924 New York City residents with a conviction record.**<sup>12</sup>



**Over 77 million people have a conviction record in the United States.**<sup>11</sup>



About 95% of people incarcerated in state prisons return to their communities at some point,<sup>13</sup> and **each year over 650,000 return to their communities** after spending time in correctional custody.<sup>14</sup>



## A Disproportionate Burden: How the Criminal Legal System Preserves Oppression

The United States' overly punitive policies affect certain communities more severely than others. Our criminal legal system is rife with racial disparity. Laws that are neutral on the surface are disproportionately enforced against underserved and under-resourced communities of color.<sup>17</sup> Studies show that Black and Latinx people are more likely to be stopped, searched, and arrested.<sup>18</sup> There is no justification for these disparities.

The myth that Black people commit more violence against other Black people is just that: a myth. Data from the Bureau of Justice Statistics show similar rates of violence among Black and white Americans.<sup>19</sup> Further, in light of greater awareness of our criminal legal

system's limitations and inequities, there is a growing understanding that violence is in fact a public health issue rather than a problem that law enforcement is equipped to solve. Punishing violence after it has occurred fails to acknowledge the larger societal factors that contributed to it.<sup>20</sup> And when violence is prosecuted, wealthy white people consistently fare better in court and are acquitted of charges more often or face lesser penalties.<sup>21</sup>

Across all types of offenses, Black and Latinx people are more likely to have bail set and are given harsher punishments than white people.<sup>22</sup> As a result, they are especially overrepresented in incarceration rates. These numbers offer a glimpse into the disparities:



**People of color make up more than 60%** of the total prison population.<sup>23</sup>



In 2017, **1 in 3 Black men had a felony conviction.**<sup>25</sup>



**Black men are six times as likely to be incarcerated** as white men, while Latin men are 2.3 times as likely.<sup>24</sup>



In 2017, Black people represented 12% of America's adult population but **one-third of all those in jails and prisons.**<sup>26</sup>

Women of color are also disproportionately impacted by the system of mass incarceration. Between 1980 and 2019, the number of incarcerated women increased by more than 700%.<sup>27</sup> The incarceration rates for Black and Latinx women are 1.7 and 1.3 times the rate for white women, respectively.<sup>28</sup>

The overrepresentation of Black and Latinx people in our criminal legal system is connected inextricably to the history of slavery in the United States. The post-Civil War Reconstruction period was accompanied by an onslaught of laws deliberately designed, and in many cases, enforced with purposeful inconsistency, to preserve the social control over Black Americans.

While the adoption of the 13th Amendment in 1865 is widely cited as the end of slavery, criminalization quickly became a simple means for quietly and unofficially revoking a Black person's freedom in the years that followed. As the Equal Justice Initiative's Bryan Stevenson writes:

“After emancipation, Black people, once seen as less than fully human ‘slaves,’ were less than fully human ‘criminals.’ The provisional governor of South Carolina declared in 1865 that they had to be ‘restrained from theft, idleness, vagrancy and crime.’ Laws governing slavery were replaced with Black Codes governing free Black people — making the criminal justice system central to new strategies of racial control.”<sup>29</sup>

The bottom line is that we haven't moved nearly as far beyond the racist origins of our criminal legal system as many of us would like to believe. Mass criminalization as it stands today disproportionately targets people of color — just as vagrancy laws, which criminalized homelessness and unemployment and were selectively enforced against Black Americans following emancipation,<sup>30</sup> did more than 150 years ago.

The seemingly race-neutral laws currently in place may bolster much subtler forms of discrimination, but they preserve our history of racism and oppression all the same. And it's millions of Black and Latinx Americans who must shoulder the burden.

## Beyond the Numbers: Discrimination and Divergent Standards of Justice

A quick glance at incarceration statistics can lead to the false impression that Black people engage in criminal activity — or criminalized public health issues masquerading as crime — at higher rates than white Americans. But that is simply untrue; crime itself has a much weaker correlation with the number of Black and Latinx people in jails and prisons than it may seem. For example, drug use is relatively consistent across demographics, but people of color are disproportionately incarcerated for drug charges.<sup>31</sup>

A person's involvement in the criminal legal system neither begins nor ends with an arrest, and the macro-level racial disparity is driven by discriminatory practices all throughout the process. From racist policing and prosecutorial discretion in charging, to pressured plea bargaining and problematic evidentiary laws, the entire system consists of documented inequities that unfairly and disproportionately impact communities of color long after a sentence has ended. Here are some of the primary drivers of this disparity:

### The expansion of incarceration in the United States stems from policy choices that continue to target people of color to this day.

Rising crime rates are not responsible for the explosive incarceration rates from the 1970s onward — that responsibility lies with the deliberate choices of legislators at various levels of government to put more people in prisons and jails, cementing a link between arrest and incarceration that had not existed so firmly before.<sup>32</sup>

Throughout the history of incarceration in America, Black people have entered the criminal legal system in disproportionate numbers, in large part because of racial bias in policing and policies that have intensified law enforcement presence in communities of color.<sup>33</sup> Policy changes in the 1980s like mandatory minimums, longer sentences, and three strikes laws expanded

incarceration by deepening or prolonging initial involvement with the system. This attached new layers of consequences to a single arrest, making it incredibly difficult to move forward after a conviction, which remains the case today. These policies merely exacerbated the disparities already in place, sharpening the divide between the incarceration rates of Black and white Americans.

### Criminal activity transcends demographic barriers. Intense policing and harsh punishment do not.

A lot of Americans have engaged in criminal activity — many more people than there are in jails and prisons. Odds are that you know someone who has broken the law at one point or another but does not have a conviction record. That's because our country's incredibly divergent justice standards allow for a person of privilege to engage in criminality without facing any consequences, while someone with fewer resources can be separated from their family and stripped of their dignity and basic rights because of a much lesser crime — or simply for being in the wrong place at the wrong time.

The 2008 financial crisis is perhaps the clearest example of this double standard. Bank employees inflicted tremendous harm through lies, bribes, rate-rigging, forgery, mortgage fraud, and other criminal acts, leaving millions of Americans in poverty. While some banks faced prosecution in the end, the fines they paid were merely a fraction of what they stole, and most of the individuals responsible for the damage were let off the hook completely.<sup>34</sup>

This example illustrates a broader, unsettling truth about our criminal legal system: the definition of crime itself is incredibly arbitrary, and too often, those whose crimes have inflicted the greatest harm are afforded the greatest protection from criminal prosecution.

## A plea of guilty does not necessarily equal guilt.

In fiscal year 2018, of the 80,000 people who were defendants in federal criminal cases, only 2% went to trial.<sup>35</sup> The decline of trials in our criminal legal system stems from the rise of plea bargains, which allow for defendants to plead guilty in exchange for more lenient sentencing. Negotiated behind closed doors, with very little oversight, they resolve all but a fraction of both state and federal criminal charges every year and factor heavily into our criminal legal system's deeper inequities.

Plea bargains first emerged as a way to resolve cases without overburdening the system as crime rates rose in the aftermath of the Civil War.<sup>36</sup> In 1984, Congress introduced mandatory sentencing guidelines, which transferred sentencing power away from judges and into the hands of prosecutors, where it remains today. Coupled with mandatory minimums, these guidelines essentially ended jury trials in federal criminal cases.

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Of the millions of Americans in jails and prisons today, the vast majority are there because of plea bargains dictated by prosecutors, which receive little to no internal or external review.<sup>37</sup>

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The system's structural bias that begins with police discretion in deciding which neighborhoods to police and who to arrest resurfaces here.<sup>38</sup> Prosecutors have tremendous discretion — in deciding which charges to bring and whether to rely on police officers' testimony — with virtually no accountability about racial disparities.<sup>39</sup> It's all too easy for police misconduct to go overlooked, and far too difficult for defendants to have a voice.

In a criminal legal system that's biased at all levels, with under-funded public defenders, it's no surprise many defendants feel pressured to enter into plea bargains and plead guilty to crimes they have not committed. And naturally, it is the most vulnerable defendants, with the fewest resources, who are likeliest to do so.

## Perpetual Punishment and the Power of Background Checks

The scale of mass criminalization in the United States, and the racial disparities within the system, directly contribute to the challenges of living successfully in the community after a sentence ends. A conviction record is the product of an inherently problematic, racially biased criminal legal system that relies on punishment rather than addressing root causes. But none of that is accounted for in a background check, which is far from perfect, often containing difficult-to-fix errors that damage lives.

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Far from ensuring morally upstanding candidates, background checks — which are often used as a precondition to employment, housing, education, and professional licensure — exclude millions of Americans from opportunity. This perpetuates the cycles of poverty that played a central role in the expansion of mass criminalization to begin with.

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As we reckon with our country's history of racist policing, we must examine all aspects of our criminal legal system — including how our use of background checks as decision makers can amplify the already-damaging impact of a conviction record.

# Understanding Conviction Records

The injustices in our criminal legal system start long before an arrest or conviction is attached to a record. Extensive racial bias by police officers and prosecutors — much of it unconscious — significantly impacts who gets arrested and who gets sentenced, and for how long. Still, the lifespan of a conviction record, and the range of contexts in which it is used, is what links a single arrest to damaging, long-term consequences. It is where a conviction ensures a lifetime of less access to opportunity.

Conviction records are also the point in our criminal legal system where structural biases begin to reverberate at the community level. In making it difficult to live successfully in the community after incarceration, the cycle of criminalized poverty and incarceration continues into another generation.

The broad availability of background checks in the United States is something you will not find in many other places in the world,<sup>40</sup> much like our incarceration rate itself. Background checks impact access to education, housing, and employment. **But that pervasiveness speaks to an opportunity, too: as decision makers reviewing background checks, there are so many of us who have the power to expand opportunity to candidates with conviction records right now.** We can each begin to repair our country's broken system simply by learning more about conviction records and evaluating our use of background checks.

## Why Should You Hire People With Conviction Records?

As a country, we've only recently begun to engage more deeply in a long-overdue conversation about racial justice and the extent to which racism persists today, including in the workplace. People of color simply do not have the same access to resources and opportunity as other groups. It is worth noting that diversity, equity, and inclusion in the workplace is bigger than background checks — there are many Black and Latinx people without conviction records who have nonetheless encountered both subtle and explicit forms of discrimination throughout their professional experiences. But given our incarceration rate, and the millions of Black men who have been incarcerated in particular, we cannot build a more diverse or equitable future without examining our use of background checks as part of the job application process.

### Your hiring practices can address systemic racism.

The criminalization of Black Americans and the origins of structural racism within our criminal legal system go all the way back to post-Civil War Reconstruction. Reforming our use of background checks won't reverse centuries of discrimination all at once, but it can limit the extent to which our racist history permeates our present. Your decision-making power can influence the quantity and quality of opportunity available to the millions of people navigating life after incarceration.

Employment is critical to living successfully in the community after incarceration, but people with conviction records have the odds stacked against them. In addition to the conviction attached to their name and formalized on paper, they may also have a gap in their resume, often a lengthy one, which is difficult for any candidate to overcome regardless of their involvement with the criminal legal system. If you're an employer, your actions can set a precedent for a more equitable future. And if you use background checks in relation to educational opportunities or housing, you play a critical role in providing the supports needed for successful employment.

Research has found that 17% of white Americans with a conviction record are called back after a job interview, in contrast to 5% of Black Americans with similar criminal legal system involvement.<sup>41</sup> Assessing your use of background checks, and potentially removing them from your hiring practices or application process, can prevent racism from further infiltrating life in this country today.

### It's not just about serving job applicants — you're also expanding your pool of strong candidates.

A conviction record has very little to do with a person's ability to succeed on the job. Research has found that the vast majority of managers and human resources professionals — 82% and 67%, respectively — report that the performance of their employees with conviction records is roughly the same or even higher than other workers.<sup>42</sup> Other studies report that retention rates are likely to be higher with employees who have a conviction record.<sup>43</sup>

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In many ways, a conviction record is a testament to a candidate's strength and resilience.

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The odds are so deeply stacked against people who were formerly incarcerated that investing in their own professional growth and cultivating valuable skills requires tremendous perseverance. The experience of overcoming adversity can bring a valuable perspective to a team. Given the number of people who have a conviction record in this country, you owe it to yourself to engage with these dedicated candidates.

## Background checks are time-consuming on both ends.

Background checks consume significant time and resources for all parties involved. Many states, including New York, have laws — described in more detail in *The Legal Landscape* section — that regulate when and how background checks can be used, and what factors must be considered. If you don't comply with these laws, you can face costly and time-consuming litigation.

Errors are common on background checks, and employers and housing providers must give candidates

the opportunity to dispute them. This can delay the overall timeline for processing applicants, which is frustrating and detrimental for both parties.

On top of that, background checks are expensive. The cheapest options are not comprehensive or reliable. Getting accurate, up-to-date information can be costly. Given all the limitations of background checks — and the damage they've inflicted on countless applicants with conviction records — we have to question if the cost is worth it.

## Conviction Records: Myths Versus Facts

The millions of people with conviction records are an untapped pool of talent, in large part because of misconceptions about background checks and the conflation of a conviction record with character. A better understanding of background checks starts with a clearer picture of the facts. These are some of the most common myths:

### MYTH 1

**A conviction record represents an unassailable truth about a person's behavior or character.**

**FACT:** To someone administering a background check, a conviction record may seem like an objective tool for evaluating a candidate, but that couldn't be further from the truth. **As the product of an inherently flawed and unjust system that is biased at all levels, conviction records cannot objectively reflect reality.**

Apart from racial bias in policing and prosecuting, there are other factors that impact whether or not a person is incarcerated — factors that have much more to do with a person's circumstances than their character. Cash bail essentially creates two different paths within our criminal legal system: one for people who can buy their way out of consequences, and one for people who have to stay in jail because they can't make bail. If a person is incarcerated because they cannot afford bail while their case is pending, they are much more likely to receive a sentence of incarceration than those who can afford to pay bail.<sup>44</sup> A conviction record doesn't account for that, but rather reinforces the criminalization of poverty.

And as previously mentioned, people who are innocent sometimes plead guilty to avoid a longer sentence. But many of the difficult choices and power imbalances that result in guilty pleas aren't immediately apparent to those without direct experience with the criminal legal system. When a candidate tries to explain their conviction, it may seem like they are avoiding responsibility.

**Ultimately, conviction records are deeply flawed and misleading, yet they have the power to make or break a person's access to opportunity.**

## MYTH 2

**Background checks will ensure safety.**

**FACT:** As we know from the case study of the 2008 financial crisis, a conviction record does not correlate with a person's morals or behavior. It is possible to engage in criminal activity that causes irreparable harm without ever seeing the inside of a courtroom.

**There's no evidence that people with convictions contribute to violence in the workplace.** One study concluded, "[n]o research has shown that workplace violence is generally attributed to employee ex-offenders or that hiring ex-offenders is causally linked to increased workplace violence."<sup>45</sup> In fact, robust research shows that within a few years after a conviction, a person is no more likely to commit any crime than other community members.<sup>46</sup>

**Some evidence suggests that people with conviction records perform as well on the job as the general population, and pose no greater safety threat to the public.**<sup>47</sup> Research has also found that employees with conviction records are more loyal to their employers and likelier to stay on the job longer.<sup>48</sup>

Further, research suggests that violence is not symptomatic of "bad people" but is instead a negative health outcome from exposure to numerous risk factors, including the toll of ongoing racism, discrimination, and poverty.<sup>49</sup> Thus, providing economic and housing opportunity is far more effective at increasing safety.

**Background checks do not predict behavior and will never be able to provide assurances of safety or trustworthiness.** Research on the use of background checks on college campuses found that they are not effective at reducing overall on-campus crime.<sup>50</sup> What background checks are effective at, however, is excluding millions of Americans from opportunity and legitimizing a problematic criminal legal system.

## MYTH 3

**People with conviction records are bad.**

**FACT:** It's easy to conceive of crime in clear-cut terms, with an unequivocal right and wrong, but that doesn't accurately reflect the complexity of human nature. We are all flawed, and we are also all capable of change. Unfortunately, our criminal legal system leaves virtually no room for atonement, forgiveness, or shades of gray. Real, lasting reform of this broken system will require a more nuanced understanding of human behavior; **the mere fact that a conviction record, and the accompanying label of "criminal," can follow someone for the rest of their life is at odds with our capacity for change and redemption.**

On top of that, it's important to remember that what gets defined as a crime — and who gets defined as a criminal — has very little to do with human behavior or even the law itself. **People with race and class privilege enjoy the greatest protection from prosecution while the criminalization of Black people has been a constant thread throughout the United States' history.**

Black people have been criminalized because of their race since the beginning of this country. Fugitive slave laws, which essentially made it illegal for a Black person to do things that white people could freely do, were reinforced by the Constitution. In the decades that mass incarceration expanded, media coverage reinforced negative racial stereotypes about Black Americans, fueling many of the previously noted structural biases in our criminal legal system.<sup>51</sup> US news media overrepresents Black people, especially Black men, in its coverage of crime. A 2014 study of New York City-based late-night news outlets found that



coverage of murder, theft, and assault cases with Black suspects significantly outnumbered actual arrests.<sup>52</sup> News media reinforces the perception of Black Americans as criminals in a variety of ways, from more frequent displays of Black suspects' mug shots to more frequent depictions of Black suspects in police custody.<sup>53</sup>

These racialized perceptions of crime ripple all throughout our criminal legal system. We treat social and public health problems differently by race. 45% of people in federal prisons and 53% of people in state prisons have struggled with addiction. Issues like unemployment, homelessness, mental illnesses, and addiction are disproportionately dealt with through incarceration rather than public health systems for Black Americans — and the resulting conviction record follows them for life.

## Job Seekers with Convictions: Myths Versus Facts

There are also many misconceptions about job seekers with conviction records. Here are some of the most common myths, debunked:

### MYTH 1

**People who've been to prison have a limited educational background.**

**FACT 1: People with conviction records have a wide range of educational backgrounds.** Some people earn a college degree while they're in prison. Be sure to ask about a job seeker's prior education and training, including what they accomplished while in prison.

### MYTH 2

**People with sex offense convictions won't be able to find a job.**

**FACT 2: People with sex offense convictions still have legal protections in their job search.** They will have to obtain clearance to work with children and other vulnerable populations, but otherwise employers have to assess whether the conviction represents a direct or unreasonable risk to the job on a case-by-case basis, as opposed to automatically ruling out a candidate.

Despite the significant stigma, a number of studies indicate that people convicted of sex-related offenses have a very low likelihood of committing another sex-related offense.<sup>54</sup> Bureau of Justice Statistics data show that people who served time for sex offenses had markedly lower recidivism rates than almost any other group.<sup>55</sup> Further, 95% of sex crimes are committed by people who **don't** have prior sex crime convictions.<sup>56</sup>

### MYTH 3

**People with conviction records don't want to work, or only want to do manual labor.**

**FACT 3: People with conviction records often have many strong motivations to work.** They may be trying to provide for their children or other family members. Many see the opportunity to work as their chance to put the past behind them. If they have faced previous discrimination about their conviction record, they may feel discouraged while looking for work. But they can perform a variety of types of work, from administrative roles to human and professional services. These job seekers should be assessed for their skills and interests, like all job seekers.

# The Legal Landscape

Several federal, state, and local laws govern access to background checks and their use in employment and housing decisions. Unfortunately, these laws have not done nearly enough to protect people with conviction records from discrimination, but they can be a source of liability for anyone who uses background checks. Most of these laws are enforceable through either a complaint to a government agency tasked with enforcing the law or a civil lawsuit by the aggrieved person.

This section is intended to present a brief, high-level overview of the legal landscape. It is not comprehensive and does not represent legal advice. You should consult counsel for your organization to ensure complete compliance with these laws, and to balance the limited value of performing background checks against the risk of liability for failure to follow the law.

## Federal Law

### Equal Employment Opportunity Commission (EEOC) Guidance for Employers<sup>57</sup>

In April 2012, the Equal Employment Opportunity Commission issued comprehensive policy guidance for employers reviewing conviction records as part of their hiring practices. While superseding previous statements, the new guidance reaffirmed the underlying core position: policies that exclude candidates from employment because of their conviction records almost always have a disproportionate impact on Black and Latinx people. And when a policy or practice has such an impact, it violates Title VII unless there is a legitimate, business-related necessity for its existence. Below are the most important points from the guidance:

- **Blanket bans are illegal.** Conviction records must be reviewed on a case-by-case basis. Any automatic, broad-brush exclusion from employment opportunities on the basis of criminal legal system involvement is illegal. The guidance was informed by data that affirms the racially disparate impact of conviction record-based exclusions.
- **Rejections for arrests are generally illegal.** Any exclusion based simply on an arrest does not fulfill the need for business necessity, so a policy that rules out candidates based only on an arrest that did not result in conviction is illegal in nearly all instances. In some states, including New York, the law is even more stringent. Later in this section, you'll find more information about the New York State Human Rights Law, which prevents entities from asking about or taking adverse action related to an arrest that did not result in a conviction, unless specifically required or permitted by statute.
- **Employers must evaluate specific convictions on a case-by-case basis.** As summarized in the EEOC's guidance, the law requires an employer "to link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position." Proper, lawful evaluation of convictions considers the following factors:
  - ❶ The specific circumstances of the offense or conduct;
  - ❷ The amount of time that has passed since the conviction or the completion of the sentence; and
  - ❸ The responsibilities of the position held or sought.

If an employer feels that there's reason to reject a candidate after considering those factors, the EEOC recommends performing an individualized assessment after asking the candidate to provide additional information, such as:

  - ◆ The facts or circumstances surrounding the offense or conduct.
  - ◆ The number of offenses for which the individual was convicted.
  - ◆ Their age at the time of conviction, or release from prison.
  - ◆ Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct.
  - ◆ The length and consistency of employment history before and after the offense or conduct.
  - ◆ Rehabilitation efforts, e.g., education or training.
  - ◆ Employment, character references, and any other information regarding fitness for the particular position.

## Housing and Urban Development (HUD) Guidance for Housing and Real Estate-Related Transactions<sup>58</sup>

Because Black and Latinx people are disproportionately arrested, convicted, and incarcerated, they are also disproportionately impacted by conviction records-based housing barriers. Given these racial disparities, conviction-related restrictions on housing opportunities can violate the Fair Housing Act, which protects against racial discrimination.

In 2016, The United States Department of Housing and Urban Development issued guidance to help housing providers avoid liability for racial discrimination related to the use of conviction records while screening applicants. Below are the main points for landlords or other housing providers to consider:

- Landlords cannot issue blanket bans on anyone with a conviction history.
- Landlords cannot deny housing opportunities on the basis of an arrest record.
- If using background checks, landlords must perform them consistently, rather than using them selectively with some applicants based on stereotypes or fears.
- Landlords must consider applicants on a case-by-case basis, taking into consideration both the nature and the severity of the conviction and how much time has passed. It is essential to make a decision based only on the facts.
- It is legal to deny an applicant housing if a recent conviction poses a clear risk to other tenants or neighbors. However, that decision must stem from credible evidence; it cannot be based on hypotheticals or speculation.
- A denial must also offer evidence that the housing provider or landlord has a legitimate, discrimination-free reason for their decision.

A denial must also show that the landlord's underlying policy differentiates criminal conduct that poses a verifiable risk to property and/or resident safety from criminal conduct that does not.

## Federal Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies (CRA), including conviction record information used to evaluate applicants **for employment and housing**. It's important for employers, housing providers, and landlords to understand key aspects of the law.

### **Employment and FCRA<sup>59</sup>**

- An employer must obtain written consent before running a background check. Notification language that appears on an application for employment is not acceptable; written authorization from the subject of the report, in the form of a "stand-alone document," must be used for a consumer report to be obtained for employment purposes.
- Any employer who uses information from a CRA to deny employment must inform the job applicant and share the name, address, and phone number of the CRA that provided the consumer report.
- If an individual requests access to the information in their file, the CRA must provide it, along with a list of everyone who has requested it recently. There is no charge for the report if an employer has taken action against the individual because of information provided by the CRA and the request occurs within sixty days of receiving notice of the action.
- If an individual's file contains inaccurate information, the CRA must investigate the item(s) in question and provide a written report of the investigation. If the investigation results in any change, the CRA must also provide a copy of an amended report. If no change is made to the disputed item, the person may submit a statement for their file.
- Inaccurate information must be corrected or deleted within thirty days of being disputed.

### **Housing and FCRA<sup>60</sup>**

- Landlords must take certain steps before getting a consumer report — which can include a credit report, a rental history report, or a conviction history report — and after taking an adverse action based on the report. They must have a "permissible purpose," like tenant screening, to access the reports. They also must certify to the company providing the report that they will only use the information for housing purposes.

- If a landlord takes an adverse action against a tenant or rental applicant such as denying a lease, requiring a co-signer, or requiring higher rent than for another applicant, they must give notice — orally, in writing, or electronically. An adverse action notice must include the contact information for the company who supplied the report and an explanation of the right to dispute the report. The FTC's guidance has more examples of instances when an adverse action notice is required.
- When finished with a consumer report, a landlord must securely dispose of it.
- The bearing, if any, the criminal offense(s) for which the person was previously convicted will have on their fitness or ability to perform such responsibilities.
- The length of time that has passed since the offense(s).
- The applicant's age at the time of the offense(s).
- The nature and gravity of the offense(s).
- Any information produced by the applicant, or on their behalf, regarding their rehabilitation and conduct post-conviction.
- The legitimate interest of the public agency or private employer in protecting property and the safety and welfare of specific individuals or the general public.

## New York State Law

### New York State Fair Credit Reporting Act<sup>61</sup>

The New York State Fair Credit Reporting Act adds two key provisions to the federal Fair Credit Reporting Act, described above:

- 1 If a consumer reporting agency provides a report for employment purposes that contains conviction information, the person or entity that requested the report must give its subject a physical or electronic copy of Article 23-A of the correction law, which regulates the licensure and employment of people with convictions, described in more detail below.
- 2 Consumer reports may not contain conviction information more than seven years old, unless it is for employment at a job with a salary greater than \$25,000.<sup>62</sup>

### New York State Article 23-A<sup>63</sup>

In the state of New York, it is illegal for an employer to discriminate against a job or occupational license applicant who has been convicted of one or more crimes, unless the position is directly related to the conviction(s) or if the applicant could endanger the property, safety, or welfare of the people they would be working with or that of the general public.

To make this decision, the employer must consider:

- The public policy of New York, as expressed in the act, to encourage the licensure and employment of people previously convicted of one or more criminal offenses.
- The specific duties and responsibilities necessarily related to the license or employment sought.

In making a decision about an applicant, the public agency or private employer must also consider a Certificate of Relief from Disabilities or a Certificate of Good Conduct issued to the applicant, which serves as evidence of rehabilitation in regard to the offense(s).

An applicant with a conviction record who has been denied a license or employment can request a written explanation of the reasons for the decision from a public agency or private employer. A response is required within thirty days.

### New York State Human Rights Law<sup>64</sup>

Under the New York State Human Rights Law, an entity cannot ask about or take adverse action related to an arrest that did not result in a conviction, unless specifically required or permitted by statute. This includes cases that were dismissed, adjourned in contemplation of dismissal (ACD), sealed, or ended with a violation conviction, Youthful Offender adjudication, or juvenile delinquency conviction. **This law applies to licensing, housing, employment, including volunteer positions, and credit or insurance applications.**

Anyone required or requested to provide information in violation of this law may respond as if the arrest, criminal accusation, or disposition of such arrest or criminal accusation did not occur. This does not apply to police or peace officer jobs — including firefighter jobs — or to gun license applications, which require disclosure of all arrests and convictions.

## New York State Division of Housing and Community Renewal Guidance<sup>65</sup>

New York State has anti-discrimination policies to guide the evaluation of applicants with convictions or pending arrests for **state-funded housing**.

A housing provider may only consider convictions or pending arrests for offenses that involved physical danger or violence to people or property, or which adversely affected the health, safety, and welfare of other people.

Even in these instances, housing providers cannot have a blanket ban. They must conduct an individualized assessment of all applicants. In this evaluation, no single factor can be considered in isolation. The housing provider must take into account the interplay between various factors; for example, a reviewer may look for stronger evidence of rehabilitation if an applicant has a more serious offense.

State-funded housing providers screening applicants must do the following:

- Use a reputable background check company.
- Comply with the previously-described requirements of the Fair Credit Reporting Act and the New York State Human Rights Law.
- Provide an application with information on background check procedures and policies, including the applicant's right to review, contest, and explain the information in the report, and to present evidence of rehabilitation.

These guidelines must be followed by anyone who determines tenant eligibility, including (but not limited to) case managers, project managers, clerks, or independent contractors.

## New York State Real Property Law

As of 2019, New York State law also caps the total fee for both a background check and credit check at \$20, or the actual cost if it is less than \$20. The fee must be waived if the applicant can provide a copy of a background or credit check conducted within the past thirty days.<sup>66</sup>

## New York City Law

### New York City Fair Chance Act

When an employer does a background check in New York City for a job that will be located in New York City, most employers:

- Cannot do a background check or ask questions about a candidate's conviction record until they've made a conditional job offer.
- If an employer then wants to revoke the conditional job offer based on a conviction record, they must:
  - ◆ Explain why in writing, using the New York City Fair Chance Act Notice set by law.
  - ◆ Provide the candidate with a copy of any background check.
  - ◆ Give the candidate at least three business days to respond.

To learn more about your compliance with the New York City Fair Chance Act, see the NYC Commission on Human Rights' information page, Fair Chance Act: [www1.nyc.gov/site/cchr/media/fair-chance-act-campaign.page](http://www1.nyc.gov/site/cchr/media/fair-chance-act-campaign.page)

## Choosing Not to Do Background Checks

If you perform background checks on a regular basis, you have to make sure that you are complying with this rubric of laws in order to avoid costly and time-consuming litigation. There is another option, however: you can simply choose not to conduct background checks.

No housing provider in New York State has ever been held liable for the failure to perform a background check. Landlords are only expected to protect tenants from reasonably foreseeable harm. For example, in a case arguing that a landlord should have investigated a tenant's history of psychiatric hospitalizations, the Court found that imposing such a burden would be offensive and unwarranted.<sup>67</sup> Similarly, in a case where a landlord knew about a tenant's prior threats of violence, the court declined to hold the landlord responsible for subsequent violent acts.<sup>68</sup>

The only case where liability was found involved a landlord who had failed to lock the door to a vacant apartment where illegal activity occurred.<sup>69</sup> However, the Court wrote that “[e]ven if a landlord has actual or constructive notice of a tenant's criminal history, ‘a landlord is under no duty to safeguard a tenant against attack by another tenant since it cannot be said that the landlord had the ability or a reasonable opportunity to control [the assailant].’”<sup>70</sup> Courts in other cities have also explicitly held that landlords are not liable for failure to conduct a background check because of the burdens such a duty would place on landlords and on society.<sup>71</sup>

Employers sometimes cite concerns about negligent hiring liability as a reason for conducting background checks. But there have been few court decisions in New York in the past fifty years that deal with liability of employers who hire people with conviction records who subsequently engage in criminal acts. This suggests that employer's fears may not align with the actual risk.

Employers have no legal duty to perform a conviction record check of prospective employees.<sup>72</sup> A duty only arises if an employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee.<sup>73</sup> The depth of inquiry prior to hiring that is expected of an employer—regarding convictions or any other background information—varies in proportion to the responsibilities of the proposed employment.<sup>74</sup>

Employers can only be liable for bad conduct of their employees when the employer knew or should have known of the employee's propensity for the type of conduct which caused the injury prior to the injury's occurrence.<sup>75</sup> In addition, the bad conduct must occur in the course of the employee's duties. Courts have found that there is no employer liability for negligent hiring or supervision when an employee acts solely for personal motives, unrelated to the employer's business.<sup>76</sup>

While there is no general duty to conduct background checks on prospective employees, New York law affords some protections to employers that perform background checks consistent with the process outlined in Article 23-A, described above. The law confers a rebuttable presumption that the employee's conviction record cannot be used as evidence against the employer in an action for negligent hiring or retention.<sup>77</sup>

# The Case Against Background Checks

Consistent employment and stable housing allow a person with a conviction record to live successfully in the community after incarceration. But in our current system, millions of Americans are too often denied the opportunity to break free from the past.

And, as with so many pieces of the criminal legal system, background checks are laden with errors and inconsistencies that inflict the greatest harm upon those who hold the least power — with little oversight or accountability.

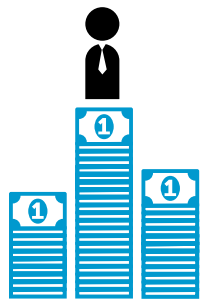
Erecting employment barriers for people with conviction histories also hurts the larger economy. Research estimates a loss of somewhere between \$78 and \$87 billion in annual gross domestic product due to such barriers, resulting in millions of lost tax revenue for state and local jurisdictions.<sup>78</sup>



## Little Regulation Leaves Ample Room For Error

When you review a background check, it may be tempting to consider it as an objective, factual document. But not only do background checks fail to account for all of the previously-mentioned disparities and inequities within our criminal legal system, they are often conducted with little attention to detail, and with minimal checks in place.

Ironically, the people conducting background check screenings are hardly screened themselves. Tenant screening once entailed only a basic credit check with the three main credit bureaus and a couple of reference calls, but that changed when electronic court records became readily available at little to no cost. These days, the data is so accessible that virtually anyone with an internet connection can start a background screening business — there are no licensing requirements, nor is there a central registration system.



The entire industry is currently valued at \$1 billion,<sup>79</sup> and **there were an estimated 1,954 background screening companies in 2019.**<sup>80</sup>

The reports generated in tenant screenings are frequently created from incomplete information and unsophisticated search criteria, often without verification of sources. In many cases, they are automatically generated and sent without any review from a human eye. Screening companies regularly fail to take extra steps to prevent false matches, and employees from screening companies have stated in lawsuits that they lean toward including any potential match rather than limiting errors.<sup>81</sup>

As you can imagine, such a haphazard process inevitably leads to inaccurate or misleading reports. Here are some of the most common problems with background checks today:

- Incorporating other people's conviction records or mismatching the report's subject with someone else.
- Containing convictions that were legally sealed or expunged from the public record.
- Omitting key information about how a case was resolved, such as failing to report that a charge was dismissed.
- Including misclassifications, such as reporting a misdemeanor as a felony.
- Including misleading information, such as listing a single charge more than once.<sup>82</sup>

## The System Offers Little Recourse For Applicants

Overall, the odds are stacked heavily against anyone who's been the subject of an erroneous background check. Many companies try to skirt the rules that are in place to protect those who are screened. They work around the federal Fair Credit Report Act (FCRA) by subcontracting vendors<sup>83</sup> or disclaiming responsibility.<sup>84</sup>

The law allows consumer reporting agencies thirty days to respond to a request for a correction. By that point, many jobs and apartments have already gone to another applicant. Often, the people who lose out on housing or job opportunities because of an erroneous background check are grappling with some degree of financial insecurity and can scarcely afford the additional strain.

In many cases, employers and landlords don't even get to review the reports; screening companies automate and outsource decision-making.<sup>85</sup> This is a disservice to both applicants — who are unfairly excluded from opportunity — and employers and landlords, who don't get the chance to fully consider each applicant's merits.

## Is A Background Check Truly Necessary?

Given the rampant inaccuracies in background checks — and the disparities they perpetuate — the best way to invest in a more equitable future is to eliminate them from your screening process entirely, where possible.

Many people don't realize they can end their use of background checks. It's important to look at the law rather than relying on what others say, or industry norms. Background checks are required by law for some occupational licenses and employment fields, but that doesn't mean a training program or employer is required to do its own check.

If background checks are simply an industry standard in your field, rather than a necessity required by law, it's important to speak out and use your power to put an end to a practice that excludes qualified applicants.

For more information on background check laws, review [\*The Legal Landscape\*](#) section.

# Background Check Best Practices

The best way to ensure that a conviction does not become linked to a lifetime of less opportunity is to end the use of background checks as you screen candidates or applicants. But if that isn't an immediate possibility, use the tips and guidance in this section to make sure your process gives people with conviction records a fair chance to move forward.



Consider using the sections within this chapter identified with a pencil and line as a checklist when preparing for and performing your next background check.

## Creating a Transparent and Equitable Process

A fair screening process gives applicants plenty of time to dispute background check inaccuracies and share more information about who they are beyond the facts of their conviction. There should also be clear, upfront communication about expectations and requirements. Follow the tips below to ensure that your opportunities or offerings are accessible to people with conviction records.


### Consider your timing.

Background checks often require follow-up action from a candidate or applicant, whether it's a matter of disputing an error or gathering documents that show their post-conviction accomplishments. If you intend to deny someone a job or home based on background check results, you must give the person time to dispute the results and time to provide mitigating evidence or evidence of rehabilitation. It can take time for an applicant to pull together the necessary documents. Develop a process that allows sufficient time for your candidates or applicants to take these additional steps. Always give them a copy of the report and leave sufficient time between the various application phases, as it can take several weeks to correct an error.

Timing is particularly important with hiring deadlines and deadlines for group-based educational or professional development programs that involve designated classes and cohorts. Plan your application and selection process carefully to allow enough response time to ensure that people with conviction records don't miss out.

### Share as much information as you can.

It's common for people to feel anxious or stigmatized when going through a background check. As you plan your process, do whatever you can to minimize nerves and set candidates up for success. A little advance preparation can make the experience much less intimidating, so share the following details upfront:

-  ○ When the background check will be performed
- What information candidates will be asked to provide if a conviction poses a concern
- How they can prepare
- The point person for communication throughout the process
- Next steps for disputing background check results

### Offer encouragement.

Say explicitly that candidates with conviction records are welcomed to apply and that each application will be reviewed individually. If there are explicit bars to an occupation or profession for certain convictions in the law, it's important to say so upfront. Most mandatory bars are removed if a candidate obtains a Certificate of Relief or a Certificate of Good Conduct. Provide information to a candidate if there is a mandatory background check so they can make an informed decision.

**It is not your role to dissuade an applicant from pursuing a job or profession where background checks are mandatory.** That decision is theirs, and you can assist them by providing factual information for their consideration.

### Remove fees.

People should not have to pay for a process that may ultimately exclude them. Identify the costs associated with your background check process and explore if they can be subsidized or waived. A recent New York State housing law caps the applicant fee for both background checks and credit checks at \$20.<sup>86</sup> If you're based in another region, verify the laws in your area.

## Do not ask applicants to self-disclose conviction history.

Asking candidates to disclose their conviction history and comparing their account to official records creates an impossible conflict. A discrepancy between a candidate's written explanation and a background check is not proof of dishonesty, like many people believe. More often, it's the result of errors on the background check itself, or a candidate's misunderstanding of their record.

Given the frequency of background check errors, there's a significant possibility that the discrepancy reflects an inaccurate record. Even if candidates are aware of errors, they may lack the time and resources to correct the official government record.

Another possibility is that the candidate simply doesn't know what the record contains. It is difficult to understand the specific outcome of legal proceedings, which move quickly in court — some arrests are resolved within minutes of appearing before a judge. People are not routinely given copies of criminal court records or copies of case dispositions. Charges and plea bargain options can change multiple times during a case. Without easy access to court documents, however, there may be an unintentional disconnect between their account and the official report.

## Reading a Background Check


Inaccuracies are so rampant in background checks that you should read them with the understanding that they might contain errors or information about a different person. As previously mentioned, it's important to have an application timeline that allows for that possibility. Be sure to give candidates a copy of the report as well, so that they can attempt to dispute an error.

## Scan for major errors and ensure a dispute process.

There has been no industry-wide study of errors in background checks, but lawsuits, government enforcement actions, and government reports all confirm that errors in

background check reports are common.<sup>87</sup> Even conviction record information obtained directly from government sources may have errors.<sup>88</sup>

In your review, be mindful of common errors on commercial background checks and look for the following problems:

-  ○ Make sure the name and date of birth match your applicant exactly, including middle name.
- Look for inconsistencies, like out-of-state records that don't match your applicant's educational or work history.
- If a case doesn't have a disposition, either ask for more information or don't consider it. If it's an arrest that didn't result in a conviction, denying housing or a job based on this information may violate the human rights law.
- Watch out for information about sealed records. These errors are hard to identify, so make sure you let candidates know in advance that they should review the background check and let you know if there are any errors.
- Check that the same incident isn't listed multiple times. If the same crime is listed multiple times with similar dates, it's likely an error.
- Check that the offense is classified correctly (for example, sometimes a misdemeanor is mis-classified as a felony). Offense classifications aren't always right; even when they are, they don't always align with our perceptions of seriousness.

Tell candidates explicitly to let you know if they are disputing the background check results with the consumer reporting agency. Give them sufficient time to do so before finalizing your decision. If they are unable to resolve the error in the timeframe for your decision-making, consider any evidence of the error that they can provide.

## Use your purchasing power.

In an industry with no real regulation, you have tremendous power as a buyer, especially if you work at a large entity that spends a lot of money on background checks. It is both your responsibility and your right to know more about the background check company's process for getting information. Make sure that your background check vendor is complying with the law and providing you with a high-quality, accurate product:

- Ensure that the background check company you use has a dispute process. Make sure you understand how it works so you can tell your applicants how to dispute errors and what the timeline will be.
- Ask the background check company what steps they take to ensure accuracy — for instance, do they verify official government records?
- Ask for quality control data, including the number of disputes they receive, the process for resolution, the average timeframe for resolution of disputes, and who they are typically resolved in favor of.

If they fail to provide satisfying answers, use your leverage to demand that they do better, or commit to working with another company that will.

## Setting Guardrails for Your Conviction Record Review

All throughout the criminal legal system, a lack of accountability and minimal checks against implicit bias lead to racially disparate outcomes. In the absence of clear guardrails, stereotypes and biases may surface during the background check process, which can exclude qualified candidates.

Research shows that hiring managers who are given unlimited discretion in hiring tend to make decisions based on their own conceptions of morality, law, and risk. Often, they use conviction records to make moral and practical decisions regarding an applicant's honesty, trustworthiness, and work ethic,<sup>89</sup> informed by their own subjective experiences and beliefs. Some may be so risk-averse that they disqualify applicants based on even low-level convictions.

Ultimately, complete discretion leaves too much room for subjective decision-making, which can be a source of liability: the Equal Employment Opportunity Commission cautions that a violation may occur when an employer uses conviction record information inconsistently for different applicants or employees based on their race or national origin.


Establishing clear criteria will reduce arbitrariness, minimize the collateral damage of a conviction record, and help you avoid liability and costly litigation. Use the tips below to guide your process.

- **Know which cases you can legally consider.** Do not make any decisions on cases without a disposition, or cases that you cannot legally consider. Note that no one can ask about an arrest that did not result in a conviction, except law enforcement employers.<sup>90</sup> This includes cases that were dismissed, adjourned in contemplation of dismissal (ACD), sealed, or ended with a violation conviction, Youthful Offender adjudication, or juvenile delinquency adjudication. This does not apply to police or peace officer jobs — including firefighter jobs — or to gun license applicants.
- **Only consider recent convictions.** Create a bright line rule that you won't consider any conviction that's more than a couple of years old unless required by law. People who have remained out of the criminal legal system for even a few years are unlikely to be convicted of another crime. That said, make sure you still individually review candidates with recent convictions.
- **Keep it relevant.** Pre-determine which convictions are relevant to the opportunity, limiting them to those required by law. There should be a direct relationship between the conviction and the job position or program, and you should be able to articulate a specific risk based on that relationship before you deny someone an opportunity.
- **Don't pre-judge.** When a candidate has a conviction that is on your pre-determined list, that should not be the end of the inquiry. Review a candidate's evidence of rehabilitation, described in the next section, to determine whether, in light of the information provided, there remains a direct relationship between the conviction and the job position or program.

## Reviewing Information Provided by the Candidate

We are all more than our mistakes, and your candidates or applicants are much more than their conviction records. A fair background check process gives them the opportunity to show who they are beyond the facts of their involvement with the criminal legal system.

In your selection or application process, you should request documents that demonstrate what a candidate has achieved after a conviction, commonly referred to as “evidence of rehabilitation” or “proof of positive change.” This may include:

-   Letters of recommendation
- Awards
- Graduation certificates from programs
- Educational achievements
- Proof of employment or job training — during or after incarceration
- Certificate of Relief from Civil Disabilities and/ or a Certificate of Good Conduct
- Community or civic participation
- Responsibilities caring for family members including children, elders, or people with special needs (use a broad definition of family that allows for self-defined ones)
- Any other documents about achievements or positive developments

Share this list with candidates to help them understand what information you are looking for. Also, be aware of the catch-22 that people with conviction records frequently confront: too often, they need post-conviction employment or housing to demonstrate that they should be eligible for post-conviction employment or housing.<sup>91</sup> Give candidates the opportunity to put their past behind and move forward by accepting a variety of documents as evidence of rehabilitation.

As you review these documents, it’s important to understand how racial and economic inequalities factor into involvement with the criminal legal system. It’s highly likely that a person’s life circumstances have played a role in their conviction.

Growing up in an underserved and under-resourced community — where the government may invest more in police than it does in schools<sup>92</sup> — increases the likelihood of arrest. Much of what pushes a person toward behavior or decisions that lead to police contact are beyond their control, from lack of employment and education opportunities, to high incarceration rates in the neighborhood. Be willing to look at the bigger picture as you evaluate candidates.

Remember, too, that people who are innocent sometimes plead guilty precisely because of the power imbalances and biases that permeate our criminal legal system. Many people have pleaded guilty to avoid a longer sentence, so if a candidate maintains that they were innocent of a charge for which they were convicted, it’s not necessarily a failure to take responsibility.

## Avoiding Gut Instincts

It’s more difficult to assess a candidate’s honesty and character than it may seem. Humans are poor lie detectors, and the idea that dishonesty can be detected through monitoring facial expressions, body language, or voice modulation have been disproven.<sup>93</sup> One study found that interviewers developed strong, confident impressions of interviewees even when the interviewee answered questions with random, predetermined responses.<sup>94</sup> While research about how people make decisions about conviction records is not complete, we do know that implicit biases can play a role.

There’s comfort in familiarity, and as humans we are inclined to gravitate toward what we know, surrounding ourselves with people whose backgrounds resemble our own. This is known as “similar-to-me” bias,<sup>95</sup> which often occurs on an unconscious level: we frequently seek out other individuals who look like us without realizing we’re doing so. It may sound innocuous, but in practice, it’s one of the biggest barriers to diversity and inclusion in the workplace.<sup>96</sup>


Background check policies and hiring practices based on subjective criteria are susceptible to unconscious bias. When reviewing background checks, “similar-to-me” bias can result in a willingness to overlook a conviction record

of someone whose background resembles your own and excluding people with different backgrounds. In other words, you may be more likely to believe that someone whose background resembles yours is deserving of a second chance.

As a decision-maker, it is up to you to ensure you are making factual determinations and using objective criteria. Collecting and regularly reviewing data about decision-making for applicants with conviction records can help you determine and address the ways that unconscious bias may be showing up.

## Making and Communicating Your Decision

As you finalize your decision, use the following best practices to offer clear and transparent communication. Even if you are unable to accept a candidate's application or offer them an opportunity this time around, the information you share will help them prepare for the future. Here are some best practices:

-  ○ Communicate your decision in writing
- Be candid about the reasons for your decision — it's helpful for candidates to know, and if your reasons are legitimate, you have nothing to worry about
- Consider giving people an opportunity to appeal and submit additional information
- Let the candidate know how they could strengthen their application in the future and share the timeline for re-application



# Conclusion

Ultimately, background checks reinforce racial and economic oppression in the United States, carrying the damage caused by mass incarceration from one generation into the next. Not only does this negatively affect people directly impacted by the criminal legal system, it's a disservice to employers, landlords, and the broader economy, too.

Between the multitude of disparities in our criminal legal system, and the prevalence of background check errors, a background check will never account for a candidate's character. Yet candidates are too often denied the chance to demonstrate their strengths and show who they are. Given our country's unjustifiable incarceration rates, the use of background checks ensures that a significant portion of the population are unfairly passed over for meaningful opportunities every year.

Even in instances where the information on a report is accurate, background checks remain a barrier to justice. A person with a conviction record should not endure perpetual punishment because of a charge that happened years or even decades ago — a charge that likely involved circumstances beyond their control. We have a responsibility to make opportunity accessible to all.

In recent years, the incarceration rate has begun to flatten. But the impact of decades of unremitting, exponential growth will take years to reverse. Much of this is beyond our individual control, but with background checks, we have an opportunity to move closer to racial and economic justice right now.

The best way to end conviction record-based discrimination — and expand opportunity for the millions of Americans impacted by the criminal legal system — is to discontinue the use of background checks unless required by law. If that is not feasible in the short term, however, we hope this guide will help you create as fair and equitable of a process as possible.

# Endnotes

1. Benjamin Levin, “Rethinking the Boundaries of ‘Criminal Justice,’” *Ohio State Journal of Criminal Law* 15, no. 619 (2018): 620; Lucy Lang, “The Punishment Bureaucracy Has Nothing to Do with Justice,” *Medium*, November 18, 2019, <https://medium.com/@LucyLangNYC/the-punishment-bureaucracy-has-nothing-to-do-with-justice-afd95230005c>.
2. Eddie Ellis was incarcerated for twenty-five years, earned four college and graduate degrees, and founded the Center for NuLeadership on Urban Solutions. He was an avid prison reform advocate and wrote “An Open Letter to Our Friends on the Question of Language,” asking everyone to stop using negative and dehumanizing language and simply refer to people as people.
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