

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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May 15, 2018

The Honorable Gene L. Dodaro
Comptroller General of the United States
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Dodaro:

On December 1, 2016, the Office of Personnel Management (OPM) issued a final regulation at Title 5, Code of Federal Regulations, parts 330 and 731, which generally prohibits a hiring agency from making specific inquiries into an applicant's criminal and/or adverse credit background until the agency has made a conditional offer of employment to the applicant—as opposed to points earlier in the hiring process.¹ The stated goal of this reform is to improve ex-offenders' labor market outcomes and offer a fair chance for job attainment.² Federal agencies had until March 31, 2017, to become compliant with the new rule and on February 15, 2017, OPM issued a memorandum to agencies' chief human capital officers outlining the process by which agencies could seek exemptions to this rule. Under the new rule, and without an exemption, no agency may make an inquiry into an applicant's criminal or adverse credit history before making a conditional offer to employ the individual.

Over time, the move to restrict employers from asking about an applicant's criminal history has come to be known as the “ban the box initiative” - referring to the checkbox on more traditional applications asking applicants to indicate if they had been convicted of a crime. Jurisdictions across the country - state, county, local, and now at the federal level - have implemented ban the box efforts, and researchers have debated the effects on discrimination and ultimately employment outcomes.³ Though evidence exists connecting ex-offenders with jobs can prevent recidivism, concerns have been raised absent direct information about an applicant's past, employers may make assumptions about criminality based on race alone. In fact, some scholars who have examined this issue in Massachusetts, New York, New Jersey, and elsewhere,

¹ Office of Personnel Management, Recruitment, Selection, and Placement (General) and Suitability, 81 Fed. Reg. 86555 (Dec. 1, 2016); see also Office of Personnel Management, Guidance on Requests for Exceptions to Timing of Suitability Inquiries Rule, (Feb. 15, 2017). available at <https://www.chcoc.gov/content/guidance-requests-exceptions-timing-suitability-inquiries-rule>

² Press Release, The White House, Office of the Press Secretary, FACT SHEET: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly- Incarcerated (Nov. 2, 2015) available at <https://obamawhitehouse.archives.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation> (Last accessed Apr. 12, 2018)

³ Beth Avery and Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies* available at <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/> (last visited Apr. 12, 2018)

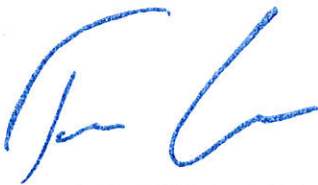
have found when an applicant's criminal history is unavailable, employers are statistically likely to discriminate against demographic groups including more ex-offenders.⁴ Proponents of similar legislation, including the National Employment Law Project (NELP), criticize the conclusions drawn by the aforementioned studies, and found the core problem is not ban the box legislation, but rather racism throughout the hiring process.⁵

Given the goal of improving employment outcomes for those with criminal records, we would like GAO to examine whether the federal ban the box initiative is achieving its intended purpose and determine whether there have been any observable changes in the hiring of individuals with criminal histories attributable to this initiative. We would also like to understand the extent to which select agencies are complying with the OPM guidance, and how many agencies have requested and received exemptions.

We understand there could be data availability, reliability, and other issues concerning the collection of evidence about applicants agencies may not retain (and whether it is retained in paper or electronic format), given the policy has been so recently implemented and not all agencies have been hiring given recent federal hiring freezes. We also understand unemployment rates and general economic conditions, among other factors, must be considered and controlled for in order to estimate the effect of the new rule. Nevertheless, an early examination of how the new rule is being administered will assist in understanding its effect. As Congress considers potential legislation codifying this rule, it is essential to receive a nonpartisan and objective examination of the issue.

We look forward to working with GAO to discuss the most appropriate scope and methodology and we thank you for your help in addressing this issue.

We would appreciate ongoing briefings as you conduct your work. If you have any questions concerning this request, please contact Sean Brebbia of the Majority staff at 202-225-5074.



Trey Gowdy

Sincerely,



Darrell Issa

cc: The Honorable Elijah E. Cummings

⁴ See Amanda Agan and Sonja B. Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* U. of Mich. Law & Econ Research Paper No. 16-012 (June 2014); See also Phil Hernandez, *Ban-The-Box "Statistical Discrimination" Studies Draw the Wrong Conclusions* National Employment Law Project, available at <http://www.nelp.org/blog/ban-the-box-statistical-discrimination-studies-draw-the-wrong-conclusions/> (last visited Apr. 12, 2018)

⁵ Phil Hernandez, *Ban-The-Box "Statistical Discrimination" Studies Draw the Wrong Conclusions* National Employment Law Project, available at <http://www.nelp.org/blog/ban-the-box-statistical-discrimination-studies-draw-the-wrong-conclusions/> (last visited Apr. 12, 2018)