

 Search All Issues Contents

BNA, Inc.

Daily Labor[®]

REPORT

No. 193

Thursday, October 6, 2005

ISSN 1522-5968

Page C-1


Special Report

Privacy Rights

Using FBI Databases for Hiring Purposes

Raises Many Issues, Commenters Tell DOJ

Before allowing employers to use Federal Bureau of Investigation databases for applicant screening and other employment-related purposes, the Justice Department needs to consider such issues as the accuracy of the databases and how errors will be corrected, according to comments recently submitted to DOJ.

DOJ solicited the comments through a notice in the June 6 *Federal Register* (107 DLR A-3, 6/6/05 ). The solicitation is part of DOJ's effort to comply with a provision in the Intelligence Reform and Terrorism Prevention Act of 2003 (Pub. L. 108-458). Section 6403 required the attorney general to report to Congress on background checks required by existing statutes, including how to standardize existing authorizations. It also asked for DOJ to report within six months of the law's passage on how to improve procedures for conducting criminal history checks for non-criminal-justice purposes, such as employment and licensing. DOJ was told to consult with representatives of state criminal history repositories, private industry, labor organizations, and other interested parties. DOJ has not yet filed its report to Congress.

Currently, employers can get access to certain FBI arrest and conviction records to use for hiring decisions, but generally must request them through state agencies rather than receiving them directly. DOJ asked commenters to consider 15 factors, such as the effectiveness of using state databases of arrest and conviction records, the scope and means of processing background checks for private employers using Federal Bureau of Investigation data, and whether employers should be restricted in passing on the costs of conducting background checks to employees. It also asked commenters to consider privacy issues, such as whether individuals should have access to records that are used to deny them employment.

Approximately 55 comments were submitted during the comment period, which ended Aug. 5, according to records DOJ provided to BNA. The department did not provide copies of all comments received to BNA, and a spokesman did not respond to several requests for comment.

A review of more than two dozen comments obtained by BNA, and comments obtained during followup interviews for this article, indicated that while there was some support for increased access to FBI databases for employment purposes, there are numerous issues for DOJ to consider.

For example, many commenters observed that the FBI databases often contain arrest information about a particular individual, but do not indicate if the individual was convicted, exonerated, or the case was disposed of in some other fashion. That can be problematic for employers trying to comply with federal and state laws and regulations that often prevent employers from making employment decisions based solely on arrest information. Several commenters also expressed concern about the rights of individuals rejected for employment based on the search of FBI data, how they would correct mistakes in FBI databases, who would pay the costs of such checks, and whether making criminal history data more widely available would create a large class of unemployable workers.

Many Jobs Already Require Checks

The FBI maintains a database, known as the Integrated Automated Fingerprint Identification System, which links fingerprint information to criminal histories on more than 47 million people nationwide, according to the

agency. The information in the database comes from federal, state, and local law enforcement agencies.

A number of federal laws require individuals to obtain criminal background checks--including FBI data--prior to being hired. For example, many truck drivers are required to undergo pre-hire criminal background checks under various laws, such as the Air Transportation Security Act, the Safe Explosives Act, and the Maritime Transportation Security Act. Until recently, individuals who have unescorted access at nuclear power plants had to have criminal history checks; now, under the Energy Policy Act of 2005, any person who is licensed or certified to engage in an activity must undergo such an investigation.

In addition, most states require individuals in certain jobs, such as teachers, child care providers, and private security guards, to undergo a criminal background check. Under a 1972 appropriations law--generally referred to as Public Law No. 92-544--the FBI may provide state agencies with records from its criminal history databases for employment and licensing purposes. Under the law, states must legislatively adopt statutes stipulating when such requests may be made. Checks must be fingerprint-based, and the results must be provided to state officials rather than directly to employers.

Ronald Howell, executive director of the National Consortium for Justice Information and Statistics--a Sacramento, Calif.-based nonprofit whose members include many of the officials who lead state criminal justice information repositories--told BNA that some of those statutes require only a record check within that state. Others, however, require that job applicants undergo a nationwide criminal history investigation, according to Howell, whose group refers to itself as SEARCH.

For example, Diane Sherman, director of Michigan's repository of criminal history information, said in her comment that her office performs approximately 120,000 fingerprint-based checks per year. The office only has the resources to perform such checks when Michigan or federal law requires them, she said. However, anyone can run a particular name through an Internet-based search system. That database only includes conviction records from Michigan, according to Sherman.

The FBI and most states allow individuals to request copies of their own criminal history report. However, employers often choose to initiate the investigation themselves to ensure that the results received are legitimate.

Investigations Vary by Job Type, State

The way an employer conducts a criminal background investigation varies based on the type of job. Some states will perform criminal background checks on an employee or job applicant for any employer that submits authorization from the individual. Others, however, will only perform such investigations for workers in certain occupations.

Employers generally cannot directly petition the FBI to perform a background check. Instead, they generally must submit a request through a state agency. Under some circumstances, such as the hazardous materials endorsement programs, the states then send the request for an FBI background check to a private contractor, which then works with the federal agency. The American Banking Association, financial stock exchanges, and the Nuclear Regulatory Commission are among the only employers that may directly request records from the IAFIS, according to an FBI spokesman.

However, as the National Association of Professional Background Screeners observed in its comments to DOJ, relatively few employers are legally permitted to obtain fingerprint-based criminal histories from the FBI or even the states. Thus, most employers that want to conduct criminal history checks on their workers and job applicants use third-party consumer reporting agencies. A 2004 survey by the Society for Human Resource Management found that 68 percent of employer respondents always performed criminal background checks on job applicants.

Jason Morris, president of Background Information Services Inc. in Cleveland and co-chair of NAPBS, told BNA that such companies generally take an individual's Social Security number and credit history--which may be accessed by employers under the Fair Credit Reporting Act--to determine where they have lived and worked. They then send investigators to local courthouses in those jurisdictions to see if the individual in question has been arrested, and if so, how his or her case was resolved.

Benefits of Wider FBI Access Cited

The American Trucking Associations observed in its comments that it would be easier for employers if there was a single database with all relevant arrest and conviction information. For example, it said that "the FBI criminal databases should be the central repository of all criminal background checks, including all the criminal information located in state databases."

Howell, of the nonprofit SEARCH, suggested to DOJ that criminal history records in federal and state databases be made available to private employers and agencies that deal with children, the elderly, and the disabled. "We believe these agencies are able to make their own fitness determinations concerning their applicants as an alternative to State agencies that may not be familiar with all of the circumstances concerning applicants' duties and the environments in which they will be employed or may volunteer," he said.

Howell added in his remarks that SEARCH's position does not restrict the right of states to conduct checks related to licensing and certification. However, he told BNA, SEARCH does not believe that state agencies generally should be deciding for private organizations whether an individual's criminal background disqualifies him or her from employment in the absence of a larger public policy issue.

Other commenters suggested that third-party investigators, such as companies specializing in background checks, should have direct access to federal databases, rather than employers. NAPBS observed that many states prohibit employers from using arrest information to make employment decisions, yet that is the primary information available in FBI records depositories. "Allowing employers to have access to this information on the federal level may thwart these purposes," NAPBS told DOJ.

The National Employment Law Project suggested that DOJ should recommend that Congress limit, rather than expand, the authority of private employers to request and review national records. "Expanding the authority of private employers to request and review FBI criminal records absent state laws creates a significant potential for error and abuse," according to the New York-based NELP, which advocates for low-income workers.

For example, employers lack the technical expertise to evaluate FBI records, particularly if they contain incomplete or incorrect information, the group said. Maurice Emsellem, NELP's policy director, told BNA that not only are the FBI databases often wrong, but it is often difficult for employers to determine how serious an offense was, given the different ways that states define their crimes and penalties.

"Private employers who are provided the [incorrect] information are likely to make significant factual mistakes or, more likely, choose to err in favor on denying employment based on literally any evidence of a criminal record," the group told DOJ.

NELP suggested that employers be allowed to receive only the standard results of a "fitness determination" from an appropriate state or federal agency that reviews the FBI criminal records pursuant to state or federal employment and licensing laws. For example, Emsellem observed that California currently will only provide such fitness determinations; it will not release an individual's actual criminal history to employers unless they work with children, the elderly, or the disabled.

Howell told BNA that it can be difficult for a novice to make sense of criminal history information. For example, terminology differs from state to state, and it may not be clear what a particular abbreviation means. In addition, states may use similar terms to refer to crimes of different magnitudes. "We recommend that such agencies be required to enter into user agreements that contain such requirements as training, security and perhaps making the criminal history records reviewed during applicant processing available to the applicants themselves to help ensure they are complete and accurate," Howell said in his comments to DOJ.

James P. Hoffa, president of the International Brotherhood of Teamsters, suggested in a comment on behalf of IBT that if DOJ allows increased access to criminal records, a federal agency be charged with administering the system. "Employers and employees must be able to contact one Agency or Department that provides information, makes determinations on which disqualifying offenses are relevant to specific jobs, and affords parties an appeals process," the union president said.

Concerns Over Accuracy of Databases

However, other commenters observed that the idea of an accurate, comprehensive national database may be a panacea. "The national database is fairly notoriously inaccurate," Gregory M. Davis, an attorney with Seyfarth Shaw in Chicago who represents NAPBS, told BNA.

For example, a 2005 report prepared for NAPBS by Craig N. Wilson, an assistant professor of criminal justice at Sonoma State University in Sonoma, Calif., found that many states do not maintain information on dispositions, declinations to prosecute, and decisions not to charge someone after their fingerprints have been taken. States have different reporting requirements, meaning identical crimes may be reported differently from state to state. For example, a crime might be a felony in one state and a misdemeanor in another. Furthermore, it can take several weeks for localities to report information to a state depository.

"Aside from this, many states effectively prevent most private employers and their agents from accessing the information housed in their central database or, alternatively, place such onerous requirements on the use of the data that it is inefficient or impractical for employers to utilize the state resource," NAPBS said. For example, several states require an original notarized signature authorizing the employer to obtain criminal history information from a state database.

Any inaccuracies at the local and state levels get magnified at the federal level, according to several commenters. Howell told BNA that the national databases are often less complete than their local and state counterparts. In the past, there were problems with local records being transferred to the state and then federal repositories on a timely basis. Now, more and more localities are automating their systems. Another problem is that the FBI did not always include all types of criminal activity in its databases, he said, particularly when computer storage was more expensive. If the FBI received incomplete fingerprint information on a particular individual, it did not always go back to the locality to obtain a correct set of prints, he added.

Furthermore, even if local police submitted arrest information, according to Howell, courts and prosecutors have not always submitted disposition information. It has only been in recent years, he told BNA, that courts have been putting significant resources into automating their information systems.

"Every circle you remove yourself from the source data," the information becomes less complete, according to Howell.

Thus, Howell urged DOJ to keep the current model of using both national and state databases when information is needed for non-criminal justice purposes. "We would be opposed to the development of any system that results in State repositories being bypassed, which would fail to take advantage of State-maintained records that have been shown to be more complete than those maintained by the FBI," he said in his comments to the department.

Les Rosen, president of Employment Screening Resources in Novato, Calif., said in his comments to DOJ that an FBI database search is not as accurate as a search conducted at courthouses, which he said gives "up to the minute detail. Database searches are only lead generators or supplemental searches for preemployment background screening purposes."

"Since the FBI database is a much more effective arrest database than a true criminal history database given the inconsistent recording of disposition, it should be recognized from the onset that the FBI database has inherent limitations for employers who in many states" are prohibited from using anything other than conviction data, according to Rosen.

The American Trucking Associations acknowledged that its members' general experiences have indicated that states do not fully report criminal records information to the FBI. In order to deal with that problem, ATA recommended that the federal government require states to share complete criminal history information.

Michigan's Sherman urged that state databases should remain the primary source of criminal history information, given that the FBI only recently began tracking nonfelony incidents and is missing disposition information for many arrest records. However, she suggested that all state databases should be queried. "A

query of a single state database gives employers a false sense of security," Sherman said. "We must recognize we live in a mobile society."

Comparison to Credit Reporting Law

The Fair Credit Reporting Act applies to companies performing criminal background checks, Rosen said. Such organizations are considered under the FCRA to be "consumer reporting agencies," meaning that they compile consumer credit and other information and provide it to a third party for a fee. Rosen questioned whether the FBI would be considered a consumer reporting agency.

A 1998 letter from the Federal Trade Commission indicated that if an employer obtains criminal records from a public agency from which anyone can obtain the same information, the public agency is not a consumer reporting agency, Rosen said in his comment. However, if employers--but not the general public--could obtain FBI reports, then the FBI might be considered a consumer reporting agency. That would mean the FBI would have to comply with the FCRA's rules on ensuring that the reports it provides are accurate, disclose to a consumer upon request what is in his or her file, and investigate any information the consumer asserts is inaccurate.

NAPBS suggested that the FCRA provides a framework that protects the rights of individuals while supporting the needs of employers. It is not suggesting that "the DOJ become a credit reporting agency, yet some portions of the FCRA offer a relevant working model that could be easily adapted to address" many concerns regarding working protections. For example, NAPBS suggested using FCRA procedures when an "adverse" decision, such as the denial of employment, is made. In such cases, the employer must provide a copy of the report and a summary of consumers' rights, including the name of the information providers and its contact information so the consumer can correct any erroneous information.

However, the San Diego-based Privacy Rights Clearinghouse suggested that the FCRA itself does not go far enough to protect the rights of job applicants, and those shortcomings should be considered if employers gain access to federal databases. For example, the PRC said, individuals who are subjects of criminal history investigations should have access to the records and reports used as a matter of fairness. However, the FCRA only requires that employees be given a copy of the report if it is used to make an "adverse" decision.

In addition, PRC observed that while an individual may challenge information in his or her credit report that is used to make an adverse decision, the employer is free to hire someone else. PRC Director Beth Givens suggested that there be an appeals process for using federal databases that requires employers to reconsider decisions based on faulty information. Similarly, NELP suggested an individual should have the ability to challenge the FBI's records before an adverse employment decision is made.

Meanwhile, IBT President Hoffa asserted that employers should be required to articulate a reasonable need for access to criminal history information, particularly in the case of workers who already are on the job.

"A major concern of the Teamsters is the use of criminal background checks by employers to intimidate workers and prevent them from exercising their rights under the National Labor Relations Act to engage in collective action," the union told DOJ. "Employers should not be free to harass workers who engage in union organizing campaigns by deciding in the middle of the campaign that they need to check criminal backgrounds." Similarly, IBT said, employers should not be able to use such checks to harass employees who have filed grievances or serve as union officers.

Who Pays for Records Checks?

A handful of comments dealt with the issue of whether employers or employees should pay the cost of criminal history investigations. NAPBS said it is not common for employers to directly charge employees for the cost associated with doing background checks. Instead, most employers treat them as a cost of doing business. NAPBS added that certain states, such as California, bar employers from charging employees for background checks.

Allowing such charges could cause problems for employees, according to NAPBS. For example, charging an unemployed individual for such checks could have a disparate impact on unemployed individuals, and could have a disparate impact on certain employees, setting the stage for potential litigation, it told DOJ.

"Unemployed workers should not be required to bear the burden of paying for government mandated background checks," the Teamsters added.

ATA asserted that the decision as to who should pay for background checks should be left to employers and employees. For example, many truck drivers switch companies fairly frequently, it said. Some companies frequently cover the fees associated with criminal background checks as a recruiting tool. On the other hand, some drivers opt to pay for their own checks to secure faster employment.

Another concern for several commenters is the time that it takes the FBI to process criminal background checks. NAPBS said employers typically request that screening companies provide results of their investigations within three days. "To extend response time beyond this time period likely would be to disregard employer requirements and business conditions," the organization told DOJ.

ATA suggested that DOJ study whether the National Instant Criminal Background Check System should be expanded for use by employers that need such information in a timely manner. Currently, the NICS is used to check the records of gun purchasers. "Establishing a similar expedient system for transportation workers would significantly improve the wait times that truck drivers now face," which can be as long as 120 days, ATA said.

Some Fear Blacklisting

Many commenters, particularly labor unions, worried that increased access to federal databases--and their arrest histories--would lead to many individuals being denied employment.

The AFL-CIO Transportation Trades Department suggested in its comments that DOJ recommend to Congress that when it comes to hazardous materials truck drivers, there be a clearer nexus between disqualifying felonies and risks to national security. For example, TTD said, although possession of a controlled substance should be punished, it should not necessarily automatically disqualify an individual from holding a hazardous materials endorsement. Similarly, many aviation workers have been forced out of the industry for committing offenses that do not affect airline security, TTD asserted.


Teamsters President Hoffa acknowledged that "some of our members have pasts that are less than stellar," but added that "this does not mean that they are not qualified for their jobs, are a security risk, or that they should not have the opportunity to be productive members of society. Therefore, any increase in the use of criminal background checks for non-criminal reasons must be balanced with civil rights, privacy concerns, and basic employee protections."

Similarly, the Security, Police, and Fire Professionals of America submitted a letter warning that the intelligence reform law apparently authorizes employers to consider arrest records and not just convictions--but does not tell them what exactly the job candidate did. "The possible and probable result of such a system is the effective 'blacklisting' of an individual from the security industry," the union warned, even if an individual was arrested but never convicted.

NELP observed that many industries currently subject to employment prohibitions based on criminal records tend to employ entry-level workers. "As a result, the new laws are foreclosing employment opportunities to those with criminal records who rely on entry-level work as their first, and often only, employment action," according to NELP's Emsellem.

TTD suggested the creation of a waiver process to allow workers who have committed a disqualifying felony to demonstrate that they are not a security risk. Such workers should be able to appeal to an administrative law judge or some other independent person, rather than to someone who would face political pressure to avoid giving convicted felons a second chance, according to TTD. The Air Line Pilots Association also called for an appeals process to allow pilots to demonstrate that they are not a security risk.

There also are legal compliance issues, according to ESR's Rosen, who said use of the FBI database can subject employers to legal exposure under both federal and state civil rights and anti-discrimination laws. California, Illinois, New York, Virginia, and Washington are among the states that prohibit the use of arrest records for employment decisions. Furthermore, the Equal Employment Opportunity Commission has said

that the use of arrest records is subject to limitation, and even when asking about convictions, the EEOC has said employers should have a business justification for doing so. 

By Eric Lekus

Contact customer relations at: customercare@bna.com or 1-800-372-1033
ISSN 1522-5968

[Copyright](#) © 2005, The Bureau of National Affairs, Inc.
[Copyright FAQs](#) | [Internet Privacy Policy](#) | [BNA Accessibility Statement](#) | [License](#)

Reproduction or redistribution, in whole or in part, and in any form,
without express written permission, is prohibited except as permitted by the BNA Copyright Policy,
<http://www.bna.com/corp/index.html#V>

