

# Background Checks and the Health Workforce: Practices, Policies and Equity

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Ben Dunlap, MPH, Anne Basye, MFA, Susan M. Skillman, MS

## KEY FINDINGS

Potential U.S. workers seeking jobs in health care, as in other industries, are subject to background checks throughout their careers, from education, to licensing, to employment. Long-term care, home health, behavioral health and other settings serve vulnerable patient populations, face public concern about quality of care, and operate under complex regulatory and reporting structures. They provide many jobs with relatively short training requirements yet have difficulty recruiting and retaining workers. Background checks are intended to prevent harms to clients and businesses and ensure a quality workforce, but problems with their application may also exclude qualified workers. This study reviewed relevant literature and conducted key informant interviews to describe: why and how background checks are used; the broad variation of laws, regulations and policies that govern them; evidence relevant to their use and potential misuse; and ways to use background checks to help ensure patient/client safety and support health workforce development.

Specific findings include:

### Background checks and their use

- Background checks review an individual's past conduct, including consumer credit standing, personal character, general reputation, and criminal justice system interactions.
- The background checks industry has

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## KEY FINDINGS continued

grown considerably, due to: the increased availability of private and government electronic databases, including criminal databases; few barriers to entry into the industry; and rising demand for services.

- Federal and state regulations provide a variety of enforcement mechanisms to prevent misuse of background check information, but the time and resources required for implementation and related litigation blunt their effectiveness.

### Consequences of using background checks

- Criminal involvement data obtained through background checks may be incomplete or inaccurate, lacking final dispositions of charges or state-level conviction records, or drawing on incorrect name-based matches and uncorrected identify theft.
- The evidence that background screening processes are effective is mixed. Some evidence links types of criminal history with subsequent risk to clients/patients and to employers, but there is also research showing that, for example, a majority of nurse aides found to have abused or neglected patients had no prior criminal history.
- Research shows that, over time, the risk that a previously convicted individual will commit a new crime decreases, depending on the type of prior crime, gender, and age at conviction. Eventually, an individual with a record poses nearly the same level of risk for committing a new offense as an individual without one.
- There is wide recognition that criminal records have a disparate negative impact on people of color and on lower income individuals.
- Concern about background checks deters some job and education program applicants, despite the availability of appeals and individual reviews of disqualifying findings.
- Criminal background checks as currently used may have limited efficacy in preventing harms to patients, may unnecessarily limit the available health workforce, and, to the degree that they prevent employment, may contribute to recidivism.
- Widespread use of background checks may be determined more by their convenience and low cost than by their effectiveness in reducing risk of harm.

### Looking forward – options and opportunities

- Many initiatives are underway to adjust the balance between patient risk, workforce development, and the rights of justice-involved individuals. These include state and local legislative actions, litigation, and programs to help justice-involved individuals gain employment.
- System-level solutions to prevent abuse and neglect of vulnerable patients and clients deserve more attention, such as addressing low staffing levels and inadequate staff training in health care settings.

### Implications for policy and practice

To address problems that result from using background checks, policymakers and users should consider the following guidelines:

- Take into account the power differentials between those using background check reviews and those being reviewed.
- Address the disparate impact of background checks on employment prospects for people of color and people with low income.
- Remember that criminal records may contain important errors and omissions.
- Resist the pressure to hire quickly – try not to skip over an applicant whose background check is taking extra time.
- Incentivize employers to develop written policy to guide hiring managers and provide training for appropriate reviews of background checks. Support measures that help employers interpret background checks accurately.
- Consider both system-level and individual risk factors for harm in health care education, licensing and employment settings.
- Identify and implement evidence-based programs that prevent abuse and neglect of vulnerable individuals.
- Improve and increase use of bonding programs which insure employers hiring “high risk” employees.
- Recognize that the likelihood of recidivism may decline over time.

Background checks can be a tool to help protect vulnerable patients and clients while promoting access to a high-quality and diverse workforce, but the drawbacks and potential harms of these checks need to be remedied.

# Background Checks and the Health Workforce: Practices, Policies and Equity

## INTRODUCTION

Health care employers, regulatory agencies, and education programs in the U.S. frequently review information about an applicant's background before or after hiring, during professional licensing processes, or before acceptance to an educational program and career path. Typically the information sought includes evidence of any prior convictions for a criminal offense, credit history, and verification of education and credentials, among other topics. Though these background checks may appear straightforward, they rely on information from a variety of sources, and are governed by a complex regulatory environment. The internal policies of the organizations obtaining background screening information are shaped by relevant federal, state and local laws and court precedent, as well as industry norms, all of which may vary by jurisdiction, professional licensing requirements, and type of employment setting.

The number of individuals under correctional supervision has grown over the past decades, particularly those released on parole and on probation in lieu of incarceration (Bureau of Justice Statistics, 2020; Shannon et al., 2017). In 2015, an estimated 70 million people in the U.S. had an arrest or conviction record, and approximately 700,000 were released from incarceration annually (S. Williams et al., 2016). The racial disparities in criminal records in the U.S. have also widened over time: between 1980 and 2010, the estimated percent of African American adults with a felony conviction rose from 7.6% to 23%, compared with a rise from 2.5% to a little over 6% among the rest of the U.S. population (Shannon et al., 2017). In 2008, unemployment among all previously incarcerated individuals was 27%, while 43% of African American women with a record, and 35% of all men with a record, experienced unemployment (Couloute & Kopf, 2018). Whether it is harder or easier for individuals with records to find employment during the COVID-19 pandemic is unclear. In the past, a high rate of unemployment, as seen at the start of the pandemic, disadvantaged individuals with records who were seeking work (Stabley, 2021). More recently, anecdotes of relatively strong hiring of individuals with records during the current pandemic can be found (Lee, 2021).

The health care industry has a consistently high demand for workers, and most jobs in the field are considered to be of good quality with employment benefits and opportunities for professional growth. It is important that the health care workforce receive some initial and ongoing scrutiny during their employment to help ensure effective and safe environments for delivering their care, especially because many individuals who receive health care (patients, clients, residents) have some kind of limitation or impairment that makes them particularly vulnerable. The background check is one tool used to select trainees, licensees and employees that are perceived to be low risk to educational institutions, licensing agencies, employers and their clients.

Health care employees in the U.S. are subject to background checks throughout their career, from education, to licensing, to employment. In this report, we outline how background checks shape education, licensing and employment, with specific examples from health care settings such as long-term care, home health settings and behavioral health. The report addresses the following questions:

- What are background checks?
- What regulations and policies govern the use of background checks in general, and in health care settings?
- What are the ways in which the health workforce is affected by the use of background checks, especially in settings with vulnerable patients and a high demand for workers?

- How are policies for background checks changing, and how might these relate to health care settings?
- How can background screening be improved to help ensure patient safety and security, and strengthen the health care workforce?

By examining how background checks can affect patient and client safety as well as workforce development, this report offers information that may be used to improve how background checks are used in practice, and areas for future policy focus.

## APPROACH

We reviewed literature from scholarly databases and internet searches to identify relevant sources related to criminal background checks in general employment and in health care settings specifically, focusing on how they are used as employer risk-mitigation strategies with the intent of preventing abuse and neglect of vulnerable individuals. We also conducted interviews with six key informants, described below and in **Appendix B**.

Our literature review included reports from national and regional organizations focused on improving the background check process, relevant state and federal laws and regulations, congressional testimony, and programs that encourage the use of background checks in health care settings with vulnerable adults, or that attempt to address ways for individuals who have had contact with the criminal justice system to gain employment. We also examined peer-reviewed publications relevant to safety, workforce development, and policy directions for background checks in the health workforce. In addition, we drew from recent work in Washington State, co-authored by two of this report's authors, that addressed barriers to behavioral health employment related to criminal background checks (O'Connor et al., 2020).

For this report, the study team selected key informants with expertise on the use of criminal background checks, as well as the effects of these checks on the workforce, including advocates, legal experts and academics. Interviews were conducted using a semi-structured interview guide for clarification and insights on these topics, and were transcribed and reviewed by the study team. The University of Washington Internal Review Board determined this study to be exempt from human subjects regulations.

## BACKGROUND CHECKS AND THE HEALTH CARE WORKFORCE

### What are background checks and why are they used?

Background checks are a review of information about an individual's past conduct, often in the context of an application to an educational program, occupational license, or a job, and may also verify information reported by the applicant such as their name, educational and training credentials, certifications, and other information relevant to the applicant selection process. The information sources used vary and are described in greater detail below (see "Examples of data sources used for background screening"). Though there are many laws which reference and regulate the use of background checks, the U.S. Fair Credit Reporting Act (FCRA) provides some of the most detailed federal regulation of background screening processes (Federal Trade Commission, 2020). Within FCRA, background checks are referred to as "consumer reports" and are defined as:

*...any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is to be used...as a factor in establishing the consumer's eligibility for – (A) credit or insurance to be used primarily for personal, family or household purposes; (B) employment purposes;... ("15 U.S. Code § 1681a - Definitions; rules of construction," 2020).*

Reasons for using background checks vary. Employers report using background checks, and identification of prior criminal histories, to reduce risk of harm to clients and their business, reduce liability, and to meet regulatory requirements, among

other concerns (HR.com, 2020). Stigma, an aversion to people with a criminal record independent of the conduct itself, may also be influencing how background checks are used during hiring decisions (Sugie et al., 2020). A U.S. Government Accountability Office (GAO) evaluation of the 1993 Child Protection Act found that the deterrent effect of background checks (i.e., preventing some individuals with criminal records from applying to certain jobs) was an even more important function for some hiring officials than obtaining results to use in hiring decisions (U. S. Government Accountability Office, 1997). Although the GAO's report was limited to settings with children, employers' use of background checks to deter certain types of applicants may be relevant in other settings as well.

## **Growth in use of background checks**

Completing a background check in a legally permissible way, and correctly using the information for hiring decisions, is a complex task, particularly in the highly regulated health care sector (Snyder, 2020; Wells & Harrington, 2013). As a result, most background checks are completed by third party companies, such as consumer reporting agencies, that specialize in these checks (Bushway & Kalra, 2021). An estimated 72% of colleges in the U.S. conduct background checks on applicants (Stewart & Uggen, 2020). The number of states using both name-based and fingerprint-based background checks during occupational licensing is growing (Murrin, 2019a, 2019b). In 2000, an estimated "70% of large companies and less than 20% of small to mid-sized companies" used background checks on new and current employees (HireRight, 2011). Since then, background checks have become nearly ubiquitous in hiring, with estimates ranging from 87% to 97% of U.S. employers using criminal background checks (Nelson, 2019).

The background check industry is large and there are no federal or state registration requirements for existing or new companies in this industry. In 2019, there were an estimated 1,954 background screening companies, and the two largest companies accounted for 14% of the industry's revenue (Consumer Financial Protection Bureau, 2019). Today, the background check industry collects \$3.2 billion in revenue and is forecasted to grow 7.8% between 2019 and 2025 (Market Research Future, 2021).

Both employer demand and increased availability of data have contributed to the growth in the use of employment-related background checks. Employer concern about negligent hiring lawsuits may be one of the most important drivers of demand for background checks (Bushway & Kalra, 2021). Social and legislative reactions to some high-profile crimes committed by individuals with past arrests or convictions, including in health care settings, as well as the September 11th attacks, have also contributed to the increased demand for background checks (Love & Schlüssel 2020a; Travis, 2002). On the supply side, Federal programs, state laws, and U.S. Supreme Court precedent made some types of court records, including arrest records, available online for free, and these have been turned into commercial products. Access to records has also become easier as technological advances have reduced some of the costs of gathering, storing, and processing relevant information (Corda, 2016).

## **Background check technologies**

The methods used by the background check industry are changing rapidly as companies apply new technologies to increasingly detailed datasets about individuals. Twenty years ago, background checks were labor intensive and so only used by those companies with resources and a perceived need. Technological and statutory changes have generally facilitated access to criminal records, reducing the time and effort required to complete a criminal background check.

Continuous background check services, also called "rap-back" services, proactively report new information about current employees or students to their employer or institution after the individual is hired or admitted (FBI Criminal Justice Information Services Division, 2021). More recently, the application of artificial intelligence (AI) to large datasets has allowed background check companies to more efficiently process and use detailed information about individuals to "continuously monitor"

employees and assess for risks to client businesses. For example, Virginia-based software company Endera claims to use AI to continuously monitor “thousands” of datapoints about an individual employee in an effort to identify changes in risk to a business. Results can be tailored to specific industries concerned about specific types of worker behavior that may be perceived as particularly risky given an individual’s position at a company. For example “[h]ospitals are seeking to screen employees and patients for domestic abuse detection, which Endera identifies through divorce, restraining orders and citations” (Francis, 2017). Other major companies that use AI include Chekr and Intelligo. While automated background check processes may appear more efficient to hiring managers, admissions officers, and licensing agencies, they have also have raised concerns that automation may obscure flawed data or reproduce prohibited forms of discrimination (Eaglin, 2017; Martinez, 2020; Nelson, 2019; Smith, 2020; U.S. Federal Trade Commission, 2016).

Matching individuals to records in criminal databases involves a variety of technologies. State-based criminal records are typically matched to an individual using the applicant’s name and date of birth. Background checks using the Federal Bureau of Investigation’s (FBI) national database are matched using fingerprints, perhaps the most well-known form of biometric (i.e. physical measurement) record matching. Other more sophisticated biometric matching technologies include photographic matching against online photographs, and derived-data (e.g. “face-prints”) such as the commercially available service offered through Clearview AI (Hill, 2021). Other matching technologies that rely on databases of human DNA are limited to criminal justice activities and are not currently legal to use during hiring, licensing, or admissions decisions (LaMance, 2018; Shawneequa et al., 2010).

Accurate record linkages are critical to match a student, license applicant, or job seeker to relevant records, if any exist. When done incorrectly, applicants may be matched with records that in fact refer to a different individual, and the applicant may be unfairly excluded. This problem has led to lawsuits against background check companies by individuals seeking damages for lost employment opportunities (Nelson, 2019). State-based background checks, which typically use the candidate’s name and date of birth to match records, may provide incorrect results for individuals with common names. Biometric means of linking individuals to records, such as fingerprints, have the potential to be more precise in linking individuals to records, but also may falsely associate an individual with prior criminal behavior. Though expectations of the databases might be quite high among the public and law enforcement, U.S. Senate testimony in the 2000s indicated that up to 50% of records in the FBI’s fingerprint database were missing information about case disposition, (e.g. whether or not an arrest led to a conviction) (Nelson, 2019; Yu & Dietrich, 2012). The U.S. GAO has reported various efforts intended to remedy this issue such as the FBI’s Disposition Task Force in 2009, and Department of Justice’s assistance to states to improve record completeness (U. S. Government Accountability Office, 2015).

The information returned by background screening companies varies and is not standardized. Reports from different background check companies may vary by what data elements are included, how individuals are matched to records, accuracy, and the completeness of the records. These data sources are described in greater detail below.

## **Use of background checks to deny or condition employment, licensing, and education in health care**

Health care employers in the U.S. have considerable discretion in how they use background checks (Bushway & Kalra, 2021). They typically check backgrounds with the goal of ensuring patient safety, engendering trust and improving public perceptions of professions and employers, and avoiding legal liability for the employer, such as negligent hiring charges. In educational institutions, background checks are intended to prevent harm to both students and the institution. In health care education, the checks are frequently conducted to ensure students can meet requirements for clinical training in health care facilities. In state licensing and credentialing processes, background checks can restrict practice to individuals deemed by authorities to

have good character, including an absence of sometimes vaguely defined “crimes of moral turpitude”, in addition to meeting education and experience requirements.

The use of background checks in health care is one of many ongoing efforts intended to prevent harms to patients in health care settings, and to help improve the quality of care in these settings. Public and government concern about harms to patients in nursing homes and other long-term care settings have, since 1935, been periodically addressed in federal regulation, including in 1965 with the passage of the Medicare and Medicaid Acts (Institute of Medicine Committee on Nursing Home Regulation, 1986). In 1983, only five states leveled a total of 376 criminal penalties for patient abuse (Institute of Medicine Committee on Nursing Home Regulation, 1986). Reports from the Institute of Medicine (IOM) and other sources led to inclusion of language in the Omnibus Budget Reconciliation Act of 1987 barring individuals convicted of abuse or neglect of nursing home residents from working in nursing homes (Institute of Medicine Committee on Nursing Home Regulation, 2001). In 2010, passage of the Affordability Care Act (ACA) ushered in new reforms, including a federal grant program to support states’ development of fingerprint-based national background checks for employment in long-term care settings, as well as requirements for health care employers to exclude job applicants who are listed on the Health and Human Services Office of Inspector General’s (HHS-OIG) Exclusion List (Murrin, 2019a). HHS-OIG’s 2019 evaluation of 11 of the states participating in the ACA background check program for long-term care facilities found that the number of determinations of ineligibility varied among the states, from 0% to 3%. (Murrin, 2019b). While the evaluation noted that none of the states reported unintended consequences associated with conducting background checks, such as reduced availability of long-term care workers, given the long-standing workforce shortages in these settings, it may be difficult to distinguish among factors affecting recruitment problems.

Many workers in behavioral health occupations, which include professions providing mental health and substance use disorder services, engage with vulnerable populations and are thus subject to background checks related to their employment. Individuals who have experienced and are in recovery from chemical dependency and addiction are sometimes the best suited to assist patients in recovery as substance use disorder professionals and peer counselors. These individuals in recovery may also be more likely to have criminal convictions that stem from their addiction. If disqualified by background checks from the education, licensing and employment opportunities to become a behavioral health professional, the individual not only is unable to leverage their adverse experience for their own career benefit, but access to beneficial services for clients seeking recovery may also be reduced.

Many jurisdictions have statutes or regulations which restrict employment for individuals with certain criminal records from working in some health care settings (Office of the Assistant Secretary for Planning and Evaluation, 2018). Other jurisdictions’ courts have struck down prohibitions on employing individuals with criminal convictions on the grounds that these bans are unconstitutional (Langley, 2016). Guidance increasingly points towards careful assessment of an applicant rather than firm bans in health care settings (Office of the Assistant Secretary for Planning and Evaluation, 2018). This may be particularly relevant for some occupations like peer counseling or forensic peer support specialists, whose own history of criminal justice involvement becomes a tool they use to help clients with similar experiences in recovery and interactions with the system.

Background checks may affect a career, including in health care, at any stage (**Figure 1**). Students, potential employees, recent hires, and existing employees may all be screened for criminal records or other potentially disqualifying history. During employment, licensing, or educational screening processes, a background check may reveal findings that disqualify a potential student or worker from education and employment.

Although background checks may limit the number of candidates seeking employment, institutions and employers may see these checks as protective against potential future litigation or damage to their reputation. From the perspective of the

**Figure 1: Criminal background checks may be conducted at any of the following points**

<u>Education</u>	<u>Licensure</u>	<u>Employment</u>
<ul style="list-style-type: none"><li>• Application to program</li><li>• Clinical training application</li></ul>	<ul style="list-style-type: none"><li>• Initial license application</li><li>• “Good-character” requirements</li><li>• Continuous checks during licensure</li></ul>	<ul style="list-style-type: none"><li>• During application process</li><li>• Continuous checks during employment</li></ul>

applicant with a criminal or arrest record, a required background check may end a career, possibly before it begins, if the person believes they will be excluded from job opportunities due to their criminal record. Every stage of a health care career can be affected, interrupted, or closed by a background check that reveals a criminal record: from enrolling in an educational program to starting supervised clinical work or seeking licensing and credentialing.

Our interviews indicate that background check processes can take time to process and an individual with any arrest or conviction history may be at a disadvantage during hiring simply because of the delay, even for a minor offense. For individuals without any arrest or criminal record, criminal background checks are typically completed in 2-3 days. However, criminal background checks for individuals with an arrest or conviction, particularly those with records in other states, may be delayed while databases are checked and primary documents such as court records are gathered. For the hiring manager with an open position, this delay may telegraph an undesirable candidate and could create an incentive to hire someone with a background check that was returned more quickly and without findings of involvement with the justice system.

## Examples of data sources used for background screening

The data sources used for background checks may affect the kinds and amount of information that is revealed, which could in turn affect decisions about employment or admissions. Relevant data sources for background screening in health care depend on several factors, including: the entity or employer’s internal policies for screening candidates, the specific position, the practices and data sources of the background screening company (“consumer reporting agency”), and the laws and regulations governing the specific health care setting or occupation. Some of the information sources for determining hiring suitability may include criminal records, sex-offender registries, non-criminal registries of professional conduct, and industry-specific databases. Adding to this complexity, criminal convictions and arrest records are held by a variety of different entities including county courts, police agencies, non-law enforcement state agencies, and federal agencies, with differing approaches to access.

### ***Private databases held by consumer reporting agencies***

Consumer reporting agencies collect and sell information about individuals as defined in FCRA, including criminal history data, educational verification, credit history, tax compliance, drug testing results, etc. These companies may compile databases of information about individuals for commercial use. Some companies that provide information about private individuals explicitly state that they are not consumer reporting agencies, which may be a legal strategy to avoid liability for harm under the terms of the FCRA, which regulates consumer reporting agencies (Nelson, 2019).

### ***State-level background checks***

State records of arrests and criminal convictions are commonly used data sources for background checks. State-based criminal records, housed in the state’s court systems, are often public record (Lageson et al., 2021). While many states have state-centralized electronic means of accessing these records, others do not aggregate them. State-level records for health care related background checks typically contain police records, state court records, sex-offender registries,



and health care worker registries, e.g., nurse aide registries (Levinson, 2011). Police records include arrest data, but may not include information about the disposition of a case (e.g., whether charges were dropped or if the person was convicted) (Nelson, 2019).

Most states also maintain separate state-based Medicaid exclusion lists for providers and entities which may have violated state laws and as a result cannot bill the state Medicaid agency for services. As one background check company notes, these state Medicaid exclusion lists include, “violations of state law that do not necessarily violate federal law—and may not be reported to the federal databases. This is despite the fact that the federal [Affordable Care Act] now mandates that if a provider or entity is excluded under any state Medicaid database, that provider should be excluded from participating in all states” (Stefansky, 2021).

### **Federal-level background checks**

The FBI’s Interstate Identification Index (FBI Index) contains fingerprint data for individuals arrested, as well as convictions, and is the source queried during fingerprint-based background checks (Levinson, 2011). This database includes individuals with any arrest, as well as those with convictions. An estimated 75 million people, or one in three individuals in the U.S., have an arrest or conviction record in the FBI Index (Prescott & Starr, 2020). The FBI Index records are compiled using federal and state court and police records. The FBI Index has come under scrutiny for incomplete records, and records which have not been updated as needed, particularly with case disposition data (National Employment Law Project, 2015; Nelson, 2019). Disposition data are necessary to determine if the individual arrested and fingerprinted was ever charged with a crime, and whether they were convicted or if charges were dismissed.

The HHS-OIG maintains the OIG’s List of Excluded Individuals/Entities (LEIE) who are not allowed to bill any federal health care programs, including Medicare and Medicaid (Office of Inspector General, 2021a). The list includes both mandatory and discretionary exclusions made by the HHS-OIG. Health care employers who contract with any excluded individual or entity are themselves also barred from payment by federal health care programs. The ACA requires long-term care employers to query the LEIE when hiring or contracting. This exclusion includes all employees in the long-term care setting, regardless of whether or not they are licensed, and regardless of role in the company, and numerous enforcement actions have leveled fines against companies hiring excluded individuals: one long term care facility was fined \$376,000 for multiple violations of the exclusion rules, with fines in the tens of thousands of dollars per violation more common (Provider Trust, 2013). To make the LEIE list more useful to state Medicaid agencies, the U.S. Centers for Medicare and Medicaid Services (CMS) adds personally identifying information such as social security number, date of birth, and National Provider Identifier (NPI), if applicable and available, and provides these data to state Medicaid agencies for their use (Stefansky, 2021).

Health care employers may also be required to, or wish to, avoid hiring individuals excluded from the General Services Administration’s (GSA) System for Award Management (SAM) (Office of Inspector General, 2021b). Whereas the LEIE list is specific to health care and the OIG can level fines against individuals and entities, the GSA’s SAM holds records of entities doing any kind of business with the federal government, as well as those barred from doing business with the federal government due to statute or regulation (Stefansky, 2021).

### **Administrative findings**

Administrative findings reached by state agencies after completing a hearing or other procedure may be collected during a background check. Administrative findings do not require as rigorous a burden of proof as a criminal conviction. State child or elder protective services’ findings of abuse or neglect of vulnerable persons or children are one type of state agency administrative finding that may be identified through background checks. Other types of administrative findings used in background checks include those referenced in states’ unprofessional conduct statutes related to professional licensing.

These types of findings would not typically be in a criminal or court record unless the agency finding led to civil or criminal charges. Administrative findings may also be relevant in states where licensing laws require that licensees have “good moral character” as determined by a state authority, which can be difficult to justify and vulnerable to legal action by the licensing applicant (Atkinson, 2019; Umez & Pirius, 2018).

### ***Industry-specific and proprietary databases***

Some background check companies build databases that are specialized for use in specific industries. In the health care industry, Verisys aggregates data for the purposes of screening, verifying, and monitoring health care providers. Its proprietary database, the Fraud Abuse Control Information System (FACIS), incorporates data from state-level medical and specialty boards, HHS-OIG and GSA, as well as other non-criminal federal and state administrative data, which may relate to an individual's eligibility to be licensed or employed in some health care occupations or settings (Verisys, 2021). Some background check companies rely on Verisys' FACIS database to complete background checks for health care employers (HireRight, 2021).

### ***National Practitioner Data Bank (NPDB)***

The National Practitioner Data Bank (NPDB) is a web-based repository of reports containing information on medical malpractice payments and certain adverse actions related to health care practitioners, providers, and suppliers. Established by Congress in 1986, this workforce tool consolidates data to provide a national resource to help reduce health care fraud and abuse by supporting the process of professional reviews of providers (National Practitioner Databank, 2021). Federal regulations authorize eligible entities to report to and/or query the NPDB. Individuals and organizations who are the subjects of these reports have access to their own information, but the confidential reports are not available to the public. Long-term care settings are among employers not typically able to access the NPDB because they do not typically meet the eligibility requirements for data access (e.g., having a regular peer review process), though this could change with proposed federal legislation (Yamshon, 2019).

### ***Social media***

Social media may also be used by some employers and educational institutions as part of a background check. According to one industry survey, 70% of hiring managers and human resource professionals reported viewing social profiles or using an online search engine to research candidates (CareerBuilder.com, 2017). While individuals with public-facing social media accounts may not have a reasonable expectation of privacy, use of social media may expose hiring managers and others reviewing applications to charges of bias (Barreiro, 2013; Hazelton & Terhorst, 2015). Currently, 25 states have passed laws expressly forbidding employers from asking potential hires and existing employees for their login information to social media accounts (Barreiro, 2021).

## **How are background checks regulated?**

### ***Federal regulations***

Background checks are generally regarded as more necessary when convictions are considered to be particularly relevant to job duties, such as a health care job applicant with a conviction for abuse or neglect (U.S. Equal Employment Opportunity Commission, 2012). Because of this, employers in health care generally have considerable discretion in how to use criminal histories obtained through background checks.

Patient safety in nursing homes and long-term care settings, and in particular protection from abuse and neglect, has been an area of concern at the Federal level for decades (Institute of Medicine Committee on Nursing Home Regulation, 1986, 2001; Levinson, 2011, 2014, 2018; National Research Council, 2003; U. S. Government Accountability Office, 2019). Background

checks are typically seen as one way to mitigate risks to nursing home residents. Federal law does not explicitly require nursing facilities to conduct state-level or FBI criminal background checks on employees, but does require that nursing homes and long-term care settings take reasonable steps to assure patients' rights are respected, and that a standard of care and quality of life is upheld for beneficiaries (U. S. Government Accountability Office, 2019).

FCRA regulates consumer reporting agencies' sharing of any information including state-level police records, FBI fingerprints, administrative findings from child protective services, and any other non-criminal information used to establish an individual's suitability for employment (Federal Trade Commission, 2020). A consumer reporting agency is defined in FCRA as an individual or entity that assembles or evaluates "consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties...." FCRA includes detailed requirements for how consumer reporting agencies may and may not release information about an individual, including that agencies may not report arrests or convictions greater than seven years old unless the expected annual salary of the position is \$75,000 or more (Federal Trade Commission, 2020). The FTC and the Consumer Financial Protection Bureau (CFPB) are responsible for enforcing FCRA (Federal Trade Commission, 2020).

When background checks are used by employers, under FCRA, candidates for employment must be notified of adverse information identified by the check that influences a decision to not hire the candidate. The candidate is then to be given a minimum period of time to challenge the veracity of a background check. Determining compliance with the relevant laws and regulations is daunting, however, and it is unclear if these laws are being honored by employers. For example, our key informant interviews suggested that FCRA requirements for notification of individuals adversely affected by a background check may be skipped over by many employers without consequence, and applicants often do not know of their right to notification and appeal. Nonetheless, lawsuits continue to be filed alleging violations of FCRA (Fleigel & Stockton, 2018).

More specific to health care, federal CMS regulations explicitly require participating nursing facilities to "not employ or otherwise engage individuals who—(i) Have been found guilty of abuse, neglect, exploitation, misappropriation of property, or mistreatment by a court of law; (ii) Have had a finding entered into the State nurse aide registry concerning abuse, neglect, exploitation, mistreatment of residents or misappropriation of their property; or (iii) Have a disciplinary action in effect against his or her professional license by a state licensure body as a result of a finding of abuse, neglect, exploitation, mistreatment of residents or misappropriation of resident property" ("Requirements for States and Long Term Care Facilities," 2021). In 2011, however, the HHS-OIG was not able to determine whether employees with a record were employed in violation of the federal regulation because the FBI-maintained criminal history records list convictions, but do not specify characteristics of victims, which is necessary information to understand legal compliance with the CMS regulation and to disqualify an individual from nursing facility employment (Levinson, 2011).

### **State and local regulations**

State and municipal policies for nursing facilities' hiring practices may be stricter than federal regulations, and vary in terms of what databases must be queried and what roles require a background check (Levinson, 2011). In 2017, over 19,000 state and local laws authorized or required the use of background checks for employment purposes (Duane et al., 2017). The use of information from background checks is highly regulated in some settings and jurisdictions and lightly regulated in others, and may be encouraged or even required in some settings and cases while prohibited in others. State and municipal laws may set additional requirements for licensing, education, and accreditation, which may authorize or require a background check in specific settings or occupations, and determine what information can be used. Relief measures for individuals with an adverse background check also vary considerably by jurisdiction, the type of conviction, and the nature of the work (Love & Schlüssel, 2020b).

The wide variation in policies regulating background checks reflects competing objectives seeking to balance employer and worker interests (Kurlychek et al., 2019). Some laws are written to provide relief to the job applicant while others seek to protect employer interests. Ensuring personal safety and property protection for patients, employers, and colleagues is a frequently cited goal. For employers, concerns about liability and reputation may be paramount. Other objectives include promoting access to adequate and appropriate high-quality health care, and reducing crime and recidivism by promoting employment, licensing, and education, among those with a criminal history.

The information obtained from background checks, which may disqualify individuals from working in long-term care settings, varies by state. In 2012, a report commissioned by CMS found extensive variation among states with regard to what criminal convictions barred long-term care employment, whether states used fingerprint-based background checks or name-based checks, or both. The report also found extensive variation in whether there was a lifetime ban on employment for certain convictions or a time-limited ban during which additional convictions would prohibit employment (CNA, 2012). For example, Florida law requires disqualification from long-term care employment if a background check shows arrests or charges for specific offenses (Murrin, 2019a). In the District of Columbia, a prospective employee who has committed a disqualifying offense may still be eligible for employment if there was only one offense, the offense does not involve abuse, and there were no pending charges at the time of hire (Murrin, 2019a). The Washington State Department of Social and Health Services uses a list of crimes and timeframes to exclude individuals from certain positions, without individualized review, though any decision of disqualification can be appealed (Washington State Department of Social & Health Services, 2020). On the other hand, the Washington State Department of Health uses individualized review for applicants with records before making a determination regarding licensure. In Rhode Island, the state conducts criminal history checks for prospective long-term care employees, but employers are responsible for making the final disqualification determination rather than the state disqualifying applicants directly (Murrin, 2019a).

### **Compliance and enforcement**

Compliance with background check regulations varies, and effectively enforcing regulations is difficult. One key informant described the situation this way:

*Even though...the state has made a judgment that certain records should not be viewable ... that doesn't mean that these ... commercial [background check] entities don't report them anyway. Potential employers, for example, would rather that these commercial companies over-report, even if that is not the law. They often want to know more about the person than even they're legally entitled to know because of...the perceived risks around criminal history.*

Existing federal and state regulations provide a variety of enforcement mechanisms to prevent misuse of background check information by employers. Under federal law, individuals or classes of people may sue employers or consumer reporting agencies if they believe they have been unlawfully barred from employment or opportunities due to a background check. The FTC and Consumer Financial Protection Board may bring enforcement actions of FCRA, and the Equal Employment Opportunity Commission (EEOC) may sue if they believe an employer's use of background check information unlawfully discriminates against a class of people protected by the Civil Rights Act of 1964 (U.S. Equal Employment Opportunity Commission, 2012). Litigation may be brought against background check companies by individuals or by government agencies on various charges, and class action lawsuits for violations of FCRA have been frequent (Dadika, 2016). In 2019, an industry trade group, The Society for Human Resource Management (SHRM), reported that, "[t]he number of FCRA lawsuits has risen each year since 2011 and reached 4,531 for the whole of 2018. The number of claims has more than doubled since 2009" (Maurer, 2019).

As emphasized in our key informant interviews, the regulatory effects of class action litigation is likely blunted because of the considerable time and resources required. There are typically large numbers of companies involved in these suits and the litigation must name individual companies, and then establish wrongdoing and actual harm caused by these specified

companies in court. Meanwhile, the many other companies providing background check information may continue to operate on the margins of regulation unless a specific charge alleging actual harm is brought against them.

## THE CONSEQUENCES OF USING BACKGROUND CHECKS

### Are background check data accurate, consistent, or comprehensive?

The sources of information about job applicants that are available to employers may contain incomplete information, especially among records at the state level where most criminal convictions are made (Nelson, 2019; Yu & Dietrich, 2012). An arrest or conviction may appear in one database, but not another, or be included in a database for a limited time. An entity that checks only state-level convictions may overlook crimes committed in another state. Lack of consistent case disposition data is one of the largest accuracy problems. Records may show an “arrest”, but not indicate whether the individual arrested was tried and convicted or if the charges were dismissed. Our interviewees mentioned that non-experts may not know how to interpret this incomplete data and that for some employers, seeing an arrest record could be enough of a suggestion of criminal activity to pass over a candidate.

One source found that commercially prepared background checks commonly include records wrongly attributed to individuals, multiple reporting of the same incidents, and uncorrected identity theft (Nelson, 2019). Our interviews with key informants indicated that some consumer reporting agencies may not be adequately addressing data errors and updating data files. These inaccuracies have continued to generate legal cases, and in 2015, the U.S. GAO issued guidance to help improve the accuracy of these records and the reporting of disposition data from state courts to federal databases (U. S. Government Accountability Office, 2015).

### Do criminal records predict future criminal conduct?

Employers, licensing agencies and educational programs, as well as policy makers, are interested in the extent to which a past criminal record predicts future criminal conduct. Some evidence is available linking criminal history with subsequent risk to clients/patients and employers. The HHS Assistant Secretary for Planning and Evaluation found that, based on their analysis of data from Kansas and Arizona, “nurse aides with a non-disqualifying offense have higher rates of substantiated abuse against patients than nurse aides without a criminal history” (The Lewin Group, 2006).

Future criminal conduct may be influenced by the types of crimes committed in the past, though research in this area is not conclusive. A HHS-OIG study from 2012 found that, “19% of of nurse aides with substantiated findings had at least one conviction in their criminal history records prior to their substantiated finding,” and that most (53%) of these prior convictions were for property offenses, e.g., theft, writing bad checks, shoplifting, etc. (Wright, 2012). The study also found, “. . .nurse aides with substantiated findings of either abuse or neglect were 3.2 times more likely to have a conviction of crime against persons than nurse aides with substantiated findings of misappropriation,” and “nurse aides with substantiated findings of misappropriation [e.g. theft] were 1.6 times more likely to have a conviction of crime against property than nurse aides with substantiated findings of abuse or neglect.” The same study, however, also found that 81% of nurse aides who abused or neglected patients had no prior criminal convictions in the FBI-maintained criminal history records. In their study on elder abuse and neglect, Lachs and Pillemer (2015) point out:

*On the basis of the limited evidence available, perpetrators are most likely to be adult children or spouses, and they are more likely to be male, to have a history of past or current substance abuse, to have mental or physical health problems, to have a history of trouble with the police, to be socially isolated, to be unemployed or have financial problems, and to be experiencing major stress.*

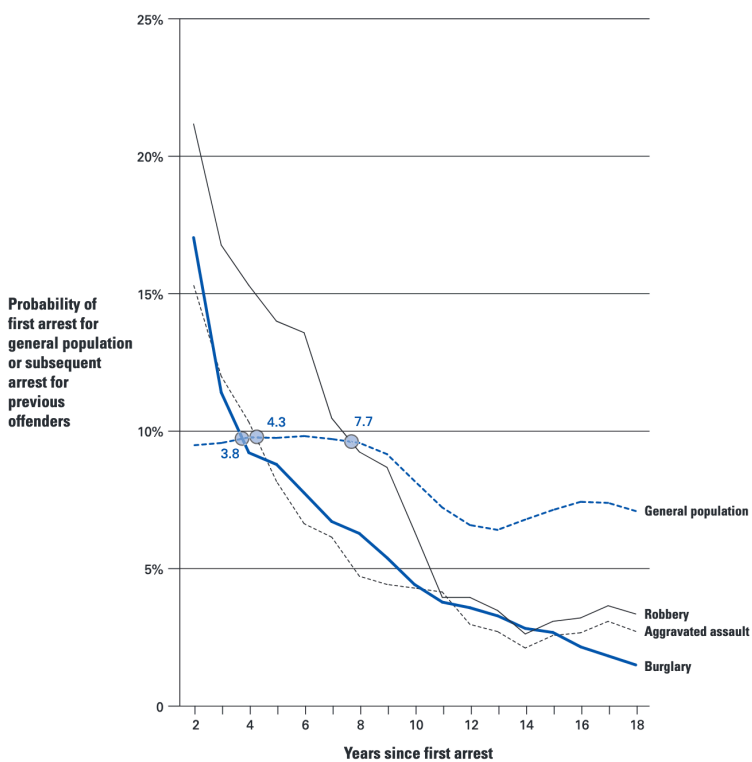
As individuals age, the risk that they will commit a new crime decreases, a trend also influenced by factors like the type of crime committed, gender, education, and the individual’s age at conviction. As illustrated in **Figure 2**, at some point over

time, an individual with a record poses nearly the same level of risk for committing a new offense as an individual without a record—a concept called “redemption” (Blumstein & Nakamura, 2009). Using data from New York, Florida, and Illinois, Blumstein and Nakamura (2012) developed models that estimated redemption times for individuals with various records were longer for violent offenses compared with drug and property offenses. A 2014 meta-analysis found that education in correctional settings reduces reincarceration by an average of 13%, and may also increase the likelihood of employment following an individual’s release from incarceration (Davis et al., 2014)

Exclusion from the workforce through prolonged application of background check findings, however, may counteract redemption. Evidence suggests that barriers to employment can also contribute to an increased risk for recidivism, and emphasizes the societal importance of allowing individuals with records to find legal work. A recent study using data from New York estimated the impact of receiving a work clearance for individuals with criminal records who were provisionally hired to work in non-licensed health care jobs. The researchers found the cleared individuals had a 2.2 percentage point decrease in the likelihood of arrest in one year and 4.2 percentage points decrease in likelihood over three years (Denver, 2017). Percentage point changes were higher for men than for women. Additional research suggests that when individuals with records show educational attainment or have secured a Certificate of Relief (as state-issued certificate indicating evidence of rehabilitation), they signal to prospective employers that the applicant has made an internal private decision to desist from crime—important information that may be difficult or impossible to ascertain directly from the applicant (Bushway & Apel, 2012; Bushway & Kalra, 2021).

**Figure 2. Hazard Rate for 18-year Olds: First-time Offenders Compared to General Population**

The probability of new arrests for offenders declines over the years and eventually becomes as low as the general population.



Source: Blumstein, A., & Nakamura, K. (2009). 'Redemption' in an Era of Widespread Criminal Background Checks. *National Institute of Justice Journal*(263), 6. Retrieved from <https://nij.ojp.gov/topics/articles/redemption-era-widespread-criminal-ba>

## How does race and income influence the way background checks are used and interpreted?

Researchers have sought to understand how employers use and interpret background check information, examining the effects of race, criminal history, and credit information on employer and landlord decision making, as well as how individuals with records navigate these processes (Kuhn, 2013, 2020; Lageson et al., 2015; Pager, 2003; Pager & Quillian, 2005; Quillian

et al., 2017; Reosti, 2020). According to the EEOC, “[n]ational data supports a finding that criminal record exclusions have a disparate impact based on race and national origin” (EEOC, 2012). Some users of background checks assume that a history of arrest, irrespective of conviction or disposition data on conviction, is predictive of criminal activity, and proceed to discount applications based on this information, despite the EEOC’s 2012 guidance against this practice.

An analysis of nationally representative longitudinal surveys of youth indicate that, between the 1980s and the 2000s, arrests became increasingly related to race and less related to criminal activity (Weaver et al., 2019). A variety of studies have described how the collateral consequences of conviction are inequitably distributed by race and class due to population-level race and class inequities in: police arrests (Kochel et al., 2011); increased prosecution of black individuals in some locations (T. Williams, 2019); unequal access to sufficient legal defense based on race and class (Leasure, 2019); unequal rates of conviction (Turney & Wakefield, 2019); harsher sentencing for drug crimes more often found in minority communities (Tonry, 1995); and imprisonment (Pettit & Western, 2004; Western et al., 2001). People of color, particularly in poorer neighborhoods, are generally more likely to come into contact with police, and be arrested, than Whites (Turney & Wakefield 2019).

The potential for background check information to exacerbate economic and race-based inequities undergirded the EEOC’s 2012 guidance to incorporate individualized review (informing the applicant they may be excluded because of past criminal conduct, and providing the opportunity to respond) in the event of an adverse finding (U.S. Equal Employment Opportunity Commission, 2012).

Racial inequities exist at all stages of criminal justice involvement, with Black and Latino men bearing a disproportionate burden of arrests, conviction, and prison time. In 2018, the Sentencing Project reported to the U.N. that:

*African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences. African-American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely. As of 2001, one of every three black boys born in that year could expect to go to prison in his lifetime, as could one of every six Latinos—compared to one of every seventeen white boys. Racial and ethnic disparities among women are less substantial than among men but remain prevalent (The Sentencing Project, 2018).*

The research on redemption by Blumstein and Nakamura (2012) led them to conclude:

*It is important that employers recognize that the arrest prevalence difference does not provide a meaningful estimate of risks posed by white and black applicants with a criminal record, and after a long period of time clean, their risks become similar (Blumstein and Nakamura, 2012).*

Unequal police pressure on specific communities also shapes the background check process. Racially biased outcomes in policing, whether overt or unintended, have been studied for many decades. The concerns regarding racial animus by some police and police departments have been long-standing and based on historic patterns of police conduct towards minority populations (National Academies, 2018). Documented cases of municipal governments’ aggressive collection of fines for petty infractions (sometimes resulting in incarceration), and the unequal burden placed on poor and predominantly Black neighborhoods, adds to the unequal pressure placed on poor and minority communities (The Sentencing Project, 2018).

Public perceptions about risk may also reinforce an over-reliance on background checks for preventing harm in health care settings, intensifying conditions that contribute to workforce racial inequities. Attitudes towards race also influence how background check information is interpreted. For example, the perceived risk of criminal victimization among individuals who identify as White has been shown to be associated with the proportion of Black residents who also live in the same neighborhood, though the actual risk of criminal victimization is not associated with this proportion (Quillian & Pager, 2010). Educational institutions with a high incidence of on-campus crime are more likely to deny admission to Black individuals with records than White individuals with records (Stewart & Uggen, 2020).

Employers on average may be more willing to hire White individuals with a criminal record than Black individuals without a criminal record, indicating that perceptions of risk from past criminal conduct are mediated by perceptions of race (Pager, 2003; Quillian et al., 2017). Even outward expressions of support for hiring individuals with records may not be reliable, as employers who state they would consider hiring someone with a criminal record, on average, do not follow through, and apparently strong racial preferences persist which disadvantage Blacks with records (Pager & Quillian, 2005).

In some cases, individuals with a criminal record may be able to have their records cleared, either through court order, a more formalized record-clearing process initiated by the individual with a record, or automatic expungement (Love & Schluskel, 2020b). However, petitioning a court to have one's record cleared is expensive and uncertain to provide benefit, leaving those with fewer resources without access to this remedy and more likely to be excluded from the workforce. Increasing awareness and political pressure to address unequal access to the courts has led to some innovation in record-clearing processes. Automatic record clearing processes are thought to provide greater access, transparency, and predictability for individuals seeking relief over application-based processes (Prescott & Starr, 2020).

Record-clearing processes also often require that the individual with a record meet certain requirements first, including paying any fines or fees associated with their conviction. These monetary barriers have attracted the attention of policy makers interested in reducing inequities in employment and criminal record burden. This issue was highlighted by one key informant, who pointed out that with these requirements:

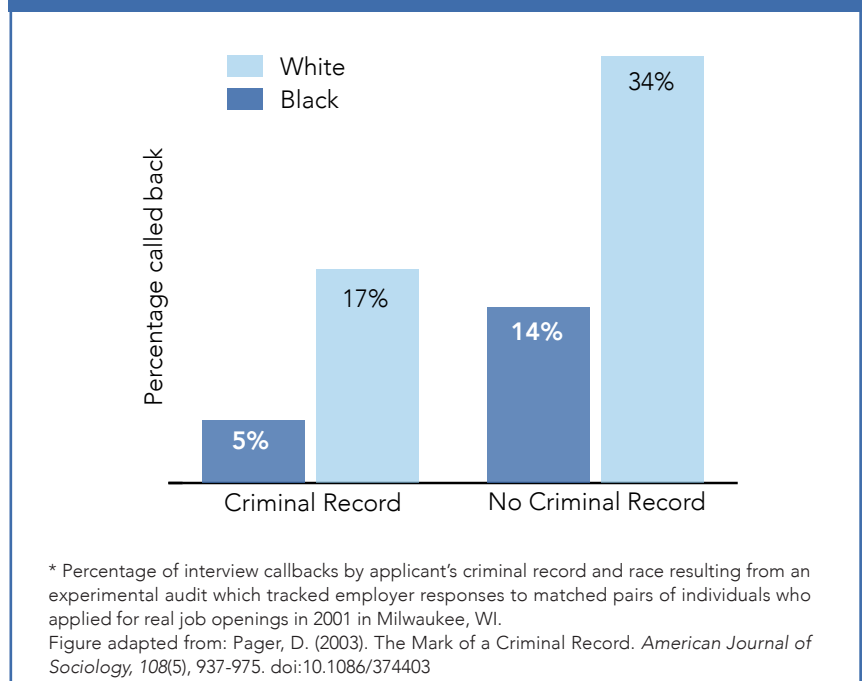
*...you might have someone with the same circumstances, but the only difference between them is wealth and that's the determining factor and who is able to reenter society successfully and access employment.*

Experimental audits designed to quantify the impact of a criminal record and race on employment prospects have shown that while having convictions in a criminal record does significantly reduce interview callbacks, appearing to be Black in the eyes of a potential employer may have an even greater negative impact on employment than a criminal record, as illustrated in **Figure 3** below (Pager, 2003; Quillian et al., 2017).

## Do background checks deter good job candidates?

It is exceedingly difficult to quantify the degree to which individuals with records avoid applying to educational programs, licensing, or jobs. However, our key informants suggested that workers with records generally do not apply to jobs or attempt to work in industries where they believe they will be unlikely to get a job. This perception has important implications for developing the health care workforce in human-resource challenged settings like home health, long-term care, and behavioral health. In their report on background checks implementation following the passage of the ACA, the HHS-OIG reported that after Delaware instituted mandatory background checks in 1998, these checks disqualified approximately 4-5% of the applicant pool. Over the years, however, that

**Figure 3. Racial Impact of a Criminal Record on Interview Callbacks\*, 2003**





rate declined to less than 1%. State officials “suggested that prospective employees with disqualifying backgrounds are now familiar with the background check program and no longer apply for these positions” (Murrin, 2019a).

In some cases, deterring individuals with records from the workforce has been the express purpose of background checks. In the 1997 evaluation of the Child Protection Act referred to earlier in this report, the HHS-OIG found that officials interviewed believed that the deterrent effect was “perhaps more important than any other aspect of such checks” and although these checks might deter good candidates, “the deterrent effect of national background checks was largely positive, that is, unsuitable applicants were being deterred from applying for child care-related positions” (U. S. Government Accountability Office, 1997). Reasons for deterrence might include the perception among individuals with records that these opportunities are out of reach, or concerns about being stigmatized at work if they were hired.

Given the workforce shortages and increasing recruiting and retention challenges in some health care settings, such as in long-term care and behavioral health, overreliance on background check findings may be creating obstacles to employers seeking to develop a stable, well-trained workforce able to provide high-quality care for a diverse population.

## LOOKING FORWARD – OPTIONS AND OPPORTUNITIES

### **Balancing patient risk, workforce development, and the rights of justice-involved individuals**

Preventing harms to vulnerable individuals, including those living in long-term care settings, has been an objective of the health care community since at least the 1970s, and federal regulation of nursing homes increased substantially in 1987 with the passage of supporting legislation (Lachs & Pillemer, 2015). There are general expectations from the public that employers and government agencies will provide a safe environment for patients and employees, as well as ensure that processes implemented with the intent to protect vulnerable patients do not violate applicable laws, that oversight is provided, and that existing problems with these processes are addressed.

The use of background checks in health care is just one of many regulated processes developed with the intent of helping to protect vulnerable patients and clients, as well as other health care workers. During decades of use, stakeholders, including employers, the government, and patient advocates, have begun to recognize that use of background checks and identification of prior involvement with the criminal justice system can have unintended consequences, and that if misused can harm justice-involved individuals, promote recidivism, and negatively impact the employer’s ability to develop a stable workforce.

Bushway and Kalra (2021) describe how in the U.S. employers can use publicly available conviction information to select candidates they believe are at higher or lower risk of criminal activity, in contrast to the closed-records systems in Europe where “only the government has access to this information and only the government can make determinations about potential employee risk.” The authors go on to conclude:

*...U.S. employers’ use of conviction information is not clearly aligned with the risk of future criminal behavior or employer costs, and ... using such information leads to hiring errors that pose costs to society. Perversely, we find that many of these problems come from government statutes around negligent-hiring lawsuits rather than from inherent preferences on the part of employers. We suggest research that would improve the use of conviction history to predict future criminal risk, and we discuss a hybrid policy for the United States in which the government, not employers, makes the final determination about employee risk. We argue that this approach may result in both better risk predictions and better alignment between employer and societal goals, creating advantages for employers, candidates, and society (Bushway and Kalra, 2021).*

All stakeholders want to prevent the abuse and neglect of vulnerable individuals. These same stakeholders also support health

workforce development goals in order to ensure access to health care services. Policies that govern the use of background checks should address and balance other complex, often competing, interests and concerns, such as are described in **Table 1**.

**Table 1.** Health workforce goals at risk from improper background check applications in education, licensing and employment

Health workforce development goals	Risk from improper applications of background checks
Ensuring adequate workforce size and distribution.	Prevent otherwise eligible workers from entering health care occupations.
Improving workforce diversity.	Exclude applicants from racial and ethnic minorities because of higher perceived risk compared with White applicants.
Protecting workers' privacy.	Amplify the stigma of having a criminal conviction by disclosing applicants' prior experience with the criminal justice system, especially information that is incomplete, inaccurate, or exceeds what is relevant to the position
Creating societal benefits through increased opportunities for employment in health care.	Contribute to recidivism by excluding otherwise-eligible individuals from legal employment.

The individual stakeholders interacting with the background check system have varying degrees of power to influence their regulation and use. Because the regulatory environment generally reflects these power differentials, regulations, policies, and guidance on background checks in health care are often framed primarily in terms of patient safety rather than the interests of individuals with a criminal conviction looking for work, and often build in business necessity exceptions giving employers the most discretion (U.S. Equal Employment Opportunity Commission, 2012). Generally, less consideration is given to the harms to justice-involved workers who have diminished social standing, fewer resources to bring legal challenges, and fewer advocates. Unfortunately, this is consistent with structural forms of racism which, on average, disadvantage Black individuals in the U.S. (Bailey et al., 2021). Whether the recent social movements protesting unequal police treatment of Black individuals, for example, and the media coverage of these types of events, drives meaningful and long-acting policy change for background checks specifically, remains uncertain given the diversity of opinions among Americans regarding criminal justice reform and racism broadly (Pew Research Center, 2020).

## Initiatives to improve criminal background checks

Many initiatives are underway to adjust the balance between patient risk, workforce development, and the rights of justice-involved individuals. These include state and local legislative actions, litigation, and development of programs to assist justice-involved individuals gain employment (Love & Schlüssel, 2020b). There is a growing awareness that excluding individuals with criminal records from work can be thought of as a cost that employers externalize to society, without directly experiencing the harms of this practice (Bushway & Kalra, 2021). Employers may indirectly, and society may directly, benefit when people with records are employed, as this has been shown to reduce recidivism (Denver, 2017), may increase available workforce (S. Williams et al., 2016), and, in the case of health care employment, may improve access to appropriate care for specific patient populations who can benefit from peer support specialists, for example (Philadelphia Department of Behavioral Health and Intellectual disAbility Services, 2017).

### State and local legislative actions

Between 2013 and 2020 the U.S. legislative map changed dramatically, most notably in 2019, largely in favor of workers with criminal records, as legislatures made changes to laws and regulations governing criminal background checks at the federal, state, and local levels (Love & Schlüssel, 2020a).

Record-clearing laws, which vacate or expunge criminal convictions, represent some of the strongest changes in how states are attempting to reduce the collateral consequences of conviction for residents. Statutes and regulations directing or supporting the expungement of records related to low-level marijuana-related offenses are perhaps the most common new statute within this legislative record-clearing movement. Some laws require an application, while others take action automatically without requiring individuals to apply for relief (Love & Schlusser, 2020b). For example, in January 2020, Illinois' marijuana legalization law became effective, along with plans for automatic expungement for some low-level marijuana convictions, which coincided with the Governor's mass pardon of about 11,000 cases (McCoppin, 2020). However, procedural hurdles, as well as police and court delays due to the pandemic, slowed the Illinois automatic expungement process and left about 70,000 potentially eligible individuals without relief a year later, as of December 2020. Other examples of states with automatic expungement of low-level marijuana convictions include: Michigan, where expungement will seal records from non-criminal justice use such as employment and housing; and Virginia, where legislation passed in February 2021, which required agencies to "... set up a system for automatically sealing nine misdemeanor charges after seven years if the person isn't convicted of any other crimes during that time" (Associated Press & Fearing, 2021). Other states, like Washington State, require application for expungement.

Ban-the-box legislation, enacted in many jurisdictions, generally seeks to delay the time at which an employer may legally request and review background check information. The "box" being banned is the once-common job application checkbox which asked applicants to disclose any prior arrests or convictions. By delaying an employer's review of background check information, often until a conditional offer of employment has been made, individuals with records will have been interviewed by the employer and given an opportunity to make their case for being hired (Avery, 2019). These laws may help some individuals, but also may lead to unintended consequences: research has found decreases in hiring of Black individuals following Ban-the-box policy implementation, suggesting that in the absence of criminal justice information some employers discriminate against Black individuals more frequently in an attempt to avoid individuals with records (Doleac & Hansen, 2020). Furthermore, industrial psychology lab-based hiring simulations specifically designed to measure hiring manager responses to criminal background check information suggest that when reviewing adverse criminal background check information, situational factors may influence decision making: later admissions of a criminal record were negatively weighted by simulated hiring managers, but when the criminal record was also accompanied by new positive information about the candidate, the hiring manager's negative impression was reduced (Kuhn, 2020). Additional examples of recent legislation are shown below in [Table 2](#).

### **Legal cases**

Through numerous federal cases, plaintiffs have extracted concessions from consumer reporting agencies through suits related to alleged FCRA violations (Nelson, 2019). The suits are often related to mismatched records and harm resulting, due to failure by consumer reporting agencies to effectively police their data and clean it, leading to use of outdated records and harm to individuals seeking work, or records that should have been expunged or vacated (Nelson, 2019). Employers have also been sued under FCRA for a variety of alleged violations, including failing to follow the required process for notifying applicants of exclusion from the applicant pool due to a criminal background check (Maurer, 2019). Recent FCRA-related decisions by Appellate Courts have reaching seemingly disparate decisions on whether plaintiffs have constitutional standing or right to assert a claim in court, for example under the criteria that they have been harmed in fact by inaccurate background check information (Fleigel & Stockton, 2018).

The 2012 EEOC guidance that supports legal action if an employer's use of background check information is believed to unlawfully discriminate against a class of people protected by the Civil Rights Act of 1964 is being actively contested in the courts. A decision in the 5th Circuit in 2019 made 2012 EEOC guidance on disparate impact non-enforceable in Texas,

**Table 2:** Examples of recent legislation related to background checks in employment, education, and licensing

State	General topic addressed	Legislative number (year)
Arkansas	Provided waiver for disqualifying crimes under certain conditions; reform of criminal records dissemination.	H 1796 (2021); AR S 266 (2019)
California	Required state to automatically seal eligible records.	H 1076 (2019)
Colorado	Restricted use of background checks in higher education; established study of alternatives to criminal justice system for individuals with a substance use disorder.	H 1025 (2019); S 8 (2019) SB19-170 (2019)
Connecticut	Created public database of individuals convicted of, or with substantiated claims of, abuse/neglect of elder or disabled individuals.	H 832 (2019)
Illinois	Extended the Illinois Human Rights Act (IHRA) to individuals with a criminal record, making it illegal to discriminate against individuals on the basis of their record, and restricted the use of criminal records by employers.	H 1480 (2021)
Louisiana	Created a Clean Slate Task Force to study, evaluate and make recommendations regarding automatic criminal record-clearing for eligible individuals; restricted use of criminal records during college admissions.	H 67 (2020) Act 276 (2017)
Mississippi	Restricted use of criminal history during licensing; banned use of vague terms in law, such as moral turpitude, good character, and “any felony”.	S 2781 (2019)
Virginia	Individuals convicted of certain crimes such as burglary may be employed by Virginia’s Community Services Boards or licensed behavioral health treatment providers in roles providing direct care to clients/patients.	S 555 (2018)
Washington	Restricted use of criminal records in long-term care employment; established workgroup to develop new process for suitability review; strengthened Certificate of Restoration of Opportunity; reduced barriers to professional licensure for individuals with previous criminal convictions; restricted use of criminal records during college admissions.	H 1411 (2021); H 1399 (2021); SB 6582 (2018)
Wisconsin	Extended Wisconsin’s 2002 ban on discrimination against individuals with a criminal record to include a ban on discrimination during licensing, unless the conviction is “substantially related” to the licensed occupation, subject to review by state authority.	278 (2017)

Sources: “2017 Wisconsin Act 278” 2021); “Barrier crimes; adult substance abuse and mental health treatment providers” 2018); Collateral Consequences of Conviction Resource Center (2021); “Expanding health care workforce eligibility” 2021); National Conference of State Legislatures (2021); “Reducing barriers to professional licensure for individuals with previous criminal convictions” 2021).

Louisiana, and Mississippi. Though the EEOC can still make charges based on Title VII of the Civil Rights Act of 1964 as amended, the guidance is not considered valid in the 5th Circuit as justification, in part because the EEOC can enforce the Civil Rights Act but was never authorized by Congress to write regulations. In addition, liability due to disparate impact on protected groups may be viewed as contrary to equal protection under the law, an issue that has been raised at the U.S. Supreme Court but not directly addressed (Bagenstos, 2016).

***Making it easier for justice-involved individuals to get jobs***

A number of federal and state programs seek to make it easier for justice-involved individuals to re-enter the workforce. One example is the Federal Bonding Program, which provides insurance to employers who hire employees considered “high-risk” because of their conviction history. Created by the U.S. Department of Labor in 1966, these bonds “protect the employer against losses caused by the fraudulent or dishonest acts of the bonded employee...[such as]...theft, forgery, larceny, and embezzlement.” Employers can receive a \$5,000 bond free-of-charge with no deductible as an incentive to hire these applicants. The bond covers the first six months of a selected individual’s employment.

In 2021, twelve states offer Judicial Certificates of Relief, also called Certificates of Rehabilitation. These Certificates help people with convictions obtain employment, housing and other benefits because “generally, they relieve mandatory collateral consequences and may influence discretionary decision-making through an official judgment about a person’s

reliability and good character” (Love & Schlusel, 2020b). In Washington State, justice-involved individuals who have served a criminal sentence can apply to receive a Certificate of Restoration of Opportunity (CROP) from the Washington State Superior Court, which sends it to the State Patrol to note in an individual’s record. By making the CROP visible to an employer, educational institution or accrediting agency searching a person’s background, a justice-involved individual may have an easier time securing work, education, or an occupational license, if the person is otherwise qualified for that license. In an in-depth review of these policies, Love and Schlusel (2020b) note that:

*In the recent wave of reform, legislatures have been slow to enact judicial certificate laws, possibly because the advocacy community strongly favors relief that limits public access to the record. But in the 12 states where they are available (California, Colorado, Connecticut, Illinois, New Jersey, New York, North Carolina, Ohio, Rhode Island, Vermont, Washington, and Tennessee), they extend to a broader range of offenses than sealing or expungement, and may be obtained after a shorter waiting period, making them potentially a more valuable aid to reentry.*

At the state level, in 2015 the Pennsylvania Supreme court decision struck down an existing law that had prohibited people with certain offenses (including homicide and rape, as well as drug-related felonies, theft and forgery) from working in long-term care facilities, home care agencies, or adult day centers (Langley, 2016). The presiding judges, citing the considerable length of time since the crimes presented in the case were committed, said in their decision that it was not logical to think that every person convicted of these crimes presents a danger to the employing facility, and that:

*Act-covered facilities should not be required to employ a person with a criminal record, but they should have the opportunity to assess the situation and exercise their discretion to employ an applicant found to be sufficiently rehabilitated and a good fit for the job (Scolforo, 2016).*

The collateral consequences of conviction, including the use of background checks and resulting exclusion from education, work, and licensing, even after serving a sentence, have long been a topic of concern. In 2004 the American Bar Association published guidance directly arguing against over-application of background checks, among other collateral consequences of conviction, and 2008 national survey results indicated that most (57%) trial judges agreed that these collateral consequences inhibited reentry of people with records into society (Ewald & Smith, 2008). As one legal scholar writes:

*...the publication and dissemination of CCRs [criminal conviction records] clash with the basic principles of proportionality of punishment. Publication of CCRs should be reimagined as an ancillary penalty supplementing the main penalty imposed at sentencing, and taken into account in calculating the punishment deserved, and therefore justly inflicted, for the crime. European penal systems recognize concepts and categories of “ancillary penal sanctions” that are all but unknown to U.S. criminal law, and that American jurisdictions should emulate (Corda, 2016).*

### **Improving employer use of background check processes**

Our interviews with key informants indicated that employers frequently use background check information incorrectly, or in ways that are not legally compliant, and that legal technical assistance to employers may help address some of the more problematic practices which lead to ineffective or even non-compliant use. Variation in how employers use background check information may also stem from differences in whether written policy guidance on the use of background checks is available and used by hiring managers (Lageson et al., 2015).

More effective use of background check processes, along with increased use of bonding programs and Judicial Certificates of Relief, may help employers concerned about recruiting and retaining a well-qualified workforce. Workforce recruitment and retention in long-term care and behavioral health settings is problematic. Workers leaving long-term care services and supports have been reported to outnumber those entering the profession (Frogner and Spetz, 2015), and the problems have been exacerbated by the COVID-19 pandemic (Frogner and Skillman, 2020). Home care workers are the fastest-growing

occupation in the U.S., and before the pandemic, there was a projected national shortfall of 446,300 workers by 2025 (PHI, 2018). Inflation-adjusted wages remained low between 2007 and 2017. In 2016, 19% of these workforce members lived in poverty, 60% were people of color, and 25% were immigrants (PHI, 2018). The costs of high turnover in this workforce are great, creating significant problems for employers and patients, including re-training new staff, loss of experienced staff and loss of continuity of care. While state policy makers are using a variety of strategies for addressing this shortage, even during the Covid-19 pandemic (Fox-Grage, 2020), the use of background checks may be excluding qualified employees.

## Looking beyond individual risk – system-level solutions

In their report to the U.S. Department of Justice, Hawes and Kimbell (2010) concluded:

*Our research suggests that these mechanisms – health care personnel registries and criminal background checks – fail to address abuse and neglect associated with low staffing levels and inadequate staff training.*

Background checks are relatively inexpensive and may allow employers to sufficiently mitigate corporate risk and meet the expectation that they are “doing something” to mitigate risk to patients. Researchers have pointed out, however, that more emphasis should be placed on evidence-informed approaches to, for example, addressing elder maltreatment (Baker et al., 2016). The President’s Elder Justice Coordinating council also found that:

*[t]here is a significant lack of evidence and data about effective methods and practices to prevent elder abuse, despite growing knowledge about the scope of the problem and the growing body of evidence on the negative impacts of abuse (Elder Justice Coordinating Council, 2018).*

The National Research Council’s 2003 Report on elder mistreatment established both individual and system-level risk and protective factors for physical or financial harm to vulnerable adults by caretakers (National Research Council, 2003). Understaffing of nurses in long-term care settings is correlated with complaints, and complaints are correlated with deficiencies found during facility audits (Stevenson, 2006). Studies have also demonstrated that low nursing home staffing levels lead to poor quality of care and poor patient outcomes (Elder Justice Coordinating Council, 2018; Harrington et al., 2020; Harrington & Edelman, 2018; Harrington et al., 2016).

Funding to generate evidence for effective interventions and to enforce protections for long-term care residents has been lacking. Regarding national problems in elder abuse and neglect the U.S. GAO indicated in 2011:

*[t]he amount of funds devoted to elder mistreatment by the National Institutes of Health, the Centers for Disease Control, the National Science Foundation and other federal agencies is a tiny fraction of that spent for research on aging issues of similar magnitude and potential harm (Pillemer et al., 2015).*

The government bodies charged with enforcing existing laws and regulations, and which would likely be involved in implementation of evidence-informed interventions, also have a long history of being deeply underfunded given the extent of their mandate (Hawes & Kimbell, 2010).

In addition to requiring increased use of background checks in long-term care settings, the ACA included funding for demonstration grants and evaluations of programs preventing abuse and neglect of elders, including those with dementia (Administration for Community Living, 2017). One of the prevention programs implemented through these grants focused on training family members of patients as well as long-term care staff. The program included application of the evidence-based “Stress Busting” program developed by Lewis et al. (2009), which has been shown to decrease caregiver stress, aggression, and anxiety (Administration for Community Living, 2017). This program has been implemented in 15 states, and includes interventions for family caregivers, as well as interventions for professionals. The professional program focuses on professional empathy fatigue and burnout prevention.

## IMPLICATIONS FOR POLICY AND PRACTICE

Similar to employees in other fields, health care employees in the U.S. are subject to background checks throughout their career, from education, to licensing, and to employment. Though these background checks often appear straightforward, they are in fact governed by a complex regulatory environment that includes relevant federal, state, and local laws, and court precedent, industry norms, professional licensing requirements, and type of employment setting.

In this report, we outline how background checks shape education, licensing, and employment, with emphasis on how they relate to specific settings emphasizing care for vulnerable populations, such as long-term care, and behavioral health.

### The issues and consequences

Widespread use of background checks may be determined more by their convenience and low cost than by their effectiveness in reducing harm. However, information returned by background screening companies is not standardized and varies in what data elements are included, how individuals are matched to records, and the accuracy and completeness of the records. Records about arrests may not include information about whether charges were dropped or if the person was convicted. Employers may not be interpreting or using background information correctly or in ways that are legally compliant. Compliance itself is difficult to determine due to the thousands of state and local laws, which authorize or require the use of criminal background checks for employment purposes (Duane et al., 2017). Finally, background checks may be a poor predictor of the risk of abuse or neglect towards vulnerable individuals, disproportionately affect people of color, and affect a large group of working-age adults in the U.S.

Background checks may affect a career, including in health care, at any stage. Students, potential employees, recent hires, and existing employees may all be screened. During employment, licensing, or educational screening processes, a background check may reveal findings that disqualify a potential student or worker from education, licensing, or employment. These justice-involved individuals, who may have limited resources and little social and political power, encounter a regulatory regime that is generally reflective of stakeholders with a high degree of social and political power to shape policies (e.g., major employers, well-organized patient advocates, professional societies, etc.).

### Addressing the problems

Federal, state, and local governments are addressing some of the concerns about the accuracy, utility and consequences of using background checks for hiring in general, including taking legislative and regulatory actions to address concerns. Courts are also hearing specific cases related to the use of background checks, including suits related to mismatched records and the resulting harm, and failure by consumer reporting agencies to effectively monitor and clean their data leading to harm to job-seeking individuals (Nelson, 2019).

Record-clearing laws, which vacate or expunge criminal convictions, represent some of the strongest changes in how states are attempting to reduce the collateral consequences of conviction for residents, such as for low-level marijuana-related offenses (Love & Schlüssel, 2020b). Some federal and state programs also seek to make it easier for justice-involved individuals to re-enter the workforce. Federal bonding programs provide no-cost insurance to employers who hire employees considered “high-risk” because of their conviction history. Unfortunately, the bonds only last six months and cover theft and damage, not abuse or violence, which may limit application in health care settings (Office of the Assistant Secretary for Planning and Evaluation, 2018). State-based judicial “Certificates of Relief,” also called “Certificates of Rehabilitation”, are intended to provide relief from the collateral consequences of conviction and may influence discretionary decision-making through signaling an official judgment about a person’s reliability and good character (Bushway & Apel, 2012; Office of the Assistant Secretary for Planning and Evaluation, 2018).

Additional empirical research directly relevant to the effects of criminal background checks on the health care workforce is needed to better address the competing interests of safety and health care workforce development. Potentially eligible candidates may be self-selecting out of the health care workforce because of an arrest or conviction history. Improved understanding of the factors contributing to actual workplace and patient risk will help to retain these individuals in the shrinking applicant pool for many health care jobs, especially among those jobs that have low barriers to entry such as relatively short education and training requirements.

The following guidelines, drawn from the literature review and interviews with key informants for this report, may be useful for policy makers and users of background checks as they interpret and apply the information they receive more accurately, or decide to not use background checks for education and employment-related purposes. In addition, considering these guidelines when assessing applicants for health care related education, licensing and jobs may help identify alternative ways to prevent risks to vulnerable clients, patients, and workers, while expanding the number of candidates for education and employment.

**Take power differentials into account.** More than a fifth of the U.S. population have criminal records. Justice-involved people with limited resources have much less social and political power than stakeholders who shape policies around criminal background checks. The interests of individuals under background check review should be represented in policy and practice so they are not unnecessarily excluded from the health care workforce.

**Address the disparate impact of background checks on employment prospects for people of color.** Under Ban-the-box, some employers may discriminate against certain racial groups in an attempt to avoid individuals with records. Measures that provide some blinding to race, combined with increased education and awareness of disparate impacts, and enforcement where needed, may help reduce some of these harms.

**Remember that criminal records may not be accurate, and may not include the final disposition of charges.** Records may be wrongly linked to a job candidate; charges shown in records may have been dismissed.

**Look beyond the criminal history check-box and resist the pressure to hire quickly.** Background checks that include a criminal offense may take longer to process. Try not to skip over an applicant whose background check is taking a few extra days. Even in states that don't "ban the box", hiring managers can postpone reviewing a background check until after a face-to-face interview, to gain a greater understanding of a person and their skills, or review Certificates of Relief or Rehabilitation, education records, or other evidence of a candidate's reliability and good character.

**Incentivize employers to develop written policy to guide hiring managers and provide training for appropriate reviews of background checks.** Our interviews with key informants indicated that employers may not be using background check information correctly, or in ways that are legally compliant. Written policy guidance on background checks can help hiring managers make better decisions. The EEOC's guidance calls for individualized review when an applicant has a record, and broader implementation of this practice could help make better hiring decisions.

**Support measures that help employers and other users interpret background checks, especially criminal justice data, accurately.** Programs to improve access to legal technical assistance may help address some of the more problematic practices which lead to ineffective or even non-compliant use of background check information. The interpretation also can be completed by an entity other than an employer, such as occurs under some policies that require a state agency to determine whether an individual is safe to hire for a given position.

**Consider both system-level as well as individual risk factors.** Factors such as low staffing levels, inadequate staff training, staff burnout, or negative attitudes towards patients with dementia contribute to poor quality of care, poor



patient outcomes and increased complaints. While hiring the right candidate is important, other factors contributing to workplace outcomes may have as much or more impact on reducing risk of harm.

**Identify and implement evidence-based programs that seek to prevent abuse.** The evidence-based “Stress Busting” program (Lewis et al., 2009), for example, has been shown to decrease caregiver stress, aggression and anxiety. Implemented in multiple states, it includes interventions for family caregivers as well as professionals and focuses on professional empathy fatigue and burnout prevention.

**Improve and increase use of bonding programs.** These programs provide insurance to employers who hire employees considered “high-risk” because of their conviction history, especially when paired with negligent-hire insurance protection policies. The Federal Bonding program protects employer against losses such as theft, forgery, larceny, and embezzlement by the bonded employee for their first six months of employment.

**Recognize the influence of time.** As individuals age, the risk they will commit a new crime decreases, a trend influenced by factors like the type of crime committed, gender, and the individual’s age at conviction. At some point an individual with a record poses nearly the same level of risk for committing a new offense as an individual from the general public without a record. Estimated “redemption” times for individuals with various records vary depending on the type of offence committed, but generally range from 3-7 years.

Ensuring appropriate use of background checks for the health care workforce is an important and challenging task for employers; educational institutions; and accreditation, certification, and licensing bodies. All have the goals of simultaneously: (1) attracting and retaining a high-quality workforce, (2) protecting potentially vulnerable patients and clients, (3) understanding and meeting regulatory and accreditation requirements, and (4) improving workforce diversity and patient access to appropriate care. Background checks will remain one part of the toolkit essential to meeting all of these objectives, but their faults and limitations need to be addressed, and their broader societal costs need to be considered, as background checks are used in practice and governed by policy.

# APPENDIX A

## GLOSSARY OF KEY TERMS

**Background check** refers to a review of information about an individual's history and may include a variety of information about the individual including but not limited to their education, credentials, licensing, conduct, administrative proceedings, credit scores, and criminal history. Background checks may also be referred to as "consumer reports" in statute. For example, within FCRA, background checks are referred to as "consumer reports" and are defined as

*...any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is to be used...as a factor in establishing the consumer's eligibility for – (A) credit or insurance to be used primarily for personal, family or household purposes; (B) employment purposes;... ("15 U.S. Code § 1681a - Definitions; rules of construction," 2020)*

**"Ban the box"** refers to a wide variety of laws and regulations in Federal, State and local jurisdictions which generally delay the time at which an employer may ask a job candidate whether they have a criminal record. The exact terms of these laws vary widely across jurisdictions, though generally they require that criminal history inquiries begin only after an interview or conditional offer of hire has been made.

**Behavioral health care** refers to care and treatment for mental illnesses, substance use disorders (SUDs), or both. This type of care may be delivered in either an inpatient or outpatient setting, and may be delivered through primary care or by specialty providers. The names, definitions and scopes of practice for the typical health care workers providing behavioral health services vary across states, but generally include: social workers; counselors; Marriage and Family Therapists (MFTs); Substance Use Disorder Professionals (SUDPs) or Chemical Dependency Professionals (CDPs); psychiatrists; psychologists; nurses; and may include community health workers (CHWs) and peer counselors, as well as other professional types.

**Bonding programs** provide a way for the Federal government to insure against the real or perceived risk of harm when hiring someone with a criminal record. The Federal bonding program does not charge fees to the employer requesting the bond. The specific types of incidents covered under the bond may be limited, and may warrant additional insurance coverage.

**Certificate of relief** refers to a legal document or decision which is handed down by a court of law expressing confidence that an individual with a criminal record is not a threat to the public and is employable. These certificates are not uniformly available in all U.S. states, and they go by various names in different states. These certificates are typically only available though legal action taken by someone with a criminal record.

**"Clean Slate" laws** typically refer to laws which establish a procedure through which an individual's criminal record is expunged, sealed or otherwise occluded from subsequent background checks. Depending on the jurisdiction, these laws range widely in their requirements, with some processes requiring an application, hiring an attorney, and/or appearing before a court, and other processes becoming automated, with requirements placed on the State to periodically review and seal or expunge records.

**Consumer reports** are often used as an alternative to "background checks", such as in FCRA regulation where they are defined as

*...any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics,*

*or mode of living which is to be used...as a factor in establishing the consumer's eligibility for – (A) credit or insurance to be used primarily for personal, family or household purposes; (B) employment purposes;... ("15 U.S. Code § 1681a - Definitions; rules of construction," 2020).*

**Disparate impact** refers to practices in employment, housing, and other areas which, although formally neutral, adversely affect a class of people protected under the Civil Rights Act of 1964. Disparate impact is a central feature of the EEOC's 2012 Enforcement Guidance.

**Equal Employment Opportunity Commission (EEOC) 2012 Enforcement Guidance** was created to help employers comply with the Civil Rights Act of 1964, as amended, and in particular to guide employers on the lawful use of criminal background checks so as to avoid unlawful discrimination against any protected class of people, as defined in the Act.

**Fair Credit Reporting Act (FCRA)** provides detailed federal regulation of background screening processes (Federal Trade Commission, 2020). Within FCRA, background checks are referred to as "consumer reports" and are defined as

*...any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is to be used...as a factor in establishing the consumer's eligibility for – (A) credit or insurance to be used primarily for personal, family or household purposes; (B) employment purposes;... ("15 U.S. Code § 1681a - Definitions; rules of construction," 2020)*

**Individualized assessment** is defined by the Equal Employment Opportunity Commission as a process by which

*...an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity. (EEOC 2012 Enforcement Guidance)*

**Justice-involved** is an umbrella term used to refer to all the different ways in which an individual may become involved in the criminal justice system, such as arrest without prosecution or conviction, deferred prosecutions, probation, conviction with or without incarceration, incarceration, release from prison or parole. Each of these processes generate official records (from police agencies, the courts, corrections, and parole officials, etc.) about the individual, and which may be included in a background check.

**Vulnerable populations** suffer from

*...disparities in physical, economic, and social health status when compared with the dominant population. Vulnerability refers to the likelihood of contracting disease or illness. Vulnerable populations may be less able to anticipate, cope with, resist, or recover from the impacts of a hazard.... (Rukmana, 2014).*

# APPENDIX B

## KEY INFORMANTS

The following individuals provided insights and expertise through interviews with the study team that contributed to the information provided in this report.

Beth Avery, JD, Senior Staff Attorney  
National Employment Law Project

Shawn Bushway, PhD, Professor  
Rockefeller College of Public Affairs and Policy, University of Albany (SUNY)

Hon. Mary Fairhurst, Former Chief Justice  
Washington State Supreme Court (retired)

Ariel Nelson, JD, Staff Attorney  
National Consumer Law Center

Noel Vest, PhD, Postdoctoral Fellow  
Department of Anesthesiology, Perioperative & Pain Medicine  
Stanford University School of Medicine

Sodiqa R. Williams, Esq., Vice President, External Affairs and General Counsel  
Safer Foundation

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## AUTHORS

Ben Dunlap, MPH, Center for Health Workforce Studies, University of Washington

Anne Basye, MFA, Center for Health Workforce Studies, University of Washington

Susan M. Skillman, MS, Center for Health Workforce Studies, University of Washington

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University of Washington • School of Medicine  
Box 354982 • Seattle WA 98195-4982  
phone: (206) 685-0402 • fax: (206) 616-4768  
<https://familymedicine.uw.edu/chws/>