



MEMORANDUM

DATE: February 21, 2023

TO: House Judiciary Committee

FROM: Jerome Reide, Ph. D. Legislative Liaison

SUBJECT: MDCR Opposition to HB 4069 (and HB 4045) Voluntary Criminal Record Program

The proposed volunteer employee criminal history system program would be created in the Michigan State Police for the purpose of authorizing a national and state criminal history record information of a qualified entity's covered individuals. This proposed system will circumvent the spirit of Michigan Executive Order 2018-4.

If Michigan State Police becomes a vehicle to allow employers to discriminate against ex-offenders in employment it will violate EEOC regulations. MDCR's contract with EEOC may be impacted and some \$1,257,800 in federal revenue may be lost.

This bill will allow prospective employers to evade the protections of the Elliot-Larsen Civil Rights Act. The cost of unemployed ex-offenders will be a financial drain on State, Local Government, and Tribal budgets as they will have to forego the tax revenue these individuals could generate if they were gainfully employed. In addition, an increase in welfare, homeless shelters, law enforcement, and health care services is much more likely than not.

Summary of Arguments

Pro

Volunteer Employee Criminal History System Program

Page 2

The bill sponsors believe that employers who serve the elderly, the infirm and youth under 18 should be allowed to pre-screen prospective employees with criminal records before they make a contingent job offer.

To accomplish this, the Michigan State Police will create a:

"Rap back program" means a state or federal record of arrest and prosecution background program that enables qualified entities to receive ongoing status notifications of any criminal history reported on covered individuals whose fingerprints are registered in the system thereby eliminating the need for repeated background checks on covered individuals by qualified entities. Sec. 3. (1) The volunteer employee criminal history system program is created in the department for the purpose of authorizing a national and state criminal history record information of a qualified entity's covered individuals. (2) The department shall do both of the following: (a) Develop the application, approval, and compliance process and standards necessary to operate and manage the program. (b) Develop the application form and any other forms required for a qualified entity's registration and participation in the program.

[HB-4045-Establish a volunteer employee criminal history system for national background checks](#)

Con

The opponents of the legislation believe that to “ban the box” that employers use to ask about arrest and conviction history on job applications helps provide a fair chance at employment opportunity for ex-offenders. It also requires that federal agencies and contractors subject a prospective employee to a criminal background check only after a contingent job offer is made.

Under the [Elliot-Larsen Civil Rights Act of 1976](#)

“...Sec. 205a. (1) An employer, employment agency, or labor organization, other than a law enforcement agency of this state or a political subdivision of this state, shall not in connection with an application for employment or membership, or in connection with the terms, conditions, or privileges of employment or membership request, make, or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result. A person is not guilty of perjury or otherwise for giving a false statement by failing to recite or acknowledge information the person has a civil right to withhold by this section. This section does not apply to information relative to a felony charge before conviction or dismissal.”

- **Stakeholder Positions Background**

Under the [Elliot-Larsen Civil Rights Act of 1976](#)

“...Sec. 205a. (1) An employer, employment agency, or labor organization, other than a law enforcement agency of this state or a political subdivision of this state, shall not in connection with an application for employment or membership, or in connection with the terms, conditions, or privileges of employment or membership request, make, or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result. A person is not guilty of perjury or otherwise for giving a false statement by failing to recite or acknowledge information the person has a civil right to withhold by this section. This section does not apply to information relative to a felony charge before conviction or dismissal.”

This bill will allow prospective employers to evade the protections of the Elliot-Larsen Civil Rights Act.

This proposed legislation will have an adverse impact on historically disadvantaged communities under the guise of shielding youth, seniors and the infirm from prospective employees without a nexus demonstrated between a criminal record and the duties of the employment sought.

The Biden-Harris Administrations [Incarceration to Employment Strategy](#) is also in opposition

the attempt to circumvent “Ban the Box,” in the proposed legislation:

“Federal efforts to “ban the box” have represented one of the most significant federal policies to encourage employment for formerly incarcerated persons. In 2015, the Fair Chance Business Pledge, the Obama-Biden Administration a call to action to private employers to enact ban the box policies and directed the Office of Personnel Management (OPM) to consider modifying its rules to limit criminal background questions on federal job applications until after a conditional offer of employment has been extended (i.e., “ban the box”). OPM issued proposed “ban the box” regulations in May 2016, and final regulations in December 2016 and applied to federal agencies. The bipartisan Fair Chance to Compete for Jobs Act of 2019’s made “ban the box” law across all branches of government as well as federal contractors by prohibiting inquiry into arrest and conviction history until a conditional job offer is extended. In his June 2021 Comprehensive Gun Crime Reduction Strategy, President Biden directed OPM to fully implement the Fair Chance Act’s “ban the box” policy, underscoring his belief that good, stable jobs promote public safety. OPM published proposed regulations, that, once implemented, will delay inquiries into an applicant’s criminal history until a conditional offer has been made and expand the number and types of federal jobs covered by the policy. He also directed OPM to evaluate actions the federal government could take to remove barriers to and expand opportunities in federal employment for formerly incarcerated persons, work that is underway.”

This proposed legislation will have an adverse impact on historically disadvantaged communities under the guise of shielding youth, seniors, and the people with disabilities from prospective employees without a nexus demonstrated between a criminal record and the duties of the employment sought. The *Griggs* Court stated that the employer's burden

was to show that the policy or practice is one that "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used" and "measures the person for the job and not the person in the abstract.

[Griggs v. Duke Power Co., 401 US 434 \(1971\)](#)

The legislation requires "A disclosure stating whether the covered individual has *ever* been convicted or is the subject of pending charges for a criminal offense and, if convicted, a description of the offense and the result of the conviction."

There is no time limit on the convictions that ex-offenders are required to disclose under the bill. The Fair Credit Reporting Act's seven-year lookback period governs how far back certain types of information can be reported for applicants. Information that is seven or more years old about an applicant's arrests not leading to convictions, should not be reported.

The legislation would create a national data base that would allow employers to look at convictions from other states and conflict with EEOC limitations:

The 9th U.S. Circuit Court of Appeals ruled May 14 that the measuring period for a criminal charge runs from the date of entry rather than the date of disposition under the Fair Credit Reporting Act (FCRA). The FCRA prohibits background screening firms from reporting any arrest record or adverse non-conviction information older than seven years. The 9th Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

[FCRA's Seven-Year Reporting Window Begins with Charge, Not Dismissal](#)

The bill has provisions that relate executive order powers:

Proposed legislation seeks to abrogate the spirit and the letter of Michigan's "["Ban the Box"](#) [Executive Directive 2018-4](#) and additional pronouncements that provide a fair chance at employment for ex-offenders, [Gov. Snyder: State government is going 'Outside the Box'](#)

Volunteer Employee Criminal History System Program

Page 6

In 2018 Gov. Rick Snyder announced the Department of Licensing and Regulatory Affairs (LARA) has removed the checkbox reading “Were you convicted of a felony?” that precedes occupational and construction code licensing applications. The Governor today also signed an executive directive instructing all state departments and agencies to remove the felony question box that precedes job applications on NEOGOV, the website through which residents can apply for state employment. The felony conviction box will be replaced with an affirmation of good character statement, similar to what will be used on licensing applications.

The Governor is encouraging private employers to follow suit, by removing the felony box from job applications, or “moving the box” to later in the hiring process. Several Michigan companies large and small have already taken this approach and boast of great success in hiring former offenders.

The proposed legislation seeks to abrogate the spirit and the letter of Michigan’s “["Ban the Box" Executive Directive 2018-4](#) and additional pronouncements that provide a fair chance at employment for ex-offenders, [Gov. Snyder: State government is going 'Outside the Box'](#)

In 2018 Gov. Rick Snyder announced the Department of Licensing and Regulatory Affairs (LARA) has removed the checkbox reading “Were you convicted of a felony?” that precedes occupational and construction code licensing applications. The Governor today also signed an executive directive instructing all state departments and agencies to remove the felony question box that precedes job applications on NEOGOV, the website through which residents can apply for state employment. The felony conviction box will be replaced with an affirmation of good character statement, similar to what will be used on licensing applications.

The governor is encouraging private employers to follow suit, by removing the felony box from job applications, or “moving the box” to later in the hiring process. Several Michigan companies large and small have already taken this approach and boast of great success in hiring former offenders.

History

In 2018 Gov. Rick Snyder announced the Department of Licensing and Regulatory Affairs (LARA) has removed the checkbox reading “Were you convicted of a felony?” that precedes occupational and construction code licensing applications. The Governor today also signed

Volunteer Employee Criminal History System Program

Page 7

an executive directive instructing all state departments and agencies to remove the felony question box that precedes job applications on NEOGOV, the website through which residents can apply for state employment. The felony conviction box will be replaced with an affirmation of good character statement, similar to what will be used on licensing applications.

Governor Snyder encouraged private employers to follow suit, by removing the felony box from job applications, or “moving the box” to later in the hiring process. Several Michigan companies large and small have already taken this approach and boast of great success in hiring former offenders.