

Calendar No. 228

115TH CONGRESS }
1st Session }

SENATE

{ REPORT
115-162

FAIR CHANCE ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 842

TO PROHIBIT FEDERAL AGENCIES AND FEDERAL CONTRACTORS
FROM REQUESTING THAT AN APPLICANT FOR EMPLOYMENT
DISCLOSE CRIMINAL HISTORY RECORD INFORMATION BEFORE
THE APPLICANT HAS RECEIVED A CONDITIONAL OFFER, AND FOR
OTHER PURPOSES



SEPTEMBER 25, 2017.—Ordered to be printed

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FAIR CHANCE ACT

SEPTEMBER 25, 2017.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 842]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 842) to prohibit Federal agencies and Federal contractors from requesting that an applicant for employment disclose criminal history record information before the applicant has received a conditional offer, and for other purposes, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

S. 842, the Fair Chance to Compete for Jobs Act of 2017, or the Fair Chance Act, gives formerly incarcerated individuals a fair chance to compete for employment in the Federal government and on Federal contracts by prohibiting Federal agencies and prime Federal contractors from requesting criminal history information from job applicants until after they have issued a conditional offer of employment. By granting individuals with a criminal history the opportunity to compete for Federal jobs without first considering

their criminal history, the legislation seeks to improve employment prospects for these individuals, thereby reducing recidivism.

S. 842 includes exceptions for certain positions for which access to criminal history information is required by law, jobs involving law enforcement and national security duties, in addition to other commonsense exceptions. The bill also requires the United States Census Bureau and the Bureau of Justice Statistics to issue a report on the employment of formerly incarcerated individuals.¹

II. BACKGROUND AND THE NEED FOR LEGISLATION

Rise in prison population

On August 4, 2015, the Committee held a hearing titled *Oversight of the Bureau of Prisons: First-Hand Accounts of Challenges Facing the Federal Prison System*.² The hearing outlined a number of problems facing the Federal prison system and state and local systems. The United States has the world's largest prison population, with approximately 190,000 people incarcerated in Federal facilities, and an additional 2 million people in state and local facilities.³ Since the 1980s, the Bureau of Prisons (BOP) has experienced rapid growth in terms of both the number of inmates under its jurisdiction, and its appropriations. Between fiscal year (FY) 1980 and FY2013, the Federal inmate population increased from approximately 25,000 inmates to 219,000 inmates—a 790 percent increase.⁴ In FY1980, BOP appropriations were just under \$330 million.⁵ By FY2016, the BOP's budget had risen nearly \$7.1 billion—a 783 percent increase—to its current level of \$7.5 billion.⁶

Rise in population of formerly incarcerated individuals

The rise in inmate population has seen a commensurate rise in the number of formerly incarcerated people living in communities across the country. According to the Bureau of Justice Statistics (BJS), 2015 marked the third consecutive year of decline in the Federal prisoner population.⁷ Population levels are at their lowest since 2005.⁸ The BJS found that state and Federal prisons admitted fewer new prisoners in 2015 than in 2014, while also releasing an increased number of inmates.⁹

¹ On October 7, 2015, the Committee approved S. 2021, the Fair Chance Act. That bill is substantially similar to S. 842. Accordingly, this committee report is in large part a reproduction of Chairman Johnson's committee report for S. 2021, S. Rep. No. 114–200.

² *Oversight of the Bureau of Prisons: First-Hand Accounts of Challenges facing the Federal Prison System: Hearing Before the S. Comm. on Homeland Sec., and Gov't Affairs*, 114th Cong. (2015).

³ Federal Bureau of Prisons, *Federal Inmate Statistics*, http://www.bop.gov/about/statistics/population_statistics.jsp (last visited Aug. 2, 2017); Bureau of Justice Statistics, NCJ250229, Prisoners in 2015 (December 2016). available at <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5869> [hereinafter BJS report].

⁴ Nathan James, Cong. Research Serv., R42486, Appropriations for the Bureau of Prisons (BOP): In Brief (2016).

⁵ *Id.* at 9 (Table A–1).

⁶ *Id.* at 1.

⁷ According to BJS, state and Federal prisons admitted 608,300 prisoners with sentences exceeding one year in 2015, representing a 3 percent decrease from the total admissions in 2014 (626,100). See BJS Report at 10.

⁸ The total Federal inmate population in 2005 was 187,618. See BJS report at 3, table 1. As of July 28, 2017, the total number of federal prisoners was 187,315. See Federal Bureau of Prisons, Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited August 2, 2017).

⁹ There were 17,800 fewer new prisoners admitted into state and Federal prisons in 2015 than in 2014; state and Federal prisons released 4,700 more prisoners in 2015 than they did in 2014. See BJS report.

In 2014, the United States Sentencing Commission (USSC) amended the Federal sentencing guidelines, lowering the statutory minimum for drug offenders.¹⁰ An additional amendment made the reduction retroactive, allowing nearly 46,000 Federal drug offenders sentenced before the lowered drug guidelines went into effect to petition for reductions to their sentences.¹¹ As a result, there are more individuals with criminal records being released back into communities.

At the same time, the Federal Government has spent more and more money to maintain and operate the BOP's facilities. As of FY2016, the BOP's budget is just over 25 percent of the DOJ's discretionary budget.¹²

Recent expenditure data from the BOP indicate that the overall per capita cost of incarceration for inmates in the Federal system is on the rise, having increased from \$21,603 per inmate in FY2000, to nearly \$32,000 per inmate in FY2015—an increase of 48 percent.¹³ Because the BOP spends significant resources simply housing inmates for the duration of their sentence, they spend fewer resources on vocational training. At the Committee's August 4, 2015, hearing, the BOP Director testified that those Federal inmates who participate in Federal Prison Industries, a vocational training program, are 24 percent less likely to recidivate than similar non-participating inmates.¹⁴ However, the hearing also revealed that fewer than five percent of inmates are able to participate in the program.¹⁵ This highlights the need to improve employment prospects for those who leave the prison system.

With each inmate costing taxpayers nearly \$32,000 annually, it is essential that those with criminal histories have the tools available to them upon release to seek stable employment, and avoid recidivating. Reducing the rate of recidivism by improving employment opportunities for the formerly incarcerated has the potential to reduce crime, reduce the prison population, save taxpayer dollars, and improve lives.

The American economy pays a price for having such steep barriers to employment for people with criminal records. A 2016 Center for Economic Policy and Research study on the formerly incarcerated and the labor market found that in 2014 alone, employment losses of those with criminal records cost the economy the equivalent of 1.7 to 1.9 million workers, and a loss of \$78 to \$87 billion in gross domestic product.¹⁶

¹⁰United States Sentencing Commission, *Amendments to the Sentencing Guidelines*, April 30, 2014. available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments.pdf (Amendment 782).

¹¹United States Sentencing Commission, Memorandum: Summary of Key Data Regarding Retroactive Application of the 2014 Drug Guidelines Amendment. (July 25, 2014), available at: <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140725-Drug-Retro-Analysis.pdf>.

¹²Department of Justice, *FY 2018 Budget Request at a Glance* (May 23, 2017) available at: <https://www.justice.gov/doj/fy-2018-budget-and-performance-summary>.

¹³*Supra* note 4.

¹⁴*Supra* note 2, statement of Charles Samuels, Dr., Bureau of Prisons.

¹⁵*Id.*

¹⁶Cherrie Bucknor & Alan Barber, *The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies*, Center for Economic Policy and Research, (June 2016), available at <http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf>.

Barriers to employment

Formerly incarcerated people face a number of obstacles upon re-entry into their communities that impede rather than encourage their reintegration. Speaking at the August 4, 2015, hearing, Chairman Ron Johnson stated that he had met with a small group of formerly incarcerated men and that “what [he] learned was that these men want to turn their lives around and stay out of prison” but that there “are many challenges that people face leaving the prison system.”¹⁷ Chief among them are barriers to employment and, consequently, income and stability.

Studies have shown that as many as two-thirds of people released from prison between 2005 and 2010 were arrested for a new crime within three years, and three-quarters were arrested within five years.¹⁸ The DOJ estimates that roughly 40 percent of people formerly incarcerated in Federal prisons and over 60 percent of people formerly incarcerated in state prisons are re-arrested or have their supervision revoked within three years.¹⁹

There are many factors that increase a formerly incarcerated person’s likelihood of being re-incarcerated and limited employment opportunities are one of the strongest predictors of recidivism. Multiple studies have shown that formerly incarcerated people who maintain steady, legitimate employment are less likely to return to criminal acts upon release from prison.²⁰ Employment has been found to reduce recidivism by as much as 20 percent among non-violent offenders.²¹

An extensive body of research has established that a felony conviction or time in prison makes individuals significantly less employable. According to research from the Pew Charitable Trust, serving time reduces hourly wages for men by approximately 11 percent, annual employment by 9 weeks, and annual earnings by 40 percent.²² By age 48, the typical formerly incarcerated person will have earned \$179,000 less than if he had never been incarcerated, not including income forfeited while incarcerated.²³ Equally troubling, upon release from prison, incarceration depresses the total earnings of white males by 2 percent, of Latino males by 6 percent, and African American males by 9 percent.²⁴

Advancements in information technology and the Internet have given employers unprecedented access to criminal history record information. Surveys show that an estimated 87 percent of employers conduct criminal background checks on all job candidates. Therefore, a person’s criminal history can have a profound impact on

¹⁷ *Supra* note 2, statement of Senator Ron Johnson, Chairman.

¹⁸ Matthew R. Durose, Alexia D. Cooper, PhD., & Howard N. Snyder, PhD, Bureau of Justice Statistics, NCJ244205, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (Apr. 2014).

¹⁹ Dan Merica & Evan Perez, *Eric Holder seeks to cut mandatory minimums*, CNN (Aug. 12, 2013, 7:03 PM), <http://www.cnn.com/2013/08/12/politics/holder-mandatory-minimums/>.

²⁰ Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 *Justice Quarterly* No. 2 (Apr. 2011), available at <http://www.pacific-gateway.org/reentry,%20employment%20and%20recidivism.pdf>.

²¹ Aaron Yelowitz & Christopher Bollinger, *Prison-to-Work: The Benefits of Intensive Job-Search Assistance for Former Inmates*, Manhattan Institute Center for State and Local Leadership, Civic Report No. 96, 28 (Mar. 2015), available at <http://www.manhattan-institute.org/html/prison-work-5876.html>.

²² Pew Center on the States, “*Collateral Costs: Incarceration’s Effect on Economic Mobility*,” *The Pew Charitable Trusts* 4, 11 (2010), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1.pdf.

²³ *Id.* at 4.

²⁴ *Id.* at 4, 12.

their ability to find work, at times even when there is no logical connection between their criminal history and the work they apply for.²⁵

Research examining the impact of a criminal record on the employment process found that in the initial stages of the hiring process, formerly incarcerated people were only one-half to one-third as likely as non-offenders to even be considered by employers.²⁶ Additional research shows that a criminal record reduces the likelihood of a callback or job offer by nearly 50 percent for men, and that number increases to 60 percent for African American men, specifically.²⁷

“Banning the Box”

Recognizing the impact employment has on reducing recidivism among persons with felony convictions, criminal justice reform advocates have begun encouraging states and private companies to consider adopting “ban the box” hiring policies, which remove or delay the criminal history inquiry on job applications.²⁸ This relatively simple change has been shown to have had benefits for employers and felons alike. When an employer sees that an applicant has checked the “box” indicating their criminal record, they are more likely to dismiss the applicant. This not only hurts the applicant, it also hurts businesses by artificially reducing the pool of qualified candidates.

Recent studies examining hiring trends before and after the introduction of ban the box policies have questioned their efficacy and cautioned policymakers to consider the unintended consequences such reforms might have on overall employment prospects among certain populations.²⁹ The authors argue that, in the absence of upfront access to criminal background information, employers relied on other factors such as race to determine the likelihood of a candidate having a criminal history.³⁰ As a result, entire demographic groups experienced disproportionately fewer callbacks and lowered hiring prospects—even those with no prior record.³¹

These studies do not expose any significant flaws in ban the box policies. On the contrary, the data gathered confirms that individuals with criminal records experience higher call back and employment rates after the introduction of fair chance hiring practices,

²⁵ Society for Human Resource Management, *SHRM Survey Findings: Background Checking—The Use of Criminal Background Checks in Hiring Decisions*, (July 2012), available at <http://www.shrm.org/research/surveyfindings/articles/pages/criminalbackgroundcheck.aspx>.

²⁶ Devah Pager, *The Mark of a Criminal Record*, 108 *Am. J. of Sociology* 937, 960 (Mar. 2003), available at http://scholar.harvard.edu/files/pager/files/pager_ajs.pdf.

²⁷ Devah Pager, Bruce Western, & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 *Annals of the American Academy of Political and Social Science* 195 (May 2009), available at http://scholar.harvard.edu/files/pager/files/annals_sequencingdisadvantage.pdf?m=1392390789.

²⁸ Michelle Natividad Rodríguez and Beth Avery, NELP, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies* (June 5, 2017), available at <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

²⁹ Jennifer L. Doleac & Benjamin Hansen, *Does ‘Ban the Box’ Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes when Criminal Histories Are Hidden* (Jan. 1, 2017), available at <https://ssrn.com/abstract=2812811>; see also Amanda Y. Agan & Sonja B. Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* (June 14, 2016), available at <https://ssrn.com/abstract=2795795>.

³⁰ Agan and Starr found no that black applicants without criminal records saw a substantial drop in callback rates after BTB policies were implemented, while white applicants with criminal records experienced significantly increased callback rates. Amanda Y. Agan & Sonja B. Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, 40 (June 14, 2016), available at <https://ssrn.com/abstract=2795795>.

³¹ *Id.* at 24; see also Doleac, & Hansen, *supra* note 29, at 4.

which is precisely the intended outcome.³² The more concerning revelation for policymakers to consider is the continued role race and implicit bias play in the hiring process.

Ban the box policies were never meant to solve the problems of racism or discrimination in the hiring process.³³ Rather, they represent one part of a larger reform effort to destigmatize the mark of a criminal record, reduce employment barriers, and grant the formerly incarcerated the chance to be assessed by their merit and not their mistakes.³⁴

The Fair Chance Act

Barriers to employment increase the likelihood of recidivism, hurt the economy, and damage communities. It is therefore unsurprising that 28 states, the District of Columbia, and over 150 cities and counties have adopted some variation of a policy to “ban the box” on job applications to ensure that people with felony records have a fair shot at putting their lives back on track.

Consistent with these state efforts, the Fair Chance Act removes one of those barriers by leveling the playing field for individuals with a criminal history to find employment in the Federal government. The bill moves the criminal history inquiry in most cases from the beginning of the hiring process, when differential treatment has been found most likely to occur,³⁵ to later in the hiring process, when a conditional offer of employment has been made.

According to the Office of Personnel Management (OPM), agencies generally do not currently ask about an applicant’s criminal history at the outset of the hiring process, so the legislation should not be a significant change in the process in most cases and its implementation would be relatively smooth. In addition, unlike some state and local ban-the-box policies that affect private employers broadly, the Fair Chance Act is more limited in scope since it only covers hiring in the Federal government and hiring by prime Federal contractors.

The Fair Chance Act applies to the entire Federal Government, including Congress and the Federal Judiciary. It also applies to some Federal civilian and defense contractors. The legislation is narrowly crafted, however, to only apply to prime contractors and only to those employees doing work for the Federal Government on a Federal contract. While a great deal of government work is performed by subcontractors, it would be exceedingly burdensome for large prime contractors to monitor the hiring practices of every single one of their subcontractors. Most agencies maintain a goal that one-fourth to one-third of all subcontracting dollars must flow to small businesses.³⁶ These smaller entities are less likely to have sophisticated human resources offices and have more basic hiring practices.³⁷

³² Agan & Starr, *supra* note 30.

³³ Maurice Emsellem and Beth Avery, *Racial Profiling in Hiring: A Critique of New “Ban the Box” Studies*, National Employment Law Project 6 (Aug. 2016), available at <http://www.nelp.org/content/uploads/Policy-Brief-Racial-Profiling-in-Hiring-Critique-New-Ban-the-Box-Studies.pdf>.

³⁴ *Id.* at 6.

³⁵ *Supra* note 26.

³⁶ These goals vary from agency to agency. The General Services Administration’s model plan calls for a goal of 30 percent of all subcontracting dollars. General Services Administration Acquisition Manual, Appendix 519A—Small Business Subcontracting Plan Outline (Model), available at <https://www.acquisition.gov/sites/default/files/current/gsam/html/Part519AppA.html>.

³⁷ Diane Arthur, *Managing Human Resources in Small and Mid-Sized Companies* 29 (2nd ed. 2005).

The legislation also provides commonsense exceptions for jobs where it would clearly undermine government efficiency, place at risk our national security, or risk harm to vulnerable populations if a person with a criminal history held the position. For agencies hiring for sensitive national security positions, the bill provides an exception that would allow the agency to inquire about a criminal history at any stage of the process. It also provides an exception for positions that would allow for unsupervised access to children. The Department of Defense, for example, operates schools and childcare centers on military bases around the world,³⁸ and it is appropriate to inquire about the criminal history of applicants for positions at those schools earlier in the hiring process.

The legislation also has a broad exception for positions where an employer is otherwise required by law to inquire about a criminal history prior to the conditional offer. This exception is modeled after the “ban the box” executive order instituted by the Commonwealth of Virginia.³⁹ There are a variety of state, local, and even some Federal laws that require employers to collect information about criminal history, such as for teaching positions and positions that have access to personally identifiable information.

Finally, rather than attempt to identify every type of position that should require an exception, the legislation provides broad authority for OPM, the General Services Administration, and the Department of Defense to establish additional exceptions for positions with the Federal Government, on civilian contracts, and on defense contracts.

Even where an exception does not exist, the Federal agency or contractor is still able under this legislation to decide at the end of the process that the individual’s criminal history disqualifies them from a particular position. The purpose of the Fair Chance Act is not to remove access to criminal history information about an applicant for government employment; rather, the purpose is to move that information to the end of the process to give those with a criminal history a fair chance to compete for the Federal job.

The legislation also does not prohibit employers from conducting outside research into job candidates, nor does it prohibit candidates from voluntarily disclosing their criminal history earlier before the conditional offer stage.

The legislation is silent on the issue of background and credit checks for employment. Under existing law, any employers must request consent to conduct a background or credit check on an applicant for employment. Under the Fair Chance Act, an agency or contractor may still request that a job candidate sign a release to allow the Federal employer to conduct these checks. The legislation does not change the application of existing law and guidance on the use of information resulting from a background or credit check.

The legislation simply addresses the timing of a Federal agency or contractor’s inquiry into the criminal history of an applicant, and prohibits an employer from asking a candidate either in the application or interview whether they have a criminal history. The bill creates an administrative process to deal with Federal employees and contractors who ask an applicant about their criminal his-

³⁸ See generally, U.S. Department of Defense Education Activity, <http://www.dodea.edu/>.

³⁹ Exec. Order No. 41 (Commonwealth of Virginia) (2015).

tory earlier in the process. The legislation specifically states that this administrative process is the only avenue to deal with those who violate its provisions, and in no way creates a private right of action for any individual or entity to file any legal action based on a violation or alleged violation. For Federal employees, the legislation creates a process by which the employee is warned about the conduct and, after notice and appeal, may be fined if the conduct is repetitive. For civilian and defense contractors, the bill creates a process whereby the contractor is warned not to repeat the violation. It creates a permissive process for the contract manager to work with the contractor to achieve compliance.

This approach balances the need for an enforcement mechanism with the overall goal of encouraging federal agencies and government contractors to consider hiring individuals with a criminal history when they are otherwise qualified for the position.

III. LEGISLATIVE HISTORY

S. 842, the Fair Chance Act, was introduced on April 5, 2017, by Senators Cory Booker, Ron Johnson, Tammy Baldwin, Joni Ernst, Sherrod Brown, and Rob Portman. Senators Patrick Leahy and Gary Peters later joined as cosponsors. The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 842 at a business meeting on May 17, 2017. The bill passed by voice vote, with Senators Johnson, McCain, Portman, Paul, Lankford, Enzi, Hoeven, Daines, McCaskill, Tester, Heitkamp, Peters, Hassan, and Harris present. Consistent with Committee Rule 11, the Committee reports the bill with a technical amendment by mutual agreement of the Chairman and Ranking Member.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section establishes the short title of the bill as the “Fair Chance to Compete for Jobs Act of 2017” or the “Fair Chance Act”.

Section 2. Prohibition on criminal history inquiries prior to conditional offer for Federal employment

This section prohibits inquiries into the criminal history of an applicant for Federal employment, including the Legislative Branch, Executive Branch, and the Federal Judiciary until that applicant has received a conditional offer of employment. It establishes a process for those who are asked about their criminal history to report the violation, as well as adverse actions against Federal employees who violate the prohibition. It provides for exceptions to the prohibition, such as applications for sensitive positions, positions that are prohibited under law from being filled by an individual with a criminal history, positions with access to minors, and other such positions as regulated by OPM. It also requires that such exceptions be consistent with existing civil rights laws.

Section 3. Prohibition on criminal history inquiries by contractors prior to conditional offer

This section prohibits inquiries into the criminal history of an applicant for employment for work under a Federal contract until

that applicant has received a conditional offer of employment. It establishes a process for those who are asked about their criminal history to report the violation, as well as adverse actions against contractors that violate the prohibition.

It provides for exceptions to the prohibition, such as for sensitive positions, positions that are prohibited under law from being filled by an individual with a criminal history, positions with access to minors, and other such positions as regulated by the General Services Administration and the Department of Defense. It also requires that such exceptions be consistent with existing civil rights laws.

Section 4. Report on employment of individuals formerly incarcerated in Federal prisons

This section requires a joint study and report by the Bureau of the Census and Bureau of Justice Statistics regarding the employment of individuals following their release from Federal prison.

This report must be issued no later than two years after the date of enactment of the legislation, and every five years thereafter, and should exclude personally identifiable information. These reports are to be submitted to the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on Health, Education, Labor, and Pensions of the Senate, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Education and the Workforce of the House of Representatives.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

MAY 26, 2017.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 842, the Fair Chance Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL.

Enclosure.

S. 842—Fair Chance Act

S. 842 would amend federal law to prevent federal employers and contractors from asking about a job applicant's criminal history

until after the applicant has received a conditional job offer. The bill also would direct the Bureau of Justice Statistics within the Department of Justice to issue reports to the Congress on the employment of former federal prisoners.

There is no general prohibition against hiring ex-offenders; however, regulations do prevent their employment in certain positions. Most of the provisions of the bill would codify a recently promulgated regulation that delays inquiries into the criminal history of potential employees until later in the hiring process. Thus, CBO estimates that enacting S. 842 would cost less than \$500,000 annually to prepare the required reports; such spending would be subject to the availability of appropriated funds.

Enacting S. 842 could affect direct spending by some agencies (such as the Tennessee Valley Authority) because they are authorized to use receipts from the sale of goods, fees, and other collections to cover their operating costs. Therefore, pay-as-you-go procedures apply. Because most of those agencies can make adjustments to the amounts collected as operating costs change, CBO estimates that any net changes in direct spending by those agencies would not be significant.

Further, enacting S. 842 could increase the collection of civil and criminal fines from federal employees who fail to follow federal hiring procedures. Those fines are recorded in the budget as revenues. Criminal fines are available to be spent without future appropriation action. Therefore, enacting the legislation could increase federal revenues and associated direct spending, but CBO estimates that such increases would not be significant in any year.

CBO estimates that enacting S. 842 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 842 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. This estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

**CONGRESSIONAL ACCOUNTABILITY ACT OF
1995**

* * * * *

SEC. 1. SHORT TITLE AND TABLE OF CONTENTS

- (a) * * *
- (b) * * *

TITLE II—EXTENSION OF RIGHTS AND PROTECTIONS

Sec. 201. * * *
* * *

Sec. 207. *Rights and protections relating to criminal history inquiries.*
 [207] 208. *Prohibition of intimidation or reprisal.*

* * * * *

SEC. 102. APPLICATION OF LAWS

(a) * * *

(1) * * *

* * * * *

(12) *Section 9202 of title 5, United States Code.*

* * * * *

SEC. 207. RIGHTS AND PROTECTIONS RELATING TO CRIMINAL HISTORY INQUIRIES

(a) *DEFINITIONS.—In this section, the terms ‘agency’, ‘criminal history and record information’, and ‘suspension’ have the meanings given the terms in section 9201 of title 5, United States Code, except as otherwise modified by this section.*

(b) *RESTRICTIONS ON CRIMINAL HISTORY INQUIRIES.—*

(1) *IN GENERAL.—*

(A) *IN GENERAL.—Except as provided in subparagraph (B), an employee of an employing office may not request that an applicant for employment as a covered employee disclose criminal history record information if the request would be prohibited under section 9202 of title 5, United States Code, if made by an employee of an agency.*

(B) *CONDITIONAL OFFER.—For purposes of applying that section 9202 under subparagraph (A), a reference in that section 9202 to a conditional offer shall be considered to be an offer of employment as a covered employee that is conditioned upon the results of a criminal history inquiry.*

(2) *RULES OF CONSTRUCTION.—The provisions of section 9206 of title 5, United States Code, shall apply to employing offices, consistent with regulations issued under subsection (d).*

(c) *REMEDY.—*

(1) *IN GENERAL.—The remedy for a violation of subsection (b)(1) shall be such remedy as would be appropriate if awarded under section 9204 of title 5, United States Code, if the violation had been committed by an employee of an agency, consistent with regulations issued under subsection (d), except that the reference in that section to a suspension shall be considered to be a suspension with the level of compensation provided for a covered employee who is taking unpaid leave under section 202.*

(2) *PROCESS FOR OBTAINING RELIEF.—An applicant for employment as a covered employee who alleges a violation of subsection (b)(1) may rely on the provisions of title IV (other than sections 404(2), 407, and 408), consistent with regulations issued under subsection (d).*

(d) *REGULATIONS TO IMPLEMENT SECTION.—*

(1) *IN GENERAL.—Not later than 18 months after the date of enactment of the Fair Chance to Compete for Jobs Act of 2015, the Board shall, pursuant to section 304, issue regulations to implement this section.*

(2) *PARALLEL WITH AGENCY REGULATIONS.—The regulations issued under paragraph (1) shall be the same as substantive regulations issued by the director of the Office of Personnel*

management under section 2(b)(1) of the Fair Chance to Compete for Jobs Act of 2015 to implement the statutory provisions referred to in subsections (a) through (c) except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

(e) EFFECTIVE DATE.—Section 102(a)(12) and subsections (a) through (c) shall take effect on the date on which section 9202 of title 5, United States Code, applies with respect to agencies.

[SEC. 207] SEC. 208 PROHIBITION OF INTIMIDATION OR REPRISAL

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TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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PART III—EMPLOYEES

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Subpart H—Access to Criminal History Record Information

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CHAPTER 92—PROHIBITION ON CRIMINAL HISTORY INQUIRIES PRIOR TO CONDITIONAL OFFER

Sec.

9201. Definitions

9202. Limitations on requests for criminal history information.

9203. Agency policies; whistleblower complaint procedures.

9204. Adverse action.

9205. Procedures.

9206. Rules of construction.

SEC. 9201. DEFINITIONS

In this chapter—

(1) the term ‘agency’ means ‘Executive agency’ as such term is defined in section 105 and includes—

(A) the United States Postal Service and the Postal Regulatory Commission; and

(B) the Executive Office of the President;

(2) the term ‘appointing authority’ means an employee in the executive branch of the Government of the United States that has authority to make appointments to positions in the civil service;

(3) the term ‘conditional offer’ means an offer of employment in a position in the civil service that is conditioned upon the results of a criminal history inquiry;

(4) the term ‘criminal history record information’—

(A) except as provided in subparagraph (B), has the meaning given the term in section 9101(a);

(B) includes any information described in the first section of section 9101(a)(2) that has been sealed or expunged pursuant to law; and

- (C) includes information collected by a criminal justice agency, relating to an act or alleged act of juvenile delinquency, that is analogous to criminal history record information (including such information that has been sealed or expunged pursuant to law); and
- (5) the term 'suspension' has the meaning given the term in section 7501.

SEC. 9202. LIMITATIONS ON REQUESTS FOR CRIMINAL HISTORY RECORD INFORMATION

(a) *INQUIRIES PRIOR TO CONDITIONAL OFFER.*—Except as provided in subsections (b) and (c), an employee of an agency may not request, in oral or written form (including through the Declaration for Federal Employment (Office of Personnel Management Optional Form 306), or any similar successor form), including through the USAJOBS Internet Web site or any other electronic means, that an applicant for an appointment to a position in the civil service disclose criminal history record information regarding the applicant before the appointing authority extends a conditional offer to the applicant.

(b) *OTHERWISE REQUIRED BY LAW.*—The prohibition under subsection (a) shall not apply with respect to an applicant for a position in the civil service if consideration of criminal history record information prior to a conditional offer with respect to the position is otherwise required by law.

(c) *EXCEPTION FOR CERTAIN POSITIONS.*—

(1) *IN GENERAL.*—The prohibition under subsection (a) shall not apply with respect to an applicant for an appointment to a position—

(A) that requires a determination of eligibility described in subparagraph (A), (B), or (C) of section 9101(b)(1);

(B) as a Federal law enforcement officer (as defined in section 115(c) of title 18); or

(C) identified by the Director of the Office of Personnel Management in the regulations issued under paragraph (2).

(2) *REGULATIONS.*—

(A) *ISSUANCE.*—The Director of the Office of Personnel Management shall issue regulations identifying additional positions with respect to which the prohibition under subsection (a) shall not apply, giving due consideration to positions that involve interaction with minors, access to sensitive information, or managing financial transactions.

(B) *COMPLIANCE WITH CIVIL RIGHTS LAWS.*—The regulations issued under subparagraph (A) shall—

(i) be consistent with, and in no way supersede, restrict, or limit the application of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or other relevant Federal civil rights laws; and

(ii) ensure that all hiring activities conducted pursuant to the regulations are conducted in a manner consistent with relevant Federal civil rights laws.

SEC. 9203. AGENCY POLICIES; COMPLAINT PROCEDURES

The Director of the Office of Personnel Management shall—

(1) develop, implement, and publish a policy to assist employees of agencies in complying with section 9202 and the regulations issued pursuant to such section; and

(2) establish and publish procedures under which an applicant for an appointment to a position in the civil service may submit a complaint, or any other information, relating to compliance by an employee of an agency with section 9202.

SEC. 9204. ADVERSE ACTION

(a) *FIRST VIOLATION.*—If the Director of the Office of Personnel Management determines, after notice and an opportunity for a hearing on the record, that an employee of an agency has violated section 9202, the Director shall—

(1) issue to the employee a written warning that includes a description of the violation and the additional penalties that may apply for subsequent violations; and

(2) file such warning in the employee's official personnel record file.

(b) *SUBSEQUENT VIOLATIONS.*—If the Director of the Office of Personnel Management determines, after notice and opportunity for a hearing on the record, that an employee was subject to subsection (a) has committed a subsequent violation of section 9202, the Director may take the following action:

(1) For a second violation, suspension of the employee for a period of not more than 7 days.

(2) For a third violation, suspension of the employee for a period of more than 7 days.

(3) For a fourth violation—

(A) suspension of the employee for a period of more than 7 days; and

(B) a civil penalty against the employee in an amount that is not more than \$250.

(4) For a fifth violation—

(A) suspension of the employee for a period of more than 7 days; and

(B) a civil penalty against the employee in an amount that is not more than \$500.

(5) For any subsequent violation—

(A) suspension of the employee for a period of more than seven days; and

(B) a civil penalty against the employee in an amount that is not more than \$1,000.

SEC. 9205. PROCEDURES

(a) *APPEALS.*—The Director of the Office of Personnel Management shall by rule establish procedures providing for an appeal from any adverse action taken under section 9204 by not later than 30 days after the date of the action.

(b) *Applicability of Other Laws.*—An adverse action taken under section 9204 (including a determination in an appeal from such an action under subsection (a) of this section) shall not be subject to—

(1) the procedures under chapter 75; or

(2) except as provided in subsection (a) of this section, appeal or judicial review.

SEC. 9206. RULES OF CONSTRUCTION

Nothing in this chapter may be construed to—

- (1) authorize any officer or employee of an agency to request the disclosure of information described under subparagraphs (B) and (C) of section 9201(4); or
- (2) create a private right of action for any person.

TITLE 10—ARMED FORCES

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Subtitle A—General Military Law

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PART IV—SERVICE, SUPPLY, AND PROCUREMENT

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CHAPTER 137—PROCUREMENT GENERALLY

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SEC. 2338. PROHIBITION ON CRIMINAL HISTORY INQUIRIES BY CONTRACTORS PRIOR TO CONDITIONAL OFFER

(a) LIMITATION ON CRIMINAL HISTORY INQUIRIES.—

(1) IN GENERAL.—Except as provided in paragraphs (2) and (3), the head of an agency—

(A) may not require that an individual or sole proprietor who submits a bid for a contract to disclose criminal history record information regarding that individual or sole proprietor before determining the apparent awardee; and

(B) shall require as a condition of receiving a Federal contract and receiving payments under such contract that the contractor may not verbally or through written form request the disclosure of criminal history record information regarding an applicant for a position related to work under such contract before such contractor extends a conditional offer to the applicant.

(2) OTHERWISE REQUIRED BY LAW.—The prohibition under paragraph (1) does not apply with respect to a contract if consideration of criminal history record information prior to a conditional offer with respect to the position is otherwise required by law.

(3) EXCEPTION FOR CERTAIN POSITIONS.—

(A) IN GENERAL.—The prohibition under paragraph (1) does not apply with respect to—

(i) a contract that requires an individual hired under the contract to access classified information or to have sensitive law enforcement or national security duties; or

(ii) a position that the Secretary of Defense identifies under the regulations issued under subparagraph (B).

(B) REGULATIONS.—

(i) ISSUANCE.—Not later than 16 months after the date of enactment of the Fair Chance to Compete for Jobs Act of 2015, the Secretary of Defense, in consultation with the Administer of General Services, shall issue regulations identifying additional positions with

respect to which the prohibition under paragraph (1) shall not apply, giving due consideration to positions that involve interaction with minors, access to sensitive information, or managing financial transactions.

(ii) **COMPLIANCE WITH CIVIL RIGHTS LAWS.**—The regulations issued under clause (i) shall—

(I) be consistent with, and in no way supersede, restrict, or limit the application of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or other relevant Federal civil rights laws; and

(II) ensure that all hiring activities conducted pursuant to the regulations are conducted in a manner consistent with relevant Federal civil rights laws.

(b) **COMPLAINT PROCEDURES.**—The Secretary of Defense shall establish and publish procedures under which an applicant for a position with a Federal contractor may submit to the Administrator a complaint, or any other information, relating to compliance by the contractor with subsection (a)(1)(B).

(c) **ACTION FOR VIOLATIONS OF PROHIBITION ON CRIMINAL HISTORY INQUIRIES.**—

(1) **FIRST VIOLATION.**—If the Secretary of Defense determines that a contractor has violated subsection (a)(1)(B), the Secretary shall—

(A) notify the contractor;

(B) provide 30 days after such notification for the contractor to appeal the determination; and

(C) issue a written warning to the contractor that includes a description of the violation and the additional remedies that may apply for subsequent violations.

(2) **SUBSEQUENT VIOLATIONS.**—If the Secretary of Defense determines that a contractor that was subject to paragraph (1) has committed a subsequent violation of subsection (a)(1)(B), the Secretary shall notify the contractor, shall provide 30 days after such notification for the contractor to appeal the determination, and, in consultation with the relevant Federal agencies, may take actions, depending on the severity of the infraction and the contractor's history of violations, including—

(A) providing written guidance to the contractor that the contractor's eligibility for contracts requires compliance with this section;

(B) requiring that the contractor respond within 30 days affirming that the contractor is taking steps to comply with this section.

(C) suspending payment under the contract for which the applicant was being considered until the contractor demonstrates compliance with this section.

(d) **DEFINITIONS.**—In this section:

(1) **CONDITIONAL OFFER.**—The term 'conditional offer' means an offer of employment for a position related to work under a contract that is conditioned upon the results of a criminal history inquiry.

(2) **CRIMINAL HISTORY RECORD INFORMATION.**—The term 'criminal history record information' has the meaning given that term in section 9201 of title 5.

**TITLE 28—JUDICIARY AND JUDICIAL
PROCEDURE**

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PART III—COURT OFFICERS AND EMPLOYEES

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**CHAPTER 41—ADMINISTRATIVE OFFICE OF UNITED
STATES COURTS**

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SEC. 604. DUTIES OF DIRECTOR GENERALLY

(a) * * *

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(i) *RESTRICTIONS ON CRIMINAL HISTORY INQUIRIES.—*

(1) *DEFINITIONS.—In this subsection—*

(A) *the terms ‘agency’ and ‘criminal history record information’ have the meanings given those terms in section 9201 of title 5;*

(B) *the term ‘covered employee’ means an employee of the judicial branch of the United States Government, other than—*

(i) *any judge or justice who is entitled to hold office during good behavior;*

(ii) *a United States magistrate judge; or*

(iii) *a bankruptcy judge; and*

(C) *the term ‘employing office’ means any office or entity of the judicial branch of the United States Government that employs covered employees.*

(2) *RESTRICTION.—A covered employee may not request that an applicant for employment as a covered employee disclose criminal history record information if the request would be prohibited under section 9202 of title 5 if made by an employee of an agency.*

(3) *EMPLOYING OFFICE POLICIES; COMPLAINT PROCEDURE.—The provisions of sections 9203 and 9206 of title 5 shall apply to employing offices and to applicants for employment as covered employees, consistent with regulations issued by the Director to implement this subsection.*

(4) *ADVERSE ACTION.—*

(A) *ADVERSE ACTION.—The Director may take such adverse action with respect to a covered employee who violates paragraph (2) as would be appropriate under section 9204 of title 5 if the violation had been committed by an employee of an agency.*

(B) *APPEALS.—The Director shall by rule establish procedures providing for an appeal from any adverse action taken under subparagraph (A) by not later than 30 days after the date of the action.*

(C) *APPLICABILITY OF OTHER LAWS.—Except as provided in subparagraph (B), an adverse action taken under subparagraph (A) (including a determination in an appeal*

from such an action under subparagraph (B)) shall not be subject to appeal or judicial review.

(5) **REGULATIONS TO BE ISSUED.—**

(A) **IN GENERAL.—**Not later than 18 months after the date of enactment of the Fair Chance to Compete for Jobs Act of 2015, the Director shall issue regulations to implement this subsection.

(B) **PARALLEL WITH AGENCY REGULATIONS.—**The regulations issued under subparagraph (A) shall be the same as substantive regulations promulgated by the Director of the Office of Personnel Management under section 2(b)(1) of the Fair Chance to Compete for Jobs Act of 2015 except to the extent that the Director of the Administrative Office of the United States Courts may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this subsection.

(6) **EFFECTIVE DATE.—**Paragraphs (1) through (4) shall take effect on the date on which section 9202 of title 5 applies with respect to agencies.

TITLE 41—PUBLIC CONTRACTS

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Subtitle I—Federal Procurement Policy

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CHAPTER 47—MISCELLANEOUS

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SEC. 4713—PROHIBITION ON CRIMINAL HISTORY INQUIRIES BY CONTRACTORS PRIOR TO CONDITIONAL OFFER

(a) **LIMITATION ON CRIMINAL HISTORY INQUIRIES.—**

(1) **IN GENERAL.—**Except as provided in paragraphs (2) and (3), an executive agency—

(A) may not require that an individual or sole proprietor who submits a bid for a contract to disclose criminal history record information regarding that individual or sole proprietor before determining the apparent awardee; and

(B) shall require, as a condition of receiving a Federal contract and receiving payments under such contract that the contractor may not verbally, or through written form, request the disclosure of criminal history record information regarding an applicant for a position related to work under such contract before the contractor extends a conditional offer to the applicant.

(2) **OTHERWISE REQUIRED BY LAW.—**The prohibition under paragraph (1) does not apply with respect to a contract if consideration of criminal history record information prior to a conditional offer with respect to the position is otherwise required by law.

(3) **EXCEPTION FOR CERTAIN POSITIONS.—**

(A) *IN GENERAL.*—The prohibition under paragraph (1) does not apply with respect to—

(i) a contract that requires an individual hired under the contract to access classified information or to have sensitive law enforcement or national security duties; or

(ii) a position that the Administrator of General Services identifies under the regulations issued under subparagraph (B).

(B) *REGULATIONS.*—

(i) *ISSUANCE.*—Not later than 16 months after the date of enactment of the Fair Chance to Compete for Jobs Act of 2015, the Administrator of General Services, in consultation with the Secretary of Defense, shall issue regulations identifying additional positions with respect to which the prohibition under paragraph (1) shall not apply, giving due consideration to positions that involve interaction with minors, access to sensitive information, or managing financial transactions.

(ii) *COMPLIANCE WITH CIVIL RIGHTS LAWS.*—The regulations issued under clause (i) shall—

(I) be consistent with, and in no way supersede, restrict, or limit the application of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or other relevant Federal civil rights laws; and

(II) ensure that all hiring activities conducted pursuant to the regulations are conducted in a manner consistent with relevant Federal civil rights laws.

(b) *COMPLAINT PROCEDURES.*—The Administrator of the General Services shall establish and publish procedures under which an applicant for a position with a Federal contractor may submit to the Administrator a complaint, or any other information, relating to compliance by the contractor with subsection (a)(1)(B).

(c) *ACTION FOR VIOLATIONS OF PROHIBITION ON CRIMINAL HISTORY INQUIRIES.*—

(1) *FIRST VIOLATION.*—If the head of an executive agency determines that a contractor has violated subsection (a)(1)(B), such head shall—

(A) notify the contractor;

(B) provide 30 days after such notification for the contractor to appeal the determination; and

(C) issue a written warning to the contractor that includes a description of the violation and the additional remedies that may apply for subsequent violations.

(2) *SUBSEQUENT VIOLATION.*—If the head of an executive agency determines that a contractor that was subject to paragraph (1) has committed a subsequent violation of subsection (a)(1)(B), such head shall notify the contractor, shall provide 30 days after such notification for the contractor to appeal the determination, and, in consultation with the relevant Federal agencies, may take actions, depending on the severity of the infraction and the contractor's history of violations, including—

(A) providing written guidance to the contractor that the contractor's eligibility for contracts requires compliance with this section;

(B) requiring that the contractor respond within 30 days affirming that the contractor is taking steps to comply with this section.

(C) suspending payment under the contract for which the applicant was being considered until the contractor demonstrates compliance with this section.

(d) DEFINITIONS.—In this section:

(1) *CONDITIONAL OFFER.*—The term 'conditional offer' means an offer of employment for a position related to work under a contract that is conditioned upon the results of a criminal history inquiry.

(2) *CRIMINAL HISTORY RECORD INFORMATION.*—The term 'criminal history record information' has the meaning given that term in section 9201 of title 5.

