

# **COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS**

## **DISMANTLING BARRIERS TO OPPORTUNITY**



2012

## **Forward**

A criminal conviction can have far reaching and lifelong consequences that extend beyond the payment of a fine, a term of probation, or time in prison. A criminal record could follow someone for the rest of their lives, informing every opportunity or lack of opportunity available.

This manual provides necessary background and context for the issues facing individuals with criminal records. It should be used by criminal defense attorneys to better inform and advise their clients of the consequences of having a criminal record. For others working in the criminal justice system, it could assist in sentencing and plea bargaining, as well as hopefully provide incentive to consider alternatives to incarceration and conviction (such as PTI, conditional discharges, or another diversion program). Third, this manual will hopefully provide information to elected officials, non-profit groups, advocates, and the general public.

While we have attempted to cover a wide array of topics, this manual is not exhaustive. Each person's situation is different and needs to be approached individually. However, this is a good starting point, and we have provided links to additional resources. The laws, policies, and practices reflected in this manual tend to change rapidly, and for that reason it may be helpful to conduct further research. Nothing contained in this publication should be considered legal advice.

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## Introduction

Approximately 1 in 4 adults in the United States has a criminal record.<sup>1</sup> In addition, over 700,000 people are released from federal and state prisons each year. More than 1.7 million children aged 18 or younger in the United States has an incarcerated parent. These numbers have increased drastically over the past 30 years.

In South Carolina, the percentage of South Carolinians with a criminal record is just over 30% of the total population.<sup>2</sup> African-Americans constitute only 30% of the South Carolina population but 50% of persons arrested, 55% of those on probation, and 70% of persons incarcerated.<sup>3</sup> This reflects a nation-wide trend reflecting a higher arrest rate for African-Americans.<sup>4</sup>

After incarceration, thousands of people attempt to reenter society. Thousands more are never incarcerated but still have the burden of a criminal conviction, or even an arrest, that impacts many of their opportunities. These individuals face nearly insurmountable barriers to basic needs such as housing and employment as well as other barriers to personal advancement.

The day to day discrimination facing people with criminal records may be found in our code of laws, or simply a function of personal bias. For purposes of this guide, the discussion has been limited to laws and policies which are the collateral consequences of the criminal justice system.

### What is a Collateral Consequence?

A collateral consequence is defined as a collateral sanction or a disqualification.<sup>5</sup> This can be distinguished from direct consequence of a criminal charge. A direct consequence is the sentence - whether prison or probation or time served - and any associated fines. The collateral consequences are those consequences that arise as a result of a criminal record – the requirement to register as a sex offender, deportation, employment consequences, eligibility for public benefits, eligibility for student loans, etc.

### South Carolina and the National Landscape

Some barriers facing individuals with criminal records are based on federal exclusions, and others are a result of local law and policy. This manual will review some issues that stem from federal law, as well as those laws and policies that are exclusive to South Carolina.

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<sup>1</sup> Michelle Natividad Rodrigues & Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, National Employment Law Project 2011, available at:

[http://nelp.3cdn.net/e9231d3aee1d058c9e\\_55im6wopc.pdf](http://nelp.3cdn.net/e9231d3aee1d058c9e_55im6wopc.pdf)

<sup>2</sup> Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2008*. Table 1, available at:

[www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf](http://www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf).

<sup>3</sup> South Carolina Budget and Control Board, *South Carolina Young Adults Count State Report: Section 6: Crime*, available at: [www.scyoungadults.org/sc\\_crime.asp](http://www.scyoungadults.org/sc_crime.asp).

<sup>4</sup> U.S. Dept. of Justice, Federal Bureau of Investigation, *Crime in the United States, 2009*, available at:

[www2.fbi.gov/ucr/cius2009/index.html](http://www2.fbi.gov/ucr/cius2009/index.html).

<sup>5</sup> Court Security Improvement Act of 2007, Pub. L. 110-177, §510(d).

With bipartisan support, South Carolina recently signed into law S.1154, the Omnibus Crime Reduction and Sentencing Reform Act of 2010. This Act is a comprehensive package of sentencing and institutional reform. The Act is projected to save South Carolina up to \$175 million in construction costs and more than \$66 million in operating costs over the following 5 years.<sup>6</sup> While these sentencing reforms are designed to slow the growth of South Carolina's prison population over the next 5 years, they do very little to reduce barriers that individuals face after their release from the criminal justice system. The majority of individuals in the criminal justice system will one day leave prison and complete supervision. These individuals will face a myriad of barriers in reentry.

The Obama Administration has expressed support for reentry reform. In 2008, the Second Chance Act (P.L 110-199) was signed into law. The Second Chance Act is designed to improve outcomes for people returning to communities from prisons and jails. In 2011, Attorney General Eric Holder announced the creation of a cabinet level Reentry Council whose goal is to bring various agencies together to work towards this goal. Conservative groups have also been in support of these reforms; especially how reform could save states money and reduce crime.<sup>7</sup>

Barriers to reentry don't only affect the formerly incarcerated individual, but also impacts their families, communities, and the public in general. Rather than creating barriers to reentry, supportive policies directed at those with criminal justice involvement will instead improve reentry outcomes. Successful reentry in turn will reduce tax payer expense, increase public safety, reduce homelessness, and will create stronger communities.

Underlying the discussion of collateral consequences is how they affect recidivism rates. Recidivism occurs when an individual with a criminal conviction is rearrested, reconvicted, or returned to custody. Recidivism traditionally occurs in one of two ways:

- 1) The ex-offender commits a new crime that results in a new conviction, or
- 2) The offender commits a technical violation of supervision (probation or parole), such as failing to report to their probation or parole officer, failing a drug test, or violating another term of their supervision.<sup>8</sup>

Reducing recidivism rates reduces crime and increases public safety, while also reducing prison costs. In a study conducted by the Pew Center on the States analyzing recidivism rates of two different time periods (1999-2002 and 2004-2007), recidivism rates in South Carolina have increased by 19% between those two time periods.<sup>9</sup> While evaluating the direct cause of this increased rate of recidivism is beyond the scope of this guide, collateral consequences and lack of opportunity have a distinct impact.

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<sup>6</sup> *South Carolina's Public Safety Reform: Legislation Enacts Research-based Strategies to Cut Prison Growth and Costs*, Pew Center on the States Public Safety Performance Project, June 2010. Available at: [www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/PSPP\\_South\\_Carolina\\_brief.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/PSPP_South_Carolina_brief.pdf).

<sup>7</sup> Newt Gingrich and Pat Nolen, January 7, 2011, Washington Post, available at: [www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html](http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html). See also the *Right on Crime* campaign, at: [www.rightoncrime.com/](http://www.rightoncrime.com/).

<sup>8</sup> South Carolina Department of Probation, Parole, and Pardon Services, *Standard Conditions of Supervision*, available at: [www.dppps.sc.gov/what\\_we\\_do\\_supervision.html](http://www.dppps.sc.gov/what_we_do_supervision.html).

<sup>9</sup> Pew Center on the States, *State of Recidivism: The Revolving Door of America's Prisons*, page 15, Exhibit 3. Available at:

Barriers to opportunity have both an immediate and a long term effect, not only to the individual with a criminal record, but society as a whole. Bringing these barriers to light will hopefully inform those working with the population facing reentry issues so that they may be mitigated as much as possible, and ultimately be eliminated when possible.

# Housing

## Introduction

Individuals leaving jail or prison face a number of obstacles. Finding adequate and affordable housing is often both the most immediate concern and the most challenging. Finding employment, maintaining sobriety, and positively engaging in society are all extremely difficult without stable and affordable housing.<sup>10</sup> Formerly incarcerated individuals often have multiple underlying issues, such as a history of drug abuse, mental illness, disabilities, and/or educational shortfalls (including illiteracy), and many individuals have more than one of these background factors. Additionally, formerly incarcerated individuals often have a poor work history or lack of job skills that make finding adequate employment to afford housing especially difficult. The practical barriers to reentry are quite significant.

Federally funded public housing was established to provide decent and safe rental housing for eligible low-income families, the elderly, and persons with disabilities. Individuals with criminal records are in need of affordable housing. Local policies often put federally subsidized housing outside their reach, especially for those with a history of drug convictions.

The U.S. Department of Housing and Urban Development (HUD) administers federal aid to local public housing authorities (PHAs), which manage the housing programs in their jurisdictions. HUD has given local PHAs a great amount of discretion in crafting admissions and eviction policies relating to criminal activity and criminal records. Each individual PHA creates a unique policy regarding how that PHA will treat criminal activity and criminal records in admissions and evictions. There are currently 43 different housing authorities in South Carolina, each with their own unique policies.

Individuals returning to the community after incarceration or release to parole or probation will often turn to family members for housing and support.<sup>11</sup> Because of a PHA's termination policies relating to criminal records, it could prove difficult for these individuals to rejoin their families living in public or subsidized housing. Without housing options, people recently released from incarceration will come face to face with the prospect of being homeless.

## Federally Assisted Housing and Previously Incarcerated Individuals

For reference purposes, a brief discussion of income limits is relevant to be aware of the financial realities facing families who seek housing assistance. Income limits to qualify for housing assistance are based on a percentage of the area median income (AMI) for a particular area or jurisdiction. These income levels are readjusted ever year, and HUD publishes yearly income limits for all jurisdictions.<sup>12</sup>

For example, in Richland County for a family of four, the 2011 income levels were as follows:

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<sup>10</sup> Fontaine, J., J. Biess. 2012. *Housing as a Platform for Formerly Incarcerated Persons*, The Urban Institute; available at: [www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid=%7BCE90236E-564D-424F-8386-B3A1E2ED4407%7D](http://www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid=%7BCE90236E-564D-424F-8386-B3A1E2ED4407%7D).

<sup>11</sup> Studies have shown that between 48-62% of prisoners slept at a relatives' house on their first night out of prison. See Fontaine, J., J. Biess. 2012. *Housing as a Platform for Formerly Incarcerated Persons*, The Urban Institute; available at: [www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid=%7BCE90236E-564D-424F-8386-B3A1E2ED4407%7D](http://www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid=%7BCE90236E-564D-424F-8386-B3A1E2ED4407%7D).

<sup>12</sup> More information can be found at: [www.huduser.org/portal/datasets/il/il12/index\\_il2012.html](http://www.huduser.org/portal/datasets/il/il12/index_il2012.html)

Area Median Income is \$64,500  
Low Income (80% of AMI) is \$51,600  
Very Low Income (50% of AMI) is \$32,250  
Extremely Low Income (30% of AMI) is \$19,350

**Accessing Subsidized Housing:** A person with a criminal record may wish to apply for housing on their own, or they may wish to join an existing household (such as with their children or other family members).

**Application for Housing Assistance:** Federal law requires criminal background checks to be done on all adult (age 18 or older) household members who apply for housing assistance. The PHA must obtain signed, written authorization to obtain an applicant's criminal history.<sup>13</sup> If a PHA determines during the screening process that there is information in an applicant's criminal history that would bar him from admission, the PHA must notify the individual of the proposed action and provide the individual with a copy of the information and an opportunity to dispute the accuracy or relevance of the criminal history prior to any adverse action by the PHA.<sup>14</sup> Any policy regarding admission and screening must be in writing and available to applicants.

**Denial of application:** The PHA must provide written notice to the applicant stating the reasons for the rejection. If the notice states that an applicant is not eligible for housing based on their criminal record, the notice should specify why. The notice should set forth the procedure for contesting an adverse determination, and the applicant should be given the opportunity to dispute the accuracy or relevance of the record.

**Public Housing:** The local PHA is generally both the owner of the housing unit as well as the landlord.

**Section 8 Housing Choice Voucher:** The tenant applies for a voucher with the local PHA. A tenant is responsible for finding a landlord who will take the Section 8 Voucher. The tenant pays a share of the rent and the PHA pays the landlord the difference.

**Applying for Assistance:** Subsidized housing is in high demand. Many PHAs in South Carolina have a waiting list, and due to limited availability, some have temporarily discontinued taking applications. Check with the local PHA to find out more about the process and/or waiting periods that may exist. Waiting lists tend to be longer for Housing Choice Vouchers.

**Criminal Records and Criminal Activity:** Pursuant to federal law, PHAs must reject applicants with two specific criminal backgrounds. Otherwise, PHAs have broad discretion to deny or accept applicants who have engaged in any other types of criminal activity.

**There are two mandatory and permanent lifetime bans based on criminal records.** Per federal law, PHAs must establish a lifetime ban on admission to applicants with the following convictions:

- 1) Individuals who have been convicted of methamphetamine production on the premises of federally-funded assisted housing; and

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<sup>13</sup> 42 U.S.C.A. §1437d(s).

<sup>14</sup> 24 CFR 5.903(f).

- 2) Individuals who are subject to a lifetime sex offender registration requirement under state law. Under South Carolina law, all individuals required to register as a sex offender in South Carolina are required to register for life.

**Permissive Denials.** Other than the two mandatory denials listed above, PHAs have a great deal of discretion. PHAs are allowed the flexibility to set local admission policies and criteria for individuals with certain histories of criminal activity and the use of illegal substances or alcohol abuse. It is important to note that a conviction is not always required before a PHA can take action.

A PHA may create a policy that would deny an applicant based on the following:

**Drug Related Criminal Activity:**

- If a household member has been evicted from federally assisted housing within the past three years because of drug-related criminal activity. This includes individuals and households evicted under HUDs “one strike” policy. PHAs are authorized to extend the ban beyond three years.
- If a household member is currently engaging in illegal drug use; or
- If the PHA has reasonable cause to believe that a household member’s illegal drug use or pattern of illegal drug use may threaten the health , safety, or right to peaceful enjoyment of the premises by other residents.

**Current Alcohol Abuse:** If a household member is currently abusing alcohol in a manner that interferes with the health, safety or right to peaceful enjoyment of other residents. The standards here require that the PHA must establish a nexus between the alcohol abuse and a threat to the health, safety or right to peaceful enjoyment of other residents.

**Other criminal activity:** A local PHA may establish policies that deny admission if it determines that any household member is currently engaged in, or has engaged in during a *reasonable time* before the admission decision any:

- Drug-related criminal activity; or
- Violent criminal activity; or
- Other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents; or
- Other criminal activity that would threaten the health or safety of the PHA or owner or any employee, contractor, subcontractor or agent of the PHA or owner who is involved in the housing operations.

For a denial based on a previous eviction for drug related criminal activity, the PHA may establish a policy to admit the household or household member if the evicted member has successfully completed treatment at an approved drug rehabilitation facility or the circumstances leading to the eviction no longer exist (for example, the criminal household member has died or is imprisoned). However, the PHA is not required to take such circumstances into consideration if it is not part of their established policy to do so.

In determining what a “reasonable time” is, HUD has determined that it would be too rigid to define a reasonable time period in a manner that covers every circumstance nationally, so they have left that

issue to the local PHA to determine in their admissions policies. The local PHA has the sole discretion to define the concept of a “reasonable time” period.

A PHA may have a policy in place to shorten the period of time the individual or household is restricted from admission and consider other factors such as the severity of the crime and/or completion of a rehabilitation program. Federal law allows a PHA to reconsider an applicant it previously denied based on criminal activity, but there is no requirement of the PHA to make such considerations. Other considerations the PHA may make are the time, nature, and extent of an applicant’s previous criminal conduct, including the seriousness of the offense.

The bottom line: If an individual is denied public/assisted housing under the provision that they had previously been evicted from public housing for drug-related criminal activity, it is important to check the specific policies and procedures for that particular housing authority. The applicant may be able to gain admission upon showing the PHA that they have completed a supervised drug rehabilitation program that has been approved by the PHA, or an applicant may be eligible if the PHA admits individuals on a case by case basis.

### **Eviction from Public Housing or Terminating Tenancy:**

**Federal One Strike Policy:** This policy permits the eviction of an entire household when one member, a guest of the tenant, or another person deemed to be under the tenant’s control engages in drug activity or other types of criminal conduct. A tenant could be subject to eviction regardless of their knowledge of the misconduct and regardless of whether or not they had any control over the person who engaged in the unlawful conduct. The PHA may terminate assistance regardless of whether the household member has been arrested or convicted of any criminal activity.

The “one-strike” policy makes all tenants, even the elderly, disabled, and children, vulnerable to eviction. The Supreme Court has stated that the eviction of an entire family is permissible, though not mandatory, under this provision.<sup>15</sup> PHAs must take into considerations real-world factors that may make such a policy counterproductive. Such considerations could include the actual crime-reducing benefits measured against the considerable human costs of displacement, homelessness, and family division that might occur with such a policy.

### **Section 8 Housing Choice Voucher – PHA termination of voucher<sup>16</sup>**

#### **Permissive terminations of a Section 8 Housing Choice Voucher by the local PHA:**

- If any family member has committed fraud, bribery, or any other corrupt or criminal act in connection with any federal housing program;
- If any family member has engaged in or threatened abusive or violent behavior towards PHA personnel;
- If any family member is currently engaged in illegal drug use;
- If a pattern of illegal drug use by any household member interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

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<sup>15</sup> *Dep’t of Hous & Urban Dev. V. Rucker*, 535 U.S.125 (2002).

<sup>16</sup> 24 C.F.R. §982.552 and 553.

**PHA discretion to consider circumstances:**

In making the determination whether to terminate a tenants voucher, the PHA may consider all relevant circumstances such as: the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure.<sup>17</sup>

In determining whether to terminate assistance for illegal use of drugs or alcohol abuse by a person who is no longer engaged in such behavior, the local PHA may consider whether that household member has successfully completed a drug or alcohol rehabilitation program or can consider other evidence of rehabilitation, and can require the household member to submit evidence of his or her rehabilitation.<sup>18</sup>

The PHA may impose, as a condition of continued assistance for other family members, a requirement that the culpable family members will not reside in the unit. The PHA may then permit the other members of a participant family to continue receiving assistance.<sup>19</sup> This is a reasonable adjustment to the federal “one strike” allowance. This way, an entire family is not evicted because of the action of one household member.

**Informal Hearing:** The PHA must have procedures for an informal hearing based on the PHAs determination to terminate assistance because of certain criminal acts.

**Landlord Eviction for a tenant with a Section 8 (Housing Choice) Voucher<sup>20</sup>**

These evictions are typically based on violations of the lease agreement between the landlord and the Section 8 Voucher holder. The landlord may only evict a tenant by instituting a court action. If the landlord seeks an eviction, they are required to provide the PHA with a copy of the owner eviction notice as provided to the tenant. The tenant is also required to inform the PHA of the eviction and provide the PHA with a copy of the eviction notice. The PHA may terminate assistance if the cause for eviction was also a basis for termination of assistance in the local PHAs plan.

The landlord may base their eviction for criminal activity if the owner determines that the covered person has engaged in the activity. There is no requirement that the covered person be arrested or convicted for such activity, and the landlord does not have to satisfy criminal conviction standards (beyond a reasonable doubt) in order to seek an eviction. The following list contains permissive grounds for an eviction by an owner/landlord.

**Landlord grounds for eviction of a Section 8 Housing Voucher Tenant as it relates to criminal activity:**

- Any drug related criminal activity engaged *in, on, or near* the premises by any tenant, household member, or guest, or such activity engaged in on the premises by any other person under the tenant’s control;
- When the owner determines that any household member is illegally using a drug or when the owner determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents;

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<sup>17</sup> 24 C.F.R. § 982.552(c)(2).

<sup>18</sup> 24 C.F.R. § 982.552(c)(2)(iii).

<sup>19</sup> 24 C.F.R. § 982.552(c)(2)(ii).

<sup>20</sup> 24 C.F.R. § 982.310.

- Activity by a covered person that is a threat to other residents:
  - a. Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity of the premises; or
  - b. Any *violent* criminal activity *on or near* the premises by a tenant, household member, or guest; or
  - c. Any violent criminal activity on the premises by any person under the tenant’s control;
- If a tenant is a fugitive felon;
- If a tenant is violating a condition of probation or parole imposed under federal or state law.

**Discretion of landlord:** The landlord could make it a condition of continued household tenancy that the culpable household member(s) leave the unit. The landlord can also take into consideration evidence of drug or alcohol treatment.

**Summary**

The below chart summarizes the federal drug and crime related restrictions for public housing:

Summary of Federal Drug- and Other Crime-Related Restrictions in  
Federal Housing Assistance Programs  
(denial=denial of admission to applications; termination=termination of assistance and/or tenancy)

Activity	Public Housing	Section 8 Vouchers	Project-Based Section 8
Drug-related criminal activity	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination
Violent criminal activity	Grounds for denial	Grounds for denial; grounds for termination	Grounds for denial
Criminal activity that interferes with health, safety, peaceful enjoyment of other residents	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination
Determined to be currently using illegal drugs	Mandatory denial; grounds for termination	Mandatory denial; grounds for termination	Mandatory denial; grounds for termination
Abuse of drugs or alcohol that interferes with health, safety, peaceful enjoyment of other residents	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination
Subject to lifetime registration on a state sex-offender registry	Mandatory denial	Mandatory denial	Mandatory denial
Convicted of producing methamphetamines on federally assisted property	Mandatory denial; mandatory termination	Mandatory denial; mandatory termination	No provision
Fugitive felon	Grounds for termination	Grounds for termination	Grounds for termination
Drug testing	No provision	No provision	No provision

Source: Table prepared by CRS.

Note: This table summarizes only federal policies. While there may be no federal policies in a given category, local administrators may have adopted a policy in that category using their discretionary authority. <sup>21</sup>

<sup>21</sup> CRS Report R42394, *Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance*, Table 2, page 19 (March 7, 2012).

## Miscellaneous Provisions:

**Sex Offenders:** Federal law bans sex offenders who are subject to lifetime registration requirements from admission into federally assisted housing. On June 11, 2012 HUD issued guidance stating that if a PHA discovers that it erroneously admitted a household member who was subject to a lifetime registration requirement at the time of admission and was admitted after June 25, 2001, the PHA must immediately pursue eviction or termination.<sup>22</sup> The PHA must offer the household the option of removing the ineligible family member.<sup>23</sup> The guidance also clarifies that there is currently no statutory or regulatory basis to evict or terminate assistance of the household based solely on the household member's sex offender registration status if they were admitted to public housing prior to June 25, 2001.<sup>24</sup>

**Portability:** Portability is a key feature of the voucher program. Tenants with a voucher may move from one PHA's jurisdiction to another PHA's jurisdiction. Portability allows Section 8 voucher holders the freedom to relocate to another area.

Criminal history can affect portability. Under current law, a family moving into another jurisdiction must satisfy the receiving PHA's screening criteria. This policy could cause problems if the receiving PHA's screening criteria is more stringent than the initial PHA's screening criteria. A household member who has a criminal record that was acceptable under the initial PHA's screening policy may be ineligible based on the receiving jurisdiction's PHA screening policy. This type of policy could result in loss of mobility, employment, housing uncertainty, and other practical problems.

To reduce the problems associated with criminal records and portability, a PHA could adopt screening criteria that are less stringent when it comes to criminal records. In the alternative, PHA's could adopt the screening criteria used by the issuing PHA when evaluating ported vouchers. Voucher holders with criminal records should always check the eligibility requirements of the receiving jurisdiction or seek to move to a jurisdiction with less rigid eligibility requirements.

## Veterans Affairs Supportive Housing (VASH):

VASH combines housing choice vouchers with case management and clinical services provided by the Veterans Administration. This program is designed to reduce homelessness among veterans. Under this program veterans are specifically excluded from the criminal record screening criteria for the regular housing choice voucher program, with the exception for the provision relating to veterans who must register as a sex offender.<sup>25</sup>

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<sup>22</sup> HUD Notice PIH 2012-28 (June 11, 2012).

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> HUD-VASH Operating Requirements, Federal Register Vol. 77 Issue 57 (March 23, 2012), available at: [www.gpo.gov/fdsys/pkg/FR-2012-03-23/pdf/2012-7081.pdf](http://www.gpo.gov/fdsys/pkg/FR-2012-03-23/pdf/2012-7081.pdf)

There is currently a very limited number of VASH voucher available across the state. South Carolina received 200 VASH vouchers in fiscal year 2012, bringing the South Carolina total number of vouchers to 595.<sup>26</sup>

## **Discussion: Strategies to reduce barriers to subsidized and affordable housing**

Advocates should attempt to identify and quantify the housing needs in their area for individuals with criminal records. The South Carolina Department of Corrections or local jails may have relevant information relating to the number of individuals released from incarceration. Local homeless organizations and shelters may be able to shed light on the criminal history background of their client population.

Local PHAs may keep records of the number of people that are excluded from admission annually based on criminal history screening. The local PHA may have data relating to current tenants with criminal histories and the proportion of that population to the public housing population in general, as well as how many households include members with criminal histories.

If possible, advocates should determine the extent to which individuals with criminal records are dissuaded from applying for assistance or are under the belief that any criminal history is a permanent ban from public housing assistance. In South Carolina, African Americans are disproportionately represented in the criminal justice system. A PHA policy that excludes or limits an individual with a criminal record from access to housing could have a disproportionate impact on people of color, which could have serious fair housing implications. PHAs could face fair housing complaints if their policies disproportionately impact a protected class.

The inability of a person to find stable housing could be a contributing factor to whether or not that person recidivates or ends up homeless and living on the streets. The lack of stable and affordable housing available to the reentry population could have a severe negative effect to public safety, as well as additional costs to the general public. A local policy to exclude people from public housing could also mean that individual is unable to join their families and their children, which impacts their access to a support system.

HUD Secretary Shaun Donovan has encouraged public housing authorities to allow ex-offenders to rejoin their families living in public housing when it is appropriate to do so.<sup>27</sup> HUD understands that blanket prohibitions would not allow local PHA's to consider important factors when creating their policies. HUD gives PHAs broad discretion so that the housing authorities are able to consider factors such as disability, age, evidence of rehabilitation, time since offense, and any number of other factors. Mandating termination, instead of providing the PHA with discretion, strips the PHA of its ability to consider factors specific to their region and circumstances.

Advocates should work with local PHAs to encourage them to use discretion to make their policies and leases as non-punitive as possible, while still protecting the public. Housing authorities should be urged

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<sup>26</sup> Excel Spreadsheet available for download at:

[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/hcv/vash](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/vash)

<sup>27</sup> Link to letter is available at: <http://nationalreentryresourcecenter.org/announcements/hud-director-encourages-public-housing-authorities-to-grant-access-to-people-with-criminal-records>

to eliminate or reduce barriers to affordable housing. Both PHAs and private landlords accepting vouchers should adopt policies that individually assess each applicant based on a relevant and individualized assessment of the risk.

The American Bar Association Criminal Justice Section has issued a resolution urging the federal government to encourage public housing authorities to reevaluate their current rules regarding admission, termination, and additions to household to ensure that those rules do not unfairly punish people with criminal records.<sup>28</sup> According to the ABA resolution, “many barriers to housing that come from local PHA rules and policies are overly broad and unfairly discriminate against the reentering population.”<sup>29</sup> Advocates should work with local PHAs to ensure that their policies do not unreasonably restrict access to affordable housing.

Admission policies may touch on various factors that ultimately lead to a housing provider using a person’s criminal record to deny access to housing for low-income people. PHAs should take a look at their admission policies and identify those policies which may lead to overbroad denials for people with criminal records.

**Suggested PHA Admission Policies:**

- A policy to make individualized reviews for each applicant
- Limit a review of an applicant’s criminal history to a set “look-back” period
- Ensure that admissions policies are clear
- Require consideration of mitigating circumstances or evidence of rehabilitation
- Create specific time periods of ineligibility based on the nature and seriousness of the crime, while also allowing for individualized circumstances or mitigating evidence to overcome ineligibility.
- Clear policies on whether the prohibition period begins at the time of arrest, conviction, or release from jail/prison/parole/probation.

PHA should be encouraged to establish policies that take individual circumstances into consideration, as well as mitigating circumstances. For instance, a PHA could establish specific waiting periods or bans based on categories of offenses (6 months for misdemeanors, 1 year for non-violent felonies, etc.), or accept individuals who have completed drug rehabilitation. PHAs should establish a list of charges with a related waiting period based on the nature of the threat, and clarify if the waiting period starts at the date of conviction or another date. It makes little sense to treat a prior possession of marijuana charge the same as a robbery charge or trafficking charge. Additionally, PHAs should also limit their criminal history “look-back” period to a fixed period of time prior to application.

**Problematic PHA Admissions Policies:**

- Admissions policies that exceed the required federal bans.
- Blanket prohibitions that don’t relate to the seriousness of the offense.
- The use of arrests without convictions as proof of criminal activity.
- Vague, inappropriate, or misleading definitions of criminal activity.
- Policies that do not allow an applicant to present circumstances or other mitigating factors.
- Policies that do not consider drug/alcohol treatment or rehabilitation.

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<sup>28</sup> Reentry Housing Resolution, American Bar Association, Criminal Justice Section (Oct. 2011).

<sup>29</sup> Reentry Housing Resolution, American Bar Association, Criminal Justice Section (Oct. 2011).

- Unreasonably long prohibition periods that do not relate to a present threat to the health, safety, or right to peaceful enjoyment by other tenants.
- Unreasonably long look back periods.

### **For More Information:**

- HUD website: [http://portal.hud.gov/hudportal/HUD?src=/topics/rental\\_assistance/phprog](http://portal.hud.gov/hudportal/HUD?src=/topics/rental_assistance/phprog)
- Affordable Housing Coalition of SC: [www.affordablehousingsc.org/](http://www.affordablehousingsc.org/)
- SC State Housing Finance & Development Authority: [www.schousing.com/](http://www.schousing.com/)
- 24 CFR 960.204 for Public Housing
- 24 CFR 982.553 for the Housing Choice Voucher Program

# Employment

## Introduction

Studies have shown that employment is a fundamental component of the reentry process, and that ex-offenders who are able to find stable employment are much more likely to succeed in their rehabilitation than those who cannot find work.<sup>30</sup> Ex-offenders must contend with a number of barriers to finding stable employment, much less employment that provides a living wage. Some of these barriers relate to various characteristics that may apply to the ex-offender, including lack of education, job skills, or work history. Other factors may have more to do with societal or personal feelings about ex-offenders. Taken altogether, these factors rarely qualify an individual with a criminal history for jobs that pay much above minimum wage.

Increasing employment opportunities for individuals with criminal records has multiple benefits. Increased employment of ex-offenders would go a long way in reducing recidivism rates which would ultimately increase public safety. Studies have shown that strict across the board employment bans for individuals with criminal records are not based on the actual risk posed by such employees.<sup>31</sup> Reducing barriers to employment will have an effect on crime rates, unemployment rates, homelessness, and will reduce dependence on public benefits such as housing assistance and TANF/SNAP. As the chart below will show, unemployment rates in South Carolina have been consistently higher than national unemployment rates over the last ten years:<sup>32</sup>

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
National	5.8	6.0	5.5	5.1	4.6	4.6	5.8	9.3	9.6	8.9
SC	6.0	6.7	6.8	6.7	6.4	5.6	6.9	11.3	11.2	10.3

Reducing barriers to employment for individuals with criminal records could have a widespread positive impact that could benefit all South Carolinians, both economically and in terms of public safety.

There is much to be said about unemployment generally and the costs to society. However, the discussion in this guide will focus on the few employer incentives that exist on the federal level, as well as a discussion on how employers who screen for criminal history may run afoul of anti-discrimination laws.

## Employer Incentives:

- **Work Opportunity Tax Credit:** The Work Opportunity Tax Credit (WOTC) is a federal tax credit used to reduce the federal tax liability of private-for-profit employers. Employers can save money on their federal income taxes in the form of a tax credit incentive through the Work Opportunity Tax Credit (WOTC) program by hiring ex-felons (in addition to other populations that are traditionally difficult to employ). An ex-felon under WOTC is an individual who has been

<sup>30</sup> CRS Report for Congress RL34287 (2005), *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism*.

<sup>31</sup> Michelle Natividad Rodrigues & Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, National Employment Law Project (2011), page 6, available at: [http://nelp.3cdn.net/e9231d3aee1d058c9e\\_55im6wopc.pdf](http://nelp.3cdn.net/e9231d3aee1d058c9e_55im6wopc.pdf).

<sup>32</sup> Bureau of Labor Statistics, [www.bls.gov](http://www.bls.gov).

convicted of a felony under any statute of the United States or any State, and has a hiring date which is within one year from the date of conviction or release from prison. For each new ex-felon hired, the credit is 25% of qualified first-year wages for those employed at least 120 hours, or \$1500; and 40% for those employed 400 hours or more, or \$2400. There is no limit to the number of ex-felons an employer can hire to benefit from these tax savings. Employer should fill out IRS Form 5884 to take advantage of the Work Opportunity Credit.

According to the SC Department of Employment and Workforce, in program year 2011, South Carolina employers were issued 18,684 certifications adding up to \$77,310,600 in potential tax savings, with 497 tax credit certifications used specifically for hiring ex-felons.

- **Federal Bonding Program:** The Federal Bonding Program (FBP) is a federally funded incentive directed towards encouraging employers to hire at-risk and hard to place job applicants, including ex-offenders. The bond insures the employer for any type of theft, forgery, larceny or embezzlement by an employee for a six-month period. This service is provided at no cost to either the employer or the employee. The bonds are available to any individual who is qualified for the employment in question, not commercially bondable, and has a firm job offer. Bonding requests should be made by the job applicant at any of the South Carolina Workforce Centers. A directory of Workforce Centers is available at: [www.scworks.org/directory.asp](http://www.scworks.org/directory.asp).

## Discrimination Based on Criminal Record

South Carolina has no state law that limits employer inquiry into a job applicant's prior arrests or convictions. Federal law does not bar employers from examining a job applicant's criminal record. However, an employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964. The Equal Employment Opportunity Commission (EEOC) enforces Title VII.<sup>33</sup>

Title VII does not prohibit an employer from requiring applicants to provide information about arrests, convictions, or incarceration, nor are individuals with criminal records specifically protected under Title VII as a protected class. Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate in employment based on race, color, national origin, religion, or sex.<sup>34</sup> A violation of Title VII occurs when an employer's practice of using criminal records in employment decisions leads to either disparate treatment or disparate impact of a protected class, such as race.

On April 25, 2012 the EEOC updated its policy statement relating to Title VII and the use of criminal records in employment decisions.<sup>35</sup> This guide will summarize some of the significant aspects of the guidance.

### Who Does Title VII Apply To?

- Private Employers and federal, state, and local government;
- Federal Security Clearances appear to be acceptable under Title VII;

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<sup>33</sup> 42 U.S.C. §2000e-5(a).

<sup>34</sup> 42 U.S.C. §2000e-2.

<sup>35</sup> EEOC Enforcement Guidance, available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)

- *State and local laws are pre-empted by Title VII.* If the employer has an exclusionary policy or practice and it is not job related and consistent with business necessity, the fact that it was adopted to comply with state or local law will not shield the employer from Title VII liability.<sup>36</sup>

### **Disparate Treatment:**

An employer may be liable under a disparate treatment theory if the applicant can show the employer treated him differently because of his race, national origin, or on another protected basis.<sup>37</sup> For example, an employer's use of criminal records could trigger Title VII liability under a disparate treatment theory if the employer rejects an African American applicant based on his criminal record but hires a similarly situated white applicant with a comparable criminal record. Evidence of disparate treatment might include an employer's biased statements, inconsistent hiring practices, statistical evidence, or comparisons between similarly situated applicants from different protected classes might suggest that an employer may be discriminating based on race or another protected characteristic.<sup>38</sup>

### **Disparate Impact:**

It may be more likely that claims of employment discrimination based on a criminal record would fall under disparate impact. An employer may be liable under a disparate impact claim if the applicant can show that the employer's *neutral* policy or practice has the effect of disproportionately screening out a Title VII protected group, and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity.<sup>39</sup>

Nationally, African Americans are arrested in numbers disproportionate to their representation in the general population.<sup>40</sup> This is also true in South Carolina where African Americans constitute around 30% of the population, but 50% of those arrested and 70% of those incarcerated. This information would suggest that a blanket criminal record exclusion would have a disparate impact based on race.

There are two main parts to Title VII that should be reviewed when establishing a disparate impact claim. They are as follows:

**Part I** – A covered employer is liable for violating Title VII when the plaintiff/potential employee demonstrates that the employer's neutral policy or practice has the effect of disproportionately screening out a protected group *and* the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity

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<sup>36</sup> 42 U.S.C. §2000e-7.

<sup>37</sup> See 42 U.S.C. §2000e-2(a).

<sup>38</sup> See EEOC Enforcement Guidance for more detail:

[http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm#sdendnote1sym](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote1sym)

<sup>39</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i). If an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory "alternative employment practice" that serves the employer's legitimate goals as effectively as the challenged practice but that the employer refused to adopt. *Id.* § 2000e-2(k)(1)(A)(ii).

<sup>40</sup> See [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm#sdendnote1sym](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote1sym)

In *Green v. Missouri Pacific Railroad*, the Eighth Circuit identified the following three factors (known as the “Green factors”) used to assess whether an exclusion based upon a criminal record is job related for the position in question and consistent with business necessity:<sup>41</sup>

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense or conduct and/or completion of the sentence; and
- The nature of the job held or sought.

**Part II** – Even if an employer demonstrates that its policy or practice is consistent with job related business necessity, the potential employee may still prevail by demonstrating that there is a less discriminatory “alternative employment practice” that serves the employer’s goals (other than criminal record exclusion).<sup>42</sup>

The EEOC has specified two circumstances in which employers will consistently meet the “job related and consistent with business necessity” defense:<sup>43</sup>

- 1) The criminal conduct screen is conducted pursuant to the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines);<sup>44</sup>
- 2) The employer has developed a targeted criminal conduct screen that takes into consideration the *Green* factors, and also provides an opportunity for an individualized assessment to determine whether the policy as applied is job related and consistent with business necessity.

Employers should read the EEOC guidance so that they do not run afoul of federal law. Employees and job seekers with criminal records also need to be aware that there are laws that might protect them from employment discrimination. If a job seeker feels they may have been discriminated against, they must file a charge of employment discrimination within 180 days of the unlawful employment practice.<sup>45</sup>

There are a number of policies and practices that can be changed or modified to give individuals with criminal records a better chance of obtaining employment. Some of these changes may include:

- Encourage employers in South Carolina to adopt the EEOC Employer Best Practices.<sup>46</sup>
- Encourage employers to refrain from asking about arrests or convictions on job applications and instead wait until the hiring process has narrowed down applicants based on who is best qualified for the position.
- Pass a law in South Carolina that requires employers to wait until later the selection process to ask about arrests and convictions.<sup>47</sup> An employer is more likely to objectively assess the

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<sup>41</sup> *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977). See also *El v. Southeastern Pennsylvania Transportation Authority* 479 F.3d 232 (3d Cir. 2007) for in depth statutory analysis.

<sup>42</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C). See also *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988).

<sup>43</sup> See EEOC Enforcement Guidance for more detail:

[www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm#sdendnote1sym](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote1sym)

<sup>44</sup> See 29 C.F.R. § 1607.5 (describing the general standards for validity studies).

<sup>45</sup> 42 U.S.C. §2000e-5(e)(1).

<sup>46</sup> See EEOC Enforcement Guidance, §VIII. Employer Best Practices, available at:

[www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm#sdendnote89sym](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote89sym).

relevance of a potential employee's conviction if it becomes known after the employer is already aware of the applicant's qualifications and experience.

### **Fair Credit Reporting ACT:**

The Fair Credit Reporting Act (FCRA) is a law that protects the privacy and accuracy of the information in a person's credit report, and is enforced by the Federal Trade Commission (FTC).<sup>48</sup> The FCRA also covers certain background checks conducted when an employer uses a third party entity to conduct a background check.

FCRA states that arrests (also called an adverse item of information) must be removed from third party criminal background reports after 7 years.<sup>49</sup> Note that this requirement applies to arrests only, not convictions. Additionally, consumer reporting agencies are required to verify the accuracy of public records of arrests, indictments, and convictions.<sup>50</sup>

FCRA imposes a number of requirements on employers who use criminal background checks to screen job applicants or employees.

- Employers must get permission, usually in writing, before obtaining a report about an applicant or employee.
- If adverse action is taken (no job offer, no promotion, termination, etc.) based on the report, the employer must provide the applicant or employee with a copy of the report as well as inform the applicant or employee of their rights under the FCRA.
- An applicant/employee has the right to dispute inaccurate or incomplete information on their report.<sup>51</sup>

There are legal consequences for employers who don't comply with the FCRA, whether they fail to get an applicant's written permission before getting a copy of their credit or other background report, fail to provide the appropriate disclosures in a timely way, or fail to provide adverse action notices to unsuccessful job applicants.

### **For More Information:**

- Work Opportunity Tax Credit:
  - Department of Labor: [www.doleta.gov/wotc](http://www.doleta.gov/wotc)
  - IRS Website: [www.irs.gov](http://www.irs.gov)
  - South Carolina Department of Employment and Workforce: [www.dew.sc.gov/](http://www.dew.sc.gov/)
- Federal Bonding Program:
  - Department of Labor Federal Bonding Website: [www.bonds4jobs.com/](http://www.bonds4jobs.com/)

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<sup>47</sup> The Legal Action Center has summarized a description of 14 states that have laws prohibiting employment discrimination based on criminal records. This list is helpful when crafting policies or proposed legislation in South Carolina. The overview is available at: [http://lac.org/toolkits/standards/Fourteen\\_State\\_Laws.pdf](http://lac.org/toolkits/standards/Fourteen_State_Laws.pdf).

<sup>48</sup> Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.

<sup>49</sup> The reporting periods have been lengthened for certain adverse information pertaining to U.S. Government insured or guaranteed student loans, or pertaining to national direct student loans. See sections 430A(f) and 463(c)(3) of the Higher Education Act of 1965, 20 U.S.C. 1080a(f) and 20 U.S.C. 1087cc(c)(3), respectively.

<sup>50</sup> 15 U.S.C. §1681(d). See also §1681k.

<sup>51</sup> See the Federal Trade Commission website for more information: [www.ftc.gov/bcp/index.shtml](http://www.ftc.gov/bcp/index.shtml)

- South Carolina Department of Employment and Workforce: [www.dew.sc.gov](http://www.dew.sc.gov)
- SC Works (for a map of workforce centers across the state: [www.scworks.org/directory.asp](http://www.scworks.org/directory.asp))
- EEOC Enforcement Guidance, number 915.002, April 25<sup>th</sup> 2012; available at: [www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)
- About the Fair Credit Reporting Act (FCRA): [www.ftc.gov/credit](http://www.ftc.gov/credit) or call 1-877-382-4357.

## EDUCATION – Student Loans and Grants

### Federal Student Aid:

Federal student aid may include grants, school loans, or federal work study. Starting in 2000, students with drug convictions lost access to federal financial aid as a result of an amendment to the Higher Education Act.<sup>52</sup> The Souder Amendment added the Aid Elimination Penalty which affected the eligibility of many students with drug convictions. This penalty was in effect until Congress scaled back the law in 2006, and again in 2008. Students who were previously denied access to federal aid may now be eligible.

**Current Status:** A student who is receiving federal student aid and is convicted for the possession or sale of illegal drugs while receiving federal student aid will have their aid suspended. Student loan eligibility may be suspended for an amount of time depending on the nature of the conviction.<sup>53</sup> Suspension from aid will be as follows:

	POSSESSION OF ILLEGAL DRUGS	SALE OF ILLEGAL DRUGS
FIRST OFFENSE	One Year	Two Years
SECOND OFFENSE	Two Years	Indefinite
THIRD (+) OFFENSES	Indefinite	

If a student is disqualified due to such a drug conviction, there are three methods for a student to regain eligibility:<sup>54</sup>

- 1) If the conviction is reversed or set aside; or
- 2) If the student successfully passes two unannounced drug tests; or
- 3) If the student successfully completes a drug rehabilitation program that includes two unannounced drug tests.

### Pell Grant:<sup>55</sup>

In 1965, Congress passed Title IV of the Higher Education Act, which permitted incarcerated persons to apply for Pell Grants to finance their education. In 1994, Congress eliminated Pell Grant eligibility for incarcerated persons pursuant to the Violent Crimes Control and Law Enforcement Act, signed into law by President Clinton.<sup>56</sup> Once released from incarceration, individuals will re-gain Pell Grant eligibility subject to the drug conviction ban and time limits listed in the above chart.

In addition to the above criteria relating to drug convictions, students subject to an involuntary civil commitment (Sexual Violent Predator) after completing a period of incarceration for forcible or non-forcible sexual offense are ineligible to receive a Federal Pell Grant.<sup>57</sup>

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<sup>52</sup> Students for Sensible Drug Policy, The Higher Education Act, available at: <http://ssdp.org/campaigns/the-higher-education-act/>

<sup>53</sup> 20 U.S.C. 1091(r)(1).

<sup>54</sup> 20 U.S.C. 1091(r)(2).

<sup>55</sup> 34 CFR §690.1 -690.83.

<sup>56</sup> 20 U.S.C §1070a(b)(6).

<sup>57</sup> 20 U.S.C. §1070a(b)(6).

Students who may be ineligible for the above grants or loans are still encouraged to fill out a FAFSA as there may be non-federally based aid available for which they qualify.

### State Based Student Aid:

To be eligible for South Carolina specific grants and financial aid, a student must never have been convicted of any felonies and must never have been convicted of any second or subsequent alcohol/drug-related misdemeanor offenses within the past academic year.

South Carolina offers a variety of student aid. The below list summarizes specific exclusions based on criminal record:

**LIFE Scholarship:** any felony convictions, or second or subsequent alcohol or other drug related misdemeanor conviction within the past academic year.<sup>58</sup>

**SC Hope Scholarship:** any felony conviction, or a second alcohol or drug related misdemeanor within the past academic year.<sup>59</sup>

**Palmetto Fellows:** any felony conviction or juvenile adjudication, or any second or subsequent alcohol or other drug-related misdemeanor offense within the past academic year.<sup>60</sup>

**Lottery Tuition:** the regulations do not specifically enumerate eligibility requirement relating to criminal records, though students must first determine eligibility for federal student aid.<sup>61</sup>

**SC National Guard College Assistance Program:** no specific mention of criminal record eligibility requirements, though applicant must be in good standing with the National Guard.<sup>62</sup>

**Free Tuition for Residents Sixty Years of Age:** no enumerated eligibility requirements relating to criminal records.<sup>63</sup>

### Discussion:

For many students from low or middle income families, student aid is the only way to pay for a college education. Students convicted on drug charges while in school may be forced to drop out of school solely because of their financial dependence on financial aid. This penalty therefore has a greater impact on lower income students, who are often dependent on financial aid. Individuals with drug convictions who can independently afford college will be able to complete their degrees. Furthermore, because of the discriminatory enforcement of drug laws, these penalties will have a greater impact on minority students.

Because students receiving federal aid must already meet academic standards and minimum GPA requirements, this policy will impact good students who are academically qualified for student aid. Even a temporary suspension of student aid may deter a student from finishing their education.

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<sup>58</sup>SC Code of Regs §62-1200.10(A)(7). See also LIFE Scholarship FAQ, available at: [www.che.sc.gov/StudentServices/LIFE/Frequently\\_Asked\\_Questions\\_for\\_LIFE.pdf](http://www.che.sc.gov/StudentServices/LIFE/Frequently_Asked_Questions_for_LIFE.pdf).

<sup>59</sup> SC Code of Regs. §62-900.95(A)(5). See also SC HOPE Scholarship FAQ, available at: [www.che.sc.gov/StudentServices/HOPE/Q&A\\_HOPE.pdf](http://www.che.sc.gov/StudentServices/HOPE/Q&A_HOPE.pdf).

<sup>60</sup> SC Code of Regs. §62-315(A)(6). See also Palmetto Fellows Scholarship FAQ, available at: [www.che.sc.gov/StudentServices/PalmettoFellows/files/Q&A\\_PFS\\_2010-11.pdf](http://www.che.sc.gov/StudentServices/PalmettoFellows/files/Q&A_PFS_2010-11.pdf).

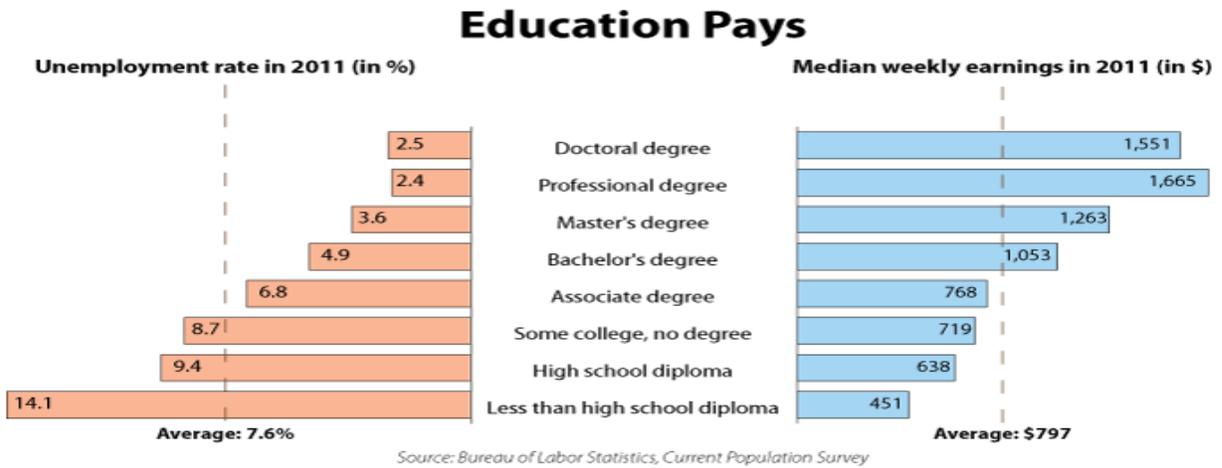
<sup>61</sup> SC Code of Regs. §62-900.165. See also General Eligibility Requirements, available at: [www.che.sc.gov/StudentServices/LTAP/LTAGenEligReq.htm](http://www.che.sc.gov/StudentServices/LTAP/LTAGenEligReq.htm).

<sup>62</sup> SC Code of Regs, §62-253.

<sup>63</sup> SC Code of Regs. §62-1110.

Higher education and incarceration rates are also linked. Studies show that the more education a person completes, the more likely they are to avoid incarceration or abuse drugs. According to the Bureau of Justice Statistics, in 2002 individuals with college degrees made up less than 3% of the jail population, whereas individuals with either a GED or high school diploma made up more than 40% of the jail population.<sup>64</sup>

Education and income potential are also linked. By denying lower-income students who otherwise maintain good grades the financial assistance that would provide them the opportunity to finish their degree, the policy acts to curtail their future income potential. This could have far reaching lifelong implications for these students. In South Carolina, the lifetime income of a person with a bachelor's degree averages around \$2.5 million dollars, compared to \$1.3 million dollars for the same person who is a high school graduate.<sup>65</sup> The below chart shows income potential on a national level, for individuals age 25 and older:



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## Discussion

There are a number of policy goals that can be achieved with greater access to higher education. These include:

- Poverty Reduction:** Access to higher education has a direct impact on potential future earnings. Increasing access to higher education will increase earning potential. Individuals with criminal records could obtain higher paying/living-wage jobs if given the opportunity to seek higher education. Furthermore, children of parents who have postsecondary education are more likely to go to college, which will allow future generations the ability to climb out of poverty and stay out of poverty.
- Reduce Recidivism:** Many people who leave prison are unskilled and under-educated. These factors correlate to recidivism rates as less educated inmates are more likely than educated

<sup>64</sup> Bureau of Justice Statistics, Profile of Jail Inmates, 2002, available at: [www.bjs.gov/content/pub/pdf/pji02.pdf](http://www.bjs.gov/content/pub/pdf/pji02.pdf).

<sup>65</sup> South Carolina Commission on Higher Education: [www.che.sc.gov/](http://www.che.sc.gov/).

<sup>66</sup> Bureau of Labor Statistics, available at: [www.bls.gov/emp/ep\\_chart\\_001.htm](http://www.bls.gov/emp/ep_chart_001.htm).

inmates to be recidivists. Increasing educational opportunities will decrease recidivism rates and in turn increase public safety, which will save tax payer dollars.

### **For More Information:**

- Federal Student Aid: [www.studentaid.ed.gov](http://www.studentaid.ed.gov)
- For details on specific drug convictions, refer to the “FAFSA Question 23 Student Aid Eligibility Worksheet” at [www.studentaid.ed.gov/pubs](http://www.studentaid.ed.gov/pubs).
- South Carolina Commission on Higher Education: <http://www.che.sc.gov/>.
- The South Carolina Commission on Higher Education also maintains a student/parent friendly website at: <http://www.sccango.org/index.php>.

## SNAP/TANF

### SNAP: Supplemental Nutrition Assistance Program (Food Stamps):

In October 2008, the name of the federal Food Stamp Program was changed to the Supplemental Nutrition Assistance Program (SNAP). Federal and state laws and regulations govern the SNAP Program, and the Department of Social Services (DSS) administers the SNAP program in South Carolina. SNAP applicants must meet both the state and federal guidelines for the program. SNAP benefits are provided to supplement the food purchasing power of low-income recipients via the use of an EBT card (a debit card).

While the majority of rules regarding the program are the same in every state, there are some choices that federal law allows state agencies to make regarding how those agencies administer SNAP in their respective states. Federal law bans individuals convicted after August 22, 1996 of a drug-related felony from receiving SNAP benefits unless the state chooses to opt-out or modify the ban.<sup>67</sup> If a family member is a convicted drug-felon, his or her income shall be considered the income of the family, but he or she will not be considered a member of the family when determining benefits.<sup>68</sup>

The majority of states have either opted-out of or modified the drug felon ban for SNAP benefits.<sup>69</sup> South Carolina is one of fifteen states that have the full ban in place, without any modifications.<sup>70</sup> Nineteen states allow SNAP benefits to individuals with felony drug conviction. The remaining states have either modified or limited the ban. Examples of these modified approaches are:

- Limiting the circumstances in which the permanent disqualification applies (such as only when convictions involve the sale of drugs);
- Requiring the person convicted to submit to drug testing;
- Requiring participation in a drug treatment program; and/or
- Imposing a temporary disqualification period.<sup>71</sup>

H.R. 377: Food Assistance to Improve Reintegration Act of 2011 is federal legislation introduced January 2011 to repeal the SNAP felony drug ban. Similar legislation was introduced in 2009 but did not make it out of committee.

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<sup>67</sup> 21 U.S.C. § 862a. *See also* 7 C.F.R. 273.11(m) **Individuals convicted of drug-related felonies.** An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 102(6) of the Controlled Substance Act, [21 U.S.C. 802\(6\)](#)) shall not be considered an eligible household member unless the State legislature of the State where the individual is domiciled has enacted legislation exempting individuals domiciled in the State from the above exclusion.

<sup>68</sup> 42 U.S.C. 862a(b)(2).

<sup>69</sup> CRS Report R42394, *Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance*, pages 11-12 (March 7, 2012).

<sup>70</sup> *Ibid.*, pages 11-12.

<sup>71</sup> United States Department of Agriculture, SNAP State Options Report, November 2010, *available at:* [www.fns.usda.gov/SNAP/rules/Memo/Support/State\\_Options/9-State\\_Options.pdf](http://www.fns.usda.gov/SNAP/rules/Memo/Support/State_Options/9-State_Options.pdf)

## TANF: Temporary Assistance for Needy Families

TANF (formerly AFDC- Aid to Families with Dependent Children) is the federal welfare program that provides cash assistance to needy families. TANF applicants must meet both the state and federal guidelines for the program. TANF eligibility mirrors SNAP eligibility requirements for individuals with drug-related felonies. The amount of assistance under TANF is reduced if a family member has been convicted of a drug-related felony.<sup>72</sup>

Similar to the SNAP program, states can choose to opt-out or modify the federal ban.<sup>73</sup> The majority of states have either opted-out of or modified the drug felon ban for TANF cash assistance.<sup>74</sup> South Carolina is one of twelve states that have the full ban in place, without any modifications.<sup>75</sup> TANF recipients may be required to submit to drug tests.

Modifications to the ban vary from state to state. Modifications include allowing an applicant to receive TANF benefits if they are in compliance with court orders (such as probation, etc), have completed treatment or had a negative drug screen and two states where the ban ends a certain time after completion of sentence.

In addition to the felony drug ban, TANF includes a 10-year prohibition of assistance to those who have been convicted in state or federal court of committing welfare fraud by applying for benefits in more than one state.<sup>76</sup>

H.R. 3573: RISE Act of 2011 is federal legislation introduced December 2011 in part to eliminate the ban for individual convicted of drug felonies.

## Discussion

Food assistance is a critical element for a successful reentry into society for many ex-offenders. These bans *only* apply to individuals with drug convictions. Individuals convicted of other crimes, including violent crimes like murder or rape, are still eligible for SNAP and TANF benefits. The felony drug ban targets a narrow category of ex-offenders who are typically non-violent offenders. They may be battling drug addiction on top of trying to find or hold down a job, maintain housing, and reconnect with family and society. A lifetime ban aimed at a specific group of ex-offenders will impact them for the rest of their lives, regardless of whether they ever again involved with drugs. Lack of access to food will likely have the biggest impact when individuals are most in need and have a higher risk for re-offending, such as when they are released from incarceration.

The ban also has unintended consequences for the families of those convicted of a felony drug charge. A reduction in benefits impacts an entire family, not just the individual with the felony drug conviction. SNAP benefits are determined (in part) by household size and income. Even if an individual is banned

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<sup>72</sup> 42 U.S.C. 862a(b)(1).

<sup>73</sup> 42 USC 862a(1).

<sup>74</sup> CRS Report R42394, *Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance*, page 9 (March 7, 2012).

<sup>75</sup> *Id.*, page 9.

<sup>76</sup> 42 U.S.C. §608(a)(8).

from receiving benefits, his or her income is counted towards the entire household income, thereby reducing benefits for the rest of the household. The entire household will simply have to get by on less.

The SNAP ban could separate family members from living with one another. For example, a father with a felony drug conviction has an incentive to live away from his family so that his income does not reduce SNAP benefits for the rest of the family members, including his children.

South Carolina has the option to opt-out of the federal ban completely. South Carolina could also choose to put limitations or conditions on eligibility, such as:

- Condition eligibility for SNAP/TANF on participation in a drug and alcohol treatment program.
- Condition benefits for those with drug conviction on passing a drug test.
- Condition eligibility for SNAP/TANF on successful completion of his or her sentence or compliance the terms and conditions of parole or probation.
- Limit eligibility to those individuals convicted of drug possession.
- Limited ineligibility for specific time frames, such as one year from the date of conviction.
- Exempt individuals with disabilities, dependents, etc. from the ban.
- Provide SNAP benefits without limitation while limiting TANF benefits.<sup>77</sup>

### **For More Information:**

- SNAP: [http://www.fns.usda.gov/SNAP/rules/Memo/Support/State\\_Options/9-State\\_Options.pdf](http://www.fns.usda.gov/SNAP/rules/Memo/Support/State_Options/9-State_Options.pdf)
- List of States with TANF eligibility criteria: [http://www.lac.org/doc\\_library/lac/publications/HIRE\\_Network\\_State\\_TANF\\_Options\\_Drug\\_Felony\\_Ban.pdf](http://www.lac.org/doc_library/lac/publications/HIRE_Network_State_TANF_Options_Drug_Felony_Ban.pdf)
- The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PL 104- 193)

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<sup>77</sup>The Legal Action Center has an Advocate's Toolkit with many additional suggestions. The entire Toolkit is available online at: [www.lac.org/toolkits/Introduction.htm](http://www.lac.org/toolkits/Introduction.htm)

## Social Security and Disability Benefits<sup>78</sup>

### Social Security

Social Security benefits are not payable to an individual who is convicted of a criminal offense and confined for more than 30 days. Benefits to a spouse or children will continue as long as they remain eligible. There are a few specific federal offenses which would disqualify an individual from benefits.<sup>79</sup> These are: espionage, sabotage, treason, sedition, or subversive activities.<sup>80</sup>

There is a prerelease procedure in place to ensure that an individual's benefits will resume upon release, usually within 30 days. The inmate should check with their institution to begin processing the inmate's paper work. Alternatively, the inmate could write their local Social Security Office about setting up a pre-release agreement. Social Security and/or Supplemental Security Income (SSI) benefits are suspended when individuals are in jail or prison.

- For Social Security Beneficiaries, benefits remain suspended until the inmate is released.
- For SSI beneficiaries, benefits are suspended during the first year of incarceration, and benefits are terminated when the individual is incarcerated for a year or more.

When individuals leave prison or jail it is important that they have funds to cover living expenses. If benefits have merely been suspended, they can be restarted without much delay. If benefits have been terminated it could take a few months before benefits will resume.

A pre-release agreement is important for an individual's successful reentry into society after incarceration and could serve to lessen financial hardship and could also deter recidivism. Once an inmate knows his anticipated release date, he should ask the institution where he is housed whether they have a prerelease agreement with the local Social Security Office, or if not, he should contact the Social Security Office to tell them your scheduled release date.

### Veterans Benefits

Veterans with criminal histories may be at increased risk for homelessness. The VA has acknowledged this issue and has several programs in place to reduce incidences of homelessness for all Veterans, but also for those with criminal records. Every VA medical center has a Veterans Justice Outreach Specialist who is the VA liaison with the local criminal justice system. The Healthcare for Re-Entry Veterans (HCRV) is another program specifically designed for incarcerated Veterans. The HCRV program includes:

- Outreach and pre-release assessments services for Veterans in prison
- Referrals and linkages to medical, psychiatric, and social services, including employment services upon release
- Short term case management assistance upon release

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<sup>78</sup> This information is a general overview as it relates to currently incarcerated individuals. See SSA Publication No. 05-10133, *What Prisoners Need To Know*, available at: [www.ssa.gov/pubs/10133.html#a0=2](http://www.ssa.gov/pubs/10133.html#a0=2)

<sup>79</sup> 20 CFR §404.466.

<sup>80</sup> 20 CFR §404.465.

The VA may pay certain benefits to incarcerated Veterans depending on the type of benefit, the length of incarceration, and the nature of the charge.

An eligible Veteran who is not currently incarcerated can use VA medical care regardless of any criminal history. The only times an eligible Veteran is unable to use VA medical care is during periods of incarceration or if the Veteran is in fugitive felon status.

### **Disability Compensation**

VA disability compensation payments are *reduced* if a veteran is convicted of a felony and imprisoned for more than 60 days. The monthly payment will be reduced beginning with the 61<sup>st</sup> day of imprisonment. If the payment before incarceration was greater than 10%, the reduced payment will be the 10% rate. If the payment before incarceration was 10% rate, the reduced payment will be half the 10% rate. Payments are not reduced for recipients participating in work release programs, residing in halfway houses (also known as "residential re-entry centers"), or under community control.

### **Disability Pension**

Veterans in receipt of VA pension will have payments *terminated* effective the 61st day after imprisonment in a Federal, State, or local penal institution for conviction of a *felony or misdemeanor*. Payments may be resumed upon release from prison if the veteran meets VA eligibility requirements.

### **Reinstating Benefits after Incarceration**

Compensation or pension benefits can be resumed the date of release from incarceration if the Department of Veteran's Affairs received notice of release, such as proposed date of release as determined by the Department of Corrections, for instance. Once a veteran is released from prison, compensation payments may be reinstated based upon the severity of the service connected disability(ies) at that time.

The VA may apportion benefits that are not received by the incarcerated individual to the incarcerated individual's spouse or dependents. The VA regional office can provide more detail on how to apply.

### **For More Information:**

- For Social Security information, visit [www.ssa.gov](http://www.ssa.gov). See also: SSA Publication No. 05-10504, ICN 382004, October 2008: *Entering The Community After Incarceration—How We Can Help*; See also: SSA Publication No. 05-10133, May 2010: *What Prisoners Need to Know*.
- For Veteran's Benefits information, visit [www.va.gov](http://www.va.gov).
- The Veteran's Administration publishes a guidebook for incarcerated Veterans. The guidebook can be found online at: [http://www.va.gov/HOMELESS/docs/Reentry/09\\_sc.pdf](http://www.va.gov/HOMELESS/docs/Reentry/09_sc.pdf)

# Clearing a Criminal Record

## Inaccuracies on SLED or NCIC Checks

### SLED

South Carolina Law Enforcement Division, or SLED, is the agency responsible for maintaining criminal records in South Carolina. SLED reports contain criminal history record information that will include: all unsealed conviction data, non-conviction data and non-disposition data as well as findings of not guilty, nolle prosequi, dismissals, and similar dispositions which show any final disposition of an arrest.<sup>81</sup> The local Clerk of Court keeps the General Sessions records for cases heard in that county, and you may request your General Sessions records at the appropriate Clerk of Courts office.

### Correcting a mistake on SLED report

SC law provides a method for individuals to challenge the information on their criminal records if there is a mistake on a SLED report.<sup>82</sup> The steps to formally challenge information on a SLED report are as follows:

1. Contact SLED and request a “Challenge of Criminal History Record” packet.
2. Complete the application, provide picture ID, and submit a copy of the criminal record in question or a \$25 money order to obtain a copy of the criminal record.
3. Get fingerprinted by a law enforcement agency and submit fingerprints to SLED.
4. SLED will accept or deny the challenge through an administrative review.
5. If SLED find errors, omissions, or cannot verify the accuracy of the record, SLED must accept the challenge and modify the record.
6. The individual challenging a record may seek an appeal of the decision of the administrative review by requesting one within 30 days of the denial of the finding by petitioning the Criminal History Administrative Appeal Board. A hearing will be conducted within 60 days and the individual seeking review may present evidence concerning the record. If the appeal is denied, the individual seeking review must be notified in writing of the reason for the denial.

### NCIC

The National Crime Information Center, or NCIC, is the federal repository for criminal justice information and is maintained by the FBI. The records relating to individuals are often referred to as a person’s “Rap” (record of arrests and prosecutions) sheet. NCIC maintains information from various federal, state, local, and tribal criminal justice users. Information ranges from stolen vehicles to missing persons, as well as individuals who are fugitives. This information is generally not openly available to the public. Since NCIC is a criminal justice repository, the information pertaining to an individual is only as accurate as the information submitted by the local law enforcement agency (such as SLED).

### Correct a mistake on NCIC/Rap sheet<sup>83</sup>

If a recipient of a record believes the information on their RAP report to be incorrect, he or she should contact the agency that submitted the erroneous information. An individual could also direct his or her challenge to the FBI at the below address, and the FBI will forward the challenge to the appropriate

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<sup>81</sup> SC Code of Regs §73-23.

<sup>82</sup> SC Code of Regs. §73-24.

<sup>83</sup> See 28 CFR §16.30 et seq.

agency. You may request a copy of your RAP sheet by submitting a written request which includes the following information:

- Proof of Identify: name, date of birth, and a set of rolled fingerprints obtained by a law enforcement agency
- Certified check or money order for \$18 made out to the Treasury of the United States. If indigent, an individual may submit evidence of indigence and request a waiver of the fee. Requests should be mailed to the following address:

FBI, Criminal Justice Information Services Division  
ATTN: SCU, MOD. D-2  
1000 Custer Hollow Road  
Clarksburg, WV 23606

# Pardons and Expungements

## Pardons

**What is a Pardon?** A pardon means that an individual is fully forgiven from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided. Pardons should FULLY restore all civil rights lost as a result of a conviction, including the right to:

- Register to Vote;
- Vote;
  - It is important to know that a person's right to vote is automatically restored once their sentence is fully satisfied.
  - SC Code §7-5-120(B)3 provides that a person is disqualified from being registered or voting if he is convicted of a felony or offenses against the election laws, unless the disqualification has been removed by service of the sentence, including probation and parole time unless sooner pardoned.
- Serve on a jury;
- Hold public office, except as provided in SC Code §16-13-210;
- Testify without having the conviction introduced for impeachment purposes to the extent provided by Rule 609 of the SC Rules of Evidence;<sup>84</sup>
- Not have his testimony excluded in a legal proceeding if convicted of perjury; and
- Be licensed for any occupation requiring a license.

**Who is eligible for a pardon?** The Board of Pardons and Paroles shall make eligibility determinations based on a number of criteria as follows:

Probationers: May be considered for a pardon any time after discharge from supervision provided all restitution and collection fees have been paid in full

Parolees: Any time after successful completion of five years under supervision, or any time after the successful completion of the maximum parole period if less than five years. Restitution and collection fees must be paid in full.

Inmates: The Board will consider pardons based upon the application and findings of extraordinary circumstances. Restitution and collection fees must be paid in full.

Inmates with Terminal Illness: If an inmate has a life expectancy of one year or less. All restitution and collection fees must be paid in full. Two separate doctors' statements documenting life expectancy must be attached to the application.

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<sup>84</sup> Rule 609 states: **Effect of Pardon, Annulment, or Certificate of Rehabilitation or Other Equivalent Procedure.** Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

**The Pardon Process:** A person seeking a pardon must fill out a pardon application.<sup>85</sup> All restitution and collect fees for the charge(s) in question must be paid in full before applying for a pardon. A Pardon Application consists of the following:

- Three written letters of reference;
  - (i) Must list name, address, and telephone numbers for each reference
  - (ii) Each letter must specifically state support for your pardon
  - (iii) People related by blood or marriage do not qualify to write a letter of reference
- Application form, available online at <http://www.dppps.sc.gov/> or you can request one by writing to:
  - Department of Probation, Parole and Pardon Services
  - Attn: Legal Services, Pardon Application Processing
  - 2221 Devine Street, Suite 600
  - P.O. Box 50666 Columbia, SC 29250
- Application Fee: Applicant must submit a \$100.00 non-refundable money order or cashier's check with their application.

Once received, the pardon application is then submitted to an investigator. The investigation takes about 90 days. For an expedited investigation, an applicant may request an expedited investigation on the application form under "Reason for Requesting a Pardon." If an applicant is requesting an expedited investigation, the applicant must attach a statement describing the extraordinary circumstances for the request. There is no right to an expedited hearing and is at the discretion of the Department of Probation, Parole and Pardon.

After the investigation is complete, the pardon application will be scheduled for a hearing. The time frame for scheduling a hearing is between 7-9 months after submitting the application. Pardon applications made by out of state residents may take longer.

Victims will be notified 30 days prior to the hearing date. Victims have the right to attend the hearing and present testimony to the Paroles and Pardons Board. Additionally, victims may choose to attend the hearing by videoconferencing at the Charleston or Spartanburg Remote Videoconferencing Site. Victims may also voice their opposition to a pardon by submitting letters or petitions.

The Parole board shall permit appearances by counsel or other persons during a parole hearing. An order of pardon must be signed by at least two-thirds of the members of the board. If a pardon application is denied, the individual requesting the pardon must wait one year from the date of denial before filing another pardon application and fee.

**Expungement of Record after Receiving a Pardon:** A pardon alone does not remove the conviction from a person's criminal history or RAP sheet. Only an expungement can do that. In June 2012, Governor

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<sup>85</sup> Pardon applications are available on the SCDPPPS website at: [www.dppps.sc.gov/apply\\_for\\_a\\_pardon.html](http://www.dppps.sc.gov/apply_for_a_pardon.html).

Haley vetoed a bill that would allow a person who is applying for a pardon to request that the Board recommend the expungement of the record relating to the offense.

Good to know:

- In 2011, there were 496 pardons applied for. Of the 496 pardon applications, 301 were granted.
- A pardon does not relieve an individual from the requirements to register as a sex offender.
- A pardon DOES NOT expunge a criminal record. An individual's criminal history will still reflect an arrest and conviction. When asked about criminal history as part of a job application or interview, the applicant must still list the conviction but can indicate that the conviction was pardoned

## Expungements<sup>86</sup>

**What is an Expungement?** An expungement is the destruction of a person's arrest or criminal conviction. When a person has his or her records expunged, it is as though the related proceedings never occurred. South Carolina law provides for limited circumstances for when a person is eligible to have their records expunged.<sup>87</sup>

**Who is eligible for an Expungement?** Certain offenses are eligible for expungement if certain criteria are met. Below is a list of enumerated offenses for which an individual might be eligible for an expungement.

- (1) Nolle Prossed, dismissal, finding of not guilty. Any person who applies for an expungement on these grounds is exempt from paying the administrative fee associated with the expungement process, unless the criminal charge that is the subject of the expungement was dismissed as part of a plea arrangement under which the defendant pled guilty and was sentenced on other charges;<sup>88</sup>
- (2) First Offense misdemeanor fraudulent check;<sup>89</sup>
- (3) Conditional discharge for simple possession of marijuana or hashish;<sup>90</sup>
- (4) First offense conviction in magistrates court;<sup>91</sup>
- (5) Youthful offender act;<sup>92</sup>
- (6) First Offense failure to stop for a blue light;<sup>93</sup>

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<sup>86</sup> Information taken in large part from the South Carolina Judicial Department website, available at: [www.judicial.state.sc.us/expungementInfo/expAppProcessGS.cfm](http://www.judicial.state.sc.us/expungementInfo/expAppProcessGS.cfm) and the South Carolina Bar website, available at [www.sctbar.org/PublicServices/ExpungementandPardons.aspx](http://www.sctbar.org/PublicServices/ExpungementandPardons.aspx). The Uniform Expungement of Criminal Records Act is codified at S.C. Code §17-22-910 et seq.

<sup>87</sup> See S.C. Code §17-22-9190 et seq. for the full text of the Uniform Expungement of Criminal Records Act.

<sup>88</sup> S.C. Code §17-1-40.

<sup>89</sup> S.C. Code §34-11-90(e).

<sup>90</sup> S.C. Code 44-53-450(b).

<sup>91</sup> S.C. Code 22-5-910. Expungements are generally allowed under this provision for crimes carrying a penalty of not more than 30 days imprisonment or a fine of \$500, or both. Certain motor vehicle offenses are excluded. The waiting period for expungements of a criminal domestic violence offense is five years, as opposed to three years for other offenses.

<sup>92</sup> S.C. Code §22-5-920. There are certain exclusions that apply to expungements pursuant to this provision. See Code section for more detail. The defendant must not have had any conviction in five years since completing his or her sentence, including probation and parole.

<sup>93</sup> S.C. Code §56-5-750(f).

- (7) Successful completion of Pretrial Intervention (PTI);<sup>94</sup>
- (8) Juvenile Records;<sup>95</sup>
- (9) Alcohol Education Program.<sup>96</sup>

**The Expungement Process:** The applicant should contact the appropriate individual or department in the Solicitor's office in the circuit in which the offense was committed and prosecuted.<sup>97</sup> The applicant is required to pay administrative and other costs associated with the expungement process. The applicant must pay the following amounts to the solicitor in the form of separate certified checks or money orders:

- A non-refundable administrative fee of \$250.00 made payable to the solicitor;
- A non-refundable SLED verification fee of \$25.00 made payable to SLED;
- A filing fee of \$35.00 made payable to the county clerk of court.
- **EXEMPTION:** Any person who applies for an expungement pursuant to Section 17-2-40 (dismissed charges or finding of not guilty) is exempt from paying the administrative fee, SLED fee, and filing fee.<sup>98</sup>

The Solicitor's Office will send the expungement application to SLED in order to verify that the offense is eligible for expungement. SLED will return the application to the Solicitor and indicate on the application form if the offense(s) is eligible for expungement. If the offense(s) is determined to be eligible for expungement by SLED, the solicitor will obtain all necessary signatures, including the signature of the PTI director, AEP director, summary court judge, and the circuit court judge (as needed). Once the order is signed by the judge, the solicitor will file the order with the clerk of court. The solicitor will provide copies of the expungement order to all pertinent government agencies as well as the applicant.

### For More Information:

- SLED  
[www.sled.sc.gov](http://www.sled.sc.gov)  
SLED public phone number: 803-737-9000
- NCIC  
[www.fbi.gov/about-us/cjis/ncic/](http://www.fbi.gov/about-us/cjis/ncic/)
- Department of Probation, Parole, and Pardon Services  
<http://www.dppps.sc.gov/>  
2221 Devine Street, Suite 600  
P.O. Box 50666 Columbia, SC 29250  
(803)734-9220

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<sup>94</sup> S. C. Code §17-22-150(a).

<sup>95</sup> S.C. Code §20-7-8525. Juvenile adjudications are ineligible for expungements if the individual has a prior adjudication for an offense that would carry a maximum term of imprisonment of five years or more if committed by an adult. The person seeking the expungement must be at least 18 years old, has completed his/her sentence, and has had no subsequent charges.

<sup>96</sup> S.C. Code §17-22-530.

<sup>97</sup> A list of the appropriate contact for expungements in each circuit is available at:  
[www.sbar.org/LinkClick.aspx?fileticket=FVxtsmf8jlk%3d&tabid=1034](http://www.sbar.org/LinkClick.aspx?fileticket=FVxtsmf8jlk%3d&tabid=1034).

<sup>98</sup> See S.C. Code§17-22-940(B) [Administrative fee exemption], §940(F)(1) [SLED fee exemption] , and §940(I)[filing fee exemption].

- List of Solicitor's Offices across South Carolina:  
[www.prosecution.state.sc.us/circuit\\_solicitors.htm](http://www.prosecution.state.sc.us/circuit_solicitors.htm)
- Expungement Directory: [www.sctbar.org/LinkClick.aspx?fileticket=FVxtsmf8jlk%3d&tabid=1034](http://www.sctbar.org/LinkClick.aspx?fileticket=FVxtsmf8jlk%3d&tabid=1034)
- Relevant South Carolina Statutes
  - Pardons: S.C. Code §24-21-5 et seq.
  - Uniform Expungement of Criminal Records Act: S.C. Code Ann. § 17-22-910 et seq

## **Military**

Each branch of the military has different regulations relating to treatment of criminal records. The military requires individuals to disclose all arrests, charges, convictions, juvenile adjudications, traffic violations, probation, dismissed charges, expunged and pardoned offenses. Conduct waivers may be available for certain charges. Waiver availability and waiting periods change based on the needs of the military, so it is necessary to check with local recruiting offices to get the most current information.

Army – 1-888-550-ARMY or contact the local recruitment office.

Navy – 1-800-USA-NAVY or contact the local recruitment office

Air Force – 1-800-423-8723 or contact the local recruitment office.

Air National Guard – 1-803-806-4221 (in South Carolina) or contact

U.S. Coast Guard – 1-800-438-8724 or contact the local recruitment office.

## Immigration

Any person who is not a citizen of the United States can be deported from the country, or denied the opportunity to obtain, or even change, his or her legal status in the United States. This includes, but is not limited to, those who are undocumented, those who have Visas, and those who are lawful permanent residents.

An undocumented immigrant who entered the U.S. without inspection is removable regardless of the outcome of any criminal case. If she's been here for more than 6 months, she is also subject to at least a 3-year bar to reentry. Whether at the end of that period she could apply for a Visa would depend on whether she would be "admissible".

An immigrant who enters legally must still be concerned with deportability and the effect the criminal justice system could have on his ability to become a U.S. Citizen.

It is important for criminal defense attorneys to be reminded that in 2010 the Supreme Court in *Padilla v. Kentucky* held that criminal defense attorneys must advise non-citizen clients of the potential deportation risks of a guilty plea.<sup>99</sup> While criminal defense attorneys are not expected to become experts in immigration law, they are required to inform their clients of potentially adverse collateral consequences of their criminal charge, at least in terms of immigration issues. Criminal defense attorneys may want to look into this issue further as it may better inform plea negotiations that will eliminate deportation risk. It is also important to note that this case, though it deals solely with immigration issues, may provide important insight for challenges to other collateral consequences.

While this guide is not intended to list every possible crime that carries an adverse risk, it can provide a general outline. In general terms, there are certain crimes and convictions that can place a non-citizen at risk for deportation and can also make one inadmissible.

### **Aggravated felonies – will result in deportation and inadmissibility**

- The crime must carry a punishment of one year or more (thus many misdemeanors can fall under this category);
- The person does not have to be confined in prison to be able to be deported or be inadmissible;
- The person in this situation could receive a suspended sentence of one year or more and be deported or deemed inadmissible;

The list of aggravated felonies is detailed in the Immigration and Nationality Act.<sup>100</sup> Keep in mind, though, that the list may not contain all crimes that would be considered aggravated felonies for deportation purposes. One would also have to look at the South Carolina Code and determine what a "felony" is for purposes of being able to be deported or deemed inadmissible. Certain juvenile adjudications or diversion programs may reduce exposure to deportation.

### **Crimes involving moral turpitude (CIMT) – could make someone either deportable or inadmissible**

- No statutory definition for CIMT;

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<sup>99</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

<sup>100</sup> 8 U.S.C. §1101 et seq.

- Crimes typically involve base or vile acts;
- The crime must be punishable with a sentence of one year or more;
- One must examine the crime as it is defined by the elements in the criminal statute - not the person's actual conduct.

Examples are:

- Crimes that involve intent to defraud or steal;
- Crimes that involve intentional or reckless infliction of harm to a person or property;
- Crimes involving malice or lewdness.

It should be noted that there is no requirement that a person actually serve time for a CIMT. The person could be deemed deportable or inadmissible even if he or she received a fine or probation. A person may become inadmissible without even a conviction, simply by admitting that he or she committed a crime.

**Controlled substances – can make someone deportable or inadmissible**

- A onetime exception for possession of marijuana for personal use of 30 grams or less (only for those who are deportable) (**be aware of the distinction in SC where the inference weight for PWID is >28.6**);
- Non-citizens who are drug users or addicts are inadmissible;
- May be deportable or inadmissible even without a conviction;
- Conviction of a felony drug offense in South Carolina also makes non-citizens deportable as an aggravated felony conviction.

**In South Carolina, the personal use of 30 grams would not necessarily be an exception.** This is because in South Carolina anything over 28.6 grams is generally inferred to be possession with intent to distribute.

In cases involving controlled substances, a conviction is not always necessary to make a person deportable or inadmissible. If a person makes a formal knowing admission of a drug offense to a Department of State or a Department of Homeland Security official then they are at risk. The person must voluntarily admit to the elements of the offense after the official explains the offense in plain terms for it to constitute a valid admission. A non-citizen can also be at risk, and become permanently barred, if a Department of State or a Department of Homeland Security official has "reason to believe" that the non-citizen is or was a drug trafficker.

**Domestic violence – can make someone deportable, as can the following:**

- Stalking; or
- Child abuse; or
- Violations of orders of protection

**Firearms charges – can make someone deportable**

**Naturalization:** A non-citizen trying to become naturalized can also be affected by crimes and convictions. Anyone who wants to become naturalized has to meet several requirements, one of which is good moral character. Conviction of an aggravated felony is a permanent bar to proving good moral character.

Examples of crimes that might show a lack of good moral character:

- Any crime against a person with intent to harm; or
- Any crime against property or the Government that involves “fraud” or evil intent; or
- Violating any controlled substance law; or
- Habitual drunkenness or drunk driving; or
- Illegal gambling; or
- Prostitution; or
- Polygamy; or
- Confinement in jail, prison, or similar institution for which the total confinement was 180 days or more; or
- Failing to complete any probation, parole, or suspended sentence; or
- Criminal domestic violence (above).

The list of crimes contained here are the most common types of crimes that are considered when a non-citizen is trying to get some type of status in the United States, or become naturalized. There are many others. It is best to look to the Immigration and Nationality Act if there are any concerns, or in the alternative, contact an immigration attorney.

### **For More Information:**

- Katherine Brady and Dan Kesselbrenner, *Grounds of Deportability and Inadmissibility Related to Crimes* (Last modified August 2008).  
[http://www.fد.org/pdf\\_lib/MT08/MT08\\_GroundsDeportabilityInadmissibilityCrimes.pdf](http://www.fد.org/pdf_lib/MT08/MT08_GroundsDeportabilityInadmissibilityCrimes.pdf)
- Immigration and Nationality Act, 8 U.S.C. Section 1101 (2003)
- S.C. CODE ANN. 16-1-10 (1976)
- S.C. CODE ANN. 44-53-370 (1976)

## Appendix 1

Grounds for Deportation	Basic Criteria	Examples (not a complete list)	Exceptions
Conviction for “aggravated felony” <ul style="list-style-type: none"> <li>INA § 237(2)(A)(iii)</li> </ul>	<ul style="list-style-type: none"> <li>Defined at: Title 8 U.S.C. 1101(a)(43)</li> <li>Carries most severe immigration consequences</li> <li>Includes felonies and some misdemeanors</li> <li>Check immigration statute for definitions. For many cases, the attorney must cross check the federal definition with the elements of the state charge</li> </ul>	Murder, rape, CSC, drug trafficking, RSG/Burglary if sentence >1yr., crime of violence (AR, SAR, CDV, etc)	Full Pardon
Conviction of crime involving moral turpitude (CIMT) <ul style="list-style-type: none"> <li>INA § 237(2)(A)(i)</li> </ul>	<ul style="list-style-type: none"> <li>Single crime committed within 5 years of admission to U.S., <i>and</i></li> <li>Punishable by at least 1 year in jail (regardless of actual sentence imposed)</li> </ul>	No statutory definition. Can include theft, forgery, certain assaults, arson, felony DUI or multiple DUIs	Full Pardon Most misdemeanors would not qualify as CIMT
Conviction of 2 or more CIMT <ul style="list-style-type: none"> <li>INA § 237(2)(A)(ii)</li> </ul>	<ul style="list-style-type: none"> <li>2 or more CIMT committed any time after admission</li> <li>Length of sentence is irrelevant</li> </ul>	See above	Multiple charges arising from a single incident are counted as 1 CIMT
Controlled Substance <ul style="list-style-type: none"> <li>INA § 237(2)(B)(i)</li> </ul>	<ul style="list-style-type: none"> <li>Includes felonies and misdemeanors</li> </ul>	Poss. Controlled substance, cocaine/crack, etc.	A first offense SPMJ if less than 30 grams will not be grounds as long as no prior drug convictions
Drug Abuser/Addict <ul style="list-style-type: none"> <li>INA § 237(2)(B)(ii)</li> </ul>	<ul style="list-style-type: none"> <li>No conviction is necessary</li> <li>Can result from self-admission</li> </ul>		
Firearm Conviction <ul style="list-style-type: none"> <li>INA § 237(2)(C)</li> </ul>	<ul style="list-style-type: none"> <li>Includes felonies and misdemeanors</li> <li>Includes carrying a concealed gun</li> </ul>	UCP, possession of sawed-off shotgun, etc.	
CDV, stalking, child abuse, child neglect, child abandonment <ul style="list-style-type: none"> <li>INA § 237(2)(E)(i)</li> </ul>	<ul style="list-style-type: none"> <li>Includes felonies and misdemeanors</li> </ul>		Convictions occurring prior to September 30, 1996
Violation of Order of Protection <ul style="list-style-type: none"> <li>INA § 237(2)(E)(ii)</li> </ul>	<ul style="list-style-type: none"> <li>Violation may be found in criminal or civil court</li> </ul>		Convictions occurring prior to September 30, 1996
Failure to Register as Sex Offender <ul style="list-style-type: none"> <li>INA § 237(2)(A)(v)</li> </ul>	<ul style="list-style-type: none"> <li>Categorized as a CIMT</li> <li>See 18 U.S.C. § 2250</li> </ul>		

Grounds for Inadmissibility	Basic Criteria	Examples (not a complete list)	Exceptions/Waivers
Crime involving moral turpitude (CIMT) <ul style="list-style-type: none"> <li>INA § 212(a)(2)(A)(i)(I)</li> </ul>	<ul style="list-style-type: none"> <li>Conviction <i>or</i> admission</li> </ul>	No statutory definition. Can include theft, forgery, certain assaults, arson, felony DUI or multiple DUIs	If D under 18 when crime committed and >5 years have passed Maximum potential sentence is 1 year or less and actual sentence is 6 months or less
Controlled Substance Offense <ul style="list-style-type: none"> <li>INA § 212(a)(2)(A)(i)(II)</li> </ul>	<ul style="list-style-type: none"> <li>Conviction <i>or</i> admission</li> <li>Felonies and misdemeanors</li> </ul>	Any controlled substance offense. SPMJ would be grounds for inadmissibility, even though not grounds for deportation	Waivers available for 1 <sup>st</sup> offense SPMJ under certain circumstances.
Trafficking in Controlled Substance <ul style="list-style-type: none"> <li>INA § 212(a)(2)(C)</li> </ul>	<ul style="list-style-type: none"> <li>No conviction or admission necessary</li> <li>May be based on government knowledge</li> </ul>		
Conviction of multiple offenses <ul style="list-style-type: none"> <li>INA § 212(a)(2)(B)</li> </ul>	<ul style="list-style-type: none"> <li>Can include any type of offense</li> <li>Convictions on 2 or more charges with an aggregate sentence of imprisonment (active or suspended) of 5 years or more (even if arise from single incident)</li> </ul>		
Prostitution <ul style="list-style-type: none"> <li>INA § 212(a)(2)(D)</li> </ul>	<ul style="list-style-type: none"> <li>No conviction or admission necessary</li> </ul>		10 year look back

