

# Getting the Balance Right: Patient Safety and Employment Rights Under ACA

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Madeline Neighly  
Staff Attorney  
National Employment Law Project  
New York, NY  
(212) 285-3025 ext 328  
[mneighly@nelp.org](mailto:mneighly@nelp.org)



# Overview

- The Law: Worker Protections of the ACA Long-Term Care Background Check Program & Title VII of the Civil Rights Act
- Why Do These Protections Matter to Us?
- CMS National Background Check Program LTC Criminal Convictions Work Group Recommendations & Response



# Worker Protections in the Law: The Affordable Care Act



- Requires an “independent process” to appeal accuracy of record and demonstrate rehabilitation separate from initial fitness determination. (42 USC § 1320a-7l(a)(4)(B)(iv))
  
- Rehabilitation review process “shall include consideration of”:
  1. The passage of time;
  2. Extenuating circumstances;
  3. Demonstration of rehabilitation; and
  4. Relevancy of the particular disqualifying information with respect to the current employment of the individual  
(42 USC § 1320a-7l(a)(4)(B)(iv))

# Worker Protections in the Law: The Affordable Care Act (cont.)



- List of “mandatory” and “permissive” disqualifying offenses. (42 USC § 1320a-7l(a)(6)(A)-(B) *referencing* 42 USC § 1320a-7)
- Disqualifying offenses can be “waived” by rehabilitation review process. (42 USC § 1320a-7l(a)(4)(B)(iv))
- Only convictions may be disqualifying, not expunged, sealed, or juvenile adjudications. (42 USC § 1320a-7l(a)(6)(A))
- Drug possession is excluded from list of disqualifying offenses. (List from SSA: 42 U.S.C. § § 1320-1-7(a)(4), (b)(3))

# Worker Protections in the Law: Title VII of the Civil Rights Act

The U.S. Equal Employment Opportunity Commission (EEOC) released updated guidance on criminal records in hiring decisions.

Criminal records exclusions must be job related and consistent with business necessity.

1. The **nature and gravity of the conviction**;
2. The **nature of the job** held or sought; and
3. The **time that has passed** since the conviction/completion of sentence.

(EEOC, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*)



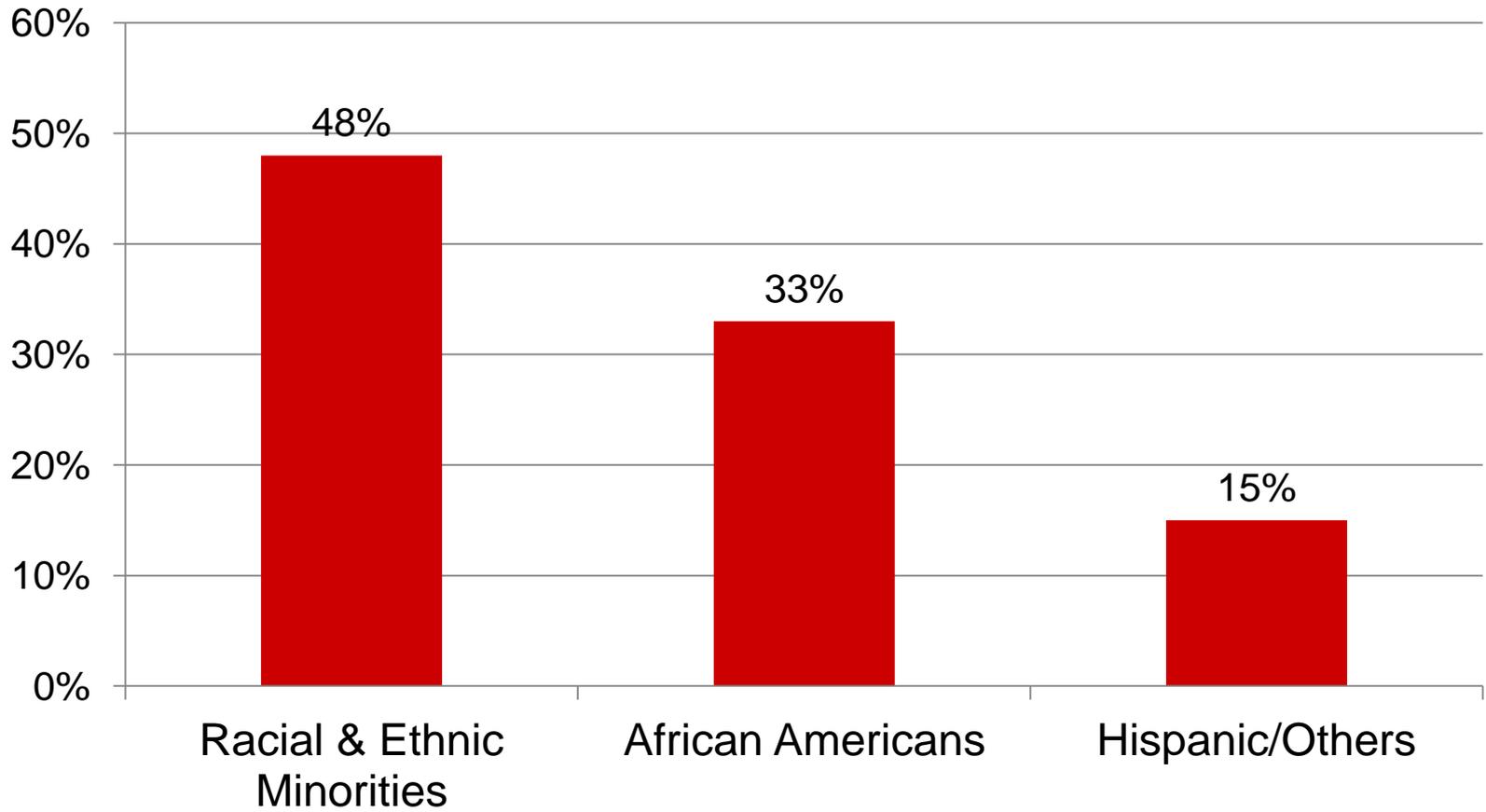
# Why Does it Matter? Who is Impacted?

- Over one in four U.S. adults have criminal records. (NELP (2011))
- There is a \$57-65 billion loss due to reduced output of goods and services of people with felonies and prison records. (CEPR, 2010)
- Communities of color are disproportionately impacted by the criminal justice system. African Americans are incarcerated at a rate six times that of Whites. (Pew Center on the States (2008))



Sixty-five million U.S. adults, over one in four adults, have a criminal record.

# Racial and Ethnic Composition of Long-Term Care Paraprofessionals



# Recommended Long-Term Care Worker Protections



Response to CMS National Background Check  
Program Long Term Care Criminal Convictions  
Work Group

# Definition of “Direct Access Employee”

## Consolidated Option:

Direct Access is physical contact or access to the resident or beneficiary’s property, personally identifiable information, or financial information

Does not include volunteers or students unless they perform regular or unsupervised functions equivalent to those performed by “direct access employees”

Does not include contractors performing repairs, deliveries, installations, or similar services only for the facility or provider (assumes contractors will not have direct access to resident or beneficiary)

- ✓ Limited to workers with physical contact or access to sensitive information
- ✓ Excludes contractors, volunteers, & students without such access
- ✓ Saves resources, narrows focus, doesn’t unnecessarily limit opportunities



# Disqualifying Convictions & Rehabilitation Factors

## Consolidated Option:

Sets minimum disqualification time periods for each conviction category

LTC facility, provider, or prospective employee can apply for variance including during disqualification period

After disqualification period, conviction is no longer automatic negative fitness determination but can still be considered in relation to subsequent convictions

Variance review is consideration of 4 factors included in ACA

- ✓ No lifetime bans
- ✓ Can apply for variance during disqualification period
- ✓ Some disqualifications limited to felonies



# Adopt an Independent, Robust Appeal Process to Promote Integrity of Background Checks

- 1) Separate from fitness determination and variance procedure
- 2) States should **update missing dispositions** before fitness determination
  - **FBI rap sheets produced for employment purposes have been documented to be missing 50% of final dispositions** (U.S. Attorney General, The Attorney General's Report on Criminal Background Checks (June 2006), at p. 3.)
- 3) Provide to applicant **written notification** of the disqualification, the appeals process, and **copy of rap sheet**.



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# Variance Process Should Provide Applicants with an Opportunity to Demonstrate Rehabilitation

- 1) **Independent process** distinct from fitness determination
- 2) ACA mandatory criteria as outlined in Consolidated Option
- 3) Additional criteria should include:
  - **personal references,**
  - **program participation,**
  - **employment history, and**
  - **specifics of job (degree of supervision, opportunity to reoffend)**
  - (See Wisconsin, DHS 12.12.(5)(a)(E), Wis. Admin. Code)

# Disqualifying Offenses Must Be Substantially Job-Related and Time Limited

- 1) States should carefully consider the impact of adding disqualifying offenses to Consolidated Option list; **minimize additions**
  - Note that targeting certain offenses has disproportionate impact on African Americans.
  
- 2) Narrowly tailor additional disqualifying offenses, ensure they are **substantially job-related**; that is “relevan[t] . . . with respect to the current employment of the individual.” (42 USC § 1320a-7l(a)(4)(B)(iv))
  
- 3) **No lifetime bans** or extended disqualification periods

# Prohibit Consideration of Expunged, Sealed, and Juvenile Records

- 1) Except for pending arrests (rapback), ACA is clear that only a “conviction” may be considered disqualifying for long-term care workers. (42 USC § 1320a-7l(a)(6)(A))
  
- 2) Adopt TSA definition of conviction: “[c]onvicted means any plea of guilty or nolo contendere, or any finding of guilt, except when the finding of guilt is subsequently overturned on appeal, pardoned, or expunged.” (49 C.F.R. § 1570.3)
  
- 3) Juvenile proceedings should not be considered disqualifying.
  - Federal law states juvenile proceeding may be considered for employment purposes if the individual is seeking a “position immediately and directly affecting the national security. . . .” (18 U.S.C. § 5038(a)(5))