

REPORT: THE WAR ON DRUGS MEETS EMPLOYMENT

(a Drug Policy Alliance publication)



INTRODUCTION

The importance of access to meaningful employment cannot be overstated. Employment provides a means to support oneself and others and connections to coworkers and the community.

Despite the generally recognized importance of employment, policies stemming from the war on drugs exclude millions of people who use drugs or who have criminal convictions from employment and its associated benefits.¹ These policies disproportionately impact communities of color, who already face additional barriers to employment.² The false assumptions underlying these policies are that people who use drugs cannot perform their jobs; any drug use is problematic and indicates a personality flaw; and a criminal conviction should permanently bar employment opportunities. Instead of targeting people for drug use or past conduct, we should ensure equitable access to employment opportunities and support employees who may benefit from substance use services.

Given the importance of employment to individuals, communities, and the country, we should focus on maximizing opportunity, not needlessly disqualifying people based on drug tests and criminal records that are inadequate indicators of work performance. For people who do have substance use needs, employment is an essential stabilizing factor and should also be an avenue for connection to services.

This report explores how the war on drugs has intersected with employment over time, both federally and in New York State. The Drug Policy Alliance offers this report in the hopes that it will lead to a deeper discussion of the individual and collective harms that have been caused by a half-century of the drug war and its infiltration into employment decisions.

THE FEDERAL STORY

The workplace has been and continues to be a primary front in the war on drugs. Federal policy has guaranteed this through intentional efforts to ensure public and private employers adopt drug war tactics. Drug testing and criminal background restrictions implemented as part of the effort to create drug-free workplaces have disqualified otherwise qualified people from gainful employment, and people with substance use disorders have been left out of federal disability protections. This section details how direction from the federal government led to the drug war's takeover of the workplace.

WORKPLACE DRUG TESTING

In his "Speech to the Nation on the Campaign against Drug Abuse" on September 14, 1986, President Ronald Reagan announced six initiatives his administration was about to undertake, and the very first one was seeking "a drug-free workplace at all levels of government and in the private sector."^{3*} Soon after his address, President

* The other five initiatives were: drug-free schools, drug treatment, treating drug trafficking as a threat to national security, strengthening law enforcement activities, and expanding awareness and prevention.

Reagan signed Executive Order 12564, which required each federal agency to establish a drug testing program for employees in “sensitive positions.”⁴ At that time, the federal Office of Personnel Management estimated that 1.1 million of the government’s 2 million civilian employees fell into the category of “sensitive employees.”⁵ In a show of “common cause,” President Reagan and Vice President Bush underwent urinalysis, and 78 members of the White House senior staff were asked to participate in a “voluntary testing” program.⁶

In 1988, Reagan signed the Drug-Free Workplace Act into law. It required federal grant recipients and companies with federal contracts worth \$100,000 or more to adopt a drug-free workplace policy and establish a drug-free awareness program.⁷ Then, in 1991, President George H. W. Bush signed the Omnibus Transportation Employee Testing Act, requiring all “safety sensitive” employees in private transportation jobs to submit to drug testing.⁸ Within a few years, random workplace drug testing (i.e., testing *not* based on job performance) had become commonplace.⁹ In 1992, the American Management Association surveyed its members, 7,000 medium- to large-sized firms representing some 25 percent of the U.S. workforce, and found that three-quarters of them were testing job applicants and/or employees, representing a 250 percent jump since the organization’s first survey in 1987.¹⁰ By 1996, 81 percent of surveyed employers said they subjected employees to drug tests.¹¹

Although some private businesses, such as private transportation companies, were required by law to test their employees, most private employers adopted drug testing programs after being convinced that the cost of having people who use drugs as employees in the workplace was greater than the cost of a testing program. For years, employers had been told that it was their patriotic duty to run a drug-free workplace. Relying mainly on information provided by drug testing’s promoters, including the sellers of drug testing products and services, employers joined the crusade.¹² To get and keep a job, millions of people in the United States had to prove their drug-free credentials by peeing into a cup.

The main purpose of random, suspicionless workplace drug testing was not to identify employees whose problematic drug use interfered with their job performance. A worker suspected of being impaired by illicit drug use could be tested “for-cause” to confirm or rule out such use.¹³ But drug test proponents and

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purveyors asserted, and employers believed, that unannounced, random testing would act as a deterrent. However, there was and continues to be no evidence demonstrating a causal link between workplace drug testing and either deterrence or improved workplace safety and productivity.¹⁴

The ubiquity of urine drug testing caused a significant erosion of employee privacy rights. First was the necessarily intrusive collection process. In many workplaces, in order to discourage tampering, workers were required to urinate in the presence of a collection monitor.¹⁵ If permitted to produce the specimen in the privacy of a stall, monitors were instructed to listen for the normal sound of urination.¹⁶ This was a degrading procedure for the millions who went through it.¹⁷ Second, the analysis of the urine revealed not only the presence of illicit drug metabolites, but also prescription and over-the-counter medications. Many workplace drug testing programs required employees to disclose in advance what medications they were taking, a clear infringement on the right to medical privacy.¹⁸ In a letter to the American Civil Liberties Union, one worker described the following:

“I was led into a very small room with a toilet, sink and desk. I was given a container in which to urinate by the attendant. I waited for her to turn her back before pulling down my pants, but she told me she had to watch everything I did. I pulled down my pants, put the container in place—as she bent down to watch—gave her a sample and even then she did not look away...I am a forty-year-old mother of three, and nothing I have ever done in my life equals or deserves the humiliation, degradation and mortification I felt.”¹⁹

Some employers used surprise as a tactic, causing fear and apprehension. A notorious case was that of a group of firefighters in Plainfield, New Jersey. At 7:00 a.m. on

May 26, 1986, the Plainfield Fire Chief and Plainfield Director of Public Affairs and Safety entered the city fire station, secured and locked all station doors, and awakened the firefighters present on the premises.²⁰ Each employee was required to submit a urine sample while under the surveillance and supervision of bonded testing agents employed by the city.²¹ Those who tested positive were fired summarily.²² They were not told what substance had been discovered in their sample, nor were they given copies of the actual lab results. They were simply told they were being fired because of the “commission of a criminal act.”²³

The firefighters brought a federal lawsuit arguing that their Fourth Amendment rights had been violated, and, in that case, public employees’ right to be free of unreasonable searches and seizures was upheld. Federal District Court Judge H. Lee Sarokin wrote: “We would be appalled at the spectre of the police spying on employees during their free time and then reporting their activities to their employers. Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person’s off-duty activities just as surely as someone had been present and watching. It is George Orwell’s ‘Big Brother’ Society come to life.”^{24*}

As the years went by, however, the courts responded to the growing panic over drug use by weakening the Fourth Amendment’s requirements, and, in 1989, the Supreme Court resolved the issue as far as public employees were concerned. In two decisions issued on the same day, one involving railway workers and the other employees of the U.S. Customs Service, the Court ruled that the drug testing programs were constitutional.²⁵ Private sector employees, of course, did not have any Fourth Amendment protections, and given the country’s adherence to the employment-at-will doctrine, unless the workforce was represented by a labor union, the employer’s right to terminate was virtually unfettered.²⁶

* There were other problems with urine drug testing aside from the invasion of personal privacy. The initial screening test, an immunoassay known as EMIT, is inexact, and false positives are not uncommon. A second, confirmatory test, gas chromatography/mass spectrometry (GC/MS), is expensive and many employers do not use it. Laboratory chain-of-custody issues have also been a problem, leading to contamination and mixing up of urine samples. ACLU, “Drug Testing: A Bad Investment,” ACLU, September 1999, <https://www.aclu.org/report/drug-testing-bad-investment?redirect=drug-law-reform/drug-testing-bad-investment>.

Drug tests can only determine if a person has a drug metabolite in their system. They cannot tell how much of a drug was consumed, how intoxicated the person became, or whether the person has a substance use disorder. Drug tests cannot determine if drug use will impact a person’s ability to perform their work or create a safety risk.

It is important to know how limited drug tests’ utility is. Drug tests can only determine if a person has a drug metabolite in their system. They cannot tell how much of a drug was consumed, how intoxicated the person became, or whether the person has a substance use disorder. Drug tests cannot determine if drug use will impact a person’s ability to perform their work or create a safety risk. Drug testing policies do infringe on workers’ privacy, requiring everyone to submit a urine sample even though estimates show that less than one-tenth of employees have used drugs within the past month.²⁷

The overwhelming majority of people negatively impacted by workplace drug tests have been marijuana users.²⁸ A positive test has often eliminated them as job applicants, caused them to lose their job, or led to other punitive sanctions. Then, as now, marijuana was by far the most common illicit drug consumed by adults.²⁹ In 1988, according to the National Household Survey on Drug Abuse, about 14 percent of people 12 and older in the U.S. reported using an illicit drug in their lifetime, and 90 percent of people who had tried an illicit drug reported using marijuana.³⁰ Marijuana metabolites also are detectable much longer than other illicit drugs.³¹ Marijuana’s primary psychoactive ingredient, THC, is absorbed into the body’s fatty tissue and is excreted over time so that someone can still test positive weeks after use.³² The presence of metabolites in the urine does not indicate impairment of any kind.

Ferretting out people who used marijuana was a major goal of the war on drugs. William Bennett, the nation’s first “drug czar,” targeted the casual drug user—code for

According to a survey by the Society for Human Resource Management, the largest association of human resources personnel, 92 percent of their members, mostly large employers, perform criminal background checks on job candidates.

marijuana user—for special focus. In his 1989 National Drug Strategy he wrote that “addicts” were “a mess” who made the “worst possible advertisement for new drug use” and whose use was therefore not “contagious.”³³ Here is his quote in full:

“The non-addicted casual or regular user, however, is a very different story. He is likely to have a still-intact family, social, and work life. He is likely still to ‘enjoy’ his drug use for the pleasure it offers. And he is thus much more willing and able to proselytize his drug use...a non-addict’s drug use, in other words is highly contagious...because it is their kind of drug use that is most contagious, any further reduction in the non-addicted drug user population will also promise still greater future reductions in the number of Americans who are recruited to join their dangerous ranks.”^{34}*

This stigmatizing language told employers that casual drug use among their employees was a danger to the nation and that it was their patriotic duty to stop the contagion by identifying the malefactors and threatening their job security. A new study carried out in California, where cannabis has been legal for adult use since 2016, concluded that smoking cannabis after work hours has no negative effect at the workplace.³⁵ According to the study’s lead author, Dr. Jeremy Bernerth, “The relaxation induced by cannabis may help employees restore energy spent during the day and they may subsequently return with more stamina to devote to their job once they are back on the clock.”³⁶ Nonetheless, even in states that have legalized all adult use or medical use of marijuana, employers may still be able to terminate employees for a marijuana-positive drug test.³⁷

* Emphasis in the original.

Unsupported by evidence, drug testing policies adopted and enforced with the drug war mentality have infringed on employee rights and unnecessarily foreclosed employment to many without demonstrated benefit to employers or workplaces.

CRIMINAL RECORD DISCRIMINATION

Another way the drug war and tough-on-crime mentality has hindered access to employment has been through disqualifications based on arrest and conviction records. Once someone has a record, it can follow them for life, serving as a bar to getting a job for which they may otherwise be qualified and in which they may excel. This discrimination has left many with drug-related convictions, often decades old, from getting gainful employment, and has had an especially negative impact on communities of color, who bear the brunt of drug law enforcement.

Mass incarceration, fueled in part by the war on drugs, has resulted in between 70 million and 100 million people – or as many as one in three people in the U.S. – having some type of criminal record.³⁸ One in three U.S. adults has been arrested by the age of 23. This appalling statistic is not spread evenly over the population. Black men are 6 times more likely and Latinx men are 2.5 times more likely to be incarcerated than white men, and hyper-policing and targeted enforcement in low-income communities of color guarantees that their arrest rates will also be much higher than those of white men.³⁹ Black and Latinx women are also overrepresented in the criminal legal system.⁴⁰ Criminal records discrimination, on top of other forms of racial discrimination that can pose a lifetime barrier to employment opportunities and career ladders, has contributed to a crisis of low economic mobility for people of color.

Drug arrests began to climb nationwide in the early 1980s, from half a million in 1980 to 1.6 million in 2006, and the numbers have remained high ever since.⁴¹ Today, someone is arrested for simple drug possession in the U.S. every 23 seconds.⁴² There are more than six times more arrests for possession than for sales.⁴³ Most of those arrested do not end up in prison, although many spend time in local jails awaiting the resolution of their cases.⁴⁴ In the overwhelming majority of cases, the defendants will plead guilty to resolve the matter more quickly and return to family and work.⁴⁵ All of these people now have a criminal record, even if the charges stemming from an arrest were dropped and there was no conviction.

Denying employment opportunities to people with criminal records comes with significant economic impacts. Employment barriers faced by people who have felony convictions were associated with a loss of \$78 billion to the economy in 2014.

According to a survey by the Society for Human Resource Management, the largest association of human resources personnel, 92 percent of their members, mostly large employers, perform background checks on job candidates.⁴⁶ Before the arrival of the internet, individual records were too time consuming and expensive for most employers to access, but the internet has given rise to a huge new industry. ChoicePoint, which is one of the largest companies, conducts more than 10 million background checks annually for some of the country's largest employers.⁴⁷ Commercial background screening is a multi-billion dollar industry that is virtually unregulated.⁴⁸ The reports it generates are rife with errors.⁴⁹ Actual accuracy rates remain unknown because no comprehensive, industry-wide study on background check reports has been conducted.⁵⁰ However, individual and class action lawsuits, government enforcement actions, and the experiences of advocates who work with consumers dealing with faulty background check reports all indicate that serious accuracy problems persist and remain pervasive. The National Consumer Law Center has identified the five most common errors:⁵¹

- False positives because of a mismatch of names
- The inclusion of sealed, expunged, and obsolete records
- Incomplete information (e.g., omission of dismissal of charges or acquittal)
- Misleading display of data (e.g., reporting a single arrest multiple times)
- Misclassification of the type of offense

MISMATCHED REPORTS: THE CASE OF RICHARD WILLIAMS

Richard Williams was denied employment twice because of background check reports that matched another person's records to him based on his name and date of birth. An automated search of First Advantage's National Criminal File matched Richard Williams with *Ricky Williams'* 2009 conviction for selling cocaine. Richard Williams lived in Chiefland, Florida, but the conviction was from Palm Beach County, approximately 300 miles away. Worse, First Advantage mistakenly put Richard Williams' Social Security Number on the report even though it was not used to match him to the record. Only after Richard Williams disputed the record did First Advantage obtain hard copies of the court records. Ultimately, the dispute was resolved in Richard Williams' favor based on the difference in height listed on Ricky Williams' court records and the height listed on Richard Williams' driver's license. However, it was too late – the employer had already hired someone else. Williams then lost another job opportunity after a second erroneous report from First Advantage.⁵²

For some employers, a record, whatever the alleged offense or conviction, is an absolute bar to employment. Job advertisements announcing the bar are not uncommon. The following appeared on Craigslist:⁵³

- For a job ad for an electrician contractor: "No arrests or convictions of any kind for the past seven years."
- For a job ad for a diesel mechanic: "Clean criminal record, no misdemeanors, no felonies."
- For a job ad for a van driver: "You must not have any felony or misdemeanor convictions on your record. Period."

These blanket bans run the risk of violating federal law. As long ago as 1987, the Equal Employment Opportunity Commission (EEOC) issued policy guidance on arrest and conviction records, and more recently, in 2012, they issued additional guidance and recommendations for employers.⁵⁴ Although the bans appear to be race-neutral, EEOC policy recognized that they can be used to disproportionately target Black and Latinx people.⁵⁵

Numerous lawsuits have been brought against offending companies.⁵⁶ But such practices continue, if not through job ad announcements, then through the actual hiring process. Highly qualified people with criminal records routinely report that they successfully apply for jobs, do well in job interviews, and receive tentative job offers only to be told – if they are even told at all – that a past arrest or conviction, even if 20 years old, has been revealed through a background check, and they are therefore disqualified from employment with that company. Studies show that more than 60 percent of formerly incarcerated individuals are unemployed one year after being released, and that those who do find jobs take home 40 percent less pay annually than those without a record.⁵⁷

People with arrest and conviction records are also barred from receiving professional licenses to practice a wide range of occupations, from trucking and barbering to positions in the healthcare field. More than a quarter of U.S. workers require a state license for their occupation,⁵⁸ but the National Inventory of Collateral Consequences of Conviction has identified more than 15,000 provisions of law across the 50 states and the federal system that limit occupational licensing opportunities for individuals with records.⁵⁹

The disproportionate impact of these exclusionary policies and practices on people of color because of the war on drugs cannot be overstated. Disparities in marijuana possession arrest rates are illustrative. Nationwide, arrests for marijuana possession ballooned during the 1990s through 2000s. Between 2001 and 2010, there were 8,244,943 marijuana arrests, of which 7,295,880 – or 88 percent – were for marijuana possession, and they accounted for half of all drug arrests.⁶⁰ In spite of marijuana law reform in a growing number of states, the number of marijuana arrests nationwide is still high.⁶¹ Although government statistics have for years shown that white people and Black people use marijuana at roughly the same rate,⁶² Black people are almost four times more likely to be arrested for possession, and in some states, the disparity is far greater.⁶³ In Illinois, West Virginia, and Iowa, for example, Black people are more than seven times as likely to be arrested.⁶⁴ These arrests result in a permanent, digitized criminal record, easily accessible by employers for little or no fee. The fact that today the unemployment rate among Black people is twice as high as the rate among white people is due, in part, to drug war criminalization and punishment.

Denying employment opportunities to people with arrest and conviction records comes with significant economic impacts. Employment barriers faced by people who have felony convictions were associated with a loss of \$78 billion to the economy in 2014.⁶⁵ Criminal legal system involvement results in an annual earnings loss of over \$370 billion, deepening income inequality.⁶⁶

The war on drugs has resulted in skyrocketing numbers of people arrested and convicted for drug law violations, all of whom will have a record that can follow them for life. Further, the war on drugs led to policies that foreclose employment opportunities for people with arrest and conviction records, shutting many people out of gainful employment. Considering how important employment can be for reentry, these policies are not only inhumane; they likely harm chances of economic stability and wellbeing.

DISCRIMINATION AGAINST PEOPLE WITH SUBSTANCE USE DISORDERS

In 1992, President George H.W. Bush, who presided over the rapid intensification of the war on drugs, signed into law one of his signature policy achievements: The Americans with Disabilities Act (ADA). The ADA applies to most private employers. It prohibits employers from treating an otherwise qualified applicant unfavorably simply because of the applicant's disability, and it creates an affirmative obligation on employers to make reasonable accommodations to disabled employees and prospective employees.⁶⁷ Although the ADA protects certain disabled people from employment discrimination, stigma led to the exclusion of certain people with substance use disorders (SUDs) from protection under the historic ADA. People with SUDs who are currently using illicit drugs are excluded from the law's protections, further depriving them of access to gainful employment.⁶⁸

Under the ADA, "the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs."⁶⁹ The exclusion of people who currently use drugs from ADA protection was a political move in furtherance of the war on drugs. People with alcohol use disorder who continue to use alcohol, for example, are treated differently, even though alcoholism and drug addiction are both considered disabilities. According to the ADA, "a person who currently uses alcohol is not automatically denied protection. An individual with alcohol use disorder is a person with a disability and is protected by the ADA

if [they are] qualified to perform the essential functions of the job.”⁷⁰ A person with alcohol use disorder is protected unless their disability adversely affects their job performance. A person with an SUD involving illicit drugs, on the other hand, is protected only if they:⁷¹

- [have] successfully completed a supervised drug rehabilitation program and [are] no longer engaging in the illegal use of drugs, or [have] otherwise been rehabilitated successfully and [are] no longer engaging in drug use;
- [are] participating in a supervised rehabilitation program and [are] no longer engaging in such use; or
- [are] erroneously regarded as engaging in such use, but [are] not engaging in such use.

This distinction between current alcohol use and drug use is not logical, has no scientific basis, and can be best explained by the intense stigma experienced by people who use illicit drugs.

The definition of “currently” has been left vague in the ADA and in guidance from the EEOC, the federal agency charged with enforcing the law.⁷² In a series of decisions interpreting the meaning of “currently engaging in the illegal use of drugs,” federal courts have generally ruled that in order to be a “qualified individual with a disability,” employees or job applicants with SUDs must have been in “long term” recovery and “long term” abstinence from drug use.⁷³ In one case, the U.S. District Court for the Eastern District of Louisiana found that a seven-week period between the plaintiff being caught with marijuana and being terminated was not a long enough time to avoid being classified as a “current drug user.”⁷⁴ In another case, a truck driver, whose work evaluations had always been positive, had a cocaine addiction. After two years of negative urine test results, he relapsed and entered inpatient rehabilitation.⁷⁵ Six weeks later, he was fired, and the U.S. District Court for the Eastern District of Arkansas ruled that he had not been abstinent long enough to qualify for protection under the ADA.⁷⁶

The loss of employment because of relapse or because the period of abstinence is deemed insufficient contradicts the definitions of SUDs and recovery used by the federal government. The National Institute on Drug Abuse defines SUDs as a “chronic disease similar to other chronic diseases such as type II diabetes, cancer, and cardiovascular disease” and notes that relapse

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rates for SUDs are similar to other chronic diseases.⁷⁷ The Substance Abuse and Mental Health Services Administration (SAMHSA) recognizes that, “[r]ecovering is non-linear, characterized by continual growth and improved functioning that may involve setbacks. Because setbacks are a natural, though not inevitable, part of the recovery process, it is essential to foster resilience for all individuals and families.”⁷⁸ Losing one’s job because of a setback would not foster resilience but would, in many if not most cases, have the opposite effect and make it more difficult for people to remain well.

“The past several years have seen a reduction of the ADA’s protections against discrimination for addiction. If this trend continues, only a tiny portion of those recovering [from a substance use disorder] who are employable and willing to work will be covered under the ADA. This situation is a loss for both [people in recovery] and society as a whole, because it excludes from the workplace those individuals who are willing and able to make a significant contribution.”
– Laurence M. Westreich, M.D., *Addiction Psychiatrist*⁷⁹

Longstanding stigma associated with illicit drug use has left many people with SUDs out of the protections of the ADA. Had they been included, many would have been able to secure employment with reasonable accommodation from employers. Instead, they have not been offered support and have effectively been closed out of many employment opportunities. Exclusion from the workplace is not only unfair; it leads to increased morbidity and mortality among people with SUDs.

Since 1999, over 702,000 people in the U.S. have died of a drug overdose, and the drug overdose death rate has increased from 6.2 to 21.8 per 100,000.⁸⁰ A 2020 National Longitudinal Mortality Study found that loss of employment significantly increases the risk of overdose deaths.⁸¹ Without employment, many struggle to gain the stability essential to addressing their health needs. In combination with workplace drug testing requirements and exclusions based on criminal records, thousands of people have been denied employment in the name of the war on drugs.

CASE STUDY: THE NEW YORK STORY

In the early 1980s, the New York Police Department (NYPD) began a campaign of massive street sweeps in low-income Black and Latinx neighborhoods. In January 1984, the NYPD launched Operation Pressure Point on the Lower East Side, assigning hundreds of uniformed and plainclothes officers to the area. For the first six weeks, they averaged 65 arrests per day. Most of the people arrested were small-time sellers and buyers.⁸² By August 1986, the police had made a total of 21,000 arrests.⁸³ In 1988, the NYPD launched a new anti-drug program called the Tactical Narcotics Team (TNT) in low-income communities of color throughout the city. TNT flooded the streets with investigators and undercover officers who conducted so-called buy and bust operations, arresting mostly low-level drug sellers.⁸⁴ Similar police tactics were employed in urban centers throughout the state. Drug arrests, prosecutions, and convictions soared, and the arrest and conviction records that attended them would create significant barriers to employment and occupational licensing for hundreds of thousands of New Yorkers.

During the 1990s and 2000s, spanning several mayoral administrations, New York City became the marijuana arrest capital of the world. From 1997 to 2016, the NYPD made over 650,000 arrests and jailings for possession of small amounts of marijuana.⁸⁵ Eighty-seven percent of those arrests were of Black and Latinx people.⁸⁶ While the total number of arrests declined beginning in 2017, the racial disparities not only persisted; they increased to extreme levels.⁸⁷ Black and Latinx New Yorkers accounted for 94 percent of all low-level marijuana arrests in New

York City during the first six months of 2019 according to NYPD arrest data compiled by the state.⁸⁸ These misdemeanor arrests, most of which resulted in guilty pleas, were on top of the aggressive enforcement of the war on drugs against people who use other drugs and people engaged in low-level sales of other drugs.

CRIMINAL RECORDS DISCRIMINATION

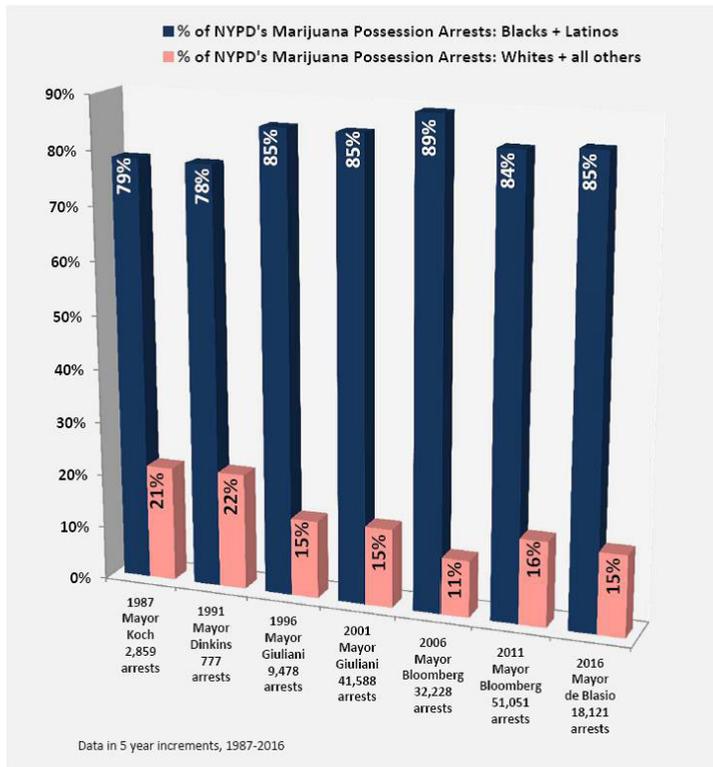
Dozens of occupations in New York State require some type of license, registration, or certification by the Division of Licensing Services (DLS) of the Department of State.⁸⁹ They include barbers, bus drivers, nurse's aides, cosmetologists, emergency medical technicians, and day-care employees. Until recently, applicants had to disclose any unsealed convictions in their backgrounds, and the DLS granted or withheld licenses based on often vague, subjective standards like being "of good moral character."⁹⁰ Even the state's medical marijuana law passed in 2014 barred people with prior convictions from working in the new legal marijuana industry.⁹¹

New York State does have some laws intended to protect people with criminal records from employment discrimination:

- It is illegal for most employers and licensing agencies in New York to ask about arrests that were not followed by a conviction. However, this protection can ring hollow since the records used by commercial databases are often not updated to reflect the final disposition in a case. It is legal to ask about convictions, including criminal (i.e., misdemeanor and felony) and non-criminal (i.e., violations).⁹²
- According to Article 23-A of the New York Correction Law, "an employer may not deny or terminate employment on the basis of prior criminal convictions, except under two (2) circumstances: 1) Where there's a direct relationship between some or all of the previous criminal offenses and the specific job or position the individual is seeking or holds; or 2) When hiring, or continuing to employ the individual would present an unreasonable risk to the employer's property, specific individuals, or the general public."⁹³
- Additionally, "a violation of Article 23-A is considered to be an unlawful discriminatory practice in violation of the New York State Human Rights Law ('HRL')."⁹⁴

30 Years of Jim Crow Marijuana Arrests in NYC

The Mayors and the Numbers of Arrests Change, But Not The Racial Disparities in Enforcement



Source: New York State Division of Criminal Justice Services (DCJS) and U.S. Census
All arrests are age 16 and older for violation of NYS criminal law 221.10, the lowest criminal possession offense, where marijuana possession was the highest charge or the only one

Marijuana Arrest Research Project & Drug Policy Alliance, New York City, June 2017

New York City also has laws intended to protect people with arrest and conviction records from employment discrimination:

- New York City's Human Rights Law prohibit employers from asking about or considering arrests that did not lead to conviction in employment decisions.⁹⁵
- New York City's 2015 Fair Chance Act bans employment discrimination based on a criminal record.⁹⁶
- New York City employers may ask about job applicants' pending arrests or criminal convictions only after making a conditional offer of employment.⁹⁷

In spite of these protections, disclosing a conviction to a prospective employer has definite negative consequences. A groundbreaking field study was done in New York City in which teams of Black and white men were matched and sent to apply for low-wage jobs.

They had equivalent resumes and differed only in their race and criminal background. The results:

“Two key findings emerge from the audit results. First, as in earlier research, a criminal record has a significant negative impact on hiring outcomes, even for applicants with other appealing characteristics. Across teams, a criminal record reduces the likelihood of a callback or job offer by nearly 50 percent. Second, the negative effect of a criminal conviction is substantially larger for [Black people] than for [white people].”⁹⁸

Given New York's targeting of Black and Latinx people for drug law violations, it can be inferred that the war on drugs has locked out many people of color from various employment opportunities.

Although workers with criminal records have the right to complain to the New York State Division of Human Rights or the New York City Commission on Human Rights if they believe they have been discriminated against, the right is more theoretical than real. Employers are supposed to ask a job applicant's permission before doing a background check, although the extent of employer compliance with this rule is unknown. Given the ease and surreptitiousness with which employers can access commercial databases, it defies belief that compliance has been universal or even widespread. Although an employer must provide a written statement detailing the reasons for denying an applicant a job upon the request from the applicant,⁹⁹ in most cases, a job applicant will have a difficult time proving that the denial of employment was based on criminal record-based discrimination. Moreover, both the State Division of Human Rights and the City Commission on Human Rights have histories of accumulating huge backlogs, and cases take a long time to reach resolution.¹⁰⁰

More than 30 years of drug law enforcement and punishment have created barriers to employment and thwarted upward mobility for a generation of mostly poor Black and Latinx New Yorkers. Today, the average income for white families in New York State is 77 percent greater than the average income for Black families and 93 percent greater than for Latinx families, in no small measure because of the criminalization fostered by the war on drugs and the chronic employment instability it produced.¹⁰¹

WHERE WE ARE NOW

There have been some positive developments in New York. In 2015, Governor Andrew Cuomo announced a series of executive orders that embraced recommendations made by his Council on Community Re-entry. They included new and reformed guidelines for state occupational licenses based on a presumption toward granting the license despite an applicant's arrest and conviction record.¹⁰²

In April 2019, in anticipation of the passage of marijuana legalization in the state,¹⁰³ the New York City Council passed a bill by a landslide margin of 40 to 4 that bars both public and private employers in the city from forcing job applicants to take a drug test for marijuana use.¹⁰⁴ It was the first such law in the country at a time when the pendulum is swinging toward legalization of adult recreational cannabis.^{105*} It was also the first law passed in New York State that limits drug testing in the private employment sector. In June 2019, New York State passed a new marijuana decriminalization law that, among other changes, required the expungement of marijuana-related criminal records. At the time, it was estimated that upwards of 160,000 New Yorkers would see their convictions disappear.¹⁰⁶

Thanks to persistent grassroots organizing and advocacy by the formerly incarcerated people's movement, there has been a spate of reforms to remove employment barriers at both the state and federal levels. In 2004, All of Us or None, a California-based national organization of formerly incarcerated people and their families, launched the Ban the Box movement whose goal was to remove questions about arrest and conviction history from employment applications. In November 2015, President Obama ordered federal agencies to ban the box on their employment applications,¹⁰⁷ and in July 2019, the U.S. House of Representatives passed legislation prohibiting federal agencies and federal contractors from asking about job applicants' record until after making a conditional employment offer.¹⁰⁸ State and local coalitions across the country also spearheaded advocacy efforts, and to date, 36 states, the District of Columbia, and

* The bill did include carve-outs for certain safety-sensitive industries, including law enforcement and construction, as well as jobs that require supervising children or medical patients. A bill passed at the same time put a stop to the city testing people on probation for marijuana.

Given New York's targeting of Black and Latinx people for drug law violations, it can be inferred that the war on drugs has locked out many people of color from various employment opportunities.

over 150 cities and counties have adopted Ban the Box legislation and three-fourths of the U.S. population now lives in Ban the Box jurisdictions.¹⁰⁹ Most of these laws apply to public employment, but to date, 14 states and 20 cities and counties extend their fair-chance laws to private employment.¹¹⁰ New York City's Fair Chance Act was signed into law in June 2015, and similar laws have been enacted in Albany, Buffalo, Dutchess County, Ithaca, Rochester, Syracuse, and Yonkers.¹¹¹ Although laws vary somewhat from place to place, in general they require that most employers remove any questions about prior convictions or arrests from job applications and delay background checks until later in the hiring process. It's been shown that the further applicants get in the hiring process, the less likely they are to be turned away.¹¹²

Workplace drug testing might be on the wane as more states legalize the medical and recreational use of marijuana. In March 2018, Bloomberg ran an article titled, "The Coming Decline of the Employment Drug Test" citing several large corporations that had recently announced the cessation of their drug testing programs.¹¹³ And because so many companies do business in New York City and prefer one consistent human resources policy, the city's recent ban on testing job applicants for marijuana may well be a harbinger of more to come.

Nationally, policymakers have recognized the need to ensure successful reentry and employability of people who are formerly incarcerated. The bipartisan Second Chance Act, which went into effect in April 2008 and has since been reauthorized, provides funding for reentry services prioritizing employment services.¹¹⁴ With this influx of funding, hundreds of reentry providers have sprung up across the country, many of them founded and/or staffed by formerly incarcerated people.

The legacy of the war on drugs in employment will last for decades to come unless federal, state, and local policymakers take action.

While there have been efforts to provide protections for people with arrest and conviction records and increase employment for people with involvement in the criminal legal system and for people who use drugs, much work remains. The legacy of the war on drugs in employment will last for decades to come unless federal, state, and local policymakers take action.

CONCLUSION

Study after study has demonstrated that gainful employment is key to the successful reentry of people coming out of carceral settings and to the successful recovery of people with substance use disorders. But the policies and practices generated by the war on drugs have created insurmountable barriers leading to economic and employment instability, the cycling in and out of prison and jail, and increased problematic drug use and overdose. Through pervasive drug testing, denials of employment based on criminal records, and refusal to extend disability protections to people with substance use disorders, the war on drugs has ensured that entire communities of otherwise employable people are not able to get jobs or advance in their careers. While the recent reforms described in this report are steps in the right direction, the harmful legacy of the war on drugs in employment will continue to harm individuals, communities, and the economy as a whole unless we uproot it.

Acknowledgments

Almost five years after Drug Policy Alliance’s “White Faces, Black Lives” conference and 50 years after Richard Nixon’s declaration of the war on drugs, DPA releases these historical reports and accompanying resources to document the massive reach of the drug war, both within and beyond the criminal legal system. As more and more of the public calls for an end to decades of punitive drug policy, we must understand the deep roots of the drug war across systems, and we must stay attuned to ways in which the drug war warps and sinks its roots deeper into our lives.

In 2016, DPA’s New York Policy Office and the Department of Research and Academic Engagement hosted “White Faces, Black Lives,” a conference that convened organizers, researchers, and policymakers to combat the increasingly popular but misguided viewpoint that we were entering a kinder, gentler era of the drug war because the face of the opioid crisis was white. Black people, particularly Black people who use drugs and their family members, knew that not only were Black people being impacted by the overdose crisis but that, despite decades of positive reforms, the drug war was far from over. After meetings with people directly impacted by the drug war and family law, education, employment, immigrant, housing, treatment, and justice movement partners, DPA then launched “Color of Pain,” a website documenting the role of racism in drug policy and mapping the wide scope of the drug war.

The publication of “Uprooting the Drug War” is possible because of a rich legacy of writers, thinkers, partners, and doers within and beyond the drug policy reform movement. This project - and past, present, and future organizing and advocacy to end the drug war - is enriched by the experience and expertise of people who use drugs, incarcerated and formerly incarcerated people, and all people harmed by the drug war. A profound thank you to Elizabeth Brico, Lauren Johnson, Steven Mangual, Miguel Perez Jr., Emily Ramos, and Jasmin Reggler for sharing and documenting their stories in these reports of how the drug war has impacted their lives and the lives of their loved ones. Deep gratitude to our movement partners who shared their insight and expertise and were willing to review drafts of these reports and provide indispensable feedback: Mizue Aizeki, Erin Burn-Maine, Gabrielle de la Guéronnière, Jeanette Estima, Tommasina Faratro, Kesi Foster, Nancy Ginsburg, Shayna Kessler, Emma Ketteringham, Amber Khan, Pamela Lachman, Marie Mark, Roberta “Toni” Meyers Douglas, Erin Miles Cloud, Tracie Gardner, Johanna Miller, Jeffrey A. Nemetsky, Victoria Palacio, Lisa Sangoi, Christopher Watler, and Alison Wilkey. We are also grateful to the organizations who took part in building our understanding in so many areas: Bronx Defenders, Brooklyn Community Housing and Services, Center for Employment Opportunities, Federation of Protestant Welfare Agencies, Immigrant Defense Project, John Jay College Institute for Justice and Opportunity, Legal Action Center, Legal Aid Society, Make the Road New York, Movement for Family Power, National Advocates for Pregnant Women, New York Civil Liberties Union, and Vera Institute. Current and former members of DPA’s New York Policy Office conceptualized this project and saw it through until its publication: thank you to Chris Alexander, Kassandra Frederique, Dionna King, Kristen Maye, Melissa Moore, Elena Riecke, Christiana Taylor, and Tejas Venkat-Ramani. Members of DPA’s Policy Team Aliza Cohen, Lindsay LaSalle, Jules Netherland, and Kellen Russoniello assisted in editing these reports. DPA expresses profound appreciation to Loren Siegel, a longtime DPA thought partner and the principal author of these historical reports.

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