



April 23, 2019

[Via Regulations.gov](http://Via.Regulations.gov)

Charles S. Phalen, Jr.
Director
National Background Investigations Bureau
Office of Personnel Management
1900 E Street NW
Washington, DC 20415

Re: Proposed Regulation OPM-2019-0002-0001

Dear Mr. Phalen:

I write on behalf of the National Legal Aid and Defender Association (NLADA) to express deep concern regarding the proposed OPM regulation for the Declaration for Federal Employment, Optional Form (OF) 306, which would require candidates for federal employment to disclose whether they had participated in a pretrial diversion or intervention program.

NLADA is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. We provide advocacy, guidance, information, training, and technical assistance for members of the equal justice community, especially those working in public defense and civil legal aid. For more than a century, we have connected and supported people across the country committed to justice for all. We are active in national discussions with our public defender and civil legal aid membership, peer organizations, and government agencies about improving justice systems and enhancing community safety through innovative approaches to pretrial justice.

We see serious problems with the proposed regulation cited above:

1. The proposed requirement to disclose participation in pretrial diversion and intervention programs would reduce the effectiveness of these programs by creating barriers to employment and re-entry into society.

The proposal to add a requirement to Question 9 that candidates disclose whether they had "Been subject to judge or court specified conditions requiring satisfactory completion before a criminal charge has been or will be dismissed" undermines the purpose of pretrial diversion and intervention programs. Diversion and intervention programs are a substantial component of many criminal justice systems: by a 2013 tally, there are 2,719 Crisis Intervention Team (CIT) programs, 298 pretrial diversion programs, and 157 pre-plea or diversionary adult drug court programs in this country.¹ These programs have been demonstrated to be effective in reducing incarceration, recidivism, and justice system costs.² Pretrial diversion and intervention programs are motivated by the observation that, for a broad array of offenses, conviction, incarceration, and the lifelong collateral consequences that follow are not an effective means of reducing recidivism and promoting rehabilitation



and reintegration into society following contact with the justice system. Indeed, a major component of pretrial diversion and intervention programs' design is that they allow people who have had contact with the justice system to access the resources they need and lead a productive life without carrying the collateral consequences for employment, inter alia, that a conviction would carry.³ Successful completion of a diversion program typically results in the dismissal of related charges.⁴ In line with standards and recommendations by the National Association of Pretrial Services Agencies, these programs are often accompanied by automatic expungement, so that participation in the program cannot be held against the individual later.⁵

The proposed regulation would upend the logic underpinning diversion and intervention programs by effectively changing them from initiatives that facilitate re-entry into society into barriers to re-entry and gainful employment. The disclosure requirement re-introduces harmful collateral consequences that pretrial diversion and intervention programs are designed to avert. The proposed regulation jeopardizes the effectiveness of a widely used and successful tool of criminal justice. This requirement should be removed from the regulation.

2. The proposed requirement to disclose participation in pretrial diversion and intervention programs is unclear and overbroad.

For any federal job candidate who has participated in a pretrial diversion or intervention program that included automatic expungement, it will likely be unclear to the candidate whether their expungement supersedes the disclosure requirement stated in the proposed revision to Question 9. This lack of clarity is likely to create confusion and a chilling effect on people applying after having had charges or records expunged.

Any pre-employment questionnaire that requires disclosure of prior involvement with the criminal justice system reflects the same systemic bias against low-income people and communities of color that pervades the justice system, and thereby unduly discriminates against those communities.

Furthermore, access to employment is a key factor in disrupting pathways into the criminal justice system and in reducing recidivism.⁶ Creating barriers to employment for people who have been involved in the criminal justice system is counterproductive to the goals of reducing crime and making communities safer.⁷ The requirement of any disclosures of criminal justice system involvement must be warranted by the peculiarities of the position or the employing agency. This standard does not comport with the proposed blanket requirement for all federal employment. The proposed requirement is overbroad and not reasonably linked to the position or hiring agencies in question. This requirement is unjust and should be removed from the proposed regulation.

Additionally, please note the error in the proposed revision to Question 11, which reads "awaiting a trail" instead of "awaiting a trial" (emphasis added).

In summary, the proposed regulation's requirement for disclosure of participation in pretrial diversion and intervention programs is overbroad and misguided. As proposed, these requirements offend the notion of equal justice by entrenching discrimination against low-income communities and communities of color. The requirements undermine efforts to reduce recidivism and facilitate accused individuals' and convicted individuals' return to society. They create barriers to employment for countless capable job-seekers. They undermine pretrial diversion and intervention programs that have been shown to be cost-effective, successful in reducing reliance on jails, and valuable in making communities safer. **We urge that these requirements be removed from the regulation.**

Thank you for your consideration.

Sincerely,



Don Saunders
Senior Vice President, Strategic Alliances
National Legal Aid and Defender Association

¹ CENTER FOR HEALTH & JUSTICE AT TASC, *NO ENTRY: A NATIONAL SURVEY OF CRIMINAL JUSTICE DIVERSION PROGRAMS AND INITIATIVES 7* (2013), *available at* http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversions%20Report_web.pdf.

² *See, e.g.*, MICHAEL REMPEL ET AL., NIJ'S MULTISITE EVALUATION OF PROSECUTOR-LED DIVERSION PROGRAMS: STRATEGIES, IMPACTS, AND COST-EFFECTIVENESS (2018), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/251665.pdf>.

³ *See, e.g.*, *A Second Change - If You Can Pay for It*, COLLATERAL CONSEQUENCES RESOURCE CENTER (Dec. 19, 2016), <https://ccresourcecenter.org/2016/12/19/a-second-chance-if-you-can-afford-it>.

⁴ *See, e.g.*, *Pretrial Diversion*, NAT'L CONFERENCE OF STATE LEGISLATURES (Sep. 28, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-diversion.aspx>.

⁵ NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES, PROMISING PRACTICES IN PRETRIAL DIVERSION 28, *available at* <https://netforumpro.com/public/temp/ClientImages/NAPSA/20b9d126-60bd-421a-bcbf-1d12da015947.pdf>.

⁶ *See, e.g.*, Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795, 826-27 (2018); Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1536 (2016); Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382 (2011); Gordon Bazemore & Jeanne Stinchcomb, *A Civic Engagement Model of Reentry: Involving Community Through Service and Restorative Justice*, 68 FED. PROBATION 14 (2004).

⁷ *See* Nat'l Employment Law Project, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies* (Apr. 4, 2019), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide>.