

Banning the “Box”: How Municipalities Can Reduce Recidivism by Promoting Fair Employment Practices for Job Applicants with Criminal Records

Cities across the country have come to realize that one of the most significant barriers to successful reintegration for individuals with criminal records is the inability to obtain employment. While former prisoners may face many obstacles to getting a job – lack of work experience, limited education or skills, health problems, unstable living circumstances, to name a few – one of the most frustrating is being shut out from even applying for a job for which they are otherwise qualified solely because of a criminal record. With the routine use of background checks for almost every job, a past offense, regardless of its age or relevance to the job sought, can make it virtually impossible for an individual to work, pay taxes, and support a family.

In response to this problem, a number of municipalities have created hiring policies for public jobs that can serve as models and encouragement for similar practices by private employers. The goal of these policies is to create a fair and efficient approach to the consideration of criminal history information that balances valid public safety concerns with the need to provide opportunities for qualified applicants with criminal records. These “ban the box” policies have typically started with the removal of the criminal history question from city employment applications (“the box” that applicants must check indicating if they have a criminal record), but also include other key policy changes that allow for consideration of a criminal record in the context of other achievements and qualifications and the requirements of the job.

Comprehensive city hiring policies include:

- **Use of background checks only for certain jobs.** The use of criminal background checks is restricted to positions where they are required by federal or state statute or where the city has deemed them necessary based on objective criteria. For example, cities identify categories of jobs that work with vulnerable populations, money, or sensitive information where a record should be considered.
- **Background checks later in the hiring process.** In addition to removing the criminal record check “box” from the basic job application form, new municipal policies use background checks (where they have been deemed necessary) later in the hiring process, on applicants who are otherwise fully qualified for the position. These two measures ensure that the city doesn’t miss out on desirable employees, who might otherwise be discouraged from applying, and gives those individuals a fair chance to prove their qualifications. This approach also saves money and time by reducing the number of background checks that have to be performed on the applicant pool.
- **An opportunity to correct criminal history information and submit evidence of rehabilitation.** City Human Resource Departments provide written notice to applicants regarding the results of background checks and an opportunity to discuss and contest the accuracy and relevance of their criminal records and submit evidence of rehabilitation to accompany any documents already in the city’s possession.
- **Clearly enumerated mitigating factors to be considered when evaluating applicants with criminal histories.** The most common of these factors are the seriousness of the crime, the relatedness of the crime to the duties of the position, the time elapsed since the crime’s commission, and any evidence of rehabilitation. As an alternative to simple ban on anyone with a record, this reasoned approach allows for individualized consideration.

Examples of Municipal Hiring Ordinances Addressing Criminal Records

In the last few years, major cities including Boston, Chicago, and San Francisco have adopted policies that include all of these elements. Reforms have been enacted using a variety of methods, including city council resolutions and executive orders, and political leaders have worked in conjunction with human resource and civil service departments to craft policies that allow for the fair consideration of all objectively qualified candidates who also have criminal records. Below are summaries of what the cities and one county have done. Attached is a chart which compares various components of each policy.

- **Boston:** In 2006, the Boston City Council passed a resolution applying nondiscriminatory hiring policies not only to the city, but to vendors doing business with the city. The city does not conduct background checks on applicants unless it is required to do so by statute or it has made a good faith determination that the sensitivity of the duties of the position warrant a background check. The city must contact adversely affected applicants to discuss their records and provide them the opportunity to challenge the accuracy and/or relevance of their records. In making employment decisions, the city must consider the seriousness of the crime(s), the relevance of the crime(s), the number of crime(s), the age of the crime(s), and the occurrences in the life of the applicant since the crime(s). Vendors must have substantially similar policies and the city reserves the right to void the contracts of noncompliant vendors.
- **St. Paul:** The Mayor of St. Paul issued a directive implementing new policies on hiring those with criminal records in December, 2006. St. Paul conducts background checks on applicants when required by statute, and beyond this, for positions that deal with children or vulnerable persons, expensive equipment, money, and sensitive information or operations. Background checks are only conducted on finalists for a position (the criminal history question was removed from job applications) and adversely affected candidates are contacted in writing- and usually by phone- to discuss their records. Applicants may re-apply and are informed that evidence of rehabilitation will be considered upon reapplication. The city considers the nature and seriousness of the crime(s); relationship of the crime(s) to position sought; the relationship of the crime(s) to a candidate's ability, capacity, and fitness required to perform the duties and responsibilities of the position sought; and evidence of rehabilitation. Minnesota already has a law prohibiting discrimination solely on the basis of criminal record, and both St. Paul and Minneapolis (see below) implemented further protections.
- **Minneapolis:** In December, 2006, the Minneapolis City Council passed an ordinance outlining a number of changes to hiring procedures. The city only conducts background checks when they are required by statute or when the city has made a good faith determination that a position is of such sensitivity and responsibility that it requires one. It does not conduct background checks on applicants unless they are otherwise qualified. The city contacts adversely affected applicants and informs them of any issues and that they may reapply and submit evidence of rehabilitation. The ordinance also enumerates factors that will be taken into account in reviewing criminal records, including mitigating circumstances or social conditions surrounding the commission of the crime(s), the age of the person at the time the crime(s) were committed, the length of time elapsed since the crime(s) were committed, and all other competent evidence of rehabilitation and present fitness.

- **Chicago:** In January, 2006, the Mayor of Chicago announced a series of initiatives aimed at improving the employment prospects of the city's re-entry population. Among these were reforms of the city's hiring process. A background check is not conducted until a candidate receives a conditional offer of employment and candidates are permitted to submit a statement relating relevant mitigating factors. When evaluating an applicant's criminal history, the city is now required to employ a "balancing test," considering the nature of the specific offense(s); the nature of sentencing; the number of convictions; the length of time that has passed since the conviction(s); the relationship between the criminal act(s) for which the candidate was convicted and the nature of the work for which he is being considered; the age of the candidate at the time of conviction(s); evidence of rehabilitation; the extent to which the individual has been open, honest, and cooperative with the City in examining his/her background; and any other information relevant to the candidate's suitability.
- **San Francisco:** In September, 2006, in response to a Board of Supervisors resolution urging administrative review of hiring policies, the Civil Service Commission and Department of Human Resources adopted a new policy aimed at combating discrimination against applicants with criminal histories. Typically, city and county employers will not request criminal records of applicants unless they are finalists in the hiring process. The policy enumerates several mitigating factors that the city and county must consider, including the nature and gravity of the crime(s), the relatedness of the crime(s) to the duties and responsibilities of the position, the time elapsed since conviction, the age of the applicant when the crime(s) were committed, the frequency of the crime(s), evidence of rehabilitation, and any other mitigating circumstances.
- **Alameda County:** In October, 2006, at the urging of the County Board of Supervisors, the Civil Service Commission adopted a Re-Entry Pilot Program which included new hiring procedures for county and municipal positions. Criminal background checks are typically not conducted until finalists have been selected and interviewed. The Human Resource Services Department discusses any issues with adversely affected applicants before making final hiring decisions and considers evidence of rehabilitation and any other mitigating circumstances when making its decisions.

MUNICIPAL “BAN THE BOX” HIRING ORDINANCES FREQUENTLY ASKED QUESTIONS

- 1. Does this type of policy ban criminal background checks in city employment? Will adopting a policy like this force us to hire dangerous individuals as daycare workers or teachers?**

No. The policy does not bar background checks for positions where they are necessary. Instead, it limits background checks to positions whose duties are such that an applicant's criminal history is relevant. If a background check is deemed necessary, these are done at later stages of the hiring process. These policies do require that a municipal employer consider other factors besides the criminal record and the relatedness of the offense to the position before making a hiring decision.

- 2. If we adopt this kind of law can we still pre-screen applicants for positions that people with criminal histories are barred by law from holding?**

Yes. Where federal or state law bars individuals with criminal histories from certain jobs, it makes sense for them and for you to provide that information up front, so neither the city nor the individuals waste their time with further interviews. These hiring policies pertain to positions that are not regulated by law.

- 3. How do city agencies typically treat arrests that did not result in convictions?**

The cities surveyed neither request nor consider information regarding arrests that did not result in convictions.

- 4. If the city or another employer will conduct background checks anyway, what are the advantages of conducting them later in the hiring process?**

First, doing background checks later in the process ensures that employers do not refuse applicants without first looking at their qualifications, and therefore ensures that they will have access to the full talent pool available. Second, the later background check, combined with an opportunity to correct errors in the criminal record and present evidence of rehabilitation along with evidence of qualifications means that individuals will not be dissuaded from applying because they suspect that their applications will not be evaluated fairly.

- 5. How late in the process are background checks usually conducted?**

No city surveyed conducts a background check prior to evaluating an applicant's other qualifications, so only applicants who are qualified for the position are screened. The exact timing of background checks varies by city. Some (Boston, Minneapolis) request an applicant's criminal history as soon as he is deemed "otherwise qualified." Others (St. Paul, San Francisco) do so when the pool of applicants has been narrowed to a list of finalists. One (Alameda County) screens at the interview stage.

- 6. Are applicants allowed to appeal or contest employment decisions when criminal history is a factor in the decision? How can applicants ensure that the law is enforced?**

Applicants are permitted to appeal employment decisions, usually through an administrative grievance procedure. Most policies require that they be given written notice of the reasons for their denial.

7. Does hiring an applicant with a criminal history open the city up to legal liability if the applicant then commits a crime?

New Jersey recognizes the doctrine of “negligent hiring,” under which an employer must exercise reasonable care in selecting competent employees and may be liable if he negligently hires or retains an individual who is incompetent or unfit for the job. However, while there is not extensive precedent in this area, courts have ruled that an employer cannot be held liable solely because he did not investigate an employee’s criminal record. New Jersey courts will, instead, look at the “totality of the circumstances.” Even though the policies surveyed revise the criminal background check process, they still retain objective procedures that allow employers to take steps to determine when background checks are to be conducted and how results of such checks are judged in relation to the responsibilities of the position sought.

8. If these laws only affect employment with the city, how will they help people applying for jobs with private employers?

Most cities surveyed do not have binding policies that affect private employers, although at least one (Boston) requires that city vendors adopt policies substantially similar to that of the city. Otherwise, the goal of these policies is to model for private employers a reasonable and efficient approach to considering criminal records in hiring decisions. The City can use this model in outreach to employers to encourage them to hire residents who have criminal records but are otherwise qualified and motivated.

9. Can these measures save the city money?

Yes. Under most policies, cities no longer have to conduct background checks on applicants for all positions. Furthermore, even when background checks are conducted, they are only conducted on the few applicants who qualify as finalists for the position. The reduction in the number of background checks alone should result in savings.