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New State Initiatives Adopt Model Hiring Policies Reducing Barriers to Employment of People with Criminal Records

Nationwide, over 20 cities and counties – six more just in the past year – have now taken the critical step of removing unfair barriers to employment in their hiring policies. As reported below, several states have now followed suit, building on the successful track record of the local hiring initiatives.

These local hiring initiatives removed the question on government job applications asking about an individual's criminal history ("ban the box") and deferred the criminal background check until the final stages of the hiring process.¹ Many of them have also adopted hiring policies modeled on federal civil rights protections that require the employer to show that the criminal records restrictions are directly related to the job and offer the worker an opportunity to show that he or she has been rehabilitated.²

Starting last year, a striking number of state legislatures elevated these local hiring initiatives to the level of state policy. Most recently, Connecticut lawmakers passed new "ban the box" legislation over the Governor's veto. In the past year, New Mexico and Minnesota also enacted statewide "ban the box" provisions that apply to public employment. In addition, several states (California, Maryland, Nebraska, New Jersey, Rhode Island) introduced legislation to expand hiring protections for people with a criminal record featuring both ban the box policies and standards requiring public and private employers to show that their criminal background checks are "job related" as required by federal civil rights laws. Also of special note, Pennsylvania proposed regulations to incorporate the federal civil rights procedures into their state anti-discrimination law. (See appendix)

To help build on this promising activity, the following paper summarizes the most favorable state laws on the books and the proposed state legislation of the past year seeking to reduce barriers to employment of people with criminal records.

Current State Laws

Connecticut (2010)

- **Ban the Box Applies to State Employment/Written Notice Requirements/Prohibited Records**

Connecticut's bill to ban the box ([HB 5207](#)) unanimously passed both the House and Senate, but was vetoed by the Governor. In response, Connecticut's lawmakers returned to the Capitol to override the veto, thus incorporating the legislation into law which takes effect on October 1, 2010.

The new law prohibits applicants from being disqualified for licensure or employment by the state or any of its agencies solely because of a prior conviction, unless otherwise disqualified by state law. State employers and licensing agencies must now wait until a conditional offer has been made before obtaining a criminal background report. Significantly, the law also requires that the employer or licensing agency consider (1) the nature of the crime and its relationship to the job or occupation; (2) rehabilitation information; and (3) the time elapsed since the conviction or release before making an employment or licensure determination.

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The law further requires the employer or licensing agency to provide an applicant with a written letter of rejection specifically stating the evidence presented and reasons for rejection if the applicant is disqualified, and prohibits the use, distribution or dissemination of records of arrests that did not lead to conviction, or records of convictions which have been erased.

New Mexico (2010)

- **Ban the Box Applies to State Employment/Prohibited Records**

This year, Governor Richardson signed [SB 254](#) into law (N.M. Stat. § 28-2-3), which prohibits state agencies from inquiring into an applicant's conviction history on an initial employment application. An applicant's criminal history may be considered only after an applicant has been "selected as a finalist for a position."

The law permits convictions to be considered when determining eligibility for employment or licensure, but states that convictions "may not operate as an automatic bar to obtaining such public employment or license." The law further prohibits the use of records of arrest if not followed by a valid conviction and misdemeanor convictions not involving moral turpitude. This information may also not be distributed or disseminated in connection with an application for any public employment, license or other authority.

Minnesota (2009)

- **Ban the Box Applies to State & Local Government Employment/Evaluating Job-Related Factors and Rehabilitation/Prohibited Records**

In May 2009, Minnesota enacted a law ([Minn. Stat. § 364 et seq.](#)) prohibiting public employers from inquiring into or considering an applicant's criminal history until after the applicant has been selected for an interview by the state, its agency, or political subdivision.

The law further prohibits the disqualification of applicants from public employment or licensure unless the conviction is "directly related" to the position of employment or occupational license sought. The law includes a set of factors that must be considered when evaluating what is "job related." Importantly, applicants may not be disqualified because of a criminal record if the applicant can show competent evidence of rehabilitation and present fitness to perform the duties of the employment or occupation.

Also of significance, records of arrest not followed by valid conviction, convictions which have been annulled or expunged, and misdemeanor convictions for which no jail sentence can be imposed may not be used when evaluating applicants for public employer or licensure.

Hawaii (1998)

- **Ban the Box Applies to All Public and Private Employment/Private Sector Screening Standards and Time Limits on Convictions**

In 1998, Hawaii became the first state to "ban the box" as applied to both public and private employment. Specifically, Hawaii's law ([HRS §§ 378-2 and 378-2.5](#)) prohibits employers from inquiring into an applicant's criminal history until after a conditional offer of employment has been made. The offer may be withdrawn if the applicant's conviction bears a "rational relationship" to the duties and responsibilities of the position sought.

Under the law, employers may only consider an employee's conviction record falling within the most recent ten years, excluding periods of incarceration. The definition of unlawful discriminatory practices (§ 378-2) includes "arrest and court record" as impermissible reasons for an employer to "refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual."

Wisconsin (1981)

- **Private Sector Screening for Criminal Records & Licenses Must be Job Related**

Enacted in 1981, Wisconsin law (Wisc. Stat. §§ [111.321](#), [111.322](#)) prohibits employment discrimination in both public and private sector employment on the basis of either an arrest or conviction record. Specifically, the law (§ [111.335](#)) provides that an applicant may not be denied employment based on a conviction history unless the conviction “substantially relate[s]” to the circumstances of the particular job or licensed activity, or is not bondable.

Pennsylvania (1979)

- **Private Sector Screening for Criminal Records Must be Job Related**

Pennsylvania law ([Title 18 Cons. Stat. § 9125](#)) prohibits private employers from considering conviction records that “do not relate to the applicant’s suitability for employment” in the position sought. The law further requires employers to provide written notification if the determination not to hire an applicant was based in whole or in part on the applicant’s criminal history. The law (§ 9124) also allows state agencies to consider an applicant’s conviction record when determining licensure. However, the law prohibits the consideration of non-conviction arrests, annulled or expunged convictions, convictions of summary offenses, pardoned convictions, and convictions that do not relate to the applicant’s suitability for the licensed occupations.

New York (1977)

- **Private & Public Sector Screening for Criminal Records Must be Job Related**

Enacted in 1977, New York law ([NY Corr. Law § 752](#)) prohibits “[u]nfair discrimination against persons previously convicted of one or more criminal offenses” in public and private employment and licensing. In the past year, New York’s law has been aggressively enforced by the State’s Attorney General, in model settlements reached against RadioShack and Choicepoint (one of the nation’s largest screening firms).

The law prohibits the disqualification of applicants from employment or licensure solely or in part on the applicant’s criminal history or because of a lack of “good moral character” based solely on a criminal offense, unless there is a “direct relationship” between the conviction and the employment or license sought, or the issuance of a license or employment would involve an unreasonable risk to property or to the safety or welfare of an individual or the general public. The law ([§ 753](#)) includes a list of factors to be considered by public agencies and private employers when making employment decisions relating to an applicant’s criminal history, including the fact that certificates of good conduct create a presumption of rehabilitation.

Pending Legislation & Guideline

Massachusetts

- **Ban the Box/Prohibited Records/Presumption of Rehabilitation/Negligent Hiring Protections**

Massachusetts legislation to reform procedures relating to use of criminal records information in employment decisions has passed both legislative chambers and is awaiting signature by the Governor ([House No. 4712](#)).

The legislation requires employers, volunteer coordinators, and professional licensing agencies to supply applicants with a copy of their criminal history report prior to questioning the applicant about his or her criminal history. In addition, an applicant is entitled to a copy of his or her criminal history report if an employer, volunteer coordinator or licensing agency makes an adverse decision on the basis of that criminal record. According to the legislation, criminal records may only contain information on (i) felony convictions for 10 years following their disposition, including termination of any term of incarceration or custody; (ii) misdemeanor convictions for 5

years following their disposition, including termination of any term of incarceration or custody; and (iii) pending criminal charges.

The legislation also creates a criminal record review board with the authority to hear complaints and investigate alleged violations of the above requirements.

New Jersey

- **Ban the Box/Prohibited Records/Presumption of Rehabilitation/Negligent Hiring Protections**

In 2010, a New Jersey Assembly bill was introduced ([AB 1757](#)) modeled on a similar 2009 measure that would prohibit State, county and municipal departments, offices and agencies from requiring applicants to disclose whether they have been convicted of a crime or substantially similar offense on employment applications.

Under the proposed legislation, applicants for employment or licensure cannot be denied because of a previous criminal conviction or a finding of lack of “good moral character” unless there is a “direct relationship” between the offense and the position or occupational license sought, or issuing the license or granting the employment would involve an unreasonable risk to property or the safety or welfare of an individual or the general public. The bill includes as list of factors that must be applied when evaluating these standards.

The pending bill also creates a “presumption of rehabilitation” when a certificate of rehabilitation is granted, and requires public agencies and private employers to give consideration to such certificates. Under the bill, public and private employers are prohibited from inquiring about whether an applicant has been arrested, charged with a crime, convicted of a sealed noncriminal offense, or adjudicated as a juvenile delinquent, and may not consider arrests that did not lead to conviction.

Finally, the pending legislation creates a rebuttable presumption in favor of excluding prior convictions from evidence in a negligent hiring or retention suit if, after learning about an applicant’s or employee’s past criminal conviction history, the employer evaluated the factors set forth in this section and made a reasonable, good faith determination that such factors militate in favor of hiring or retaining the applicant or employee.

Rhode Island

- **Applies to Contractors/Background Checks Conducted Only When Required by Law**

Introduced in 2010, the Rhode Island bill ([AB 8060](#)) is modeled after Boston’s “ban the box” ordinance, and requires vendors doing business with the State to comply with same standards that apply to the State.

The bill details the policies of the State with which vendors would need to comply, including conducting background checks only if required by law or if there has been a “good faith determination that the relevant position is of such sensitivity that a ... report is warranted.” Should a background check be required, the state will only conduct the investigation if the applicant is otherwise qualified for the relevant position.

The bill outlines several worker protections provided by the state, including: limiting the information to be included on background reports to convictions and case-pending information; requiring a copy of the background report be given to the applicant if it includes other information or if an adverse employment decision is to be made; providing an opportunity for the applicant to discuss the background report with the state; and requiring review of any information or documentation received from the applicant. Finally, the bill would require vendors to consider the seriousness, relevance, number, and age of the crime(s), and the occurrences in the life of the applicant since when making an employment decisions.

Pennsylvania

- **Civil Rights Commission Guidelines**

The Pennsylvania Human Rights Commission (PHRC) has proposed a policy guidance intended to assist employers to comply with the employment provisions found in the Pennsylvania Human Relations Act. The proposed Pennsylvania guidance, which is modeled on the Equal Employment Opportunity Commission's policy regulating criminal background checks for employment, states that when investigating claims of unlawful disparate impact discrimination presented by African American and Latino workers, "the PHRC will presume that the complainant has established the disparate impact element of a prima facie case of unlawful discrimination."

Legislation Proposed in 2010

California

- **Private & Public Sector Screening for Criminal Records Must be Job Related**

Assembly bill [AB 2727](#) prohibited both public agencies and private employers from denying an employment application because of a criminal conviction unless the employer determines that there is a "direct relationship between the criminal offense and the employment sought," or "employing the applicant would involve an unreasonable risk to property or to the safety or welfare of an individual or the general public." In addition, the bill included a list of factors to be considered when applying these screening standards. The bill did not make it out of the Assembly Appropriations Committee but is expected to be reintroduced next session.

Maryland

- **Ban the Box**

The House and Senate bills proposed in Maryland ([SB 581/HB 749](#)) prohibited the Judicial, Executive, or Legislative Branches of State government from inquiring into the criminal record or criminal history of an applicant for employment until the applicant is selected for an interview. The bills exempted the Department of Public Safety and Correctional Services and any Judicial, Executive, or Legislative Branch that has a statutory duty to conduct a criminal history records check. Both bills were stalled in committee.

Nebraska

- **Ban the Box/Prohibited Records/Presumption of Rehabilitation**

Nebraska's legislative bill ([913](#)), introduced in 2010, prohibited state regulatory boards, departments, and agencies from inquiring into an applicant's conviction history on the initial job application.

The bill permitted consideration of an applicant's conviction history in employment decisions, but states that "the conviction shall not operate as an automatic bar to obtaining public employment or license." The bill permits denying an applicant employment only if the criminal conviction directly relates to the particular employment, or if the applicant has a felony or misdemeanor conviction involving moral turpitude and the applicant "has not been sufficiently rehabilitated to warrant the public trust." Importantly, for applicants with a felony or misdemeanor conviction involving moral turpitude, completion of probation or parole supervision or three years after final discharge or release from incarceration creates a "presumption of sufficient rehabilitation."

The bill further prohibited the use, distribution, or dissemination for employment purposes of records "of arrest not followed by a valid conviction" and "misdemeanor convictions not involving moral turpitude." At this time the bill is indefinitely postponed.

Endnotes

¹ National Employment Law Project. *Major U.S. Cities and Counties Adopt Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records*. Feb. 16, 2010. Web. <<http://www.nelp.org/page/-/SCLP/CityandCountyHiringInitiatives.pdf>>

² Equal Employment Opportunity Commission. *Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.* Feb. 4, 1987. Web. <<http://www.eeoc.gov/policy/docs/convict1.html>>

Comparison of Selected State Criminal Background Check Laws and Proposed Legislation (6/28/10)*

State Bill or Statute	Ban the Box	Employers Regulated		Required Screening Standards	Screening Factors Including Rehabilitation
		Private Employers	Public Employers		
California AB 2727 <i>No legislative action</i>		X	X	Record must have a "direct relationship" to the job sought	X
Connecticut HB 5207 <i>Effective October 1, 2010</i>	X		X	Employers must consider relationship of record to job sought	X
Hawaii HRS §§ 378-2, 378-2.5 <i>Enacted</i>	X	X	X	Record must have a "rational relationship" to the job sought	
Maryland SB 581, HB 749 <i>No legislative action</i>	X		X	None	
Massachusetts H 4712 <i>Bill pending</i>		X	X	None	
Minnesota Minn. Stat. § 364 <i>Enacted</i>	X		X	Record must be "directly related" to the job sought	X
Nebraska Leg. Bill 913 <i>Bill pending</i>	X		X	Record must be "directly related" to job sought	
New Mexico N.M. Stat. § 28-2-3 <i>Enacted</i>	X		X	None	
New Jersey A1757 <i>Bill pending</i>	X		X	Requires a "direct relationship" to the job sought	X
New York NY Corr. Law §§ 752, 753 <i>Enacted</i>		X	X	Record must have a "direct relationship" to the job sought	X
Pennsylvania Pa. Cons. Stat. §§ 9124, 9125 <i>Enacted</i>		X	X	Record has to "relate" to the job sought	
Rhode Island HB 8060 <i>Bill pending</i>		X	X	None	X
Wisconsin Wisc. Stat. §§ 111.321, 111.322 <i>Enacted</i>		X	X	Record must be "substantially related" to the job sought	

* For more detailed information on state laws regulating criminal background checks, see Love, Margaret Colgate. "Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide." Table #6 – Consideration of Criminal Record in Licensing and Employment. March 2007. (Available online at <http://www.sentencingproject.org/doc/File/Collateral%20Consequences/table6.pdf>).