

MEMORANDUM

July 11, 2014

TO: County Council

FROM: Josh Hamlin, Legislative Attorney 

SUBJECT: **Introduction:** Bill 36-14, Human Rights and Civil Liberties – Fair Criminal Record Screening Standards

Bill 36-14, Human Rights and Civil Liberties – Fair Criminal Record Screening Standards, sponsored by Councilmembers Elrich, Branson, Navarro, Council President Rice and Councilmember Riemer, is scheduled to be introduced on July 15. A public hearing is tentatively scheduled for September 9 at 1:30 p.m.

Bill 36-14 would:

- (1) prohibit certain employers from conducting a criminal background check or otherwise inquiring into an applicant's criminal record before making a conditional offer of employment;
- (2) require certain employers to provide prior notice to an applicant or employee when taking an adverse action concerning the applicant's or employee's employment;
- (3) provide for enforcement by the Office of Human Rights and the Human Rights Commission;
- (4) authorize the Human Rights Commission to award certain relief; and
- (5) generally regulate the use of criminal records in the hiring process by certain employers.

Background

The "Ban the Box" Movement

This bill would remove one of the barriers to employment facing persons with criminal records by prohibiting inquiry by certain prospective employers into job applicants' criminal history early in the hiring process. Similar policies or laws have been adopted or enacted in several state and local jurisdictions¹, most recently the City of Baltimore in May of this year.²

¹ While the implementation of "ban the box" policies has primarily been done through legislative action, some local jurisdictions have administratively adopted policies applicable to hiring by the jurisdiction.

These laws are known as “ban the box” laws, a reference to the prohibition on the use of a check-box on job applications indicating whether or not the applicant has a criminal record.

The movement to “ban the box” began with Hawaii in 1998, and there are now 11 States³ and over 50 local jurisdictions that have adopted some form of “ban the box” legislation. There is substantial variance in the legislation of the different jurisdictions, but all reflect the view that the question of a job applicant’s criminal history should be deferred until later in the hiring process and not be utilized as an automatic bar to employment. The majority of the laws, including the State of Maryland’s law, apply only to public or government employers, but 18 of the local jurisdictions with “ban the box” policies have gone somewhat further and apply the restrictions to private contractors doing business with the respective jurisdictions. Going further still, five states⁴ and six local jurisdictions⁵ have banned the box for private employers.

The rationale for banning the box is fairly straightforward: when people with criminal histories are denied a fair chance at employment, the entire community pays the cost in the form of diminished public safety, increased government spending on law enforcement and social services, and reduced government revenue in the form of lost income and sales taxes. According to the U.S. Department of Justice’s Bureau of Justice Statistics (BJS), over 92 million Americans, roughly one in three adults, have a criminal history record involving an arrest or conviction.⁶ Additionally, according to the BJS, nearly 700,000 people a year nationwide return to their communities from incarceration, and many are job seekers who are ready and able to become part of the work force.⁷ For these people, a steady job is a critical factor in preventing recidivism.⁸

In addition to the general public safety benefit of reduced rates of recidivism, there is a twofold economic benefit associated with increasing employment of people with criminal records: decreased expenditures on law enforcement, corrections, and social services, and increased income and sales tax revenues. Decreasing recidivism would almost certainly result in a reduced overall crime rate, with a corresponding reduction in law enforcement and corrections costs. Raising the employment rate of persons with criminal histories would also increase the likelihood that they would fulfill their social and legal financial obligations, such as child

² The Council of the District of Columbia is poised to enact its own “ban the box” law; Bill 20-642, the “Fair Criminal Records Screening Amendment Act of 2014” passed first reading 12-1 on June 3, 2014, and the Council may take final action on the bill as early as July 14.

³ In 2013 and 2014 alone, six states enacted new “ban the box” legislation: California (2013), Illinois (2014), Maryland (2013), Minnesota (2013), Nebraska (2014), and Rhode Island (2013).

⁴ Illinois, Massachusetts, Minnesota, Hawaii, and Rhode Island.

⁵ Baltimore (2014), Buffalo (2013), Newark (2013), Philadelphia (2011), San Francisco (2014), and Seattle (2013). If Bill 20-642 is enacted in its current form, the District of Columbia would become the seventh local jurisdiction to ban the box for private employers.

⁶ Dennis DeBacco and Owen Greenspan, *Survey of State Criminal History Information Systems*, 2008. Bureau of Justice Statistics (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics 2009). <https://www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf>

⁷ Paul Guerino, Paige M. Harrison & William J. Sabol, *Prisoners in 2010*, NCJ 236096 (Bureau of Justice Statistics Dec. 2011). <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>

⁸ Mark T. Berg and Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, Justice Quarterly (28), 2011, pp.382-410.

<http://www.pacific-gateway.org/reentry.%20employment%20and%20recidivism.pdf>

support, victim restitution, and court costs.⁹ Also, economists have estimated that the lower overall employment rates of people with prison records or felony convictions cost the U.S. economy about 0.4 to 0.5 percent of GDP in 2008, or between \$57 and \$65 billion.¹⁰ Part of this cost is borne by governments in the form of lost income taxes, and lower sales tax revenue resulting from reduced economic activity.

Bill 36-14

Bill 36-14 would prohibit an employer in the County from inquiring into, or otherwise actively obtaining¹¹ the criminal history of an applicant for a job in the County before making a conditional offer of employment. It would also require the employer, in making an employment decision about an applicant or employee based on the applicant's or employee's arrest or conviction record, to conduct an individualized assessment, considering only:

- specific offenses that may demonstrate unfitness to perform the duties of the position sought by the applicant or held by the employee;
- the time elapsed since the specific offenses; and
- any evidence of inaccuracy in the record.¹²

The bill would require an employer deciding to base an adverse action¹³ on an applicant's arrest or conviction record to:

- provide the applicant or employee with a copy of any criminal record report; and
- notify the applicant or employee of the prospective adverse action and the items that are the basis for the prospective adverse action.

If, within seven days of receiving the required notice of prospective adverse action, the applicant or employee gives the employer notice of evidence of the inaccuracy of any item or items on which the prospective adverse action is based, the bill would require the employer to:

- delay the adverse action for a reasonable period after receiving the information; and
- reconsider the prospective adverse action in light of the information.

Finally, the bill would require an employer to give an applicant or employee written notice of a final adverse action within seven days of taking the action.

⁹ Bruce Western and Becky Pettit, *Collateral Costs: Incarceration's Effect on Economic Mobility*, The Pew Charitable Trusts, 2010.

http://www.pewtrusts.org/~media/Imported-and-Legacy/uploadedfiles/pes_assets/2010/CollateralCosts1.pdf.pdf

¹⁰ John Schmitt and Kris Warner, *Ex-offenders and the Labor Market*, Center for Economic and Policy Research, 2010. <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>

¹¹ This prohibition would "ban the box" on the application itself, prohibit the employer from conducting a background check, and prohibit the employer from inquiring of the applicant or any other person whether the applicant has an arrest record or conviction record.

¹² This requirement is consistent with enforcement guidance issued in 2012 by the United States Equal Employment Opportunity Commission (EEOC) regarding employers' use of criminal background information in making employment-related decisions. http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf

¹³ "Adverse action" is defined in the bill as follows: to fail or refuse to hire, to discharge or not promote a person, or to limit, segregate, or classify employees in any way which would deprive a person of employment opportunities or otherwise adversely affect the person's employment status.

Bill 36-14 exempts from its provisions inquiries or adverse actions expressly authorized by an applicable federal, State, or County law or regulation, as well as the County Department of Police, the County Department of Corrections and Rehabilitation, and employers providing programs, services, or direct care to minors or vulnerable adults.

The County Office of Human Rights would be responsible for enforcement of the law. An applicant or employee would be able to file a complaint with the Office of Human Rights and obtain an adjudicatory hearing before the Human Rights Commission.

This packet contains:

Bill 36-14

Legislative Request Report

Circle #

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Bill No. 36-14
Concerning: Human Rights and Civil Liberties – Fair Criminal Record Screening Standards
Revised: July 10, 2014 Draft No. 4
Introduced: July 15, 2014
Expires: January 15, 2016
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Elrich, Branson and Navarro, Council President Rice, and Councilmember Riemer

AN ACT to:

- (1) prohibit certain employers from conducting a criminal background check or otherwise inquiring into an applicant's criminal record before making a conditional offer of employment;
- (2) require certain employers to provide prior notice to an applicant or employee when taking an adverse action concerning the applicant's or employee's employment;
- (3) provide for enforcement by the Office of Human Rights and the Human Rights Commission;
- (4) authorize the Human Rights Commission to award certain relief; and
- (5) generally regulate the use of criminal records in the hiring process by certain employers.

By amending

Montgomery County Code
Chapter 27, Human Rights and Civil Liberties
Sections 27-7 and 27-8

By adding

Montgomery County Code
Chapter 27, Human Rights and Civil Liberties
Article XII, Fair Criminal Record Screening Standards

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Sections 27-7 and 27-8 are amended and Chapter 27, Article**
2 **XII is added as follows:**

3 **27-7. Administration and enforcement.**

4 (a) *Filing complaints.* Any person subjected to a discriminatory act or
5 practice in violation of this Article, or any group or person seeking to
6 enforce this Article or Articles X, [or] XI, or XII, may file with the
7 Director a written complaint, sworn to or affirmed under the penalties of
8 perjury, that must state:

- 9 (1) the particulars of the alleged violation;
- 10 (2) the name and address of the person alleged to have committed the
11 violation; and
- 12 (3) any other information required by law or regulation.

13 * * *

14 (f) *Initial determination, dismissal before hearing.*

15 (1) The Director must determine, based on the investigation, whether
16 reasonable grounds exist to believe that a violation of this Article
17 or Articles X, [or] XI, or XII, occurred and promptly send the
18 determination to the complainant and the respondent.

19 (2) If the Director determines that there are no reasonable grounds to
20 believe a violation occurred, and the complainant appeals the
21 determination to the Commission within 30 days after the
22 Director sends the determination to the complainant, the Director
23 promptly must certify the complaint to the Commission. The
24 Commission must appoint a case review board to consider the
25 appeal. The board may hear oral argument and must:

- 26 (A) dismiss the complaint without a hearing;
- 27 (B) order the Director to investigate further; or

28 (C) set the matter for a hearing by a hearing examiner or the
29 board itself, and consider and decide the complaint in the
30 same manner as if the Director had found reasonable
31 grounds to believe that a violation of this Article or
32 Articles X, [or] XI, or XII, occurred.

33 (3) If the Director determines that there are reasonable grounds to
34 believe a violation occurred, the Director must attempt to
35 conciliate the matter under subsection (g).

36 * * *

37 **27-8. Penalties and relief.**

38 (a) *Damages and other relief for complainant.* After finding a violation
39 of this Article or Articles X, [or] XI, or XII, the case review board
40 may order the payment of damages (other than punitive damages) and
41 any other relief that the law and the facts warrant, such as:

42 (1) compensation for:

43 * * *

44 (F) financial losses resulting from the discriminatory act or a
45 violation of [Article] Articles X or XII; and

46 * * *

47 (2) equitable relief to prevent the discrimination or the violation of
48 Articles X, [or] XI or XII, and otherwise effectuate the purposes
49 of this Chapter;

50 (3) consequential damages, such as lost wages from employment
51 discrimination or a violation of [Article] Articles X or XII or
52 higher housing costs from housing discrimination, for up to 2
53 years after the violation, not exceeding the actual difference in
54 expenses or benefits that the complainant realized while seeking

55 to mitigate the consequences of the violation (such as income
56 from alternate employment or unemployment compensation
57 following employment discrimination); and

58 (4) any other relief that furthers the purposes of this Article or
59 Articles X, [or] XI or XII, or is necessary to eliminate the effects
60 of any discrimination prohibited under this Article.

61 (b) Civil penalties.

62 (1) In addition to any damages awarded to any person under
63 this article, the case review board may require any person, except the
64 County, who has violated this article or Article XII to pay to the County
65 as a civil penalty:

- 66 * * *
- 67 (E) for each violation of Article XII, up to \$1,000;
- 68 (F) for any other violation, \$500.
- 69 * * *

70 **ARTICLE XII. Fair Criminal Record Screening Standards.**

71 **27-71. Findings and Purpose; Definitions.**

- 72 (a) Findings.
- 73 (1) The U.S. Department of Justice’s Bureau of Justice Statistics
74 (BJS) estimates that over 92 million Americans, roughly one in
75 three adults, have a criminal history record involving an arrest or
76 conviction.
- 77 (2) According to the BJS, nearly 700,000 people a year return to their
78 communities from incarceration, and many are job seekers who
79 are ready and able to become part of the work force.

- 80 (3) Studies indicate that job applicants are often precluded from even
 81 getting an interview when applications require disclosure of
 82 whether the applicant has a criminal record.
- 83 (4) Lack of employment is a significant cause of recidivism, which
 84 threatens public safety and disrupts the financial and general
 85 stability of affected families and communities.
- 86 (5) Increased government expenditures on law enforcement and
 87 social programs, necessitated by the inability of people with
 88 criminal records to find gainful employment, are an impediment
 89 to the County reaching its potential for economic growth.
- 90 (6) Increasing employment of people with criminal records improves
 91 public safety and reduces the financial burden on government.

92 (b) Purpose.

93 It is the purpose of this Article to:

- 94 (1) assist in the successful reintegration into the workforce of people
 95 with criminal records by removing barriers to employment; and
- 96 (2) enhance the health and safety of the community by assisting
 97 people with criminal records to lawfully provide for themselves
 98 and their families.

99 (c) Definitions. As used in this Article:

100 Adverse action means to fail or refuse to hire, to discharge or not
 101 promote a person, or to limit, segregate, or classify employees in any
 102 way which would deprive a person of employment opportunities or
 103 otherwise adversely affect the person's employment status.

104 Applicant means a person who is considered or who requests to be
 105 considered for employment in the County by an employer.

106 Arrest record means information indicating that a person has been
107 apprehended, detained, taken into custody, held for investigation, or
108 otherwise restrained by a law enforcement agency or military authority
109 due to an accusation or suspicion that the person committed a crime.

110 Conditional offer means an offer of employment that is conditioned
111 solely on:

112 (1) the results of the employer's later inquiry into the
113 applicant's criminal record; or

114 (2) another contingency expressly communicated to the
115 applicant at the time of the offer.

116 Conviction record means information regarding a sentence arising from
117 a verdict or plea of guilty or nolo contendere, including a sentence of
118 incarceration, a fine, a suspended sentence, and a sentence of probation.

119 Criminal record report means a record of a person's arrest and
120 conviction history obtained from any source.

121 Director means the Executive Director of the Office of Human Rights
122 and includes the Executive Director's designee.

123 Employment means:

124 (1) any work for compensation; and

125 (2) any form of vocational or educational training, with or
126 without compensation.

127 Employee means a person permitted or instructed to work or be present
128 by an employer in the County.

129 Employer means any person, individual, proprietorship, partnership,
130 joint venture, corporation, limited liability company, trust, association,
131 or other entity operating and doing business in the County that employs
132 10 or more persons full-time in the County. Employer includes the

133 County government, but does not include the United States, any State,
 134 or any other local government.

135 Inquiry or Inquire means any direct or indirect conduct intended to
 136 gather information, using any mode of communication.

137 Vulnerable adult means an adult who lacks the physical or mental
 138 capacity to provide for his or her own daily needs.

139 **27-72. Prohibited Inquiries; Retaliation.**

140 (a) Inquiry on application. An employer must not require an applicant or
 141 potential applicant to disclose on an employment application the
 142 existence or details of the applicant's or potential applicant's arrest
 143 record or conviction record.

144 (b) Preliminary inquiry into criminal record. In connection with the
 145 proposed employment of an applicant, an employer must not, at any
 146 time before a conditional offer of employment is made:

147 (1) require the applicant to disclose whether the applicant has an
 148 arrest record or conviction record, or otherwise has been accused
 149 of a crime;

150 (2) conduct a criminal record check on the applicant; or

151 (3) inquire of the applicant or others about whether the applicant has
 152 an arrest or conviction record or otherwise has been accused of a
 153 crime.

154 (c) Retaliation. An employer must not:

155 (1) retaliate against any person for:

156 (A) lawfully opposing any violation of this Article;

157 (B) filing a complaint, testifying, assisting, or participating in
 158 any manner in an investigation, proceeding, or hearing
 159 under this Article; or

160 (2) obstruct or prevent enforcement or compliance with this Article.

161 **27-73. Employment decisions; adverse actions based on criminal record.**

162 (a) In making an employment decision based on an applicant's or
163 employee's arrest record or conviction record, an employer must
164 conduct an individualized assessment, considering only specific
165 offenses that may demonstrate unfitness to perform the duties of the
166 position sought by the applicant or held by the employee, the time
167 elapsed since the specific offenses, and any evidence of inaccuracy in
168 the record.

169 (b) If an employer intends to base an adverse action on an item or items in
170 the applicant's or employee's arrest record or conviction record, before
171 taking the adverse action the employer must:

172 (1) provide the applicant or employee with a copy of any criminal
173 record report; and

174 (2) notify the applicant or employee of the prospective adverse action
175 and the items that are the basis for the prospective adverse action.

176 (c) If, within 7 days after the employer provides the notice required in
177 subsection (b) to the applicant or employee, the applicant or employee
178 gives the employer notice of evidence of the inaccuracy of any item or
179 items on which the prospective adverse action is based, the employer
180 must:

181 (1) delay the adverse action for a reasonable period after receiving
182 the information; and

183 (2) reconsider the prospective adverse action in light of the
184 information.

185 (d) Within 7 days after taking final adverse action based on the arrest or
186 conviction record of an applicant or employee, an employer must notify
187 the applicant or employee of the final adverse action in writing.

188 **27-74. Exemptions.**

189 (a) The prohibitions and requirements of this Article do not apply if the
190 inquiries or adverse actions prohibited by this Article are expressly
191 authorized by an applicable federal, State, or County law or regulation.

192 (b) The prohibitions of this Article do not apply to the County Police
193 Department or the County Department of Corrections and
194 Rehabilitation.

195 (c) The prohibitions of this Article do not apply to an employer that
196 provides programs, services, or direct care to minors or vulnerable
197 adults.

198 **27-75. Enforcement.**

199 A person aggrieved by an alleged violation of this Article may file a complaint
200 with the Director under Section 27-7.

201 **Sec. 2. Effective Date.**

202 This Act takes effect on January 1, 2015.

203 *Approved:*

204

Craig L. Rice, President, County Council

Date

205 *Approved:*

206

Isiah Leggett, County Executive

Date

LEGISLATIVE REQUEST REPORT

Bill 36-14

Human Rights and Civil Liberties – Fair Criminal Record Screening Standards

DESCRIPTION:	This bill would remove one of the barriers to employment facing persons with criminal records by prohibiting inquiry by certain prospective employers into job applicants' criminal history early in the hiring process. It would also require employers to perform an individualized assessment when making employment decisions based on an applicant's or employee's criminal record, and allow an applicant or employee time to correct errors in the criminal record prior to an adverse action being taken regarding their employment.
PROBLEM:	When people with criminal histories are denied a fair chance at employment, the entire community pays the cost in the form of diminished public safety, increased government spending on law enforcement and social services, and reduced government revenue in the form of lost income and sales taxes.
GOALS AND OBJECTIVES:	To ensure that people with criminal records have a fair chance in seeking employment by requiring that the question of a job applicant's criminal history be deferred until later in the hiring process and not utilized as an automatic bar to employment.
COORDINATION:	Office of Human Rights, Human Rights Commission and Office of Human Resources
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	To be researched.
SOURCE OF INFORMATION:	Josh Hamlin, Legislative Attorney
APPLICATION WITHIN MUNICIPALITIES:	To be researched.
PENALTIES:	Civil penalty and equitable relief.