

**MEMORANDUM**

October 21, 2014

TO: County Council

FROM: Josh Hamlin, Legislative Attorney 

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

**Health and Human Services/Public Safety Joint Committee recommendation (6-0):** enact the Bill with amendments.

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, was introduced on July 15. A public hearing was held on September 9 and a joint Health and Human Services/Public Safety Committee worksession was held on October 9.

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 jurisdictions<sup>1</sup>, most recently the City of Baltimore in May of this year.<sup>2</sup> 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 13 States<sup>3</sup> (©33) and more than 60 local jurisdictions (©34-36) 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, six states<sup>4</sup> and six local jurisdictions<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> For these people, a steady job is a critical factor in preventing recidivism.<sup>8</sup> The consequences of having a criminal record for job-seekers was recently chronicled in the Wall Street Journal (see ©24-32).

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

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<sup>1</sup> 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.

<sup>2</sup> 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.

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

<sup>4</sup> Illinois, Massachusetts, Minnesota, Hawaii, Rhode Island, and New Jersey.

<sup>5</sup> 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.

<sup>6</sup> 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>

<sup>7</sup> 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>

<sup>8</sup> 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>

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 support, victim restitution, and court costs.<sup>9</sup> 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.<sup>10</sup> 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 obtaining<sup>11</sup> 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.<sup>12</sup>

The bill would require an employer deciding to base an adverse action<sup>13</sup> 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.

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<sup>9</sup> 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/pcs\\_assets/2010/CollateralCosts1.pdf.pdf](http://www.pewtrusts.org/~media/Imported-and-Legacy/uploadedfiles/pcs_assets/2010/CollateralCosts1.pdf.pdf)

<sup>10</sup> 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>

<sup>11</sup> 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.

<sup>12</sup> 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](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf)

<sup>13</sup> "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.

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.

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 Commission on Human Rights.

### **Public Hearing**

There were 15 speakers at the September 9 public hearing on Bill 36-14. Director of Human Resources Joseph Adler (©37-38), Director of Correction and Rehabilitation Arthur Wallenstein (©39), and Director of the Office of Human Rights James Stowe (©40) represented the Executive and testified in support of the Bill. Matthew J. Green, Jr., Chair of the Community Action Board (©41-43), Anita Powell of the NAACP, Caryn York of the Job Opportunities Task Force, Robert Velthuis (©44), Robert Barkin of Jews United for Justice, Sara Love of the ACLU (©45), and Jeffrey Thames of Hope Restored, Inc. all offered support for the Bill. Supporters generally expressed belief that the Bill would help former offenders become productive members of society and decrease recidivism. Caryn York and Sara Love said that it is important to require a conditional offer before an employer makes an inquiry because, if allowed at the interview, a question about an applicant's criminal history could be the first and last question of the interview.

Erin Allen of the Greater Bethesda-Chevy Chase Chamber of Commerce (©46-47), Marilyn Balcombe of the Gaithersburg-Germantown Chamber of Commerce (©48-49), Elise Ambrose of Elite Personnel (©50-52), William Moore of the International House of Pancakes (©53-54), and Mark Scott all spoke in opposition to the Bill. A letter in opposition to the Bill from the Montgomery County Chamber of Commerce (©55-61) was also received at the public hearing. Opposition to the Bill focused on the burden it placed on employers, while generally supporting the premise that applicants should not be automatically disqualified from employment because of a criminal record. Significantly, several of the Bill's opponents expressed support for, or at least tolerance of, the removal of the criminal history question on job applications, with employer inquiry permitted at an interview.

On September 29, the Council received a joint letter from several County Chambers of Commerce<sup>14</sup> and the Apartment and Office Building Association of Metropolitan Washington (©62-64). The letter signaled a constructive approach, and identified four areas of concern for the business community: "timing, notification, protection of employers, and penalties." Rather than opposing the Bill, the signatories requested changes to the Bill addressing these areas of concern. Specifically, they requested: (1) that inquiry into an applicant's criminal background be allowed during the interview process; (2) that an employer be required to provide an applicant's

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<sup>14</sup> The Gaithersburg-Germantown, Greater Bethesda-Chevy Chase, Greater Silver Spring, Wheaton Kensington, and Montgomery County Chambers of Commerce, along with the Apartment and Office Building Association, were signatories.

criminal background information only when requested by the applicant; (3) that employer liability be more clearly defined; and (4) that penalties for violations be limited to fines payable to the County.

### **October 9 HHS/PS Joint Committee Worksession**

In addition to the Committee members, Councilmember Branson attended the worksession. The Committee discussed the Bill and made a number of changes. The Committee approved the Bill (6-0) with the following amendments:

1. change the point where an inquiry is permissible to “the conclusion of a first interview”;
2. delete all damage awards to complainants, leaving a civil penalty of up to \$1,000;
3. delete the requirement that an employer conduct an “individualized assessment” when considering an applicant’s criminal history;
4. add language to the definition of “Inquiry or Inquire” to exclude from the definition follow-up questions about an applicant’s criminal history voluntarily disclosed by the applicant and questions about the applicant’s employment history shown on the applicant’s resume;
5. add “a current employee who requests to be considered for a promotion” to the definition of “applicant,” and delete all references to employee other than in the definitions;
6. add “an offer of a promotion” to the definition of “conditional offer,” delete the definition of “adverse action,” and change the trigger for the notice requirements in Section 27-73 to if an employer intends to “rescind a conditional offer” based on an item in the applicant’s criminal history;
7. delete the requirement that an employer reconsider rescinding a conditional offer;
8. add language to provide that, except for the requirements when rescinding a conditional offer, nothing in the Article requires an employer to give notice to an applicant about any action of the employer or the basis for any action;
9. change the threshold number of employees for an employer to be covered under the Bill from 10 to 15;
10. add the County Fire and Rescue Service, and an employer hiring for a position that requires a federal government security clearance to the exemptions; and
11. insert the word “improper” on line 102 at the suggestion of the County Attorney.

### **Issues/Committee Recommendations**

#### **1. At what point should inquiry into criminal history be allowed?**

Much of the testimony at the public hearing concerned not whether banning the box was appropriate, but rather at what point an employer should be allowed to inquire into the criminal history of an applicant. There are three models used in existing ban the box laws; under these models, an employer may inquire into an applicant’s criminal history at the following points in time (with possible pros and cons of each approach listed):

- 1) **After a conditional offer is made** (Bill 36-14 as drafted, D.C., Baltimore, Newark).

#### **Pros:**

- Employer is very invested in applicant at the time of inquiry;
- Discomfort with rescinding an offer vs. not calling back is disincentive to act without legitimate basis.

**Cons:**

- Employer may incur additional costs as a result of extra length of time to fill positions;
- Possible physical danger to employer having to legitimately rescind offer from violent criminal;
- Employer may lose qualified applicants under consideration if job is offered to someone else and later rescinded;
- Applicants may follow a longer hiring process, only to have conditional offer rescinded, wasting their time and possibly missing other job opportunities.

2) **After first interview** (Philadelphia, San Francisco).

**Pros:**

- Employer is invested in an applicant on the basis of more than just a resume/application – applicant is likely close to getting an offer before any inquiry/background check is made;
- Employer is not put in the position of legitimately rescinding an offer to an applicant whose criminal history disqualifies the applicant from that job;
- Should have minimal impact on length of hiring process for employers who conduct interviews.

**Cons:**

- Applicant may not have opportunity to explain any criminal history – may simply not get a call back.

3) **At first interview** (Buffalo, Seattle).

**Pros:**

- Employer has at least given employee initial consideration without regard to criminal history;
- Applicant would have an opportunity to explain any criminal history at interview;
- Should have no impact on length of hiring process for employers who conduct interviews.

**Cons:**

- First and last question at interview could be “Do you have a criminal record?”

**Committee recommendation (5-1, Council Vice President Leventhal opposed):** Amend the Bill to allow an inquiry to be made at “the conclusion of a first interview.” See lines 152-160 at ©7; lines 170-171 at ©8.

**2. Should the Bill provide for damages awarded to complainants or just fines payable to the County?**

Bill 36-14, as drafted, permits the Commission on Human Rights (the Commission) to award damages to the complainant in the form of: (1) financial losses resulting from a violation; (2) equitable relief to prevent the violation; and (3) consequential damages, such as lost wages from a violation.

Concerns were expressed in correspondence and at the public hearing that allowing the award of damages to a complainant will lead to frivolous complaints by applicants who did not get jobs, increasing the costs to employers of defending these actions, and subjecting employers to unpredictable damage awards. The counterpoint to this concern is that if the only penalty for a violation is a fine payable to the County, there will not be an incentive for a victim of a violation to file a complaint (the County is not going to force the employer to hire anyone).

Other local jurisdictions’ treatment of this issue is as follows:

- **Baltimore** provides for damages (back pay, reinstatement, compensatory damages) which may be awarded to a complainant, as well as criminal penalties of up to \$500 fine or imprisonment for up to 90 days.
- **D.C.** has a graduated scale of fines based on the size of the employer, of which half is awarded to the complainant.
- **Buffalo** provides a private cause of action for injunctive relief and damages for aggrieved persons, and provides for the award of attorney’s fees to the prevailing party; also, any person, whether aggrieved or not may submit a complaint to the Commission on Citizen’s Rights and Community Relations, and the imposition of fines up to \$1000.
- **Newark** provides for fines of up to \$1,000, but no damages for complainants.
- **Philadelphia** provides for fines of up to \$2,000, but no damages for complainants.
- **San Francisco** provides for the award of “appropriate relief” (presumably to the applicant) plus an administrative monetary penalty. It also provides that the City may pursue a civil action against an employer, seeking “appropriate relief” including, but not limited to:
  - reinstatement;
  - back pay;
  - payment of benefits or pay unlawfully withheld;
  - payment of an additional sum as liquidated damages in the amount of \$50.00 to each employee, applicant or other person whose rights were violated for each day such violation continued or was permitted to continue;

- appropriate injunctive relief; and
  - reasonable attorney's fees and costs.
- **Seattle** provides for fines of up to \$1,000, but no damages for complainants.

**Committee recommendation (6-0):** Delete all damage awards to complainants; retain civil penalty of up to \$1,000. See lines 39, 46, 49, 52-53, at ©3; line 60 at ©4.

### **3. Over what areas does the Commission have discretion in enforcement of the law?**

Bill 36-14, as drafted, has essentially three principal components:

- 1) prohibiting the inquiry into an applicant's criminal history prior to the extension of a conditional offer;
- 2) requiring notice of an adverse action based on an item in an applicant's or employee's criminal history with reasonable time for the applicant/employee to demonstrate an error in the record; and
- 3) requiring an employer 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.

Concern was expressed at the public hearing that the third component creates the possibility that the Commission could substitute its judgment for that of the employer in the decision whether or not to hire an applicant. This is not the intent of the sponsors, nor is it their intent to create a cause of action by which applicants or employees could challenge employers' decisions. An amendment may be necessary to avoid any possibility that the Commission might second-guess whether the specific offenses demonstrate unfitness for the position, whether the time elapsed since the offenses is material to the decision, or generally question the ultimate decision of the employer.

**Committee recommendation (6-0):** Delete the requirement that an employer conduct an "individualized assessment" when considering an applicant's criminal history. See lines 93-98 at ©5; lines 188-194 at ©9.

### **4. Should the Bill retain the notice requirements as drafted?**

Bill 36-14 includes a requirement that an employer provide notice and a copy of any criminal background report to an applicant or employee before taking an adverse action<sup>15</sup> based on an item or items in the applicant's or employee's arrest record or conviction record. See lines 186-222 at ©8-10. The employer must identify the item or items in the background report that are the basis for the prospective adverse action. The Bill further requires an employer to wait seven days before taking the adverse action to allow the applicant or employee time to provide evidence of inaccuracy in the record. If such evidence is produced within that time, the Bill would require the employer to delay taking the adverse action for a reasonable amount of time,

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<sup>15</sup> "Adverse action" is defined in the Bill to mean "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."

and reconsider the adverse action in light of the evidence. Finally, the Bill requires that, at the end of this process, an employer give an applicant or employee written notice of a final adverse action within seven days of taking the action.

It should first be stated that this provision requires a process, but does not impose any requirements on the actual decision-making of the employer. The intent of the process is to ensure that an applicant or employee has an opportunity to correct an error in the applicant's or employee's criminal background report before being punished for it in an employment context. Errors in criminal background are the exception, but they do happen (©65-70). A Google search including the terms "mistaken identity" and "background check" turn up dozens of news stories about such instances costing prospective employees jobs.

The notice requirements in the Bill are modeled on the adverse action notice requirements of the federal Fair Credit Reporting Act (FCRA),<sup>16</sup> which requires employers to: (1) give advance notice prior to rejecting a job application, reassigning or terminating an employee, denying a promotion, or taking any other adverse employment action based on information in a consumer report; and (2) give notice of a final adverse action orally, in writing, or by electronic means (©71-73). In fact, in many, if not most, of the instances covered by Bill 36-14, the employer is already required to give notice under the FCRA.<sup>17</sup> See ©74-75. However, the FCRA does not say how long an employer must wait between the time it provides pre-adverse action notice and when it rejects the applicant or otherwise takes adverse employment action. Bill 36-14 differs from the FCRA in that it specifies a seven day waiting period, requires reconsideration prior to a final action, and requires that the notice of final action be in writing.

In other local jurisdictions with ban-the-box laws, Washington, D.C., Newark, NJ, San Francisco and Seattle all have notice requirements pertaining to adverse actions. Washington, D.C. does not require advance notice, but instead provides that an applicant may request a copy of any criminal record report and a "statement of denial"<sup>18</sup> within 30 days of the adverse action. Newark's law is similar to the District's, except that the burden is on the employer to provide the notice without a request from the applicant. San Francisco's requirements are virtually identical to those in Bill 36-14, including the seven day waiting period and reconsideration in light of inaccuracy in the record.<sup>19</sup> Seattle requires advance notice and provision of the record, but only imposes a two day waiting period on an employer, and does not mandate reconsideration.

Both the Gaithersburg-Germantown Chamber of Commerce (GGCC) and the Montgomery County Chamber of Commerce (MCCC) requested changes to the Bill's notice requirements. The GGCC requested that the waiting period prior to taking an adverse action be reduced to three days (See ©48-49), while the MCCC requested that the advance notification be accompanied by a copy of the criminal record report relied upon, but not require "customized

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<sup>16</sup> <http://www.consumer.ftc.gov/articles/pdf-0111-fair-credit-reporting-act.pdf>

<sup>17</sup> The FCRA applies when an employer uses a "consumer reporting agency," which includes a company providing a criminal background check, but would not apply to a background check performed internally by the employer.

<sup>18</sup> A statement of denial under the D.C. law must: (1) articulate a legitimate business reason for the decision; (2) specifically demonstrate consideration of each of a set of factors included in the law; and (3) advises the applicant of the opportunity to file an administrative complaint challenging the decision.

<sup>19</sup> San Francisco's law actually goes further than Bill 36-14 in this regard, in that it allows an applicant or employee to present evidence of rehabilitation or other mitigating factors in addition to evidence of inaccuracy.

communications” (See ©55-56). The joint letter from several Chambers of Commerce and AOBA includes a request that the Bill be amended to “read as the newly established law in the District of Columbia does with regard to notification,” shifting the burden to an applicant or employee to affirmatively request a copy to the criminal background history (See ©62-64).

**Committee recommendation (6-0):**

1. Add “an offer of a promotion” to the definition of “conditional offer,” add “a current employee who requests to be considered for a promotion” to the definition of “applicant,” and delete the definition of “adverse action.” See lines 119-120, 113-114, and 108-111 at ©6.
2. Change the trigger for the notice requirements in Section 27-73 to if an employer intends to “rescind a conditional offer” based on an item in the applicant’s criminal history. See lines 186-187 at ©10 and 195-218 at ©9-10.
3. Delete all to employee in the bill other than in the definitions. See lines 195-218 at ©9-10.
4. Delete the requirement that an employer reconsider rescinding a conditional offer. See lines 211-213 at ©9.
5. Add language to provide that, except for the requirements when rescinding a conditional offer, nothing in the Article requires an employer to give notice to an applicant about any action of the employer or the basis for any action. See lines 219-222 at ©10.

**5. Can employers ask “follow-up” questions after the existence of a criminal record is voluntarily disclosed by an applicant?**

There was discussion at the public hearing about whether an employer could violate the law by asking follow-up questions in response to criminal history information voluntarily disclosed by an applicant. Staff does not believe that such questions would violate the terms of the Bill as drafted, but staff recommends expressly stating that such questions, as well as questions about an applicant’s employment history as shown on the application or the applicant’s resume, are permissible.

**Committee recommendation (6-0):** add language to the definition of “Inquiry or Inquire” to exclude from the definition follow-up questions about an applicant’s criminal history voluntarily disclosed by the applicant and questions about the applicant’s employment history shown on the applicant’s resume. See lines 146-151 at ©7.

**6. Does the Bill provide dual channels of recourse for applicants for County employment/County employees?**

The memorandum from the County Attorney’s office correctly points out that County employees and applicants for County jobs would already have the right to challenge an adverse action, as defined in the Bill, through the Merit System Protection Board (MSPB). If the Bill is amended to limit the scope of the Commission’s review to the procedural requirements of the Bill, *i.e.*, the timing of an inquiry and the notice requirements, a complaint under the provisions of the Bill would not be a challenge to an adverse action subject to the jurisdiction of the MSPB. This would eliminate the duplicate and parallel channels of review. If the Bill is not so amended, the Bill could be amended to provide that County employees and applicants for County jobs must pursue complaints before either the MSPB or the Commission.

**7. Are the exemptions in the Bill adequate as drafted?**

There has been some concern expressed over whether the exemptions in Bill 36-14 are adequate. The memorandum from the County Attorney's office asked "what about the Sheriff or Fire and Rescue Service?" The Office of the Sheriff is a State constitutional office, and employees are State employees (the State's ban-the-box bill pertaining to public employment includes an express exemption for "a position in the office of the Sheriff for any county." Fire and Rescue Service could be added in the same subsection as Police and Corrections if the Committee wishes to do so.

There was testimony at the public hearing that the bill as drafted would pose a problem for temporary agencies, who often don't assign employees to jobs until immediately prior to the work being done. Staff is not clear on how this creates a problem, as presumably the agency screens applicants through an application and interview process before sending them to job sites, and could do so following the procedures set forth in the Bill. If the concern is that there is no job offer until a specific assignment is made, allowing inquiry during the interview process would resolve the issue.

The question has been posed whether positions requiring security clearances would be exempt from the provisions of the bill. Security clearances for many positions are required by regulation and would be exempt under the terms of the Bill as drafted. This exemption is similar or identical to provisions in the laws of other jurisdictions, and to expand it to allow a private employer to exercise discretion in determining whether a security clearance is necessary for a position would create a potentially large loophole. Also, if the Bill is amended to allow an inquiry at the conclusion of a first interview, such concern would be mitigated somewhat, as candidates ineligible for a position by virtue of their criminal background could still be eliminated fairly early in the hiring process.

**Committee recommendation (6-0):** Add the County Fire and Rescue Service, and an employer hiring for a position that requires a federal government security clearance, to the exemptions. See line 228 and lines 233-235 at ©10.

**8. Should the threshold for being a covered "employer" under the Bill be employing 10 persons?**

As drafted, Bill 36-14 defines an employer as employing 10 or more persons in the County. The threshold number of employees required in order to be subject to other local jurisdictions' ban the box laws applying to private sector employers range from 1 to 20, as follows:

<b>Baltimore:</b>	10
<b>Buffalo:</b>	15
<b>District of Columbia:</b>	10
<b>Newark:</b>	5
<b>Philadelphia:</b>	10
<b>San Francisco:</b>	20
<b>Seattle:</b>	1

The decision of the size at which employers should be subject to the law is a policy decision. There has been no consensus, though 10 to 15 employees seem to occupy the middle ground. For a local comparison, an employer must employ two or more employees to be subject to the County's minimum wage law.

**Committee recommendation (5-1, Councilmember Elrich opposed):** Change the threshold number of employees for an employer to be covered under the Bill from 10 to 15. See line 137 at ©7.

## 9. How would Bill 36-14 be enforced?

Bill 36-14 would authorize a person to file a complaint alleging violation of its requirements with the Office of Human Rights. The complaint would be handled in the same manner as a complaint alleging a violation of the County employment discrimination and minimum wage laws.

A question may arise as to how a complaint could be enforced against an employer who hires employees to work in multiple jurisdictions, including occasional work in the County. Because the County is prohibited from enacting general laws, *i.e.*, laws applicable to two or more counties, it is important that this law be drafted in such a way that its application is limited to activities within the County. With that in mind, it should first be noted that the law would only be enforceable as to violations that take place within the County's borders. Further, staff recommended a clarifying amendment to provide that employers subject to the law are hiring employees to work *primarily* in the County.

Office of the County Attorney Division Chief Edward Lattner advised the Committee of his concern that adding the word "primarily" to the definition of "applicant," could run afoul of the Maryland Court of Appeals' holding in *Holiday Universal, Inc., et al. v. Montgomery County* (2003).

**Committee recommendation:** Do not amend the definition of "applicant."

## 10. County Attorney Amendments.

The memorandum from the County Attorney contained four suggested technical amendments:

- 1) On line 95, insert the word "improper"
- 2) On lines 161-162, delete "making an employment decision based" and replace with "basing an adverse action"
- 3) On line 165 delete "offenses" and replace with "arrests or convictions"
- 4) On line 167 delete "offenses" and replace with "arrests or convictions"

**Committee recommendation (6-0):** Insert the word "improper" between the words "removing" and "barriers". See line 102 at ©5. The other suggested amendments from the County Attorney are moot due to other Committee amendments to the Bill.

## Issues for Consideration by the Full Council

### 1. Should the Bill be amended to remove the requirement that an employer delay rescinding a conditional offer?

The Bill requires an employer to “delay rescinding the conditional offer for a reasonable amount of time after receiving the information” about inaccuracy of an applicant’s arrest record or conviction record. See lines 210-211 at ©9. The Committee deleted the requirement that an employer reconsider rescinding a conditional offer in light of such information, and without this requirement, the delay appears to serve no real purpose. If the Council wishes to retain the requirement that an applicant be given seven days to give an employer notice of an inaccuracy in the applicant’s arrest record or conviction record, but not further delay an employer from filling a position it could do so by adding a new paragraph (3) after line 213 of the bill providing for the seven day period to provide notice of an inaccuracy, and delete existing subsection (b) which requires the delay for a reasonable amount of time. This change is shown on the Staff Amendment at ©76-77.

### 2. Should the Bill provide an exception to the seven day period for an applicant to provide notice of an inaccuracy in the record?

The Committee discussed the impediment that the seven day delay would present in cases where there is a need for an employer to fill a position immediately. The Committee directed staff to draft language to amend the Bill to provide for an exception in such circumstances. If the Council makes the Staff Amendment in Issue 1 above, this exception could be created by adding language at the beginning of the new paragraph (3) added by the Staff Amendment so that it would read as follows:

(3) unless the employer has a verifiable immediate need to fill the position for which the conditional offer has been made, delay rescinding the conditional offer for 7 days to permit the applicant to give the employer notice of inaccuracy of an item or items on which the intention to rescind the conditional offer is based.

### 3. Technical amendments:

For internal consistency, staff recommends inserting the words “and requirements on lines 227 and 230 at ©10 as follows:

- (b) The prohibitions and requirements of this Article do not apply to the County Police Department, the County Fire and Rescue Service, or the County Department of Corrections and Rehabilitation.
- (c) The prohibitions and requirements of this Article do not apply to an employer that provides programs, services, or direct care to minors or vulnerable adults.

### 4. Corrective amendment:

Staff has been advised that Bill 27-13 – Human Rights and Civil Liberties – County Minimum Wage – Dollar Amount included a heading for a new section that was inadvertently not underlined in the enacted Bill. As such, Section 27-70 currently has no heading.

**Staff recommendation:** Add the following after line 70 at ©4:

**27-70      Enforcement.**

\*      \*      \*

This packet contains:	<u>Circle #</u>
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Bill No. 36-14  
Concerning: Human Rights and Civil Liberties – Fair Criminal Record Screening Standards  
Revised: October 9, 2014 Draft No. 6  
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]] the conclusion of a first interview;
- (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]] rescinding a conditional offer;
- (3) provide for enforcement by the Office of Human Rights and the Human Rights Commission; and
- (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

<b>Boldface</b>	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
<b>[Single boldface brackets]</b>	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
<b>[[Double boldface brackets]]</b>	<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] or XI, [[or XII]] the case review  
40 board may order the payment of damages (other than punitive  
41 damages) and any other relief that the law and the facts warrant, such  
42 as:

43 (1) compensation for:

44 \* \* \*

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

47 \* \* \*

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

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

55 difference in expenses or benefits that the complainant realized  
56 while seeking to mitigate the consequences of the violation (such  
57 as income from alternate employment or unemployment  
58 compensation following employment discrimination); and

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

62 (b) Civil penalties.

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

67 \* \* \*

68 (E) for each violation of Article XII, up to \$1,000;

69 (F) for any other violation, \$500.

70 \* \* \*

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

72 **27-71. Findings and Purpose; Definitions.**

73 (a) *Findings.*

74 (1) The U.S. Department of Justice’s Bureau of Justice Statistics  
75 (BJS) estimates that over 92 million Americans, roughly one in  
76 three adults, have a criminal history record involving an arrest or  
77 conviction.

78 (2) According to the BJS, nearly 700,000 people a year return to their  
79 communities from incarceration, and many are job seekers who  
80 are ready and able to become part of the work force.

- 81 (3) Studies indicate that job applicants are often precluded from even
- 82 getting an interview when applications require disclosure of
- 83 whether the applicant has a criminal record.
- 84 (4) Lack of employment is a significant cause of recidivism, which
- 85 threatens public safety and disrupts the financial and general
- 86 stability of affected families and communities.
- 87 (5) Increased government expenditures on law enforcement and
- 88 social programs, necessitated by the inability of people with
- 89 criminal records to find gainful employment, are an impediment
- 90 to the County reaching its potential for economic growth.
- 91 (6) Increasing employment of people with criminal records improves
- 92 public safety and reduces the financial burden on government.
- 93 (7) In 2012, the United States Equal Employment Opportunity
- 94 Commission (EEOC) issued enforcement guidance regarding
- 95 employers' use of criminal background information in making
- 96 employment-related decisions, recommending that the use of
- 97 such information is job related and consistent with business
- 98 necessity.

99 (b) Purpose.

100 It is the purpose of this Article to:

- 101 (1) assist in the successful reintegration into the workforce of people
- 102 with criminal records by removing improper barriers to
- 103 employment; and
- 104 (2) enhance the health and safety of the community by assisting
- 105 people with criminal records to lawfully provide for themselves
- 106 and their families.

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

(5)

108 [[Adverse action means to fail or refuse to hire, to discharge or not  
109 promote a person, or to limit, segregate, or classify employees in any  
110 way which would deprive a person of employment opportunities or  
111 otherwise adversely affect the person's employment status.]]

112 Applicant means a person who is considered or who requests to be  
113 considered for employment in the County by an employer or a current  
114 employee who requests to be considered for a promotion.

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

119 Conditional offer means an offer of employment or an offer of a  
120 promotion that is conditioned solely on:

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

123 (2) another contingency expressly communicated to the  
124 applicant at the time of the offer.

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

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

130 Director means the Executive Director of the Office of Human Rights  
131 and includes the Executive Director's designee.

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

134 Employer means any person, individual, proprietorship, partnership,  
135 joint venture, corporation, limited liability company, trust, association,  
136 or other entity operating and doing business in the County that employs  
137 [[10]] 15 or more persons full-time in the County. Employer includes  
138 the County government, but does not include the United States, any  
139 State, or any other local government.

140 Employment means:

- 141 (1) any work for compensation; and
- 142 (2) any form of vocational or educational training, with or  
143 without compensation.

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

146 Inquiry or Inquire does not include:

- 147 (1) a question about an applicant's conviction record or arrest  
148 record when the existence of the record is voluntarily  
149 disclosed by the applicant; or
- 150 (2) a question about an applicant's employment history shown  
151 on the application or the applicant's resume.

152 Interview means any direct contact by the employer with the applicant,  
153 whether in person or by telephone or internet communication, to  
154 discuss:

- 155 (1) the employment being sought; or
- 156 (2) the applicant's qualifications.

157 Interview does not include:

- 158 (1) written correspondence or email; or
- 159 (2) direct contact made for the purpose of scheduling a  
160 discussion.

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

163 **27-72. Prohibited Inquiries; Retaliation.**

164 (a) Inquiry on application. An employer must not require an applicant or  
 165 potential applicant to disclose on an employment application the  
 166 existence or details of the applicant's or potential applicant's arrest  
 167 record or conviction record.

168 (b) Preliminary inquiry into criminal record. In connection with the  
 169 proposed employment of an applicant, an employer must not, at any  
 170 time before [[a conditional offer of employment is made]] the  
 171 conclusion of a first interview:

172 (1) require the applicant to disclose whether the applicant has an  
 173 arrest record or conviction record, or otherwise has been accused  
 174 of a crime;

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

176 (3) inquire of the applicant or others about whether the applicant has  
 177 an arrest record or conviction record or otherwise has been  
 178 accused of a crime.

179 (c) Retaliation. An employer must not:

180 (1) retaliate against any person for:

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

182 (B) filing a complaint, testifying, assisting, or participating in  
 183 any manner in an investigation, proceeding, or hearing  
 184 under this Article; or

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

186 **27-73. [[Employment decisions; adverse actions]] Rescission of a**  
 187 **conditional offer based on criminal record.**

188 (a) [[In making an employment decision based on an applicant's or  
 189 employee's arrest record or conviction record, an employer must  
 190 conduct an individualized assessment, considering only specific  
 191 offenses that may demonstrate unfitness to perform the duties of the  
 192 position sought by the applicant or held by the employee, the time  
 193 elapsed since the specific offenses, and any evidence of inaccuracy in  
 194 the record.

195 (b)] If an employer intends to [[base an adverse action]] rescind a  
 196 conditional offer based on an item or items in the applicant's [[or  
 197 employee's]] arrest record or conviction record, before [[taking the  
 198 adverse action]] rescinding the conditional offer the employer must:

199 (1) provide the applicant [[or employee]] with a copy of any criminal  
 200 record report; and

201 (2) notify the applicant [[or employee]] of the [[prospective adverse  
 202 action]] intention to rescind the conditional offer and the items  
 203 that are the basis for the [[prospective adverse action]] intention  
 204 to rescind the conditional offer.

205 [(c)](b) If, within 7 days after the employer provides the notice required  
 206 in subsection (b) to the applicant [[or employee,]] the applicant [[or  
 207 employee]] gives the employer notice of evidence of the inaccuracy of  
 208 any item or items on which the [[prospective adverse action]] intention  
 209 to rescind the conditional offer is based, the employer must[[:

210 (1)] delay [[the adverse action]] rescinding the conditional offer for a  
 211 reasonable period after receiving the information[[; and

212 (2) reconsider the prospective adverse action in light of the  
 213 information]].

214 ~~[(d)]~~(c) Within 7 days after [[taking final adverse action]] rescinding the  
 215 conditional offer based on the arrest record or conviction record of an  
 216 applicant [[or employee]], an employer must notify the applicant [[or  
 217 employee]] of the [[final adverse action]] rescission of the conditional  
 218 offer in writing.

219 (d) Except as provided in this Section regarding the rescission of a  
 220 conditional offer, nothing in this Article requires an employer to give  
 221 notice to an applicant of any action of the employer or the basis for any  
 222 action.

223 **27-74. Exemptions.**

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

227 (b) The prohibitions of this Article do not apply to the County Police  
 228 Department, the County Fire and Rescue Service, or the County  
 229 Department of Corrections and Rehabilitation.

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

233 (d) The prohibitions and requirements of this Article do not apply to an  
 234 employer hiring for a position that requires a federal government  
 235 security clearance.

236 **27-75. Enforcement.**

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

239 **Sec. 2. Effective Date.**

240 This Act takes effect on January 1, 2015.

## LEGISLATIVE REQUEST REPORT

Bill 36-14

*Human Rights and Civil Liberties – Fair Criminal Record Screening Standards*

<b>DESCRIPTION:</b>	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.
<b>PROBLEM:</b>	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.
<b>GOALS AND OBJECTIVES:</b>	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.
<b>COORDINATION:</b>	Office of Human Rights, Human Rights Commission and Office of Human Resources
<b>FISCAL IMPACT:</b>	To be requested.
<b>ECONOMIC IMPACT:</b>	To be requested.
<b>EVALUATION:</b>	To be requested.
<b>EXPERIENCE ELSEWHERE:</b>	To be researched.
<b>SOURCE OF INFORMATION:</b>	Josh Hamlin, Legislative Attorney
<b>APPLICATION WITHIN MUNICIPALITIES:</b>	To be researched.
<b>PENALTIES:</b>	Civil penalty and equitable relief.



ROCKVILLE, MARYLAND

**MEMORANDUM**

September 3, 2014

TO: Craig Rice, President, County Council

FROM: Jennifer A. Hughes, Director, Office of Management and Budget  
Joseph F. Beach, Director, Department of Finance *KAT JAH*

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

Please find attached the fiscal and economic impact statements for the above-referenced legislation.

JAH:fz

cc: Bonnie Kirkland, Assistant Chief Administrative Officer  
Lisa Austin, Offices of the County Executive  
Joy Nurmi, Special Assistant to the County Executive  
Patrick Lacefield, Director, Public Information Office  
Joseph Adler, Director, Office of Human Recourses  
David Platt, Department of Finance  
Robert Hagedoorn, Department of Finance  
Corey Orlosky, Office of Management and Budget  
Alex Espinosa, Office of Management and Budget  
Felicia Zhang, Office of Management and Budget  
Naeem Mia, Office of Management and Budget

## **Fiscal Impact Statement**

### Council Bill 36-14, Human Rights and Civil Liberties -Fair Criminal Record Screening Standards

#### **1. Legislative Summary.**

- 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;
- 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;
- provide for enforcement by the Office of Human Rights and the Human Rights Commission;
- authorize the Human Rights Commission to award certain relief;
- generally regulate the use of criminal records in the hiring process by certain employers.

#### **2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.**

It would appear in most instances where similar legislation is in place in cities, counties and states, significant data does not exist to estimate what our experience may be in Montgomery County. Many of these laws were recently enacted and have not seen a lot of complaints filed. The city of Philadelphia first enacted their "Ban the Box" ordinance in 2011 and since that time received approximately 50-75 cases. Many of the cases were filed shortly after the ordinance was enacted and the agency has seen a leveling off of complaints since that time. No new staff were hired at the beginning of their program. The duties and responsibilities of the new program were absorbed by existing staff and have been manageable for the last four years of the program.

While we have no way of predicting what we might anticipate in Montgomery County, the Philadelphia experience suggest that we could see a fair number of complaints filed early after establishing the law and then a very modest number of complaints over time. If this remains true then the number of cases could be processed by existing staff and would present no major expenditures or adverse impact on current services and staff. However; since extensive reliable data does not exist the Executive will revisit the impact on staffing once the law has been implemented and some activity can be analyzed.

For OHR, there may have to be changes to the current applicant tracking system to deal with this regulation. At this time, we do not know how extensive the changes to the system would be or what they would cost. In addition, staff including HR Specialist, Recruitment & Selection Manager and a County Attorney are involved in processing, reviewing and notifying applicants of their background results/status. Any additional workload would be either absorbed by the department, or handled with temporary workers or contractors, depending on volume.

- 3. Revenue and expenditure estimates covering at least the next 6 fiscal years.**  
Expenditures over the next 6 fiscal are estimated to be flat and consistent with current budget projections.  
Although the cost of any required outreach cannot be estimated at this time, the fiscal impact of outreach is expected to be limited to the first year of the bill.
- 4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.**  
Not applicable.
- 5. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.**  
Increase in the number of anticipated complaints, which could impact both HRC and OHR.
- 6. An estimate of the staff time needed to implement the bill.**  
It is expected that this bill will require an undetermined amount of additional staff time in order to implement, but HRC and OHR will utilize existing staff resources to absorb the additional workload.
- 7. An explanation of how the addition of new staff responsibilities would affect other duties.**  
HRC and OHR will utilize existing staff resources to absorb the additional workload.
- 8. An estimate of costs when an additional appropriation is needed.**  
Additional appropriations are not anticipated to be needed at this time.
- 9. A description of any variable that could affect revenue and cost estimates.**  
Variables that could affect cost estimates include the cost and scope of outreach and possible increase in staff which cannot be estimated at this time. The number of enforcement actions in any given year is also subject to wide variability.
- 10. Ranges of revenue or expenditures that are uncertain or difficult to project.**  
For HRC, although the bill allows for damages and other equitable relief per violation, actual relief or revenue cannot be estimated at this time. Furthermore, not all enforcement actions may result in complaints. In addition the cost of any needed outreach cannot be estimated at this time.

**11. If a bill is likely to have no fiscal impact, why that is the case.**

The departments involved believe they can handle any increased workload resulting from this legislation, based on preliminary indications from other jurisdictions implementing similar legislation.

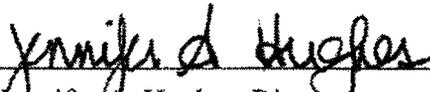
**12. Other fiscal impacts or comments.**

Assumptions and estimates regarding revenues and expenditures are approximate only.

HRC cannot estimate with certainty the number of enforcement actions performed and actual cases filed in a given year.

**13. The following contributed to and concurred with this analysis:**

Jim Stowe, Director, Office of Human Rights (HRC)  
Melissa Voight Davis, Office of Human Resources (OHR)  
Corey Orlosky, Office of Management and Budget

  
\_\_\_\_\_  
Jennifer A. Hughes, Director  
Office of Management and Budget

  
\_\_\_\_\_  
Date

**Economic Impact Statement  
Bill 36-14, Human Rights and Civil Liberties –  
Fair Criminal Screening Standards**

**Background:**

This legislation would:

- 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;
- 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;
- provide for enforcement by the Office of Human Rights and the Human Rights Commission;
- authorize the Human Rights Commission to award certain relief; and
- generally regulate the use of criminal records in the hiring process by certain employers.

**1. The sources of information, assumptions, and methodologies used.**

*Ex-offenders and the Labor Market*, Center for Economic and Policy Research (CEPR) – cited herein as the CEPR study. The study is also cited in Council Staff memorandum dated July 11, 2014.

*Employment after Prison: A Longitudinal Study of Releases in Three States*, Justice Policy Center, Urban Institute – cited herein as the UI study.

The Department of Finance (Finance) reviewed the literature cited above in preparing the economic impact statement. The review will cite the conclusions in each study to determine the economic impact on Bill 36-14, or “ban the box” legislation, on employment, spending, saving, investment, incomes, and property values in the County.

**2. A description of any variable that could affect the economic impact estimates.**

The CEPR study estimates “that ex-offenders lower overall employment rates are as much as 0.8 to 0.9 percentage points. These employment losses ... impose a substantial cost on the U.S. economy in the form of lost output of goods and services. In GDP terms, we (CEPR) estimate that in 2008 these employment losses cost the country \$57 to \$65 billion per year.” However, Finance’s review of the study cannot determine the sole economic benefit of prohibiting inquiries by prospective employers about an applicant’s criminal history and whether that history was a felony conviction or time in prison. The study states that “an extensive body of research has established that a felony conviction or time in prison makes individuals significantly less employable” but does not address the causes such as pre-prison employment history, education, having an in-prison job, general employment rates and opportunities in local areas, and age of ex-offender.

**Economic Impact Statement**  
**Bill 36-14, Human Rights and Civil Liberties –**  
**Fair Criminal Screening Standards**

The UI study conducted a longitudinal study in order to “explore the reality of finding employment after release from prison.” The UI study sampled 740 men recruited from 2002 to 2003 in Illinois and 2004 to 2005 in Ohio and Texas. The study focused on addressing: What factors influence whether former prisoners find work in the year after release? The survey asked questions of the sample two months after release and eight months after release. The survey found:

- Two months after release, many respondents had difficulty finding employment and the majority (70 percent) felt that their criminal record had affected their job search. Many people felt that background checks inhibited their ability to acquire a job and thought employers did not want to hire someone with a criminal record.
- The most successful strategy for employment upon release from prison was to return to the former employer.
- In the same two-month period, the study reports that although the majority of respondents felt their criminal record had impacted their job search, 87 percent of those employed said their current employer knew about their criminal history.
- Eight months after release, many participants in the study were still searching for a job. The majority (71 percent) again said that their criminal history affected their ability to obtain a job. While the majority reported that their criminal history made the job hunt more difficult, 80 percent of employed respondents said their employer knew about their criminal history.

The findings from the UI study are that 70 percent of the respondents to the survey two months after release felt that background checks inhibited their ability to acquire a job. After eight-months after release, a majority of respondents reported that their criminal history still made the job hunt more difficult.

The UI study reached the following conclusions:

- One important finding was the particular vulnerability of ex-offenders finding employment were those without previous work experience;
- The hiring process is a large hurdle for more returning prisoners;
- Restrictions on convicted persons working in certain types of jobs impede the process of finding a job especially after 9/11;
- A majority of respondents felt that many employers did not feel comfortable hiring individuals with a criminal record, and the study concluded that having to provide criminal history information before the interview process eliminates many job opportunities for former prisoners; and

**Economic Impact Statement  
Bill 36-14, Human Rights and Civil Liberties –  
Fair Criminal Screening Standards**

- Giving employers the opportunity to meet and speak with job applicants before discovering their criminal history has the potential to improve job outcomes for former prisoners.

The conclusions in the CEPR and UI studies show that employment opportunities for job candidates with a criminal record are more challenging than for other candidates which results in a lower employment for this population, although it is unclear to what degree the criminal record as opposed to pre-criminal record employment and education factors contribute to the job hunt challenges.

**3. The Bill's positive or negative effect, if any on employment, spending, saving, investment, incomes, and property values in the County.**

Both studies confirm that having a criminal record and having to notify prospective employers of that status will have a high probability of adversely impacting this population's ability to obtain employment. Therefore, eliminating the notification of a criminal record at the initial stages of employment application may have a positive economic impact on the target population, i.e., ex-offenders. Even though the CEPR study estimates a significant national economic and employment impact for the target population, there is no estimate for the "net" impact on the overall national economy. Unless the recommended changes in the studies and in Bill 36-14 result in more employment demand and economic activity, there would, at best, be an employment substitution effect with no measurable economic impact on overall employment, spending, savings, incomes, and property values.

**4. If a Bill is likely to have no economic impact, why is that the case?**

Please see paragraph #3.

**5. The following contributed to or concurred with this analysis: David Platt and Rob Hagedoorn, Finance.**

Karen J Hawkins, Acting  
Joseph F. Beach, Director  
Department of Finance

9/2/14  
Date



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett  
County Executive

Marc P. Hansen  
County Attorney

MEMORANDUM

TO: Joe Adler, Director  
Office of Human Resources

VIA: Marc P. Hansen *MPH/EBJ*  
County Attorney

FROM: Edward B. Lattner, Chief *EBJ*  
Division of Human Resources & Appeals

DATE: August 11, 2014

RE: **Bill 36-14, Human Rights & Civil Liberties – Fair Criminal Record  
Screening Standards**

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**I. Summary:**

Bill 36-14 is accurately summarized in Josh Hamlin's July 11, 2014, introduction packet. Bill 36-14 would prohibit an employer in the County from inquiring into, or otherwise actively obtaining 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.

The bill would require an employer deciding to base an adverse action 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.

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.

## II. Analysis

### A. Standard of review of employer's decision

Section 27-73(a) would require an employer, in making an employment decision [adverse action]<sup>1</sup> 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 [arrests or convictions]<sup>2</sup> 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 [arrests or convictions]; and
- any evidence of inaccuracy in the record.

I assume the intent of § 27-73(a) to require HRC, upon complaint, to determine not only whether the employer conducted an individualized assessment before taking an adverse action based upon an applicant's or employee's arrest or conviction record, but, more importantly, to require HRC to also determine **the correctness or quality of the adverse action taken by the**

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<sup>1</sup> As discussed below, the term "employment decision" is not defined in the bill. If the term is co-extensive with the term "adverse action," which is defined in the bill, then the bill should use the latter term.

<sup>2</sup> Again, as discussed below, the term "offenses" is not defined in the bill. It is assumed that the term refers to arrests or convictions.

**employer based upon the applicant's or employee's arrest or conviction record.** The latter inquiry is far broader than the former. If that is the intent, then the bill should provide a standard to guide HRC in its review of the employer's decision. For example, can HRC substitute its judgment for that of the employer's? Even in cases alleging discrimination the courts have eschewed acting as a "super personnel board" and refused to decide whether an employer's reasoning is wise, fair, or even correct. *Nerenberg v. RICA of S. Maryland*, 131 Md. App. 646, 675, 750 A.2d 655, 671 (2000). Thus, in a case where an employer has taken an adverse action based upon an applicant's or employee's arrest or conviction record, the bill could require HRC to give deference to the employer's business judgment. The important point is some standard should be spelled out in the law to guide HRC's review.

#### **B. Application to the county**

Because the merit system laws and the County's various labor contracts already afford applicants and employees the right to challenge an adverse action, this bill will create a duplicate and parallel channel of review.

**Applicants.** An unsuccessful applicant for a County position can file an appeal directly with the Merit System Protection Board, alleging that the County's decision was arbitrary, capricious, illegal, based on political affiliation, failed to follow announced examination and scoring procedures, or was based upon non-merit factors. § 33-9(c). This would include a complaint that an applicant's arrest or conviction did not demonstrate unfitness to perform the duties of the position sought.<sup>3</sup> Indeed, the Board has heard such complaints in the past.

**Employees.** The scope of grievable matters under the personnel regulations is quite broad, MCPR § 34-4, and would include a complaint that the County took some adverse action based upon non-merit factors (e.g., an arrest or conviction that does not demonstrate unfitness to perform the duties of the position held).<sup>4</sup> For example, the personnel regulations allow an employee to file a grievance challenging a suspension pending investigation of a job-related offense. MCPR § 33-3(f). The employee may appeal this disciplinary action to the Board.

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<sup>3</sup> Section 33-9(c) provides that the Merit Board will not hear an appeal from an applicant or employee alleging discrimination prohibited by Chapter 27; an applicant or employee must file such a complaint with the HRC as provided in Chapter 27. *See also* MCPR § 35-2(d). Although the Merit Board lacks jurisdiction to resolve complaints alleging discrimination, a complaint from an applicant or employee that the County did not select him for a position, or took some other adverse action, based upon non-merit factors (e.g., an arrest or conviction that does not demonstrate unfitness to perform the duties of the position sought or held) is not a complaint alleging discrimination outside the Board's jurisdiction. Prohibited discriminatory acts are set out in Article I of Chapter 27. But Chapter 27 sets out other requirements and prohibitions that are not "discriminatory acts." *See* Article X ("Displaced Service Workers Protection Act") and Article XI ("County Minimum Wage"). The prohibitions in Bill 36-14, which would add Article XII ("Fair criminal records Screening Standards"), are not prohibited "discriminatory acts."

<sup>4</sup> A probationary or temporary employee may grieve a disciplinary action, except an oral admonishment, but may not appeal the CAO's decision to the Merit Board. MCPR § 34-2(b). A bargaining unit employee would have to file a contract grievance under the applicable collective bargaining agreement if the County's action was covered by that agreement. MCPR § 34-2(c).

Bill 36-14 would provide a duplicate and parallel channel of review before HRC, wasting County resources and raising the possibility of inconsistent results, because the actions prohibited by the Bill are already prohibited by the County's merit system law (and possibly the collective bargaining agreements, too). In the past, the County has avoided such duplication of efforts. For example, the personnel regulations provide that a bargaining unit employee may not file a merit system grievance over a matter covered in the collective bargaining agreement, but may file a grievance under the that agreement. MCPR § 33-2(c).<sup>5</sup> An applicant or employee alleging discrimination prohibited by Chapter 27 cannot appeal to the Merit Board, but must file a complaint with the HRC. MCPR § 35-2(d).

### C. Timing issues

Proposed § 27-73(c) provides that an applicant or employee has seven days to respond after the employer provides notice of intent to base an adverse action upon a prior arrest or conviction. What if the employee does not respond within the seven days? The bill should specify whether an employee's failure to timely respond precludes the employee from filing a latter response from the employee and/or a filing complaint with HRC. Similarly, proposed § 27-73(d) provides that the employer must provide the employee notice within seven days of taking final adverse action based upon a prior arrest or conviction. What if the employer does not provide the required notice? Again, the bill should specify whether the employer's failure to timely response effectively reverses the adverse action or perhaps precludes the employer from offering a defense to any complaint before HRC. Either way, bear in mind that many employees and small employers will be unaware of these deadlines.

### D. Exemptions

Proposed § 27-74(b) provides that the bill does not apply to the County Police Department or the Department of Corrections and Rehabilitation. What about the sheriff or MCFRS?

## III. Specific Suggested Amendments:

Line 95: "removing improper barriers"

Lines 161 and 162: substitute "basing an adverse action" for "making an employment decision based." "Adverse action" is the term used later in line 169. "Adverse action" is a defined term; "employment decision" is not. If "employment decision" is intended as a synonym for "adverse actions" then the term "employment decision" should be defined as a separate term.

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<sup>5</sup> Thus, a law enforcement officer may not use the grievance procedure to appeal a matter for which there is a remedy or appeal under the Law Enforcement Officers' Bill of Rights. MCPR 33-2(f). The collective bargaining agreements also provide that an employee initiating a contract grievance challenging suspension or removal waives any right to have that action reviewed by the Merit Board. MCGEO Art. 10.3; IAFF Art. 38.17(a)(7).

Joe Adler  
August 11, 2014  
Page 5

Line 165: substitute “ arrests or convictions” for “offenses.”

Line 167: substitute “ arrests or convictions” for “offenses.”

If you have any concerns or questions concerning this memorandum please call me.

ebl

Enclosure (bill)

cc: Josh Hamlin, Legislative Attorney  
Bonnie Kirkland, Assistant CAO  
James Stowe, Executive Director, HRC  
Anne T. Windle, Associate County Attorney  
Erin Ashbarry, Associate County Attorney

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The Wall Street Journal, Print Edition, August 19, 2014

# As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime

## Even if Charges Were Dropped, a Lingering Arrest Record Can Ruin Chances of a Job

By Gary Fields and  
John R. Emshwiller

Aug. 18, 2014 10:30 p.m. ET



Jose Gabriel Hernandez was arrested after being falsely identified as a sexual predator. *Ben Sklar for The Wall Street Journal*

America has a rap sheet.

Over the past 20 years, authorities have made more than a quarter of a billion arrests, the Federal Bureau of Investigation estimates. As a result, the FBI currently has 77.7 million individuals on file in its master criminal database—or nearly one out of every three American adults.

Between 10,000 and 12,000 new names are added each day.

At the same time, an information explosion has made it easy for anyone to pull up arrest records in an instant. Employers, banks, college admissions officers and landlords, among

others, routinely check records online. The information doesn't typically describe what happened next.

Many people who have never faced charges, or have had charges dropped, find that a lingering arrest record can ruin their chance to secure employment, loans and housing. Even in cases of a mistaken arrest, the damaging documents aren't automatically removed. In other instances, arrest information is forwarded to the FBI but not necessarily updated there when a case is thrown out locally. Only half of the records with the FBI have fully up-to-date information.

"There is a myth that if you are arrested and cleared that it has no impact," says Paul Butler, professor of law at Georgetown Law. "It's not like the arrest never happened."



Precious Daniels of Detroit is part of a class-action lawsuit against the Census Bureau alleging that tens of thousands of African-Americans were discriminated against because of the agency's use of arrest records in its hiring process. *Fabrizio Costantini for the Wall Street Journal*

When Precious Daniels learned that the Census Bureau was looking for temporary workers, she thought she would make an ideal candidate. The lifelong Detroit resident and veteran health-care worker knew the people in the community. She had studied psychology at a local college.

Days after she applied for the job in 2010, she received a letter indicating a routine background check had turned up a red flag.

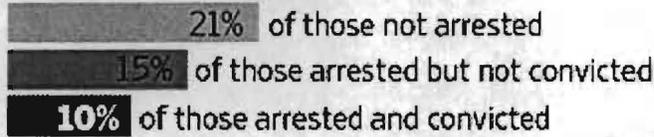
In November of 2009, Ms. Daniels had participated in a protest against Blue Cross Blue Shield of Michigan as the health-care law was being debated. Arrested with others for

disorderly conduct, she was released on \$50 bail and the misdemeanor charge was subsequently dropped. Ms. Daniels didn't anticipate any further problems.

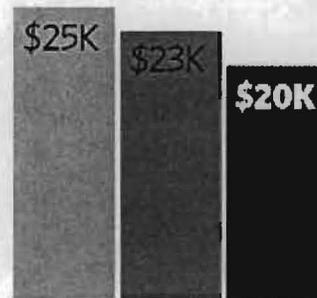
## Impact | What happens after arrest

A national survey of youth indicates that being arrested by the age of 23, regardless of whether convicted, correlates with negative outcomes in one's life. Below, indicators of respondents who have been arrested (convicted and not convicted) compared with those not arrested.

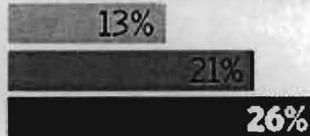
### Own a home at age 25



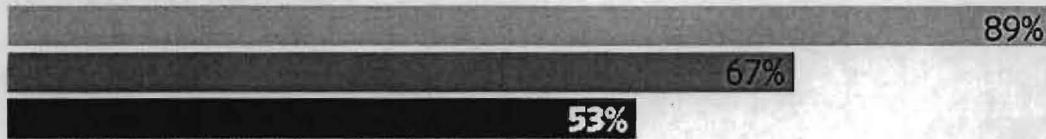
### Median income at age 25



### Household income below poverty line at age 25



### With high school diploma (or more)



### With college degree (or more)



Source: Tia Stevens Andersen of University of South Carolina's analysis of a National Longitudinal Survey of Youth conducted in 1997-2010 by the Labor Department which studied 8,984 people born in 1980-84

The Wall Street Journal

But her job application brought the matter back to life. For the application to proceed, the Census bureau informed her she would need to submit fingerprints and gave her 30 days to obtain court documents proving her case had been resolved without a conviction.

Clearing her name was easier said than done. "From what I was told by the courthouse, they didn't have a record," says Ms. Daniels, now 39 years old. She didn't get the job. Court officials didn't respond to requests for comment.

Today, Ms. Daniels is part of a class-action lawsuit against the Census Bureau alleging that tens of thousands of African-Americans were discriminated against because of the agency's use of arrest records in its hiring process. Adam Klein, a New York-based plaintiff attorney, says a total of about 850,000 applicants received similar letters to the one sent to Ms. Daniels.

Representatives for the Census Bureau and the U.S. Justice Department declined to comment. In court filings, the government denied the discrimination allegation and said plaintiffs' method for analyzing hiring data was "unreliable" and "statistically invalid."

The wave of arrests has been fueled in part by unprecedented federal dollars funneled to local police departments and new policing tactics that condoned arrests for even the smallest offenses. Spending on law-enforcement by states and local governments hit \$212 billion in 2011, including judicial, police and corrections costs, according to the most recent estimates provided to the U.S. Census Bureau. By comparison, those figures, when adjusted for inflation, were equivalent to \$179 billion in 2001 and \$128 billion in 1992.

In 2011, the most recent year for which figures are available, the Bureau of Justice Statistics put the number of full-time equivalent sworn state and local police officers at 646,213—up from 531,706 in 1991.

A crackdown on what seemed like an out-of-control crime rate in the late 1980s and early 1990s made sense at the time, says Jack Levin, co-director of the Brudnick Center on Violence and Conflict at Boston's Northeastern University.

"Zero-tolerance policing spread across the country after the 1990s because of the terrible crime problem in late '80s and early 1990s," says Mr. Levin.

The push to put an additional 100,000 more officers on the streets in the 1990s focused on urban areas where the crime rates were the highest, says Mr. Levin. And there has been success, he says, as crime rates have fallen and the murder rate has dropped.

But as a consequence, "you've got these large numbers of people now who are stigmatized," he says. "The impact of so many arrests is catastrophic."

That verdict isn't unanimous. "We made arrests for minor infractions that deterred the more serious infractions down the road," says James Pasco, executive director of the Fraternal Order of Police, which represents about 335,000 officers. "We don't apologize for that. Innocent people are alive today and kids have grown up to lead productive lives because of the actions people took in those days."

At the University of South Carolina, researchers have been examining other national data in an attempt to understand the long-term impact of arrests on young people. Using information from a 16-year-long U.S. Bureau of Labor Statistics survey, researchers tracked

7,335 randomly selected people into their 20s, scrutinizing subjects for any brushes with the law.

Researchers report that more than 40% of the male subjects have been arrested at least once by the age of 23. The rate was highest for blacks, at 49%, 44% for Hispanics and 38% for whites. Researchers found that nearly one in five women had been arrested at least once by the age of 23.

They further determined that 47% of those arrested weren't convicted. In more than a quarter of cases, subjects weren't even formally charged.



Mr. Hernandez carries a laminated legal document from the Bexar County Sheriff's office confirming his innocence in case he is arrested in the future. *Ben Sklar for The Wall Street Journal*

It can be daunting to try to correct the record. In October 2012, Jose Gabriel Hernandez was finishing up dinner at home when officers came to arrest him for sexually assaulting two young girls.

Turns out, it was a case of mistaken identity. In court documents, the prosecutor's office acknowledged that the "wrong Jose Hernandez" had been arrested and the charges were dropped.

Once the case was dismissed, Mr. Hernandez assumed authorities would set the record straight. Instead, he learned that the burden was on him to clear his record and that he would need a lawyer to seek a formal expungement.

"Needless to say, that hasn't happened yet," says Mr. Hernandez, who works as a contractor. Mr. Hernandez was held in the Bexar County jail on \$150,000 bond. He didn't have the cash, so his wife borrowed money to pay a bail bondsman the nonrefundable sum of \$22,500, or the 15% fee, he needed to put up. They are still repaying the loans.

Exacerbating the situation are for-profit websites and other background-check businesses that assemble publicly available arrest records, often including mug shots and charges. Many sites charge fees to remove a record, even an outdated or erroneous one. In the past year Google has changed its search algorithm to de-emphasize many so called "mug-shot" websites, giving them less prominence when someone's name is searched.

On Friday, California Gov. Jerry Brown signed into law a bill making it illegal for websites to charge state residents to have their mug shot arrest photos removed.

In 2013, Indiana legislators approved one of the most extensive criminal record expungement laws in the country. The law was sponsored by a former prosecutor and had a range of conservative Republican backers. One had worked as a mining-company supervisor who frequently had to reject individuals after routine background checks found evidence of an old arrest.

"If we are going to judge people, we need to judge them on who they are now, and not who they were," says Jud McMillin, the bill's chief sponsor.

The "growing obsession with background checking and commercial exploitation of arrest and conviction records makes it all but impossible for someone with a criminal record to leave the past behind," concludes a recent report from the National Association of Criminal Defense Lawyers.

Further analysis by the University of South Carolina team, performed at the request of The Wall Street Journal, suggests that men with arrest records—even absent a formal charge or conviction—go on to earn lower salaries. They are also less likely to own a home compared with people who have never been arrested.

The same holds true for graduation rates and whether a person will live below the poverty line.

For example, more than 95% of subjects without arrests in the survey graduated high school or earned an equivalent diploma. The number falls to 84.4% for those who were arrested and yet not convicted.

Tia Stevens Andersen, the University of South Carolina researcher who performed the analysis, says the results are consistent with what criminologists have found. The data, especially when coupled with other studies, show that an arrest "does have a substantial impact on people's lives," she says. That is in part because "it's now cheap and easy to do a background check."

According to a 2012 survey by the Society for Human Resource Management, 69% of employers conduct criminal background checks on all job applicants. Fewer than that—about 58%—allow candidates to explain any negative results of a check.

Mike Mitternacht, the owner and president of Factory Service Agency Inc., a heating and air-conditioning company in Metairie, La., worries that if he turns down a job applicant because of a criminal record, he could be open to a discrimination claim. But hiring the person could leave him open to liability if something goes wrong. "I have to do the background checks and take my chances," says Mr. Mitternacht. "It's a lose-lose situation."



John Keir says he was fired from his job after failing to mention brushes with the law on his application. Found not guilty of a recent charge, he says he answered truthfully. *Steve Gates for The Wall Street Journal*

John and Jessica Keir, of Birmingham, Ala., have tried various means to combat their arrest stigma. In 2012 the married couple was accused of criminal mischief for scratching someone's car with a key. They were found not guilty at trial.

In January of last year, Ms. Keir, a law-school student, googled herself. "My mug shot was everywhere," she recalls. "I was just distraught."

Though she was in the top 15% of her first-year class at Cumberland School of Law School in Birmingham, she says about a dozen law firms turned her down for summer work. Since she rarely made it to the interview stage, she feared her online mug shots played a role. Eventually, she landed a summer position at the Alabama attorney general's office.

The couple says they paid about \$2,000 to various websites to remove their mug shots. It didn't work, Mr. Keir says. New mug-shot sites seemed to appear almost daily. Keeping up with them all was "like playing Whac-A-Mole," says Mr. Keir.

Ms. Keir, who is finishing her law degree at the University of Alabama, has been using Facebook, LinkedIn and Google to create enough positive Internet traffic to try to push down negative information lower in any search-engine results.

Meanwhile, her husband believes he has been caught up in a separate quagmire. Earlier this year Mr. Keir was hired by Regions Bank as an information security official. Weeks later, he says he was let go from his \$85,000 job for allegedly lying on his application.

The 35-year-old Mr. Keir says his firing resulted after failing to disclose his recent arrest record as well as a number of traffic violations during his teens that had branded him as a "youthful offender" in Alabama. He says he didn't lie on his application, and only recalls being asked about any criminal convictions.

A spokeswoman for Regions Bank, a unit of Regions Financial Corp., says the company couldn't discuss individual personnel matters, but says the bank sends applicant fingerprints to the FBI as part of criminal background check and asks candidates to answer questions about previous criminal charges and convictions.

Arrest issues don't necessarily abate with age.



Barbara Ann Finn lost out on a school cafeteria job last year after a background check turned up a 1963 hit on her record, which was a surprise to her. *Greg Kendall-Ball for The Wall Street Journal*

Late last year, Barbara Ann Finn, a 74-year-old great grandmother, applied for a part-time job as a cafeteria worker in the Worcester County, Md., school system.

"I was a single woman on a fixed income. I was trying to help myself," she recalls.

Along with the application came fingerprints and other checks—a process Ms. Finn dismissed as mere formality. After all, she had lived in the area since 1985, had worked in various parts of county government and served as a foster parent. Her background had been probed before.

So she was surprised by the phone call she received from the school district. Her fingerprints, she says she was told, had been run through both the state and FBI criminal databases. She was clear in Maryland, but the FBI check matched her prints to a 1963 arrest of someone with a name she says she doesn't recognize.

Barbara Witherow, a spokeswoman with the school district, confirms that Ms. Finn had applied for employment and that there were "valid reasons why" she wasn't considered.

Ms. Finn says she believes her problem might trace back to a 1963 episode when she and a girlfriend had gone to a clothing store in Philadelphia. The other woman began shoplifting, she says. Police took both of them into custody, Ms. Finn recalls, but she was released.

"I never heard any more about it and never thought any more about it," says Ms. Finn.

Michael Lee is executive director of the nonprofit Philadelphia Lawyers for Social Equity's Criminal Record Expungement Project and has been working on Ms. Finn's behalf for months.

The challenge, he says, is expunging a record no one can find.

An arrest record can only be removed if the local court system notifies the FBI that it should be taken out of the file. In Ms. Finn's case, the local authorities say they can't find the original record.

A Philadelphia District Court document obtained by Mr. Lee and reviewed by the Journal says Ms. Finn was never charged. A Pennsylvania State Police spokesman declined to comment.

Mr. Lee has asked for another background check from the state to try to put the matter to rest. Says Ms. Finn: "I don't want to die with a criminal record."

**Write to** Gary Fields at [gary.fields@wsj.com](mailto:gary.fields@wsj.com) and John R. Emshwiller at [john.emshwiller@wsj.com](mailto:john.emshwiller@wsj.com)

State (Year reform was adopted)	Relevant Statutes	Reform: Ban the box or Anti-discrimination	Employers: Private and Public (State: S, Licensing: L, Cities and Counties: C)	Job-Related Screening*	Limit criminal record information (Arrests not leading to convictions: "Arrests"; Expunged or similar: "Expunged"; Time limit on record: "Time limit")*	Other protections (Notification of denial: "Notification"; Copy of record; "Copy")*
<b>California (2010, 2013)</b>	Cal. Labor Code § 432.9	Ban the Box		Public (S)		Arrests, Expunged, Time Limit
<b>Colorado (2012)</b>	C.R.S. § 24-5-101	Ban the Box		Public (S, L)	Whether there is "direct relationship" between conviction and job	Arrests, Expunged, Other
<b>Connecticut (2010)</b>	Conn. Gen. Stat. § 46a-80	Ban the Box		Public (S, L**)	Consider nature of crime and relationship to the job	Arrests, Expunged Notification, Copy
<b>Delaware (2014)</b>	19 Del. C. § 711	Ban the Box		Public (S, C)	Consider nature of offense and job	
<b>Hawaii (1998)</b>	HRS §§ 378-2, 378-2.5	Ban the Box; Anti- discrimination	Private	Public (S, C)	Conviction bears "rational relationship" to position	Time limit
<b>Illinois (2013, 2014)</b>	HB 5701 and Executive Order	Ban the Box	Private	Public (S)		
<b>Maryland (2013)</b>	Md. State Personnel and Pensions Code Ann. § 2-203	Ban the Box		Public (S)		
<b>Massachusetts (2010)</b>	M.G.L. Ch. 6 §§ 151B, 168-173	Ban the Box	Private	Public (S, L**, C)		Time limit Notification, Copy
<b>Minnesota (2009, 2013)</b>	Minn. Stat. § 364	Ban the Box	Private	Public (S, L**, C)	Determine if conviction "directly relates" to position	Arrests, Expunged, Other Notification
<b>Nebraska (2014)</b>	LB 907, Section 12	Ban the Box		Public (S, C)		
<b>New Jersey (2014)</b>	AB 1999	Ban the Box	Private	Public (S, C)		Erased, Expunged
<b>New Mexico (2010)</b>	N.M. Stat. §§ 28-2- 1 to 28-2-6	Ban the Box		Public (S, L**, C)	Conviction "directly relates" to employment	Arrests, Other Notification
<b>Rhode Island (2013)</b>	R.G. Gen. Laws §§ 28-5-6, 28-5-7	Ban the Box	Private	Public (S, C)		Arrests

\* Some of these components existed prior to the legislation listed here. \*\*Removal of conviction inquiry from the licensing application is not required.

## CHART OF LOCAL FAIR CHANCE POLICIES

Location	Employers:		Background checks only for some positions	Background check only after conditional offer or finalists selected	Job-Related Screening	Other protections: Notification of denial (N); Copy of record (C)
	Vendors or Private	Public				
<b>CALIFORNIA</b> (State law)		X				
Alameda County		X				
Berkeley		X	X		X	
Carson		X				
Compton	X	X			X	
East Palo Alto		X				
Oakland		X	X	X	X	N, C
Richmond	X	X	X			
San Francisco	X <sup>1</sup>	X		X	X	N, C
Santa Clara County		X				
<b>COLORADO</b> (State law)		X			X	
<b>CONNECTICUT</b> (State law)		X			X	N, C
Bridgeport		X			X	N
Hartford	X	X	X	X	X	N
New Haven	X	X		X	X	N, C
Norwich		X		X		
<b>DELAWARE</b> (State law)		X			X	
New Castle County		X				
Wilmington		X		X		
<b>DISTRICT OF COLUMBIA</b>	X	X		X	X	
<b>FLORIDA</b>						
Jacksonville		X		X	X	N
Tampa		X		X		N
<b>GEORGIA</b>						
Atlanta		X		X		
Fulton County		X	X		X	N, C
<b>HAWAII</b> (State law)	X	X		X	X	
<b>ILLINOIS</b> (State law)	X	X				
Chicago		X		X	X	
<b>INDIANA</b>						
Indianapolis	X	X			X	
<b>KENTUCKY</b>						
Louisville	X	X			X	
<b>LOUISIANA</b>						
New Orleans		X			X	C
<b>MARYLAND</b> (State law)		X				
Baltimore	X	X	X	X	X	

Location	Employers:		Background checks only for some positions	Background check only after conditional offer or finalists selected	Job-Related Screening	Other protections: Notification of denial (N); Copy of record (C)
	Vendors or Private	Public				
<b>MASSACHUSETTS</b> (State law)	X	X				N, C
Boston	X	X	X			N
Cambridge	X	X			X	N, C
Worcester	X	X	X		X	N, C
<b>MICHIGAN</b>						
Ann Arbor		X		X	X	
Detroit	X	X				
East Lansing		X				
Genesee County		X		X		
Kalamazoo		X				
Muskegon County		X				
<b>MINNESOTA</b> (State law)	X	X		X	X <sup>2</sup>	N <sup>2</sup>
Minneapolis		X	X		X	
St. Paul		X	X		X	
<b>MISSOURI</b>						
Kansas City		X		X	X	
<b>NEBRASKA</b> (State law)		X				
<b>NEW JERSEY</b> (State law)	X	X				
Atlantic City	X	X		X	X	N
Newark	X	X	X	X	X	N, C
<b>NEW MEXICO</b> (State law)		X			X	N
<b>NEW YORK</b>						
Buffalo	X	X		X		
New York	X <sup>3</sup>	X				
Rochester	X	X		X		
<b>NORTH CAROLINA</b>						
Carrboro		X			X	
Charlotte		X				
Cumberland County		X				
Durham City		X		X		
Durham County		X		X	X	N, C
Spring Lake		X			X	
<b>OHIO</b>						
Canton		X		X	X	
Cincinnati		X			X	N, C
Cleveland		X				
Massillon		X			X	
Youngstown		X		X		

Location	Employers Regulated Vendors or Private ERs	Public Employers	Background checks only for some positions	Background check only after conditional offer or finalists selected	EEOC criteria incorporated	Other protections: Notification of denial (N); Copy of record (C)
<b>OREGON</b>						
Multnomah County		X			X	
<b>PENNSYLVANIA</b>						
Philadelphia	X	X		X		
Pittsburgh	X	X		X		N
<b>RHODE ISLAND (State law)</b>	X	X				
Providence		X				
<b>TENNESSEE</b>						
Memphis		X			X	N, C
<b>TEXAS</b>						
Austin		X	X			
Travis County		X	X	X	X	
<b>VIRGINIA</b>						
Alexandria		X		X		
Newport News		X			X	
Norfolk		X			X	
Petersburg		X				
Portsmouth		X				
Richmond		X				
<b>WASHINGTON</b>						
Seattle	X	X	X			N, C
Spokane		X				
<b>WISCONSIN</b>						
Dane County		X				
Milwaukee County		X				

<sup>1</sup> San Francisco Fair Chance Act applies to private employers, not the City and County.

<sup>2</sup> Applies only to public employers.

<sup>3</sup> Policies apply to contractors doing business with the Human Services Department.

**Testimony on Behalf of County Executive Isiah Leggett on  
Bill 36-14, Human Rights and Civil Liberties—Fair Criminal Record Screening  
Standards**

Good afternoon. My name is Joe Adler. I am the Director of the Montgomery County Office of Human Resources. I am here today on behalf of County Executive Isiah Leggett in support of Bill 36-14. As cited in the legislative packet this bill would remove one of the employment barriers faced by persons with criminal records. It prohibits employers in Montgomery County from asking about arrests or convictions in the application form, otherwise known as “ban the box”. The need for this legislation is evidenced by the fact that over 92 million adult Americans have a criminal history record involving an arrest or conviction. Research conducted by the Center for Economic and Policy cited in the Economic Impact Statement submitted by the Montgomery County Department of Finance, estimates that the employment loss by this population in 2008 amounted to a reduction of the national GDP by as much as \$57-\$65 billion.

The Attorney General’s Reentry Council of the United States Department of Justice cites FBI data that a majority of arrests are for relatively minor offenses, and only 14 percent are for violent crimes or simple assaults<sup>1</sup>. Studies funded by the National Institute of Justice found that the employment bar due to a criminal record disproportionately impact people of color. A criminal record reduces the chance of a job call back by nearly 50 percent, but the non call back rate for African-Americans and Latinos was “substantially” higher.<sup>2</sup> Bill 36-14 begins to address these inequities by prohibiting employers from inquiring about criminal convictions until after a conditional offer of employment is made. The same process is required of all employers in the United States in terms of applicants with a disability or a serious medical condition. The Americans with Disabilities Act, as Amended (ADAA) does not allow employers to inquire about the health of an applicant until after a conditional offer is made.

Another important aspect of Bill 36-14 requires employers to provide prospective employees with a copy of the criminal record if the employer bases an adverse action, such as termination or not-hiring, on the criminal record. Candidates are given the opportunity to check the accuracy of the criminal record before any final decision is made. This element may seem minor, but it gives a measure of fairness to applicants and employees. A study conducted by the US Department of Justice (2006) found that at least 50 percent of the records in the FBI’s criminal records depository are incomplete, and that no single source exists which provides up to date information.<sup>3</sup>

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<sup>1</sup> Amy Solomon, “In Search of a Job: Criminal Records as Barriers to Employment,” NIJ Journal, Issue No. 270 (June 2012), US Department of Justice (p.43)  
<sup>2</sup> Ibid.  
<sup>3</sup> Solomon, op.cit. (p.48)

We must keep in mind that almost everyone who is incarcerated will eventually be released. Unfortunately, many will be rearrested and reincarnated. Being able to compete for employment on an even playing field is an important step for those who broke the law and paid for their mistakes. The legislation does not establish any preference for hiring ex-offenders, it merely prohibits upfront rejection and allows a more complete consideration of the applicant before a final decision is made in terms of hiring. The packet prepared by the Council's Legislative Attorney mentions that at least 11 states, including Maryland and over 50 local jurisdictions have enacted some form of "ban the box" legislation. More recently, the City of Baltimore and Washington DC have enacted similar laws.

For the reasons cited above, the County Executive supports the enactment of Bill 36-14, with amendments to address the issues raised by the County Attorney.

Testimony before the Montgomery County Council  
Bill 36-14  
September 9, 2014

Good afternoon Members of the Montgomery County Council. I am Arthur Wallenstein, Director, Montgomery County Department of Correction and Rehabilitation. I am present today to speak in favor of Bill 36-14, "Ban the Box." Over the past 30 years our country has seen a continuous growth in the prison, jail and probation population while at the same time a reduction in criminal behavior has characterized our public policy and public safety environment.

Millions upon millions of US residents have come before the criminal justice system. The vast majority - well over 85% are for non violent crimes, and almost all are returned to their local communities. Historically, recidivism rates are high - over 60% return in some measure to the criminal justice system. A major determinant in this revolving door has been the absence of meaningful employment coupled with discrimination in housing and rejection from other areas of public participation. We then manifest disdain for their inability to participate in civic life and criticize the public resources that are spent supporting their return to some element of the criminal justice system. It is a self defeating prophesy, and we must stop this revolving door and directly confront the issues of under employment or overt rejection from the job market and the employment sector that exists in our strong and vibrant economic life in Montgomery County.

Former County Council Member and now Secretary of Labor Tom Perez has spoken out repeatedly in support of real and sustained workforce development and employment policies that do not overtly deny ex offenders the opportunity to compete on an equal footing for jobs for which they are otherwise qualified. He recently reiterated this support during a visit to the Montgomery County Correctional Facility in Boyds with the Attorney General of the United States Eric Holder. They came to support the development of employment skills and and educational capacity to engage the world of work in this community.

In our County work release program offenders are guided into employment situations. They pay federal, state and local taxes and participate in the support of their family members. They also pay support when separated families exist and, where required by the Courts, restitution to the victims of their crimes. This is part of the road to a thoughtful return to our community. Ban the Box seeks to provide elements of a steady and open field of opportunity to gain the respect of meaningful employment. We fail in my work if employment is denied or if job applicants are rejected prior to being able to prove their worth and qualifications and desire for a specific position in our community. Work counts enormously. When a criminal sentence is served it is concluded and nothing in our system should reject out of hand and without full consideration of the total person their ability to work in a wide spectrum of positions in our community.

**Ban the Box does not guarantee employment. Ban the Box does not move ex offenders ahead of others in the search for meaningful employment. It does ensure they are permitted to be in line and to be considered on the merits of their credentials and skills and determination to seek and find meaningful employment.** We believe in a living wage in Montgomery County so that workers are not held in a crippling vice of poverty. Let us recognize that those previously involved with the criminal justice system not be rejected without a fair opportunity to apply for employment in our community. We cannot on one hand criticize persons for their failure to work and then immediately establish barriers that do not let them in the employment application line on the level playing field.

I urge your support of this legislation that seeks to open the doors of open and equal competition in the world of work for all persons in Montgomery County.

Testimony on Bill 36-14, Human Rights and Civil Liberties- Fair Criminal Record  
Screening Standards  
September 9, 2014

Good afternoon Members of Council. My name is James Stowe, Director of the Office of Human Rights, and I am here to speak in support of proposed Bill 36-14. We agree with the prior testimony on the conditions of our community and nation that have lead to the consideration of this bill. This is further confirmed by the number of states, counties and other local jurisdictions that are considering similar legislation. The bill strives to remove one of the many employment barriers faced by persons with criminal records, but the bill does not take the final employment decision out of the hands of the employer.

According to the proposed legislation, the Office of Human Rights and the Human Rights Commission would be involved in the enforcement activities associated with this bill. While it has not taken a formal position on the bill, the Commission, chaired by Russell C. Campbell, has been briefed on the legislation. We believe that fairness in the workplace for both employer and employee ought to be the goal of every community.

We thank the sponsors of this legislation and all the members of the County Council for bringing this important discussion and proposal to the attention of the community. We look forward to working with the Council and all interested parties as the Council considers the bill and are available to address any questions or concerns on aspects of the bill that relate to our office.



Montgomery County Community Action Board's  
 County Council Testimony  
 Bill 36-14: Human Rights and Civil Liberties –  
 Fair Criminal Record Screening Standards

Tuesday, September 9, 2014

Matthew J. Green, Jr.  
 Community Action Board Chair

Good afternoon Mr. President, and members of the Montgomery County Council.

My name is Matthew J. Green, Jr. and I am the Chair of the Community Action Board of the Montgomery County Community Action Agency, the County's anti-poverty group and governing board for Head Start and the Community Service Block Grants (CSBG).

Bill 36-14 will address the needs of many low-income residents who cannot achieve self-sufficiency due to lack of employment.

As the Chair of the Montgomery County Community Action Board, I am here today on behalf of the County's low-income community. Currently, 6.4% of the County's population and 8.7% of the County's children live below the poverty line. Due to the high cost of living in the County though, the number of people struggling to meet their basic needs is much higher.<sup>1</sup>

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<sup>1</sup> The 2012 Self-Sufficiency Standard for a family of four with two working parents, a preschooler and a school-age child, was \$83,000 – four times the Federal Poverty Level.

As you know, low-income individuals are over-represented in the Criminal Justice System. When individuals are released from incarceration, reentry into the community poses many obstacles, not the least of which is finding employment. The unemployment rate for formerly incarcerated people is as high as 60% one year after release.

The mere fact of having a criminal history can have severe negative consequences on a person's ability to find a job, earn a living wage, and help their family to become self-sufficient. A 2010 Pew Charitable Trusts study found that having been incarcerated reduces average hourly wages by 11% and reduces annual earnings by 40%. Unemployment then leads to continued poverty and, in some cases, increased recidivism.

Individuals who are released from incarceration and reenter areas like Montgomery County, where affording the basic necessities such as housing, food, and transportation can be difficult, face particular challenges. "Banning the box" will help to address these challenges by removing one of the many barriers preventing those with criminal records from obtaining employment.

Furthermore, "banning the box" in Montgomery County will not only help individuals who are released from incarceration into our community, but will also have a positive impact on their families and on our entire community. Increased participation in the workforce can improve the local economy through increased tax revenue and reduced expenditures for law enforcement and corrections.

In addition to the economic advantages of increasing the workforce, research shows that individuals who find employment after their release from incarceration have decreased rates of recidivism. National statistics show that two-thirds of all those who are released from prison will be rearrested within three years and more than half will return to prison or jail in that period.

Removing obstacles such as application questions about criminal history will help individuals to find employment and this will ultimately reduce recidivism. According to the Urban Institute, "All things equal, former prisoners who are able to secure a job, ideally at higher than minimum wage, by two months out are more likely to successfully avoid recidivism the first 8 to 12 months after release."

For many who are released from incarceration, reentry into the community can be an overwhelming experience. They face both economic and personal obstacles and often lack the necessary supports. "Banning the box" can assist this population in one significant way by removing a major barrier to employment and, ultimately, help many in the low-income community achieve self-sufficiency.

On behalf of the Montgomery County Community Action Board, we fully support Bill 36-14 as an effective tool in the fight against poverty. We hope that the Council will pass this bill and take steps in the future to provide additional services for this vulnerable population.

Thank you.

### References

*The Power of Work* by The Center for Employment Opportunities Comprehensive Prisoner Reentry Program [http://www.mdrc.org/sites/default/files/full\\_572.pdf](http://www.mdrc.org/sites/default/files/full_572.pdf)

*Employment After Prison: A Longitudinal Study of Releasees in Three States* by Christy Visher, Sara Debus and Jennifer Yahner of The Urban Institute  
[http://www.urban.org/UploadedPDF/411778\\_employment\\_after\\_prison.pdf](http://www.urban.org/UploadedPDF/411778_employment_after_prison.pdf)

*Collateral Costs: Incarceration's Effect on Economic Mobility* by The PEW Charitable Trusts  
[http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2010/CollateralCosts1pdf.pdf?la=en](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/CollateralCosts1pdf.pdf?la=en)

## Helping Ex-Offenders Get Jobs

There are 2 goals:

1. Help ex-offenders return to society and be productive and law abiding.
2. Help employers find the best person to meet their needs.

The present system defeats both of these goals to some degree.

Societies point of view:

- The worst circumstance is for them to be idle and without income.
- The best circumstance would be for them to be productive as soon as possible.

Employers point of view:

- Needs to find the best person he can to fill his job vacancy.
- Often the ex-offender will have the qualifications and experience that fit the job requirements.
- If so, why screen them out prematurely? This helps neither the ex-offender, the employer or society.

Conclusions:

- I'm certainly not saying there should be no safeguards, but I believe they are included in the proposed legislation.
- The ex-offender is much more likely to become productive sooner.
- The employer has more options infilling his job vacancy. The decision is still the employer's among a larger pool of candidates.
- **There are no disadvantages.** The employer can still do the records check at a later point in time and weigh the pros and cons.
- Let's let the employer make the decision instead of screening out potential qualified job candidates.
- Screening out ex-offenders in advance is adding an additional penalty and is a dis-service to them, the employer and society.
- What could be worse than dumping unemployable ex-offenders on society?
- **Let the employer decide.**



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Testimony for the Montgomery County Council  
September 9, 2014

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

SUPPORT

The ACLU of Maryland urges a favorable report on Bill 36-14, which would help remove a roadblock to employment for many individuals. One of the collateral consequences of our society's mass criminalization is that individuals are denied the opportunity to work because of a prior arrest or conviction. This makes it difficult if not impossible for individuals to obtain a job, and even more so for former offenders to re-enter society successfully and be able to earn a living. The Montgomery County Council should join the many other jurisdictions, including the State of Maryland and the City of Baltimore, pass this legislation and lead the way in helping Marylanders succeed as productive, taxpaying citizens.

In 2013, the ACLU of Maryland released a report documenting that despite comparable rates of use, in Montgomery County Black Marylanders are more likely to be arrested for marijuana possession than white Marylanders.<sup>1</sup> In 2010, Blacks made up 18% of Montgomery County's population, but 46% of all marijuana possession arrests.<sup>2</sup> Uneven enforcement of marijuana possession laws (which were amended by the General Assembly this past session<sup>3</sup>) has resulted in qualified applicants being denied job opportunities despite their qualifications. Under a system proposed by 36-14, an applicant would get a fair chance at employment, without a simple marijuana possession arrest derailing their chance. The employer, meanwhile, would still have the opportunity to discover the arrest and determine whether it was relevant to the job being sought.

It is important to note that contrary to some detractors' comments, employers still have the opportunity to discover a potential employee's criminal history. Under this bill, the employer has *more* information with which to determine an employee's fitness for a job: rather than having a potential employee check a box stating they had been arrested, the employer is able to discover the history and then discuss it with the potential employee, learning the details and thus having the information necessary to determine if this past arrest or offense should disqualify the individual.

At least 12 states and many cities throughout the country already have a 'Ban the Box' policy.<sup>4</sup> The fact that an applicant has been entangled by the criminal justice system, by itself, should not automatically disqualify them from obtaining employment. By allowing individuals and employers to more fully get to know each other, more employers will hire qualified individuals, who in turn will have a chance at gainful employment.

For these reasons we urge the Council to pass Bill 36-14.

<sup>1</sup> ACLU of Maryland, *The Maryland War on Marijuana in Black and White* (2013), [www.aclu-md.org/marijuana\\_reform](http://www.aclu-md.org/marijuana_reform).

<sup>2</sup> *Id.*

<sup>3</sup> SB 364, Ch. 158, [http://mgaleg.maryland.gov/webmgg/frmMain.aspx?id\\_sb0364&stab=01&pid=billpage&tab=subject3&ys=2014RS](http://mgaleg.maryland.gov/webmgg/frmMain.aspx?id_sb0364&stab=01&pid=billpage&tab=subject3&ys=2014RS)

<sup>4</sup> These states include California, Connecticut, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Minnesota, Nebraska, New Mexico, Rhode Island and Wisconsin. The cities include Baltimore, Chicago, Minneapolis, San Francisco, St. Paul, New York City, Philadelphia, and Seattle.

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Your Business Is  
Our Only Business

**Written Testimony by  
Erin Allen (ConTemporaries, Inc.)  
On Behalf of The Greater Bethesda-Chevy Chase Chamber of Commerce  
Before the Montgomery County Council on  
Bill 36-14, Human Rights and Civil Liberties – Fair Criminal Record Screening Standards  
September 9, 2014**

Good afternoon. My name is Erin Allen. I'm the President of ConTemporaries, Inc., headquartered in Silver Spring. I am here today in two capacities – first as an officer of The Greater Bethesda-Chevy Chase Chamber and our 600 member firms; and second, as an employer and owner of a 23-year old temporary and permanent employment agency specializing in the placement of supplemental staff for various occupations within Federal Government agencies and private sector companies.

Please know that the Chamber and our members are sympathetic to the concerns that have inspired the introduction of this legislation – the need to provide a fair chance for employment for those who have paid their dues for their criminal history. We also commend the Montgomery County Department of Correction and Rehabilitation for the successful program they have at their Prerelease and Reentry Services facility located in White Flint.

One of our concerns regarding Bill 36-14 is the fact that when you look at individual companies and the people they serve, numerous exceptions to this bill will need to be included. Whether it's home cleaning services, general contractors who upgrade homes or apartments, doctors' offices whose patients could possibly include children or elderly, restaurants who serve children and elderly ... the list can go on and on.

At this point I will be diverting from the written testimony, however I ask that you do read this next section at the conclusion of this hearing. It outlines just what a typical business needs to go through in order to hire a receptionist who handles money for a smaller company. This legislation will put the small business at a major disadvantage in trying to fill many positions. If the box is removed from the application but the employer is allowed to vet the question during the interview process, this gives the applicant an opportunity to be up-front and explain their past indiscretions and why the employer should now be able to employ them without concern.

*[The following is an example of the typical hiring practices of the private sector. Private sector hiring is not the same as local, state or federal government employers. In order to apply for a government position, the applicant fills out an application right off the bat. When a small business puts out an ad for a position, they do not send out applications and applications are not normally found on their website, but rather the employer requests that resumes be sent or emailed to them. For a general receptionist position as an example where the receptionist handles money within their responsibilities, a company can get as many as 150 resumes. The employer then needs to cull down the list to about 5 or 6 good candidates, who they then*

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OUR MISSION: Build an environment that encourages business to grow and prosper within a thriving Bethesda-Chevy Chase community.  
OUR VISION: The Bethesda-Chevy Chase community will be regarded as the preeminent place to do business in the Washington Metropolitan Area.  
OUR GUIDING PRINCIPLES: Our Chamber supports its members by providing both a voice and a forum to help shape public policy and enhance opportunities for exposure, connections, and growth. Our responsibility is to lead by example, holding ourselves to the highest governance principles, ethical standards and business practices.

*ask to come in for an interview. When the candidate gets to the office for the interview, they are normally given an application, although many small companies don't even have applications. Once the candidate completes the application, they are then interviewed and eventually the employer narrows down the field to 1-2 candidates. At this point, the employer will ask for 2-3 references, and they will then check the references, as well as call the applicant's past employers, check on their education and do a criminal background check. From start to finish, this process can take from a few weeks to more than a month, to replace a position that is currently unfilled. If the current legislation is passed and an employer makes a conditional offer and then finds out the candidate has a criminal history of stealing and chooses not to employ the candidate, your process for rebuttal will force the employer to start all over again because any good candidates that they turned down by this point will have already been offered another position.]*

Throughout my career I have strived to help good people find good jobs with fair pay. There are two challenges my firm faces as a result of this bill. The first is the question timing and the second is that the Federal government precludes me from hiring anyone who has been convicted of a felony.

As far as timing, in addition to our application, all applicants must complete a battery of tests, several interviews concluding with reference and background checks **before** we propose them to our clients (private companies and federal contractors). Once the client accepts the proposed applicant then I can make a job offer. Many of my clients need help quickly. If this bill passes I wouldn't be able to help my clients if they needed a last minute receptionist. I can't place them on the job unless I know their criminal history. So now with this Bill in play I can't consider that new applicant that desperately needs a job today.

The second issue is that a felony conviction prevents me from placing even the most qualified applicants in the majority of my jobs. We place candidates either directly or in directly on contract with the federal government. Felons are excluded from hire in those positions. If this bill is passed it is imperative to add government contractors to the ever expanding list of exceptions.

In conclusion, if it is necessary to remove the box on the application which we don't encourage, we ask that the question can be asked during the interview process so that the candidate has an opportunity to explain their history before thousands of dollars and man hours are wasted in the process.

Finally, we encourage the County Council to consider focusing its efforts on incentivizing businesses to work with the Department of Corrections to create ways in which criminals who are being released can be better connected with job opportunities in the community. Thank you for your consideration of our comments today.



# Gaithersburg-Germantown Chamber of Commerce, Inc.

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## LEGISLATIVE ISSUE: BILL 36-14, FAIR CRIMINAL RECORD SCREENING STANDARDS

SEPTEMBER 9, 2014

### PUBLIC HEARING

While the Gaithersburg-Germantown Chamber of Commerce understands the rationale behind the proposed Bill 36-14 addressing the Fair Criminal Record Screening Standards, there are some concerns we would like to see addressed prior to any final legislation.

1. The primary concern is the timing of when an employer is allowed to ask the question. Waiting until a conditional offer puts an undue burden on the employer. Hiring staff is a costly, timely endeavor. The longer it takes to hire someone the more expensive it is and the greater the risk that qualified candidates will find other jobs during the lengthy process. Requiring a conditional offer be made prior to asking the candidate for the information or doing a criminal background check on convictions is too late in the process.

**RECOMMENDED REVISION:** *Move the restriction from the conditional offer to the interview stage. If the primary purpose of the legislation is to allow applicants the right to ensure accurate records and to explain any extenuating circumstances, having the discussion up front is more effective to both parties.*

2. Allowing an applicant 7 days to respond to an employer's adverse action is too long and adds to the cost of the hiring process. (Sec.27-73 (c)). In the hiring arena, no prospective employer would wait 7 days to hear back from any candidate. Some responsibility must be placed on the applicant. Assuming the applicant is aware of their own criminal record they should anticipate the possibility of an adverse action and be able to respond much more quickly. This is even more relevant if there has been an error in the criminal record. A reasonable applicant would want to respond immediately.

**RECOMMENDED REVISION:** *This should be changed to 3 business days.*

3. The proposed bill does not address what happens if information about past criminal conviction is offered up by the applicant at any point prior to a conditional offer. Individuals with a conviction record are often counseled to be up front about their past convictions in order to provide an explanation as well as an assurance that past behavior will not dictate future behavior. What happens if an applicant brings up the information and is then denied employment – for whatever reason – what is the employer's burden of proof? There is also the issue of trust. Most employers see trust as a critical component of any hiring decision. It is very difficult to build a successful employer-employee relationship when the applicant has an incentive to hide potentially pertinent information from the employer right from the get-go. This Bill creates a perverse incentive to hide one's relevant past behavior.

4. There is also ambiguity about what constitutes "specific offenses that may demonstrate unfitness to perform the duties of the position". Some circumstances are very clear, e.g. an employer would not want to hire a bookkeeper who has been convicted of embezzlement. But what about a landscape company who doesn't want to hire someone convicted of burglary or any employer who would not want to hire someone convicted of a violent act. Who gets to decide what is best for an industry or a particular employer? What is the existing liability to an employer who hires someone with a criminal record, if that individual commits another crime on the job?

***The Bill is vague as to what the Human Rights Commission would consider to be a bona fide reason to consider a specific offense that would demonstrate unfitness.***

5. The size of employer impacted by this Bill is too small. Most companies of 10-30 employees do not have a Human Resources Department or even an HR Manager. The function is typically done by the CEO or Office Manager. The process needs to be efficient, not only because it takes time away from running the business, but because having an open position can greatly impact productivity. The timing of hiring decisions is much more critical in a small company. For example, a company of 15 employees with one open position is tantamount to the County being understaffed by 600 (conservative estimate).

***RECOMMENDED REVISION: Increase the applicable employer size to over 50 employees.***

6. Paying damages directly to applicants creates a financial incentive for applicants to file complaints, especially when the burden of proof is on the employer (Sec. 27-8)

***RECOMMENDED REVISION: Delete the damages paid to the applicant.***

7. It is unclear why a potential employer be responsible in any way for housing discrimination. Having potential damages include higher housing costs from housing discrimination, seems to be a mistake in this bill. (Sec. 27-8 (3))

***RECOMMENDED REVISION: Delete any reference to housing discrimination.***

**Testimony Regarding:**  
**Montgomery County Council Bill 36-14**  
 Human Rights and Civil Liberties-Fair Criminal Record Screening Standards  
 by  
 Elise M. Ambrose  
 President, Elite Personnel, Bethesda, MD

**To: Members of the Montgomery County Council**

I believe that I understand what the Council is trying to accomplish with this bill. I am a passionate, dedicated and committed Democrat and, if I weren't a private employer who had to deal with the consequences and risks inherent in this bill, might even be for it. There is no doubt that there is discrimination against criminals in the employment process and that is unfair to those that want to rejoin and be productive members of society. But this bill takes the measure too far and the unintended consequences could be very serious.

I have no opposition to taking the criminal background question off of the initial Employment Application. It seems fair and reasonable to allow otherwise qualified applicants the opportunity to have an in-person interview and explain themselves.

I do strongly object to the section of the bill where the question cannot be asked until there is a "conditional offer of employment." This is wrong on many levels, firstly and most importantly, who wants to call and rescind a job offer? What if the candidate is convicted of a crime of violence? Who is going to protect the employees of the firm that rescinded the offer? Most private sector employers don't have armed security in place, like public sector employers might have.

Secondly, private employers cannot afford to do all of the complicated, extremely time consuming, labor intensive work it takes to get an applicant to the "conditional offer" stage only to find out that they have been convicted of fraud, theft, violence, child molestation, you name it. It is absolutely essential that this question be allowed during the interview process. Very, very few of the states, counties or localities that have passed a similar law push the criminal background question to the conditional offer stage. And, as a side note, in most of the jurisdictions that have passed a "Ban the Box" measure, it is only applicable to governments and government contractors.

Thirdly, giving applicants an opportunity to profit from a claim of discrimination is a terrible idea. I can promise you that the misuse of this tool will be enormous and will very quickly overwhelm the county office handling it. If there is a blatant, provable, misuse of a potential employee's background information, the County should fine the employer. The person making the claim should not get any monetary reward. The temptation to file frivolous claims is just way too high and will be very costly and detrimental to employers of all sizes.

I wonder if you, as members of the County Council, have a clear view of the legalities, liabilities and complexities of the hiring process for private sector employers. First of all, there is a phone screen, followed by an in-person interview, then there is a

ton of legal paperwork to manage which is hugely time consuming to process, then there is the calling/faxing/emailing of numerous employment reference requests, numerous times to numerous people. Do you really think it is fair for us to do all of this work before we know if the candidate has a disqualifying (or potentially violent) criminal record?

The hiring process is already fraught with liability and is extremely complicated due to the varied, numerous and overlapping laws and regulations which must be followed. Employers are on edge constantly about the changing environment – what can and cannot be said or asked during an interview, new employment lawsuits where the legal decisions change the hiring process *again*, the fact that the threat of potential lawsuits has made it all but impossible to get a simple employment reference because employers are worried about being sued by former employees. Most mid-to-large size employers will provide nothing more than dates, title and salary which makes the reference essentially useless since it has no accompanying qualitative information. I say this so you understand the employment environment and just how much under siege employers feel today.

The “Ban the Box” bill does not take into consideration the nuances, complex and extensive paperwork and timing of the pre-employment screening process and the needs of the private sector, and in particular, my industry, staffing. Our job as a staffing business is to determine if a candidate is suitable for employment by our clients – this is already made infinitely harder by the great difficulty we have getting a qualitative employment reference. The complicated process involved in deciding to “hire” or “not hire” a candidate for a temporary, temp-to-hire or direct hire job makes it close to impossible to have to wait until a job offer is made. Our clients expect us to have candidates available to start work at a moment’s notice. A client might call us at 5:00 p.m. and request help for the next day. We don’t have the time or resources at that hour to conduct a criminal background check. We must have the flexibility to determine in the interview process if the candidate has a criminal background. In our case, we have several hundred people in our database who are actively looking for work but are not yet “employees” and therefore do not have “conditional offers of employment.” They have been through the screening process but have not yet been sent on a temporary or temp-to-hire assignment. They only become employees when they accept a temporary or temp-to-hire position.

Granted the staffing industry’s situation is unique but we are instrumental in getting a lot of people employed right here in Montgomery County. We help people get through difficult times or unemployed times by offering temporary positions or we help them get really great jobs with really great clients in the DC area.

The statistics used to describe the national support and wave of “Ban the Box” legislation across the country are misleading. Only a handful of jurisdictions actually ban criminal background checks from being performed until a conditional offer of employment in the private sector. A far more common option is to remove any questions regarding criminal history, including conviction and arrest records from the initial employment application and allow the question during the interview process. This is the alternative that we support and see it as the only fair option.

The overall aim of this legislation is to enhance the employment opportunities for people convicted of crimes. Allowing employers to inquire about criminal history during the interview process affords the employer the opportunity to ask pertinent questions, while allowing the candidate to explain their history directly to the employer. Hopefully, this in-person interaction will decrease discrimination and increase employment. In a technical bulletin released by the Office of Fair Practices of the Maryland Department of Labor Licensing and Regulation, "lawful" inquiries are defined as: "Inquiries about convictions that bear a direct relationship to the job and have not been expunged or sealed by the courts. Consideration should be given to the nature, recentness and rehabilitation." Again, allowing these questions during the interview affords the candidate the opportunity to explain their history and any pertinent circumstances surrounding any arrests or convictions directly to the employer. (<http://www.dllr.maryland.gov/oeope/preemp.shtml>). While noting that recidivism and lack of employment are significant issues among those who have criminal convictions, a multi-pronged approach must be applied to this issue, instead of simply prohibiting employers from asking these important questions in a timely manner.

This "Ban the Box" legislation is not as popular as advertised, nor has it often been applied to the *private sector*. According to the National Employment Law Project (NELP), (a major proponent of the "Ban the Box" legislation across the country), the majority of entities that have enacted this type of a law have only applied it to local government and local government contractors. And, far less than 5% of the approximately 70 jurisdictions that have put legislation in place require the employer to wait until a conditional offer is made before allowing a criminal background check. There are several variations of when one can check the background but truly very few make an employer wait until the "conditional offer" stage.

So, in closing, I strongly urge the Council to amend this bill to allow the criminal background question during the interview process (but not on the initial application) and to remove any monetary consideration to those making claims against employers.

We all want to help those who have reformed themselves – this is definitely a "there but for the grace of god, go I" situation. But it is not fair to our current employees to endanger them or simply embarrass them by having them rescind a job offer. Nor is it fair to businesses to have to worry about frivolous lawsuits by disgruntled job applicants. Most businesses just want to do the right thing. Please don't make it more difficult for us to do so.

Thank you for the opportunity to present this testimony.

Elise M. Ambrose  
President, Elite Personnel  
301-951-3333

Testimony of William Moore

Bill 36-14 Human Rights and Civil Liberties-Fair Criminal Record Screening Standards

September 9, 2014

Good afternoon members of the Council. Thank you for the opportunity to testify on Bill 36-14. My name is William Moore, President of the Wheaton/Kensington Chamber of Commerce and owner of two IHOP restaurants in the county.

I oppose this Bill as written. It is certainly laudable to help those with criminal records reintegrate into society by gaining access to job interviews. I too applaud that goal and can support removing the question from the application. However, this Bill goes far beyond "Banning the Box". By eliminating my ability to inquire about criminal convictions in the interview process you tell the applicant that its okay to conceal information which may be pertinent to their hiring and you strike at the very foundation of a successful employee-employer relationship-honesty and trust. That will poison that relationship before it even begins.

I have a legal obligation to ensure the safety of my employees and guests. The most vital aspect of fulfilling that obligation is the interview process. You ask me to look at the whole person. Where I do that is the interview. But yet you want me to look at the whole person with only the information he chooses to tell me. Worse, you are now handing the applicant a legal weapon whereas if he doesn't get the job he can file a grievance. Now my judgment based on forty years of restaurant experience will be subjugated to a bureaucrat on the Human Rights Commission who has no stake in, and does not have to live with the consequences of their decision. For you, this is an experiment in social engineering. For me this could be a matter of life or death. Do you know what it's like to be down on the floor, wrapped up in duct tape, with a machine gun pressed against your head, seconds after you prayed the safe would open as you nervously dialed the combination? I do. And this trauma is still vivid to me twenty years later and all the more unnerving knowing it was the result of a setup by an employee.

There are financial incentives in this Bill for aggrieved rejected applicants to file a complaint based on nothing more than the fact that they can. Where is my protection from what could be endless headaches and expense from responding to these complaints to the Human Rights Commission? Protecting the rights of ex-offenders should not pre-empt the right for me to run my business, or worse, put me out of business simply because I did my best to balance conflicting legal obligations.

So, in summary, I ask for the following support from the Council as struggling businesses work to create jobs:

- A. Ban the Box but don't ban the interview. This is where I accomplish your goal of evaluating the whole person
- B. Respect strapped employers time by realizing that we hire employees as needed and don't have the resources needed to handle the notification requirements nor the ability to wait as an applicant examines and then chooses to correct or not correct their record

C. Remove financial incentives for an applicant to file a grievance with the Human Rights Office. This bill should remain about getting an interview, not getting paid. All violations of this Bill should result solely in a fine paid to the county, not the applicant. And those fines should be earmarked by law to only go to programs that help ex-offenders reintegrate into society.

Thank you for this consideration.



*THE VOICE OF MONTGOMERY COUNTY BUSINESS*

Montgomery County Council  
Public Hearing  
September 9, 2014

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

OPPOSE

MCCC members are large, medium-sized and small businesses engaged in a wide variety of industries. MCCC focuses on helping members be successful as they grow their business. Therefore, MCCC advocates for public policy that retains, attracts, and expands vibrant economic activity. A successful business community is essential to generate the resources that support the broader community.

Montgomery County needs knowledge-based, technology-driven jobs in targeted industries such as cyber security, health information technology and the biosciences. This legislation runs counter to the realities businesses face in attracting talent in a competitive global marketplace. Hiring practices vary widely by industry, size and nature of the business. Some employers have large Human Resources Departments and automated application processes to manage the large volume of applications for any number of positions open at any time. Other employers rely on resumes, references and interviews to screen candidates.

For all employers, hiring employees and making sure talent matches the needs of the company is one of the most critical aspects of running a business. Job opportunities will not be available if employers are reluctant to hire in Montgomery County, where regulatory initiatives exceed requirements at the state level. This legislation as written will undermine the important efforts underway to grow jobs in Montgomery County.

As you deliberate the “banning the box” legislation here in Montgomery County, we implore you to consider modifying key areas to make this effort work for all parties involved, including the applicant who may unwittingly be applying for a job that he or she may not qualify due to criminal convictions.

Key areas to consider:

Consistency with existing procedures

This legislation has the unintended effect of creating a patchwork quilt of employer-employee labor laws that are best addressed through a consistent approach at the state level. In 2013, legislation passed at the state level that moved the inquiry into criminal history to the interview stage of the application process. The law applies to State employees, with important exemptions including any position within the State Personnel Management System exempted by the Secretary of Budget and Management. If this standard is acceptable for State jobs, it seems prudent to provide consistency by using a similar standard of inquiry at the interview stage in Montgomery County for public and private sector employers.

Gigi Godwin, President and CEO  
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#### Exemptions (27-74 c)

Employees working with minors or vulnerable adults are already exempt from this legislation for understandable reasons. Businesses need to be able to provide assurances to customers. We assert this is true in other categories as well including positions where an employee has access to the homes or property of customers or access to sensitive personal identifying information or financial information. It is critical that during these scenarios, customers can remain confident that the companies that they are taking services from and are engaged with are permitted to take every reasonable step possible at an appropriate time in the job application process to ensure the integrity of the employees who work for them. Therefore, we would like to see more job categories exempt from this legislation.

#### Notification (27-73)

As currently written, this legislation requires an employer who bases an adverse action on an applicant's criminal record to provide the applicant "the items that are the basis for the prospective adverse action." This would require individual letters to be generated in each such case, which would impose unreasonable and unnecessary costs upon employers. We urge the County to require only that notification of a prospective adverse action be accompanied by a copy of the report that the employer considered in making the prospective adverse action. An employer should not be required to prepare customized communications.

#### Fines (27-8)

If the applicant files a complaint with the Office of Human Rights and the Human Rights Commission determines, based on its review, that a violation of the law has occurred, this legislation provides "damages and other relief for complainant" and civil penalties. Any fine should be paid to the County and not to an individual.

To be clear, we appreciate the intention of this bill and the goals of the "Ban the Box" movement which focuses on removing the 'check box' from initial job applications. In its present form, this legislation goes beyond simply removing a check box from an initial job application. This legislation, as written, dictates to private sector employers how they must manage the hiring process, which is an integral component of operating a business. It makes it more difficult to operate as a business in Montgomery County which makes it harder to grow jobs. We urge the County to modify the proposal to minimize the risk that this legislation will discourage job growth.

We look forward to working with you to amend this legislation in such a way to preserve the good intentions while, at the same time, respecting the needs of employers as they try to grow their businesses.

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## Ban-the-Box Movement Goes Viral

*Dozens of cities and states restrict employers from asking job applicants about criminal convictions*

By Roy Maurer 8/22/2014

The District of Columbia, Illinois and New Jersey have joined 66 cities and counties and 11 states to pass “ban-the-box” laws, preventing employers from asking about prior criminal history on job applications.

Ban the box refers to the check box on employment applications asking whether the candidate has ever been convicted of a crime. Ban-the-box laws require hiring managers to put off asking about a candidate’s criminal history until after an interview has been conducted or a provisional job offer has been extended.

(Article continues below)



Source: The National Employment Law Project Resource Guide (July 2014)

"Civil rights groups and others view ban-the-box initiatives as important toward re-entry efforts by ex-offenders, the argument being that these measures reduce unfair barriers to employment for those with criminal records," said Montserrat Miller, a partner in the Washington, D.C., office of Arnall Golden Gregory.

The ban-the-box movement has gone viral, remarked Angela Preston, vice president of compliance and general counsel at background screening firm EmployeeScreenIQ. "The removal of this little check box has potentially made life easier for job seekers with a criminal past, but it has created much confusion and frustration for employers," she said. "Ban the box shows no signs of slowing down, and it's creating new headaches, not to mention real risks, for employers across the country."

New Jersey is the latest state to enact a ban-the-box measure. (</legalissues/stateandlocalresources/pages/nj-criminal-record-bill.aspx>) The law, signed Aug. 11, 2014, applies to an employer with 15 or more employees and prohibits that employer from inquiring about the applicant's criminal record during the initial employment application process. It goes into effect March 1, 2015 and pre-empts the Newark ordinance on that date.

On July 19, 2014, Illinois Gov. Pat Quinn signed a law preventing criminal background checks (</legalissues/stateandlocalresources/pages/illinois-ban-the-box.aspx>) before an applicant has gone through the interview process. The law takes effect Jan. 1, 2015, and covers private employers with 15 or more employees. Quinn had previously issued a ban-the-box policy for public jobs in 2013.

On July 14, 2014, the Council of the District of Columbia unanimously approved the Fair Criminal Record Screening Act prohibiting private employers from inquiring about an applicant's criminal conviction record until the employer has extended a conditional job offer. Mayor Vincent Gray is expected to sign the legislation into law, but a potential wrinkle in this case is that it must also pass congressional review. The district enacted a ban-the-box law in 2011 for public hiring. In a potential class-action lawsuit filed July 30, 2014, nine black men alleged that the Washington Metropolitan Area Transit Authority denied them employment for irrelevant criminal offenses in their past, in violation of their civil rights (</hrdisciplines/safetysecurity/articles/pages/dc-metro-sued-screening-policy.aspx>).

Currently, 13 states have passed ban-the-box laws: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico and Rhode Island.

Additional states with cities and counties that have banned the box include: Florida, Georgia, Indiana, Kentucky, Louisiana, Michigan, Missouri, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington and Wisconsin.

### **Blanket Laws Gaining Traction**

The majority of ban-the-box laws apply only to public employers, but blanket ban-the-box laws impacting all sectors are on the rise. Many advocates embrace private-sector ban-the-box laws as the "next step in the evolution of these policies," according to the National Employment Law Project (NELP), a worker advocacy organization.

"Employers now have to comply with a dizzying number of variations on banning the box, not only from state to state, but city to city," said Preston. In addition to laws in Illinois and New Jersey taking effect next year, laws affecting private employers currently exist in Hawaii, Massachusetts, Minnesota and Rhode Island.

"The trend on passage of ban-the-box measures will continue at the state level and should therefore be considered holistically by companies as they consider their overall hiring and retention practices with respect to the use of criminal history records," advised Miller.

There are also various city and county ban-the-box laws around the country that apply to private employers. Beginning Aug. 13, 2014, employers in San Francisco are barred from asking applicants about their criminal history (</legalissues/stateandlocalresources/pages/ca-ban-the-box.aspx>) until after the first live interview or following a conditional offer of employment. Further, under the San Francisco law, employers are restricted from looking at certain types of arrests or convictions anytime in the hiring process. Other local governments have passed similar ordinances, including Baltimore, Newark, N.J., Philadelphia, and Seattle. Many more are considering doing so.

"Companies doing business in multiple jurisdictions now have to consider the law and policy of each location, possibly having different processes depending on where they're located," Preston said.

Many ban-the-box policies exempt employers that have 10 employees or less, but some, such as Minnesota's, do not. And while many private employers have balked at ban-the-box policies, at least two large retailers have jumped on board. National retailers Target and Wal-Mart no longer ask about an applicant's conviction record during the initial phase of the hiring process, according to NELP.

In order to comply with the 2013 Minnesota law, Minneapolis-based Target announced it was eliminating the box on its applications. Wal-Mart took that action in 2010.

### **Impact on Employers**

Critics of ban-the-box measures say the laws raise the stakes for potential litigation and penalties, complicate the hiring process, and erode safety and security.

"Employers are in the best position to assess their hiring needs," remarked Melissa Sorenson, executive director of the National Association of Professional Background Screeners. It should generally be up to each employer to determine when in the hiring process criminal history information is most relevant, she said.

Rich Mellor, head of loss prevention at the National Retail Federation, sees it as a safety and security issue. "No retailer can make decisions without all the relevant and necessary facts," he said. Retailers and businesses across the board have an obligation to their employees and customers to create and maintain a safe workplace, he added.

"From a risk mitigation and due diligence perspective, employers need to be informed about job applicants' past history as it is important to maintaining a safe work environment, especially if there is a criminal past," said Miller. "In the interest of transparency, it is beneficial for HR to know relevant information as early in the process as possible if the goal is to make informed decisions."

Depending on the facts, an employer in Virginia can be liable for failing to conduct a reasonable investigation of an applicant it hires who then harms another person during employment, noted Todd Leeson, a partner with Gentry Locke in Roanoke, Va., and legislative director for the Virginia Society for Human Resource Management State Council.

"Consider these allegations from a 2012 Virginia case," Leeson said. "The employer hired a person to work in a hotel, and allegedly did not perform a background check or ask about the person's criminal history. The person had previously been convicted of a felony sex crime. The person thereafter raped an 18-year-old hotel maid on her third day on the job. The maid sued the hotel for negligent hire. The case settled with the hotel agreeing to pay \$675,000 to the former maid." Ultimately, Leeson said, "I believe it is reasonable and prudent for employers to ask about prior convictions as one factor in the overall evaluation of the applicant."

### HR Challenges

Most ban-the-box laws do much more than just eliminate a check box, Preston said. "Some employers mistakenly believe that if they remove the check box from the application, they're covered. Not so," she said. Preston said that most ban-the-box laws contain additional notice requirements, job-related screening tests, and limits on the scope or type of criminal record that can be considered. "No two versions of ban the box are the same, and they often conflict or overlap with existing anti-discrimination laws, the Fair Credit Reporting Act (FCRA) (</legalissues/federalresources/federalstatutesregulationsandguidanc/pages/faircreditreportingact%28fcra%29of1969.aspx>), and other laws requiring or relating to background screening," she said.

According to Preston, there are a few "hidden" factors to watch out for in ban-the-box legislation, which increases exposure for employers and increases the cost of hiring:

- Statutes and ordinances that often include language establishing a test for employers that must be undertaken before asking about criminal history. These tests may include some variation of the Equal Employment Opportunity Commission's "Green" factors—referring to the three components identified by the Eighth Circuit in the 1975 *Green v. Missouri Pacific Railroad* decision that were relevant to assessing whether a criminal record exclusion is job-related for the position in question and consistent with business necessity. The three factors to consider are the nature and gravity of the offense; the time that has passed since the offense and/or completion of the sentence; and the nature of the job held or sought.
- Limitations on the types of records employers can consider in a specific jurisdiction. "These limitations may conflict with FCRA requirements, or existing laws that allow or restrict information used in the hiring process. They may also conflict with state laws prohibiting the hire of ex-offenders for certain regulated jobs, like banking or health care," she said.
- Notifying the applicant when criminal information is being used, and requiring that the employer provide the applicant with a copy of the record. "This requirement is a duplication of the adverse-action requirement that already exists as a protection under the FCRA," Preston said.

In addition, complying with the laws can prove time-consuming and counterproductive, especially for small businesses with limited HR staff managing the hiring process, said Sorenson. "Individuals with prior criminal convictions may spend time applying and interviewing for positions which they are not qualified for due to their criminal conviction."

### Your Box Is Banned, Now What?

"From a best-practice perspective, employers who operate on a nationwide basis may want to consider the most stringent ban-the-box requirement from the relevant jurisdictions in which they operate to determine if that model is one that would be appropriate for their company," said Miller. "Where possible, I recommend that companies move the question regarding criminal history to further in the hiring process. Remove it from the job application unless there is an absolute need to know about someone's criminal history."

Sorenson advised HR professionals to find attorneys with employment screening expertise to review their hiring practices that may be impacted by ban-the-box laws in their hiring locations. HR should be prepared to provide counsel with a list of all hiring locations, a document outlining the hiring process, and documents that are involved in the hiring process, including employment applications, offer letters and adverse-action notices, she said.

*Roy Maurer is an online editor/manager for SHRM.*

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September 29, 2014

Dear Council President Rice and members of the County Council,

Thank you for the opportunity to provide the business perspective on proposed legislation in Bill 36-14. We recognize the spirit of the initiative and look forward to working with you to make it a meaningful and constructive piece of legislation for all parties involved.

To that end, there are four main areas we, as a group, would like to recommend be modified to address real concerns expressed by our members. Those areas include timing, notification, protection for employers, and penalties.

Timing

For many employers, background information is an integral part of the application process—and certainly, for most others, it is a critical part of the interview process. **We request that inquiry into the background of an applicant be allowed during the interview stage of the application process.**

Based on our understanding of the September 2014 report on the National Employment Law Project website, 13 states, including Maryland, have passed some type of Ban the Box legislation. Of those, only six -- Hawaii, Illinois, Massachusetts, Minnesota, New Jersey and Rhode Island -- apply the law to private employers. Hawaii is the only state that requires the private employer to wait to conduct a background check until after the conditional offer.

Of the 70 local jurisdictions (cities and counties) that have enacted "Ban the Box" legislation, only 8 apply the law to private employers (13 others apply it to only private employers that are local government contractors). Of the 8, only 3 -- D.C., Baltimore, and Newark, NJ -- allow a background check only after a conditional offer of employment has been made. The others allow the question at or after the first interview.

### Notification

**We urge that the Montgomery County legislation be amended to read as the newly established law in the District of Columbia does with regard to notification.** That is, an applicant/employee must affirmatively request copies of the criminal background information obtained and/or considered by the employer. The initial burden of action is; therefore, on the applicant who may suspect that inappropriate or unlawful consideration was given. This is a more reasonable approach that limits the potential burden on employers and still fully supports the intent and enforcement of the law.

### Employer Protections

As currently drafted, there is great ambiguity in the language in the bill that exposes an employer to increased liability in exercising his or her experience and judgment in the hiring process. As the County Attorney's memo suggests, **we request clear delineation of criteria and standards in the arbitration process.** There should also be language inserted that minimizes the opportunity for frivolous allegations and ensures that an employer's time and resources are not drained when trying resolve these situations.

As suggested during the public hearing, there needs to be greater certainty around voluntary disclosure and inquiry into employment gaps and protection for an employer who unwittingly engages in off limit topics (note, this is a non-issue if the legislation allows the topic to be discussed at the interview stage). If, at any time, an applicant/employee voluntarily discloses criminal background information—as, for instance, many ex-offender programs encourage or require their clients to do-- or does so in response to an employer's innocent inquiry about an extended employment gap, **the bill should make clear that subsequent inquiry by the employer will not be considered actionable.**

### Penalties

As currently drafted, the 'certain relief,' as well as civil penalties paid to the County, are problematic. There are inherent conflicts of interest created by such provisions, both for the individual and the Office of Human Rights. The Council should avoid creating potential financial incentives for alleging violations; we note that the recently enacted District of Columbia law makes the Office of Human Rights complaint process **the exclusive remedy, and believe that your bill should do likewise. We request that penalties, such as they are assigned, should be clear and objective.** Fines should be paid solely to the County and dedicated to a special fund that supports pre-release programs in Montgomery County.

To stay in business, employers are responsible for the successful operation and delivery of products and services to their customers, tenants and clients. In that capacity, they manage

employees and serve the public. Employers must concern themselves with the well-being of employees, clients, tenants and customers, shareholders and the general public.

It is the employer who is held liable when things go wrong. The hiring process is one of the most integral aspects of running a business. Legislation that balances the fair treatment of all applicants/employees with the legitimate needs of the employer is the goal we should strive to achieve in Bill 36-14. We believe our recommendations further that goal.

Thank you for addressing these concerns.

Respectfully,

Marilyn Balcombe  
President and CEO  
Gaithersburg Germantown Chamber of Commerce

Ginanne Italiano  
President and CEO  
Greater Bethesda Chevy Chase Chamber of Commerce

Jane Redicker  
President and CEO  
Greater Silver Spring Chamber of Commerce

Georgette "Gigi" Godwin  
President and CEO  
Montgomery County Chamber of Commerce

William Moore  
President  
Wheaton/Kensington Chamber of Commerce

W. Shaun Pharr, Esq.  
Senior Vice President, Government Affairs  
The Apartment and Office Building  
Association of Metropolitan Washington

cc: County Executive Ike Leggett



# Mistaken identity in background checks can cost applicants job offers

*August 23, 2014 at 12:25 PM EDT*

Today, nearly 90 percent of employers run a check on at least some of their applicants. As more employers throughout the country use background checks to review job applicants, NewsHour Weekend's Megan Thompson takes a look at the job-screening process, which has recently come under fire for inaccurate reports that can cost people jobs.

## TRANSCRIPT

**MEGAN THOMPSON:** In 2012, Kevin a. Jones applied for a part-time job as a doorman in New York City. He was soon called in for an interview at the large property management company, Halstead.

**KEVIN JONES:** The interview actually went very well. I hand him my resume. We talked about my background. And he basically ended the interview by saying, "We would love to have you work for us."

**MEGAN THOMPSON:** Great news for the divorced 58-year-old father and professional driver who needed the extra money to help pay child support. Jones filled out the paperwork, submitted a drug test and waited to hear when he could start. Instead, he got a different kind of call.

**KEVIN JONES:** And Human Resources said, "There's a problem with your background check." And I said, "What problem?" "Yeah, there's some criminal stuff going on. You need to talk to them."

**MEGAN THOMPSON:** It turned out the background check – conducted by a company now called Sterling BackCheck – showed convictions for drunk driving, attempted petit larceny and forgery, and two stints in jail. A few days later, Jones got a letter in the mail saying unless he could clear the matter up, his job offer was being revoked.

**MEGAN THOMPSON:** Do you have any kind of criminal history?

**KEVIN JONES:** None. Never. Ever. I was upset. And of course, embarrassed. You know. I'm thinking this is not right. You guys have made a major mistake and this needs to be fixed.

**MEGAN THOMPSON:** Jones says after months of phone calls with no resolution, he had to get a lawyer to sort it out. But by then, the damage had been done. So earlier this year, he became lead plaintiff in a class action lawsuit against Sterling, accusing it of “systematically failing to use reasonable procedures” to ensure accuracy, as required by the federal Fair Credit Reporting Act. Jones also sued his would-be employers, Halstead and Brown Harris Stevens, alleging they denied him adequate opportunity to dispute the report, his right under federal law.

**JIM FRANCIS:** These companies are getting thousands of disputes a year from consumers who are claiming that there's an inaccuracy on their background check.

**MEGAN THOMPSON:** Jim Francis is one of Jones's attorneys, whose firm specializes in cases of botched background checks.

**JIM FRANCIS:** It's a very, very troubling problem. And one that I don't see abating at any time in the near future.

**MEGAN THOMPSON:** Since 9/11, the background screening industry has grown dramatically. Today, almost 90% of employers screen their applicants meaning millions of checks are done every year. The idea is to avoid problems and keep the workplace safe. But critics say the sources some screeners get their information from—bulk databases or other companies called data brokers—can be flawed. And the volume and speed at which it's all compiled can mean mistakes are made, jobs lost and reputations ruined.

**JIM FRANCIS:** What is the cause of it is a business model from the background screening industry that promotes speed and value of sales over accuracy and care.

**MEGAN THOMPSON:** In recent years, hundreds of lawsuits have been filed against background check companies, some are resulting in multi-million dollar class action settlements. In the last two years, the Federal Trade Commission has also stepped up its enforcement—issuing hefty fines against major screeners and data brokers. What’s more, the burden can fall on the job applicant to get a mistake fixed and most don’t know where to begin.

**KEVIN JONES:** I was disagreeing vehemently, but they- they weren’t listening. And- and no one was helping. It wasn’t like there was a suggestion, “Well, why don’t you try this?” You know.

**MEGAN THOMPSON:** In the case of his client, Kevin A. Jones, Jim Francis contacted the local courthouses and pulled the actual records. He found all those convictions belonged to a man in upstate New York with the same first and last name, and birthday. But all the records showed this man had a different middle initial—M. He also had completely different home addresses than the other Kevin Jones.

**JIM FRANCIS:** There was plenty of information available in the actual public record that would be able to prove that he was not the person who was the subject of these criminal records. But, they didn’t get these records.

**MEGAN THOMPSON:** There is no central government database that contains criminal history information from the thousands of local jurisdictions across the U.S. and Francis says the massive databases background screeners compile themselves or get from outside data brokers can be incomplete and out of date.

**MANEESHA MITHAL:** You have to see that if there’s some information that doesn’t match, if there are multiple fields that don’t match, you have to ask more questions.

**MEGAN THOMPSON:** Maneesha Mithal is the associate director of The Division of Privacy and Identity Protection at the Federal Trade Commission which enforces the Fair Credit Reporting Act. It requires that background screeners use “reasonable procedures to assure

maximum possible accuracy.” It also guarantees a free copy of the background report and requires the screener to reinvestigate if a job applicant disputes something in their report.

**MANEESHA MITHAL:** If you have a sex offender applying for a job at a daycare, you don’t want to require necessarily that every piece of information matches. Because you want to be able to catch people who might have a transposed middle initial, but actually are the sex offenders.

At the same time, you don’t want people who are not sex offenders to be denied that job based on erroneous information. So, what we’ve told companies is that you have to have reasonable procedures. You have to do some due diligence. You have to do some checking.

**MEGAN THOMPSON:** Is there any requirement that these background screening companies have to register with anyone? Or is there any kind of national sort of list of these companies?

**MANEESHA MITHAL:** No, there isn’t.

**MEGAN THOMPSON:** So, we don’t know how many com- of these companies are even out there?

**MANEESHA MITHAL:** No, we don’t. And I think that’s one of the challenges.

**MEGAN THOMPSON:** We asked for a statement from Sterling Backcheck, the company that issued Kevin Jones’s background report. It declined comment. But in a court filing, the company denied the allegations and any liability to Jones or other plaintiffs. Jones’s would-be employers, Halstead and Brown Harris Stevens, said in a statement they engage an independent, third party provider to complete background checks and “if there was a case of mistaken identity by our screening company, we are nonetheless sympathetic to Mr. Jones’s situation and have so informed his council We support the fair credit reporting act and believe that we are fully compliant with its requirements.”

**MELISSA SORENSON:** Certainly the- one or two that come through that ha- may have a potential issue are the ones that become more noteworthy and noticeable. What you don’t necessarily hear about are the millions of successful screens that are happening each and every day.

**MEGAN THOMPSON:** Melissa Sorenson is the executive director of The National Association of Professional Background Screeners, an industry group with about 700 members, including many of the biggest screening companies. It launched its own accreditation program four years ago and says about 10 percent of its members have gone through it. But Sorenson says there is no information publicly available about the accuracy rate in the industry. But Sorenson says, anecdotally, the error rate is very low.

**MELISSA SORENSON:** For all of our members, accuracy is key to the product that they're providing. It's key not only because it's critical and mandatory under federal law/. But their customers demand an end product that's accurate and that they can use in making a hiring decision.

**MEGAN THOMPSON:** Sorenson says if a screener finds something questionable, The Fair Credit Reporting Act requires it either check the original source, or give notice to the employer and job applicant.

**MEGAN THOMPSON:** So, you're saying that the screener can then just send a letter to the employer and the consumer saying, "Hey, we found this. / I mean, hasn't the damage then already been done?"

**MELISSA SORENSON:** With that initial notice that comes out, you then have the opportunity as a consumer to dispute that information.

**MEGAN THOMPSON:** Sorenson says screeners have a duty to reinvestigate if a dispute is made, but there are no requirements about what a reinvestigation entails. And, if a job applicant does get a mistake fixed, that information isn't necessarily shared among the other companies.

**MELISSA SORENSON:** Background screening companies operate independently. It's possible that if a background screen show- something came back on a background screen for a particular individual and then another screening company performed a screen, the same information could show up.

**MEGAN THOMPSON:** And that's exactly what Kevin Jones says he's worried about.

**KEVIN JONES:** If it happened once, it could happen again. If- It's unfortunate to feel that way, but it happened. So, I- I have to feel that way.

**MEGAN THOMPSON:** Jones is now working full-time and says he hopes his lawsuits will help prevent this from happening to someone else. His cases are currently pending in New York District Court.



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## Using Consumer Reports: What Employers Need to Know

Your company has job vacancies to fill. You're also thinking about promoting some employees from within the company. You've winnowed down the stack of applications and resumes and want to run background checks through a third party company who is in the business of compiling background information.

Employment background checks also are known as consumer reports. They can include information from a variety of sources, including credit reports and criminal records.

When you use consumer reports to make employment decisions, including hiring, retention, promotion or reassignment, you must comply with the Fair Credit Reporting Act (FCRA). The Federal Trade Commission (FTC) enforces the FCRA.

### Complying with the FCRA

You must take certain steps before you can get a consumer report, and before and after you take an adverse action based on that report.

#### Before You Get a Consumer Report

You must:

- Tell the applicant or employee that you might use information in their consumer report for decisions related to their employment. This notice must be in writing and in a stand-alone format. The notice cannot be in an employment application. You can include some minor additional information in the notice, like a brief description of the nature of consumer reports, but only if it does not confuse or detract from the notice.
- Get written permission from the applicant or employee. This can be part of the document you use to notify the person that you will get a consumer report. If you want the authorization to allow you to get consumer reports throughout the person's employment, make sure you say so clearly and conspicuously.
- Certify compliance to the company from which you are getting the applicant or employee's information. You must certify that you:
  - notified the applicant or employee and got their permission to get a consumer report;
  - complied with all of the FCRA requirements; and

- will not discriminate against the applicant or employee or otherwise misuse the information, as provided by any applicable federal or state equal opportunity laws or regulations.

It's a good idea to review applicable laws of your state related to consumer reports. Some states restrict the use of consumer reports – usually credit reports – for employment purposes.

### **Before You Take an Adverse Action**

Before you reject a job application, reassign or terminate an employee, deny a promotion, or take any other adverse employment action based on information in a consumer report, you must give the applicant or employee:

- a notice that includes a copy of the consumer report you relied on to make your decision; and
- a copy of A Summary of Your Rights Under the Fair Credit Reporting Act, which the company that gave you the report should have given to you.

Giving the person the notice in advance gives the person the opportunity to review the report and tell you if it is correct.

### **After You Take an Adverse Action**

If you take an adverse action based on information in a consumer report, you must give the applicant or employee a notice of that fact – orally, in writing, or electronically.

An adverse action notice tells people about their rights to see information being reported about them and to correct inaccurate information. The notice must include:

- the name, address, and phone number of the consumer reporting company that supplied the report;
- a statement that the company that supplied the report did not make the decision to take the unfavorable action and can't give specific reasons for it; and
- a notice of the person's right to dispute the accuracy or completeness of any information the consumer reporting company furnished, and to get an additional free report from the company if the person asks for it within 60 days.

### **Investigative Reports**

Employers who use "investigative reports" – reports based on personal interviews concerning a person's character, general reputation, personal characteristics, and lifestyle – have additional obligations under the FCRA. These obligations include giving written notice that you may request or have requested an investigative consumer report, and giving a statement that the person has a right to request additional disclosures and a summary of the scope and substance of the report. (See 15 U.S.C. section 1681d(a), (b)).

## Disposing of Consumer Reports

When you're done using a consumer report, you must securely dispose of the report and any information you gathered from it. That can include burning, pulverizing, or shredding paper documents and disposing of electronic information so that it can't be read or reconstructed. For more information, see [Disposing of Consumer Report Information? New Rule Tells How](#).

## For More Information

Visit the [FTC's Business Center: Your Link to the Law](#). There, you can find [specific FCRA information](#) on:

- Getting consumer reports (see Section 604(b) of the FCRA, 15 U.S.C. § 1681b(b));
- Taking an adverse action (see Section 604(b), 15 U.S.C. § 1681b(b), and Section 615(a)), 15 U.S.C. § 1681m(a);
- Compliance for the trucking industry (see subsections (b)(2)(B), (b)(2)(C), and (b)(3) of Section 604 (b), 15 U.S.C. § 1681b(b));
- Using investigative consumer reports (see Section 606 of the FCRA, 15 U.S.C. § 1681d);
- Investigating misconduct (see Section 603(x) of the FCRA, 15 U.S.C. § 1681a(x)).

The FTC works to prevent fraudulent, deceptive and unfair business practices in the marketplace and to provide information to help consumers spot, stop and avoid them. To file a [complaint](#) or get free information on [consumer issues](#), visit [ftc.gov](http://ftc.gov) or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. Watch a video, [How to File a Complaint](#), to learn more. The FTC enters consumer complaints into the [Consumer Sentinel Network](#), a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

## Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to [www.sba.gov/ombudsman](http://www.sba.gov/ombudsman).

January 2012

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# Criminal History Checks and The Fair Credit Reporting Act

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January 08, 2014  
Author: Carla Cox & Alicia Duleba  
Organization: Jackson Walker L.L.P.

Many employers are required by law to perform criminal history checks (<https://www.lorman.com/humanresources.php>) prior to making permanent offers of employment to certain types of employees. Other employers conduct pre-offer criminal history checks on applicants for certain jobs. Recently, we were asked if criminal history checks performed by an employer on certain categories of employees were subject to the provisions of the Fair Credit Reporting Act (<http://www.lorman.com/ondemand/392273EAU>) ("FCRA").

The answer, as is often the case with legal questions, depends on the facts. If an employer, in compliance with state law, requests a criminal history check from the Texas Department of Public Safety ("DPS"), the Federal Trade Commission does not consider the criminal history check subject to the requirements of the FCRA.1 The DPS is not a "consumer reporting agency" under the FCRA and the communication of criminal record data to the employer is not a "consumer report" even if the information is being used in connection with an employment decision.

On the other hand, if an employer retains a company to perform pre-employment screening services including criminal history checks, identification and Social Security number checks, education verifications, employment verifications, and reference checks, such activities do involve the provision of consumer reports since they touch upon an individual's "character, general reputation, personal characteristics, or mode of living." Further, the company providing the criminal history check is a "consumer reporting agency" ("CRA") which is defined in the FCRA as any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties."2

If an employer acquires a report for employment purposes, including a criminal history report from a CRA, the employer has certain duties under the FCRA. The employer is required to disclose to each affected employee (or applicant for employment) that the employer is obtaining a consumer report for employment purposes and to obtain the employee's or applicant's written permission before a report is obtained. In addition, before any adverse action (including refusal to hire) is taken based on the information in the report, Section 604(b)(3) of the FCRA requires the employer to provide to the consumer a copy of the report and the summary of the employee's or applicant's rights prescribed by the FTC. These rights include giving the applicant the opportunity to contact the employer and the consumer reporting agency to dispute or explain information in the report that the applicant believes is inaccurate or incomplete. Once an adverse action is actually taken, the employer must also comply with Section 615(a) of the FCRA and provide an adverse action notice to the applicant.

Because the FCRA places additional burdens on employers, employers should be aware of these distinctions and, if an employer obtains information from a consumer reporting agency for employment purposes, the employer should comply with the requirements of the FCRA.

(Footnotes)

f (<http://www.facebook.com/sharer.php?u=https://www.lorman.com/resources/criminal-history-checks-and-the-fair-credit-reporting-act-15729%3Fp%3D17996&t=Criminal+History+Checks+and+T>)  
g+ (<https://plus.google.com/share?url=https://www.lorman.com/resources/criminal-history-checks-and-the-fair-credit-reporting-act-15729%3Fp%3D17869>)  
in (<https://www.linkedin.com/shareArticle?mir=https://www.lorman.com/resources/criminal-history-checks-and-the-fair-credit-reporting-act-15729%3Fp%3D17997&title=Criminal+History+Checks+and+The+Fair+Cr>)  
3BFCRA%26rdquo%3B%29.%3C%2Fp%3E)  
t (<https://twitter.com/share?text=Criminal+History+Checks+and+The+Fair+Cr>)  
3A%2F%2Fbit.ly%2F1VM6wg&counturl=https://www.lorman.com/resources/criminal-history-checks-and-15729%3Fp%3D17995&related=LormanEduc

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1 1998 FTC Opinion Letter, Goeke: <http://www.ftc.gov/os/statutes/fcra/goeke.htm>  
<http://www.ftc.gov/os/statutes/fcra/goeke.htm>

2 1998 FTC Opinion Letter, Beaudette: <http://www.ftc.gov/os/statutes/fcra/beaudett.htm>  
<http://www.ftc.gov/os/statutes/fcra/beaudett.htm>

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## Staff Amendment 1

*Amend lines 195-218 as follows:*

\* \* \*

(b)) If an employer intends to [[base an adverse action]] rescind a conditional offer based on an item or items in the applicant's [[or employee's]] arrest record or conviction record, before [[taking the adverse action]] rescinding the conditional offer the employer must:

- (1) provide the applicant [[or employee]] with a copy of any criminal record report; and
- (2) notify the applicant [[or employee]] of the [[prospective adverse action]] intention to rescind the conditional offer and the items that are the basis for the [[prospective adverse action]] intention to rescind the conditional offer; and
- (3) delay rescinding the conditional offer for 7 days to permit the applicant to give the employer notice of inaccuracy of an item or items on which the intention to rescind the conditional offer is based.

[[c)](b) [[If, within 7 days after the employer provides the notice required in subsection (b) to the applicant [[or employee,]] the applicant [[or employee]] gives the employer notice of evidence of the inaccuracy of any item or items on which the [[prospective adverse action]] intention to rescind the conditional offer is based, the employer must[[:

- (1)) delay [[the adverse action]] rescinding the conditional offer for a reasonable period after receiving the information[[; and
- (2) reconsider the prospective adverse action in light of the information]].

[(d)](c) Within 7 days after [[taking final adverse action]] rescinding the conditional offer based on the arrest record or conviction record of an applicant [[or employee]], an employer must notify the applicant [[or employee]] of the [[final adverse action]] rescission of the conditional offer in writing.

\* \* \*

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