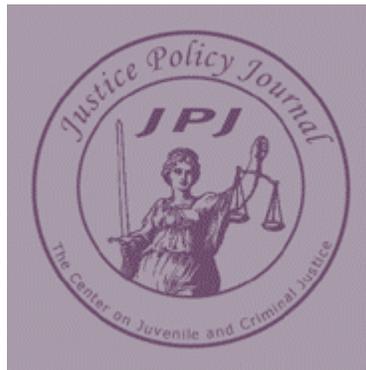


**Criminal History on a
"Need To Know" Basis: Employment
Policies that Eliminate the
Criminal History Box on
Employment Applications****

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Abstract

Employment is a critical component of successful reentry by ex-offenders to society. Major cities such as Boston, San Francisco and Chicago implemented an innovative and cost-effective initiative to promote the employment of ex-offenders by removing from public employment applications all questions relating to an applicant's criminal history. Prisoner rights advocates had argued that the presence of the criminal history question on job applications deterred ex-offenders from applying to jobs for which they were otherwise qualified and also resulted in employment discrimination based on ex-offender status. Initial data indicate that the implementation and effectiveness of the policy vary considerably between cities. Significant limitations of the policies should be addressed to ensure the intended outcome of increased ex-offender employment.

About the Author

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Criminal History on a “Need To Know” Basis: Employment Policies that Eliminate the Criminal History Box on Employment Applications

Introduction

When completing an employment application, job seekers are typically required to provide their name, address, education and work history. They also are often asked to reveal whether they ever have been charged with or convicted of a crime. An affirmative answer to this criminal history question may lead to the automatic elimination of the applicant from the applicant pool, even where the conviction is not relevant or related to the available position and even where the candidate is otherwise qualified. In this way, the criminal history “box” on an employment application presents an initial and sometimes insurmountable barrier that prevents individuals with criminal histories from obtaining employment and discourages them from applying for available positions in the first instance.

The issue of employment for ex-offenders has taken on new urgency among state and local governments. At the end of 2005, nearly one in every 32 adults was in a prison, a jail, on parole or probation (Glaze & Palla, 2006; Harrison & Beck, 2006). Approximately 600,000 offenders are expected to return to their communities each year (Travis, 2005). These individuals face multiple and complex barriers to successful reentry to society. For instance, persons with a criminal conviction may be statutorily precluded from public housing, public assistance and educational grants (Henry, 2007). Further complicating the reentry landscape are structural barriers to the employment of ex-offenders, including employer discrimination against ex-offenders and legal limitations on the types of jobs available to individuals with a criminal record.

Yet, unemployment among ex-offenders poses a serious concern for policymakers. Criminologists are in near universal agreement that unemployed persons with a criminal history

are more likely to recidivate than their employed counterparts (Bernstein and Houston, 2000; Sampson and Laub, 1993; Western and Petit, 2000; Uggen, 2000). Conversely,

[a] stable, supervised job eliminates the idleness that provides men with an opportunity to commit crime. The routine of daily work reinforces an ethic of mutual obligation between the worker and those that depend of that paycheck. These obligations provide those who are involved in crime with a stake in conformity that reduces offending (Western, 2006: 129-130).

The employment of individuals with a criminal history is a critical component of successful and constructive reentry to society.

Given the important role of employment in crime reduction, cities faced a policy dilemma. More and more ex-offenders were returning home annually from prison. Maintaining the status quo, in which ex-offenders were barred from employment, meant that cities would likely face high rates of recidivism, along with associated economic, public safety and social costs. Thus, some cities began to experiment with policies that promoted employment opportunities for ex-offenders in an effort to reduce recidivism, promote public safety, maintain families and reduce overall costs.

One modest reform that major cities such as Boston and San Francisco have adopted in an effort to promote employment of ex-offenders is to remove the criminal history box from public employment applications. While these reforms vary in their applicability, scope and efficacy, all represent an attempt to address the issue of employment of ex-offenders.

Cities Attempt to Fight Discrimination by Removing the Criminal History Box from Employment Application Forms

Recognizing that employment is inextricably linked to recidivism, cities have begun to formulate policies that promote employment opportunities for ex-offenders. In an effort to lead by example, several cities have begun to examine what role city employers can play in fostering

the hiring of ex-offenders. As Chicago's Mayor Richard Daley explained: "we could not expect private employers to hire people with criminal records if the city did not practice what it preached" (Daley, 2007).

The Rationale for Banning the Criminal History Box

Advocates argue that removing the criminal history box on employment applications increases employment opportunities for ex-offenders in several ways. As a threshold matter, the mere presence of a question about criminal history may deter otherwise qualified people who have a criminal record from applying for work in the first instance. In other words, the criminal history question itself serves as a red flag to would-be applicants, who will not bother to submit an application because they believe that their prior conviction will prevent them from ever being considered – let alone hired -- for the position. Viewed in this way, the question triggers a downward spiral in which ex-offenders fail to seek work because they believe they will not be hired, which in turn leaves them mired in chronic unemployment and often results in a return to criminal behavior. Advocates suggest that simply removing the criminal history box on employment applications may rupture that cycle by encouraging individuals with criminal histories to apply for work in the first instance.

The other and more far-reaching goal of removing the criminal history box from a job application is to reduce employment discrimination against ex-offenders. That employers are reluctant to hire ex-offenders is repeatedly borne out in the criminological literature. Devah Pager from Princeton University studied the impact of a criminal history on employment in Milwaukee, Wisconsin. Pager utilized an "employment audit," involving matched pairs of job applicants who applied for actual employment openings. The matched pairs had identical education and work experience, but one pair of applicants was comprised of African American

men, while the other pair was comprised of white men. The results demonstrated significant employment discrimination against ex-offenders and, in particular, against African American men with criminal histories. Among the white matched applicants, the person with a criminal history was only one-half as likely to be called back as the identical applicant without a criminal history. Black applicants with a criminal conviction fared even worse, with just over one-third as likely to be called back as their black counterpart without a criminal history (Pager, 2003). Pager's study confirms that ex-offender status is a significant barrier to employment, an effect which is amplified by the race of the applicant.

Pager's findings that ex-offender status dampens employment opportunities were consistent with a 2001 survey of over 600 employers in Los Angeles County. Over 60% of respondents indicated that they would "probably not" or "definitely not" hire an applicant with a criminal record (Holzer, Raphael and Stoll, 2002; Travis, 2001). Perhaps not surprisingly, the data indicate a strong bias against ex-offenders in the hiring process. Moreover, this discriminatory effect is exacerbated by race, which has the further negative impact of marginalizing ex-offenders of color.

Employment discrimination against ex-offenders is prevalent and, in many states, not explicitly prohibited. Only fourteen states prohibit employment discrimination against individuals with criminal convictions: Arizona, Colorado, Connecticut, Florida, Kentucky, Louisiana, Minnesota, New Mexico and Washington prohibit discrimination by public employers, while Hawaii, Kansas, New York, Pennsylvania and Wisconsin extend that prohibition to public and private employers (Love, 2007). Even the most comprehensive employment discrimination statutes allow employers to either fire or refuse to hire in the first instance an individual with a

Table 1: States that Prohibit Employment Discrimination Based on Criminal History

| State | Public Employers | Private Employers | State Statutory Ban | Local Ban |
|----------------|------------------|-------------------|---------------------|-----------|
| Alabama | | | | |
| Alaska | | | | |
| Arizona | X | | X | |
| Arkansas | | | | |
| California | | | | X |
| Colorado | X | | X | |
| Connecticut | X | | X | |
| Delaware | | | | |
| D.C. | | | | |
| Florida | X | | X | |
| Georgia | | | | |
| Hawaii | X | X | X | |
| Idaho | | | | |
| Illinois | | | | X |
| Indiana | | | | |
| Iowa | | | | |
| Kansas | X | X | X | |
| Kentucky | X | | X | |
| Louisiana | X | | X | |
| Maine | | | | |
| Maryland | | | | |
| Massachusetts | | | X | X |
| Michigan | | | | |
| Minnesota | X | | X | X |
| Mississippi | | | | |
| Missouri | | | X | |
| Montana | | | | |
| Nebraska | | | | |
| Nevada | | | | |
| New Hampshire | | | | |
| New Jersey | | | X | |
| New Mexico | X | | X | |
| New York | X | X | X | |
| North Carolina | | | | |
| North Dakota | | | | |
| Ohio | | | | |
| Oklahoma | | | | |
| Oregon | | | | |
| Pennsylvania | X | X | X | |
| Rhode Island | | | | |
| South Carolina | | | | |
| South Dakota | | | | |
| Tennessee | | | | |
| Texas | | | | |
| Utah | | | | |
| Vermont | | | | |

| | | | | |
|---------------|---|---|---|--|
| Virginia | | | | |
| Washington | X | | X | |
| West Virginia | | | | |
| Wisconsin | X | X | | |
| Wyoming | | | | |

criminal record where there is a “reasonable” or “direct” relationship between the conviction and the proposed employment (Stafford, 2006). As one Hawaiian congressman explained for his support of legislation which broadened an employers’ authority to consider criminal history and to conduct background checks, “pretty much any conviction would bear a rational relationship to job qualifications” (Hawaii Criminal Justice Data Center, 2002).

The federal government also does not explicitly prohibit discrimination based on criminal history. Title VII of the Civil Rights Act prohibits employment practices that disparately impact protected classes of people, such as members of groups defined by race, color, religion, sex or national origin. Although ex-offenders are not a protected class under Title VII, an individual with a criminal conviction could theoretically sustain a claim of discrimination if he or she can establish that a given hiring practice, such as the categorical refusal to hire anyone with a criminal record, disparately impacts a protected class such as African Americans and/or Latinos. The legal burden under Title VII is quite high, however, and there have been virtually no successful legal challenges under this theory since 1975 (Simonson, 2006).

Even in jurisdictions with protective legislation in place, ex-offenders may face *de facto* discrimination due to employer perceptions about ex-offenders. Employers may extrapolate from the very existence of a criminal conviction on a job application that an individual is untrustworthy and potentially dangerous. In jobs that require customer contact or the handling of cash, the perception of honesty is a factor that employers may well rely upon regardless of

whether that perception is accurate as it relates to an individual applicant (Holzer, Raphael and Stoll, 2002).

The ban the box movement may address this latter concern. Removing the up-front requirement that applicants reveal their criminal history may level the employment playing field. Because employers are unaware at the time of the initial consideration that an applicant has a prior criminal history, each candidate is considered for a position based on their skills and qualifications. Once an employer has determined that a particular applicant is otherwise qualified for the available position, the employer may be willing to “take a chance” by hiring him or her.

Table 2: “Ban the Box” in Practice

| | Boston, MA | Chicago, IL | Minneapolis, MN | St. Paul, MN | San Francisco, CA | Alameda County, CA |
|---|----------------------------------|---------------------------------|------------------------------------|------------------------------------|------------------------------------|------------------------------------|
| Applicant Must Self Disclose Criminal Conviction During Hiring Process | No | Yes | No | No | Yes | Yes |
| Initial Application Indicates that Criminal Background Check will be Conducted in the Future | No | No | No | No | Yes | Yes |
| When Prior Conviction Is Considered | After a conditional offer* | After a conditional offer | Prior to a conditional offer | Prior to a conditional offer | Prior to a conditional offer | Prior to a conditional offer |
| Background Check Performed for All Job Categories | No | Yes | No | No | Yes | Yes |
| Appeal Permitted | Yes | Yes | Yes | Yes | Yes | Yes |

*Only where opportunity is within restricted category of jobs for which a prior conviction may be considered.

City Approaches to Banning the Box

There are significant differences between city approaches to the issue of criminal history in city employment. San Francisco, for instance, has removed the criminal history box from its city employment applications. It has attempted to identify in its job announcement any convictions which automatically preclude employment for a particular job. Yet, applicants are told on the initial application form that they will be required to complete a separate Criminal History Form (CHF) at some time in the application process:

As part of the selection process you are required to complete a Conviction History Form and submit it when requested by the City and County of San Francisco. The form can be obtained at 44 Gough Street or on the Web at www.sfgov.org/site/sfdhr_index.asp. Please do not submit the Conviction History Form with your application unless directed to do so in the job announcement (San Francisco Employment Application, 2008).

Moreover, even though applicants are not typically required to submit the CHF at the initial filing of the job application, there are positions – such as driving a municipal bus – which mandate that applicants file the CHF at the same time as their initial application. In those instances, the formal removal of the criminal history box from the employment application would seemingly serve no function at all.

San Francisco also continues to consider nearly all convictions in its hiring process. Indeed, the CHF requires applicants to reveal certain arrests and even some convictions for which a pardon was issued. Assuming that the applicant has “no conviction that would automatically bar employment,” the city for most positions “will not review or consider [an] arrest and conviction history unless [the applicant] become[s] a finalist for the job” (San Francisco, 2008). At that time, the city will consider each arrest or conviction on a case-by- case basis, evaluating such factors as “(1) the nature and gravity of the offense; (2) the degree to which the arrest or conviction is related to the duties and responsibilities of the job; (3) age when

arrested or convicted; (4) the time elapsed since the arrest or conviction; (5) evidence of rehabilitation; and (6) any other mitigating circumstances” (San Francisco, 2008). Applicants who are denied a position based on their criminal history are permitted to appeal the decision to the Civil Service Commission. In San Francisco, then, most criminal history checks are conducted later in the hiring process but they continue to be an important and highly visible part of public employment applications processes.

In contrast, Boston has taken the most expansive approach to limiting the use of criminal histories in employment. In an effort to reduce employment discrimination against ex-offenders, Boston has required that all city employers and private vendors who contract with the city (some 50,000 vendors in total) wait to conduct a criminal background check until after an applicant has been deemed “otherwise qualified for the position” (City of Boston Ordinance, 2005). It sharply limited the public employment positions which require a background check. Indeed, only 1200 out of 8000 positions have been classified as needing a check of criminal history and those that are so classified relate primarily to employment involving vulnerable populations (National Employment Law Center, 2007). In addition, Boston eliminated the criminal history question from its job application and included at the top of each job application an anti-discrimination policy that specifically includes ex-offenders. Criminal history checks are now performed late in the process and only where required by law and for positions involving vulnerable populations.

Chicago too has removed the criminal history box from its city employment applications. Moreover, it now conducts criminal background checks only after a conditional offer of employment has been made. Unlike San Francisco, Chicago will only consider in the final hiring decision actual convictions, but will not request nor evaluate arrests or sealed or expunged convictions. The impact of a criminal conviction is reviewed on a case-by-case basis, through a

process designed to balance the city's commitment to "help[ing] people with criminal convictions safely reenter the workforce" (City of Chicago Mayor's Office, 2008). Personnel in charge of hiring decisions have been given guidelines in evaluating an applicant's criminal history. Factors to be considered are the nature and number of offense(s); the degree of relatedness between the offense(s) and the position; the amount of time since the last conviction(s); evidence of rehabilitation; and whether the individual has been "open, honest and cooperative" in the application process (City of Chicago Mayor's Office, 2008). Although the directive gives broad discretion in permitting the exclusion of an applicant based on a prior conviction, Chicago has made real efforts to standardize its hiring processes for ex-offenders. Its removal of the criminal history box is consistent with its stated commitment to bring more persons with criminal convictions into the work force.

A proposal pending in Philadelphia is perhaps the most sweeping of all. If passed in its current form, Philadelphia would prohibit the discrimination against persons convicted of one or more criminal offenses by prohibiting any "city or county agency or private employer [from] conduct[ing] a criminal record check on an applicant for a license or employment of for a current employee or licensee unless a criminal record check is required by law or the employer has made a good faith determination that the relevant position is of such sensitivity that a criminal record report is warranted" (Philadelphia Bill 060578, 2006). Moreover, the Philadelphia ordinance would permit a criminal history check only if an applicant has been found to be "otherwise qualified for the position." Indeed, the ordinance specifically disallows criminal record checks for applicants who are not otherwise qualified (Philadelphia Bill 060578, 2006).

As evidenced by the varied experiences in cities throughout the United States, removal of the criminal history box has the potential to encourage individuals with criminal histories to

apply for employment. Whether that potential ultimately will be realized depends on a number of complex political and legal factors.

Limitations of Banning the Box and Conclusions

The impact of removing the criminal history box from employment applications may prove to be quite limited for several reasons. First, each city's proposal to remove the criminal history question for public employment applications leaves employers with enormous opportunities to circumvent the spirit, if not the letter, of the law. Moreover, as it stands now, these laws apply only to public employers, except in Boston which expanded its law to include private vendors who contract with the city. Most jobs, however, are not in the public arena. Cities need to search out creative partnerships with private employers to encourage the hiring of ex-offenders. Finally, ensuring compliance with the law may prove difficult, if not impossible, due to limitations in data collection and the challenges of unearthing pre-textual, non-discriminatory explanations for the failure to hire one applicant over another.

Limitations of Ban the Box Proposals

At the outset, the scope and applicability of the ban the box in some cities is limited. The City of St. Paul, Minnesota, for instance, has removed the criminal history box from its city employment application forms. This may not have a significant impact. Since the ordinance applies only to public employers, the potential job pool in St. Paul is quite narrow.

In San Francisco, most applicants for city jobs spend months, if not years, waiting to move from the initial application list into an actual position. Will an ex-offender, recently released from prison, have the luxury to wait to see whether his or her name will eventually be called for the position? If not, what impact does the removal of the criminal history question on an employment application actually have?

Moreover, several newly passed “ban the box” ordinances appear limited on their face. For instance, San Francisco’s job application explicitly references the criminal history form (CHF) and the requirement that one be submitted some time during the hiring process. Upon learning on the initial application about the CHF, applicants may well be discouraged from applying because they believe they will not be hired. Its additional requirement for positions such as bus drivers that the CHF be submitted early in the process seems as likely to deter potential applicants from applying as the presence of a criminal history question on an application. Moreover, the early submission of CHFs may allow employers to eliminate all ex-offenders from the applicant pool before an individual determination has been made as to whether the offender was otherwise qualified for the position.

Even where prohibited by law, employers may continue to use background checks. For instance, the Hawaii statute appears to limit criminal background checks only to where there is a rational relationship between the existence of a conviction and the position. Yet, a report by the Hawaiian Criminal History Record Check Working Group found that “almost any conceivable relationship between the offense and the job will likely satisfy the reasonable relationship” of the statute (Hawaii Criminal Justice Data Center, 2002). Moreover, although Hawaiian law technically prohibits most employers from inquiring into criminal history until after a conditional offer has been made (Hawaii Revised Statutes § 378-2.5, 2007), an informal survey of employers in Hawaii demonstrated that employers routinely disregarded the law by asking the applicant about their criminal history. These employers admitted that they conducted criminal background checks without the applicants’ knowledge and then generated pretextual excuses for refusing to hire an applicant (Lau, 2000).

Boston appears to have addressed this issue most effectively. By reducing the number of positions which require a background check, it reduced the potential for discrimination by employers. By expanding the limitation on criminal history checks to private employers contracting with the city, it expanded the number of potential jobs. And by removing the criminal history question from its application, it removed the initial barrier that deters ex-offenders from applying for work in the first instance.

Bringing Private Employers into the Fold

With the exception of Boston, most cities have limited the removal of the criminal history box to public employment opportunities. To ensure that ex-offenders have a broader range of employment opportunities, private employers should be encouraged to hire ex-offenders. Cities could model their ordinances like Boston, to include vendors who contract with the city.

To further improve ex-offender employment, cities and states should also examine the impact of existing state laws on the hiring practices of private employers. State and federal laws, for instance, continue to prohibit the licensing and hiring of persons with a criminal record for a wide-range of jobs (Love, 2007; Petersilia, 1999). While it may be smart policy to prohibit convicted sex offenders from working in a children's day care center, it may make little sense to prohibit ex-offenders from ever working as a barber. Some of these blanket licensing prohibitions could be reexamined to promote employment of ex-offenders.

Cities and states also need to create protections and incentives for employers to hire ex-offenders. Some employers may be reluctant to hire ex-offenders for fear that they will be held liable for criminal acts that their employee may commit while on the job. This is not an unfounded fear. Negligent hiring lawsuits have been described as "one of the fastest growing segments in the law" (Leavitt, 2002). Under the theory of negligent hiring, an employer may be

held liable for failing to exercise a duty of reasonable care in hiring safe and competent employees. Employers lose 72% of negligent hiring cases and face an average settlement of over \$1.5 million (Connerly, Arvey and Bernardy, 2001). The internet is full of stories – and advertisements from companies that, for a fee, will run a criminal background check – about an employer’s potential financial liabilities from hiring a person with a history of offending (Jacobs, 2006). Barry J. Nadell, President of InfoLink Screening Services, Inc. asserts that negligent hiring or negligent retention lawsuits cost U.S. businesses an estimated \$18 billion a year (Nadell, 2003). Tony Ramos, President of Integra Security, warns would-be clients about the exorbitant potential costs from a negligent hiring lawsuit (Ramos, 2007). Not surprisingly, employers are afraid to hire ex-offenders for fear of future liability.

Cities with a real interest in encouraging employers to hire ex-offenders will have to take additional steps to address employer concerns about financial liabilities. One way cities can accomplish this goal is to form partnerships with employers to take advantage of programs that reduce employers’ potential liability from at-risk individuals, including persons with a criminal conviction. For instance, the Federal Bonding program enables employers to obtain, without charge, fidelity bonds which provide coverage to the employer against theft, forgery, larceny or embezzlement. Similarly, employers who hire individuals with a criminal record may be eligible for a federal income tax credit of up to \$2,400 per qualified new worker under the Work Opportunity Tax Credit. Some states offer state tax credits to encourage employers to hire ex-offenders (National H.I.R.E. Network, 2007).

Data Collection

Cities that require a criminal history check before making a final offer of employment have a unique opportunity to test the efficacy of removing the criminal history box from

employment applications. Indeed, in cities such as San Francisco and Chicago, it should be relatively simple to collect data relating to how many applicants had criminal records; what percentage of those applicants received final employment offers; which departments hired the most ex-offenders and for which jobs; and which types of convictions proved least and most palatable for city employers. Cities could even collect data relating to job performance; length of employment; and whether there were new arrests or convictions. This data could prove invaluable in confirming the positive linkages between work and recidivism and, moreover, could provide a model for other cities who seek to develop reentry and employment programs.

The cities, however, that have most altered their hiring practices will also have the most difficult time in collecting data as to whether their policies have impacted public employment of ex-offenders. In Boston, for instance, the very existence of its ordinance means that the city and the vendors who contract with the city will not know for the vast majority of jobs whether they hired a person with a criminal history. As a result, it will be difficult to measure, except anecdotally, whether banning the criminal history question has increased public employment among ex-offenders. Perhaps data collection could be coordinated with parole and probation officers, who could report to the city when one of their assignees has taken a position with the city. This coordination, however, is not currently in place and would take some political maneuvering. Even if such coordination were possible, it would not quantify public employment by persons with a criminal history who are no longer under public supervision.

Perhaps the most powerful evidence of the efficacy of its proposal may reveal itself in the future through reduced rates of recidivism. Banning the criminal history box from public employment applications is a positive step toward reintegrating ex-offenders into the world of

work. With additional supportive services, a push for compliance and partnerships with private employers, it is a policy proposal with significant promise. Standing alone, however, banning the box may prove to be mere lip-service to promoting employment for ex-offenders, while failing to provide much needed employment opportunities.

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