

Seattle Proposal Seeks to Restrict Employers' Access to Criminal Records for Background Checks

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Key Findings

1. Under CB 117583, employers in Seattle could no longer inquire about a potential employee's criminal history or conduct a background check early in the hiring process.
2. Only after an employer has given a conditional employment offer could a background check be conducted, and the offer could only be revoked if the crime has a "direct relationship" to the nature of the position.
3. The proposed ordinance contains ambiguous language that would leave employers open to lawsuits, among other legal concerns.
4. The proposed criminal background restriction would make it harder for businesses to assure people that their employees do not present a risk to public safety.
5. Forcing employers to hire applicants with criminal records could make workplaces less safe, increase employer liability and make it harder to expand opportunities and create jobs in Seattle.

Introduction

The Seattle City Council is considering an ordinance that would restrict employers' ability to access public records and conduct criminal background checks on potential employees.¹

If Council Bill Number 117583 is approved, employers in Seattle would no longer be able to inquire about a potential employee's criminal history or to conduct a background check until a conditional offer of employment is given. The proposed ordinance would also prohibit employers from refusing to hire an applicant because of a past arrest or conviction, unless the employer can show a "direct relationship" between the public criminal record and the job for which the individual has applied.

Background

In the United States, criminal records are considered public records. With some exceptions, most criminal records — felonies, misdemeanors, infractions and arrests — are available to the public.

However, the information included in a criminal record and access to criminal records varies by state and local jurisdiction. Further, laws on the use of criminal history background checks and to what extent an employer may consider a job applicant's criminal history in making hiring decisions vary from state to state.

In Washington, anyone, including employers, can purchase a copy of a Washington State Patrol Criminal History Report. This report includes criminal history information for all adult and juvenile convictions in Washington courts, with the exception of sealed or vacated convictions.² Employers may also obtain criminal history information by searching court records, which remain public

¹ "Council Bill Number: 117583," City of Seattle, Office of the City Clerk, at clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?s1=job+assistance&s3=&s4=&s2=&s5=&Sect4=AND&1=20&Sect2=THESON&Sect3=PLURON&Sect5=CBORY&Sect6=HITOFF&d=ORDF&p=1&u=%2F~public%2Fcbory.htm&r=1&f=G.

² "Obtaining a State Criminal History (Background Check)," Washington State Patrol, Criminal History Records, at www.wsp.wa.gov/crime/chrequests.htm.

unless they are sealed. An employer does not need to obtain permission from the job applicant to search court records or purchase a copy of the WSP Criminal History Report. Alternatively, an employer may purchase a “background check” from a Consumer Reporting Agency (CRA). Before a background check from a CRA can be purchased, however, an employer must obtain the applicant’s consent in writing and notify the applicant in writing that the report may be used to deny employment.³

Once an employer in Washington state has obtained the arrest and conviction records of a prospective employee, regulations created by the Washington Human Rights Commission require the employer to make an individualized determination as to whether the criminal history is related to a particular job. This means employers in Washington state cannot legally refuse to consider an application from anyone with a criminal record. Such blanket hiring policies have also been prohibited by the U.S. Equal Employment Opportunity Commission.⁴

State law mandates that inquiries concerning arrests are limited to those that occurred within the last 10 years and must consider whether charges are still pending, have been dismissed or led to conviction of a crime involving behavior that would adversely affect job performance. Concerning convictions, employers may make an employment decision based on a conviction only if it occurred within the last 10 years and the crime involved behaviors that “relate reasonably to the job duties.” Law enforcement agencies, state agencies, school districts, and businesses that have a direct responsibility for the supervision, care or treatment of children, mentally ill persons, developmentally disabled persons or other vulnerable adults are exempt from these rules.⁵

In 2009, the city of Seattle implemented the Citywide Personnel Rule for Criminal Background Checks. Under this “Ban the Box” policy, the city of Seattle does not ask applicants about arrests or prior convictions on job applications, and limits the categories of jobs that require or allow for background checks prior to employment. In addition, an individual’s past conviction history is not considered until later in the hiring process, and only for jobs falling within specific categories.⁶

The city’s policy appears to be the framework upon which proposed ordinance CB 117583 is based, essentially imposing the city’s personnel policy on all private employers.

Supporters of the proposal contend limiting employers’ use of background checks would increase public safety by reducing the likelihood of criminal recidivism — the theory being that when those with a criminal record cannot find a job, the chances they will become repeat offenders increase.

Supporters also say criminal background checks have a disparate and unfair impact on minorities, noting that while African Americans make up 3.6%

³ “Guide to Criminal Records and Employment in Washington State,” American Civil Liberties Union of Washington State, April 20, 2012, at www.aclu-wa.org/sites/default/files/attachments/2012-04-12%20Guide%20to%20Criminal%20Records%20and%20Employment.pdf.

⁴ “EEOC Enforcement Guidance,” U.S. Equal Employment Opportunity Commission, at www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

⁵ Washington Administrative Code (WAC) 162-12-140, Preemployment Inquiries, at apps.leg.wa.gov/wac/default.aspx?cite=162-12-140.

⁶ “Seattle Personnel Rule 10.3,” City of Seattle, at www.seattle.gov/personnel/resources/pubs/rules/Personnel_Rule_10.3_.pdf.

of Washington's population, they account for nearly 19% of the state's prison population. Native Americans are 1.5% of the state population, but comprise 4.3% of the state's prison population.⁷

Opponents of CB 117583 say criminal background checks are an important tool in hiring trustworthy employees that helps provide a safe environment for employees and customers. Opponents say removing that research tool could expose them to liability if an employee commits a crime against a co-worker or customer. They also worry the proposal would significantly slow the hiring process and leave employers exposed to a potentially lengthy adjudication process in the event an applicant challenges the employer's decision not to hire him.

Analysis

Background checks are an important part of the normal hiring process. Employers find that employment screening reduces costs in the long term. Companies conduct background checks to improve productivity, reduce absenteeism, lower turnover, and most importantly, to decrease employer liability for potential criminal acts committed by employees.

Employers understand what is at stake when it comes to making an informed hiring decision. Companies that have hired employees with a criminal record who then go on to commit a criminal act have been successfully sued. Employers lose 72% of negligent hiring cases with an average settlement of \$1.6 million, as courts have repeatedly affirmed it is an employer's duty to exercise reasonable care when hiring potential employees.⁸ Imagine the cable repairman coming to your home and the cable company not knowing his full background.

Bottom line: Employers have a moral and legal obligation to ensure a safe business environment for their employees and for their customers. Accordingly, 69% of employers conduct background checks; 52% of those employers use criminal screening to reduce the liability of negligent hiring and 49% to ensure a safe working environment for employees.⁹

Under Seattle's new proposal, employers would no longer be allowed to use public records to conduct background checks early on in the hiring process in order to make fully informed decisions. Only once employers have reached a conditional employment offer could a background check be conducted, and the offer could only be revoked if the crime has a "direct relationship" to the nature of the position. The proposed ordinance contains ambiguous language that would leave employers open to both discrimination and negligence lawsuits, among other legal concerns. Seattle's proposed law would bar employers from exercising the "reasonable care" required by the courts when making hiring decisions.

⁷ "Job Assistance Legislation," Seattle City Council, Councilmember Bruce Harrell, at www.seattle.gov/council/harrell/job_assistance_leg.htm.

⁸ "Criminal History Checks for Prospective and Current Employees: Current Practices Among Municipal Agencies," Mary L. Connerly, Richard D. Arvey and Charles J. Bernardy, Public Personnel Management, 2001.

⁹ "Background Checking — The Use of Criminal Background Checks in Hiring Decisions," Society for Human Resource Management, July 19, 2012, at www.shrm.org/research/surveyfindings/articles/pages/criminalbackgroundcheck.aspx.

Removing employers' decision-making power when it comes to who they hire is not only bad policy, it is unnecessary.

The U.S. Equal Employment Opportunity Commission (EEOC) already enforces fairness rules when employers are considering applicants with criminal arrest and conviction histories. The EEOC recently fined PepsiCo Inc. \$3.13 million for that company's blanket policy of denying jobs to any applicant with an arrest or conviction.¹⁰ The EEOC contended Pepsi's policy discriminated against minorities, specifically African Americans and Latinos, because the ratio of those minorities with criminal records is far greater than that of Caucasians. To reinforce its decision, the EEOC issued new guidelines on April 25, 2012, making it clear that employers cannot refuse to hire someone solely because the applicant had been arrested or convicted.¹¹

Three members of the U.S. Commission on Civil Rights oppose the new EEOC guidelines, citing research showing background checks used on an individual basis actually increased minority employment.¹² The research found that of companies that utilized background checks, 12% of their last hires were black employees; for companies that did not perform background checks, only 3% of their last hires were black employees. Researchers attribute these percentages to the ability of background checks to disprove racial bias.¹³

Conclusion

Seattle is often the incubator for bad business policy. Last year the city became one of the few in the nation to mandate paid sick leave for all workers. Now the City Council is considering an ordinance that would make Seattle one of the few to limit employers' ability to access public records and conduct background checks on potential employees.

People should be given a chance to turn their lives around, even if they have a criminal past, but this should not be hidden from employers during the hiring process. The proposed criminal background restriction would make it harder for businesses to assure people that their employees do not present a risk to public safety. Limiting access to public information would contribute to the public's perception that Seattle is not a safe place to live, work and shop.

Seattle already imposes a greater burden on business owners than any other city in the state. Policymakers should rethink the real impact of the proposed criminal background ordinance on businesses and minority communities. Forcing employers to hire applicants with criminal records could make workplaces less safe, increase employer liability and make it harder to expand opportunities and create jobs in Seattle.

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¹⁰ "Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans," press release, U.S. Equal Employment Opportunity Commission, January 1, 2012, at www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm.

¹¹ "EEOC Enforcement Guidance," U.S. Equal Employment Opportunity Commission, at www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

¹² Letter from U.S. Commission on Civil Rights members Peter Kirsanow, Gail Heriot and Todd Gaziano, to U.S. Equal Employment Opportunity Commission, August 10, 2011, at cdia.files.cms-plus.com/PDFs/US Commission on Civil Rights.pdf.

¹³ "Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market," Michael A. Stoll, The University of Chicago Legal Forum, 2009.