



**Legislative Department  
Seattle City Council  
Memorandum**

Date: August 27, 2012  
To: Public Safety, Civil Rights and Technology Committee  
From: Patricia Lee, Council Central Staff

**Subject: Job Assistance Ordinance C.B.**

When and How Should an Applicant or Employee's Criminal History be Considered in an Employment Decision?

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The Public Safety, Civil Rights and Technology (PSCRT) Committee will discuss proposed the Job Assistance ordinance, defining when and what criminal history can be considered in an employment decision, at its September 5, 2012 meeting.

An individual's prior criminal history is often a significant barrier to future employment. In Washington State, state law defines what prior criminal history can be considered in making employment decisions for public employees. The Seattle Human Rights Commission (HRC) requests the City enact comparable provisions for all employees in the City of Seattle.

As in many areas of the law, the Courts and various jurisdictions have balanced two competing and equally legitimate interests:

- providing employment opportunities to all qualified applicants, and
- an employer's responsibility and interest in protecting their business operations, reputation, employees and customers as well as the public at large.

This memo reviews: I) Federal, Washington State, City of Seattle and other state laws regulating the use of criminal history in employment decisions, II) discusses whether further City regulation is needed, and III) summarizes the Job Assistance ordinance.

**I. Federal, Washington State, City of Seattle and Other State Laws Regulating the Use of Criminal History in Employment Decisions**

Several Federal, State and City laws regulate the use of criminal history for some employment situations and for some applicants. Below is a summary of the applicable provisions.

A. Civil Rights Law. Federal, State and City laws prohibit employment discrimination based on race.

Title VII of the Federal Civil Rights Act of 1964 (Title VII) prohibits employment discrimination based on race, color, religion, sex or national origin. A law, policy or practice can violate Title VII by directly basing an employment decision on one of these characteristics, in other words through disparate treatment. Alternatively, a law, policy,

or practice can violate Title VII because while neutral on its face, it has a disparate impact on a protected class. For example, a law excluding Asians from certain jobs would violate Title VII because of its disparate treatment based on race. A height requirement for certain jobs could potentially violate Title VII because, though it doesn't mention race, it has a potentially disparate impact on Asians. The employer would need to demonstrate the challenged requirement is job related and consistent with business necessity, i.e. a certain height is necessary to perform the job duties.

National and local data establishes that some races are arrested and incarcerated at rates disproportionate to their numbers in the general population. An employer's policy or practice, such as an outright ban on hiring any applicant for any job because of a past criminal history, though neutral on its face, potentially violates Title VII because of its disparate impact on protected classes. An employer would need to show his policy or practice is job related for the position in question and consistent with business necessity.

When is an employer's policy or practice job related to the position in question and consistent with business necessity? Unfortunately, there is no matrix or diagram telling either applicants or employers which criminal history should be considered for which jobs. This will of necessity be a factual inquiry, specific to each job and each applicant.

The courts and the Equal Employment Opportunity Commission (EEOC), the Federal agency that enforces Title VII, have set forth factors that an employer should consider. These factors are:

- The nature and gravity of the offense or conduct,
- The time that has passed since the offense or conduct and/or completion of the sentence, and
- The nature of the job held or sought.

*Green v. Missouri Pacific Railroad*, 532 F. 1290 (8<sup>th</sup> Cir 1975)

- B. Washington State Restoration of Employment Rights. RCW 9.96A.010 et.seq.  
Washington's law applies only to public employees of the state or its subdivisions. It declares the public policy of the state to "encourage and contribute to the rehabilitation of felons and assist them in securing employment or pursuing an occupation. Employers can only consider prior felonies that are directly related to the position or occupation and occurred less than 10 years before. State law provides specific exceptions for certain employers and employment situations. See attachment 1, Table of other jurisdictions.
- C. Washington State Fair Credit Reporting Act. RCW 19.182 et. seq.  
The Fair Credit Reporting Act (FCRA) applies to both public and private employers and regulates an employer's use of "consumer reports" in employment decisions. A consumer report is defined as a "written, oral or other communication of information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing,

credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected in whole or in part for:... (ii) employment purposes” RCW 19.182.010. Both a credit check report and a criminal background report, which are two separate reports, would fall within this definition if furnished by a consumer reporting agency.

Before obtaining a consumer report regarding a job applicant, an employer must either obtain the applicant’s authorization or provide the applicant with written notice. Before obtaining a consumer report regarding a current employee, an employer must notify the employee in writing that consumer reports may be used for employment purposes. This notice provision does not apply if the employer believes an existing employee has engaged in specific activity that constitutes a violation of law.

Before an employer uses information in a consumer report as the basis, in whole or in part, for an adverse employment decision, the employer must provide the person the identification of the consumer agency who provided the report, a description of his consumer rights, and a reasonable opportunity to respond to any information in the report that he disputes.

Consumer reports can be obtained by an employer only if the information is substantially job related and the employer’s reasons are disclosed to the applicant or employee in writing, or the information is required by law. RCW 19.182.020(2)(c).

Consumer reports can not contain records of arrest, indictment or conviction that antedate the report by 7 years unless for an employment position with an annual salary of \$20,000 or more. RCW 19.182.040(1)(e).

Therefore, as it relates to an applicant’s criminal history the FCRA requires an employer to notify an applicant or employee that they may be obtaining a criminal background report. An employer must notify an applicant or employee before information in that report is used as the basis of an adverse employment decision. The applicant or employee must also be given information on the consumer agency, their consumer rights and an opportunity to respond.

It should be noted however, that an employer may have many reasons for making a hiring decision. An employer can cite a reason other than information in the consumer report and avoid the FCRA notification requirements.

The FCRA also does not regulate the circumstances under which an employer can base an adverse employment action on an individual’s criminal history. The standard of “substantially job related” applies only if an employer is using information about an applicant or employee’s creditworthiness, credit standing or credit capacity, which does not necessarily include criminal history.

D. City of Seattle Personnel Rules

The City of Seattle Personnel Rules applies only to applicants for city positions. City labor agreements cover existing employees. Criminal background checks may be obtained only with the written permission of the applicant, for certain positions and only after a conditional job offer has been extended. Where appropriate, job postings and applications advise applicants that a criminal background check may be required. The prior felony must directly relate to the position or occupation and be less than 10 years old. If criminal history is a factor in the employment decision, the Personnel Director makes the final hiring decision after notice to the applicant and an opportunity for the applicant to respond. Certain employment situations are exempted.

E. Other State Laws

Five states have addressed the use of criminal history in employment decisions by private employers:

Hawaii, Kansas, New York, Pennsylvania and New York

Massachusetts limits inquiry into criminal records rather than limiting when criminal history can be considered.

Attachment 1 to this memo provides a summary of these state laws.

I am unaware of any city regulating the use of criminal history in employment decisions by private employers.

**II. Is Further Regulation Needed and What Steps can the City take?**

While Federal, State and City laws on non-discrimination and the State's Fair Credit Reporting Act potentially provide an applicant a cause of action, and/or define some procedural requirements, they do not define for all private employers or for all applicants, when and how an applicant's criminal history can be considered in an employment decision.

Civil rights disparate impact analysis would not apply to all applicants.

Federal, State and City laws defining unfair employment practices, prohibit discrimination, by both public and private employers, based on race, color, religion, sex or national origin. The EEOC has determined that because of its disparate impact on certain races, absolute bans on all job positions for any criminal history may violate Title VII. However, current non-discrimination laws are not sufficient in the area of criminal history, as not all applicants with a criminal history are members of a disparately impacted race.

Fair Credit Reporting Act does not define the nexus between criminal history and a job position.

The State Fair Credit Reporting Act applies to both public and private employers. It requires prior notification to an applicant or employee before a consumer report is obtained and prior notification before an adverse employment decision is made based on information in a consumer report. However, it does not provide guidance on the nexus that must exist

between a job position and an individual's criminal history. Also notification is only required if the consumer report was the reason, in whole or in part, for the adverse employment decision. If the employer bases their employment decision on other factors, these provisions arguably do not apply.

Blanket provisions screen out all applicants with a criminal history.

Part of the challenge for job applicants is getting past an initial screening if job postings contain a blanket prohibition on applications from applicants with any criminal history. An individual's criminal history may not be relevant to the position but they do not have an opportunity to make that argument. Conversely, employers have an interest in not spending time reviewing applications from candidates whose criminal history would exclude them from the particular position they are recruiting for. Current state and city laws applicable to private employers do not adequately address this.

The State of Hawaii, for private employers and the City of Seattle for city positions, require that a conditional job offer be made before an individual's criminal history is requested. This prevents screening out all applicants with a criminal history. The City of Seattle includes a notice in their job postings and applications that a criminal background check may be required. Applicants are notified in advance of the requirement and can self-select whether to apply for a position that will require a criminal background check.

The City has an interest in removing barriers to employment.

The City is not preempted from defining unfair employment practices more broadly than Federal or State law and has exercised this authority in the past. For example, Seattle prohibits discrimination based on political ideology and genetic information which are not included in the State or Federal protections.

The City also has an interest in helping individuals secure employment and an interest in helping employer's create and maintain successful and safe working environments. This ordinance draws from Federal, state, city and other state laws and policies in trying to provide that balance and address areas not covered by current laws.

**III. Job Assistance Ordinance**

The Job Assistance ordinance makes it an unfair employment practice for an employer to:

1. Discharge, refuse to hire, or carry out a tangible adverse employment action because of an
  - a. Employee's or applicant's arrest record; or
  - b. Employee's or applicant's criminal conviction record, unless there is a direct relationship between the conviction record and the employment sought or held; or

- c. Employee's or applicant's pending criminal charge, unless there is a direct relationship between the circumstances of the pending criminal charge and the employment sought or held.

A direct relationship exists where the nature of the criminal conduct underlying the conviction or the pending criminal charge has a direct bearing or connection to the employee's or applicant's fitness or ability to perform the position sought or held; or where it is reasonably foreseeable that employing the applicant or employee will result in harm or injury to persons or property. In determining direct relationship, employers should consider factors such as the seriousness of the underlying criminal conviction or pending criminal charge; the number and types of convictions or pending criminal charges; how much time has elapsed since the conviction or pending criminal charge, excluding periods of incarceration; any verifiable information related to the individual's rehabilitation or good conduct; the specific duties and responsibilities of the position sought or held; and the employer's legitimate interest in protecting people, property, and its business reputation.

**Timing:** Employers cannot ask for, obtain or consider an applicant's criminal history until a conditional job offer has been made.

This provisions strike a balance between allowing applicants with a criminal history to be considered for a job opportunity and an employer's need to consider an applicant's criminal history before a final hiring decision is made.

This ordinance does not change an employer's requirements under the State Fair Credit Reporting Act (FCRA). The FCRA requires before an employer takes an adverse employment action, e.g. a decision not to hire, based in whole or in part on a consumer report, they must provide the applicant or employee the identity of the consumer reporting agency, a description of their rights under the FCRA and a reasonable opportunity to respond to the information.

SOCR implementation rules may want to recommend that job announcements and application forms contain language such as "successful candidates will be required to pass a criminal background review" where the position would appropriately require this. This will advise applicants of the requirement and they can self-select not to apply.

**Exempts certain employment situations.** The draft ordinance exempts 3 types of employers and 1 type of job position from the above provisions.

- a. Employers who provide services or housing to minors and or vulnerable populations
- b. Law enforcement, policing, crime prevention, security, private investigator services

- c. Employers permitted or required under Federal or state law to inquire into consider or rely on information about an applicant or employee's arrest or criminal conviction record or pending criminal charges for employment purposes.
- d. In addition, job positions with access to money, financial information or personal identifying information may disqualify individuals with convictions or pending charges for embezzlement, theft, fraud or other financial crimes.

These exemptions parallel state law, or recognize areas that are already subject to other laws regarding the use of criminal history and employment.

**Next Steps**

The Public Safety, Civil Rights and Technology committee will discuss and possibly vote on this ordinance in January 2013.

Attachment 1: Table of other jurisdictions