



**Legislative Department
Seattle City Council
Memorandum**

Date: May 13, 2013
To: City Council Public Safety Civil Rights & Technology Committee
From: Patricia Lee, Council Central Staff

Subject: Job Assistance Legislation

Background. On September 15, 2012 the Public Safety, Civil Rights and Technology Committee (PSCRT) discussed the Job Assistance ordinance, CB 117583. Since that time individual Councilmembers have discussed this proposed ordinance with the Greater Seattle Chamber of Commerce (Chamber), The Greater Seattle Business Association, Columbia Legal Services, Seattle Human Rights Commission, ACLU and other interested parties (described here for ease of reference as the Coalition).

The City's intent; to assist individuals with a criminal history access employment remains unchanged as does the City's recognition that businesses have a legitimate interest in protecting their employees, business assets, reputation and the public at large. Numerous ideas on how to accomplish this have been discussed.

To facilitate development of the next version of this ordinance the PSCRT committee will discuss the ordinance changes proposed by both the Chamber and Coalition. Based on this PSCRT discussion, a new version of this ordinance will be developed and introduced for PSCRT vote on June 4, and full Council vote on June 10.

Using the September 2012 version of the ordinance as the baseline this memo; 1) identifies ordinance provisions that are proposed to remain the same as CB 117583, and 2) identifies ordinance provisions where either the Chamber or Coalition has proposed changes so Councilmembers can provide direction on what they would like to see in the next version of this ordinance.

JOB ASSISTANCE ORDINANCE PROVISIONS

1. Employees Covered by this Ordinance

Provisions that remain the same as CB 117583:

- Employees in law enforcement, policing, crime prevention, security, criminal justice, private investigation services or with unsupervised access to children under 16, disabled persons or vulnerable adults are not covered by this ordinance.
- Federal, State law or collective bargaining agreements that have different requirements are not changed, or diminished by this ordinance.

Provisions for Discussion and Decision

- 1a. Define an employee covered by the provisions of this ordinance as an individual working in the City at least 50% of the time. This was added to provide clarification for employers with multiple job sites.

Proposed Change	PSCRT Preference
1a. Define employee as an individual working in the City of Seattle at least 50% of the time.	

2. Employment Actions Covered by this Ordinance.

Provisions that remain the same as CB 117583:

- Employment decisions to hire, discharge, suspend, discipline, demote or deny a promotion to an applicant or employee are covered by this ordinance.
- Employers are prohibited from retaliating against any employee or job applicant for exercising the rights protected in this ordinance.

3. When Can an Employer Request or Obtain an Individual’s Criminal History.

Provisions for Discussion and Decision:

- 3a. The Chamber requested that the timing on when an employer can obtain or request an individual’s criminal history be changed from after a conditional offer has been made to after an employer has screened applications and eliminated unqualified candidates.

The Chamber requested this change because employment practices vary amongst employers making it difficult to apply a uniform requirement. Some employers felt the conditional offer stage was too late in the hiring process. Requiring the inquiry into criminal history to be after unqualified candidates are screened out means that individuals with a criminal history can at least get themselves into the pool of qualified candidates for further consideration.

- 3b. However, because some employers, like the City of Seattle have requirements that require a conditional job offer before obtaining or inquiring about criminal history a provision is also proposed to be added that employers can adopt employment policies that are more generous to employees and job applicants than these requirements.

Proposed Change	PSCRT Preference
3a. Change requirement from requiring a conditional job offer first to allowing employers to request or obtain an individual’s criminal history after the employer has completed an initial screening of applicants to eliminate unqualified candidates.	
3b. Allow employers to adopt employment policies that are more generous to employees and job applicants than what this ordinance requires.	

4. Relationship of Arrests, Past or Pending Convictions and a Specific Employment Position

Arrests:

Provisions that remain the same as CB 117583:

- Arrests can not be the basis for an adverse employment decision as arrests are not proof a person has engaged in unlawful conduct.
- Arrest records are defined as information indicating a person has been apprehended, detained, taken into custody, held for investigation, or restrained by a law enforcement agency or military authority due to an accusation or suspicion that the person committed a crime.

Provisions for Discussion and Decision

4a. The employer can make an adverse employment decision based on conduct that led to the arrest if the employer inquires about the underlying conduct that led to the arrest and has a legitimate business reason for the adverse decision.

The EEOC guidelines allow the conduct underlying an arrest to be considered. The same standard of “legitimate business reason” should be used for convictions, pending charges and conduct underlying arrests.

4b. An arrest is not proof that a person has engaged in unlawful conduct. The Coalition requested that arrest and conviction records be better defined to include in the definition of arrest records court records that led to dismissed charges, acquittal, stipulated continuance or vacated charges, and to exclude vacated and sealed convictions from the definition of conviction record.

Proposed Change	PSCRT Preference
<p>4a. Add provision that employers can make an adverse employment decision based on the conduct, not the fact of arrest but the conduct, that led to an arrest if the employer inquires about the underlying conduct and has a legitimate business reason for the adverse decision.</p>	
<p>4b. Clarify definition of arrest records to include court records that led to dismissed charges, acquittal, stipulated continuance or vacated charges, and to exclude vacated and sealed convictions from the definition of conviction record.</p>	

Past or Pending Convictions

Provisions that remain the same as CB 117583:

- Employment practices that automatically or categorically exclude individuals with any arrest or conviction record from any employment position are prohibited. Employers must consider the individual applicant/employee’s criminal history in light of the specific job position in questions.
- The specific factors an Employer should consider remain the same.

Provisions for Discussion and Decision

4c. The nexus between the past criminal history and specific job in question is proposed to be changed from a “Direct Relationship” to a “Legitimate Business Reason.” Note: in Title VII cases the relationship is job related and consistent with business necessity.”

A “Direct Relationship”, which is the relationship required in CB 117583 and by the City of Seattle and State of Washington in hiring their employees, is defined to exist where the criminal conduct has a direct bearing or connection to the individual’s fitness or ability to perform the job or where it is reasonably foreseeable employing this individual will result in harm or injury to persons or property.

The proposed “Legitimate Business Reason” is defined to exist where based on information known to an employer at the time employment decision is made, the employer believes in good faith that criminal conduct either:

1. will have a negative impact on the individual’s fitness or ability to perform the job; or
2. will harm or cause injury to people, property or business assets
3. and the employer has considered the following factors:
 - a. seriousness of the underlying criminal conviction or pending charge; and
 - b. the number and types of convictions or pending criminal charges;
 - c. time elapsed; and
 - d. verifiable information related to the individual’s rehabilitation or good conduct; and
 - e. specific job duties and responsibilities; and
 - f. place and manner in which position will be performed.

The Chamber felt “direct relationship” although used by the State of Washington and City of Seattle in its employment policies, was a standard that would be too open to interpretation by third parties.

Proposed Change	PSCRT Preference
4c. On pending and past convictions change the nexus between past criminal history and the job in question from “Direct Relationship” to “Legitimate Business Reason”.	

5. The Employer must Provide the Applicant/Employee an Opportunity to Correct or Explain Their Criminal History.

Provisions for Discussion and Decision

5a. This ordinance does not change an employer’s requirements under any State or Federal Law, including the Washington State Fair Credit Reporting Act (FCRA).

The FCRA requires that employers provide notice, or for applicants to obtain permission, before they obtain a criminal history report, identify the report they are using for an employment decision and provide an applicant/employee the opportunity to explain or correct the report before making an adverse employment action. CB 117583 does not repeat the requirements under the FCRA.

The Chamber has requested the employee/applicant be required to request the opportunity to discuss their criminal history. This would be inconsistent with state law.

Proposed Change	PSCRT Preference
5a. Add language consistent with the FCRA regarding notice and opportunity to explain or correct the report before making an adverse employment decision?	

6. Employers are not Required to Provide Accommodations or Hold a Job Open.

Provisions that remain the same as CB 117583:

- Employers are not required to make accommodations or job modifications to facilitate the employment of an applicant or employee with a criminal history.

Provisions for Discussion and Decision

6a. The Chamber requests that employers not be required to hold a job open until a pending charge is resolved or questions about an applicant’s criminal background are resolved.

Proposed Change	PSCRT Preference
6a. Should language be added that employers are not required to hold a job open until a pending charge is resolved or questions about an applicant’s criminal background are resolved?	

7. Job Positions Covered

Provisions for Discussion and Decision

7a. The exception that individuals convicted of a financial crime could be excluded from positions involving access to money, financial information or personal identifying information has been eliminated. This was not done to minimize this link, but rather for consistency. All types of criminal history, and all types of positions are subjected to the same analysis, inquiry and standard.

Proposed Change	PSCRT Preference
7a. Should the specific exception for financial crimes be eliminated and all types of criminal history and types of positions be subjected to the same inquiry and analysis	

8. Implementation

Provisions for Discussion and Decision

8a. Data collection. Seattle Office for Civil Rights (SOCR) will maintain data on the number of complaints, investigations and dispositions and submit this data to the City council every six months for the two years following the date the ordinance takes effect. This was added to provide specific Council oversight.

8b. Directors Rules. This ordinance authorizes SOCR to implement and enforce this ordinance and to promulgate Directors Rules or guidelines. This ordinance was originally in the Unfair Employment Practices section of the SMC, and per the terms of that section, SOCR would have developed Director’s Rules, implemented and enforced this ordinance. This ordinance was removed from the Unfair Employment Practices section of the SMC only to avoid any confusion that any other remedy other than the very limited monetary penalty was being created by this ordinance. However, SOCR is the City agency authorized to educate, implement and enforce the City’s employment practices and it is consistent that they be the implementing City agency.

The Chamber has requested the City Office for Economic Development (OED) lead implementation, and that director’s rules be developed by OED and a panel of stakeholders including members of the employer, social service and legal community.

It should be noted that OED does not have experience developing implementation rules on employment practices. Also King County Prosecutor Dan Satterberg has convened a stakeholder group to address the issue of prisoner re-entry.

Proposed Change	PSCRT Preference
8a.Should SOCR maintain and submit data on the number of complaints, investigations and dispositions every six months for two years following the effective date of this ordinance?	
8b.Should Director’s Rules and Implementation be led by OED and a stakeholder group instead of SOCR?	

9. Scope of Legislation and Enforcement

Provisions for Discussion and Decision

9a. As noted, this ordinance was originally in the Unfair Employment Practices section of the SMC and the same SOCR complaint, investigation and enforcement procedures are included in this ordinance.

The Chamber requests that neither SOCR, nor any other agency have the authority to “substitute” their judgment over whether an employer had a “legitimate business reason” not to hire an applicant or terminate an employee and that the scope of the City’s inquiry should be limited to whether:

- The employment advertisement or announcement bans individuals with criminal records
- The employer informed the applicant that criminal background information may be used as part of the hiring process
- The employer, upon request, provided a copy of the criminal record they used
- The employer, upon request, gave the applicant or employee an opportunity to discuss their criminal history.

It's important to recognize that this would directly contravene the requirement that an employer consider certain factors in determining whether they have a legitimate business interest in not hiring a particular individual for a particular job.

Proposed Change	PSCRT Preference
<p>9a. Should the requirement that employers have a "legitimate business reason" for an adverse employment decision be eliminated and an individual's complaint and the City's inquiry be limited to the employer's providing information on their use of criminal history information and providing the applicant an opportunity to discuss it.</p>	

9b. The ordinance also provides SOCR the authority to initiate investigation and enforcement procedures on its own without a complaint from a charging party if SOCR has reasonable cause to believe an employer has violated this ordinance. This is the same authority the SOCR would have had if this ordinance was in the Unfair Employment Practices section of the SMC.

The Chamber has requested that SOCR not have independent investigatory and enforcement authority and be limited to responding to individual complaints.

Proposed Change	PSCRT Preference
9b. Should SOCR have the authority to initiate and review employment practices on its own?	

10. Remedies

Provisions for Discussion and Decision

10a. This ordinance was removed from the Unfair Employment Practices section of the SMC and a new Section in the Human Rights section of the SMC was created. This eliminates any confusion that remedies available under the Unfair Employment Practices section apply to this ordinance.

10b. Changed to make a notice of infraction for the first offense, a monetary penalty up to \$750 for the second offense and a monetary penalty up to \$1000 for any subsequent offense, and potential award of the City’s attorney’s fees the exclusive remedy. There is no private cause of action and no other remedy can be order by the Seattle Office for Civil Rights (SOCR) or the Hearing Examiner.

The Chamber has requested the fines be reduced from \$750 to \$150 and from \$1000 to \$300.

Proposed Change	PSCRT Preference
10a. Should this ordinance be moved from the Unfair Employment Practices Section to the Human Rights Section	
10b. Should remedies for violation be reduced.	

11. Effective Date

Provisions for Discussion and Decision

11a. Effective 3 months after the passage of the ordinance.

The Chamber has requested this be changed to 8 months after the effective date of the ordinance.

Proposed Change	PSCRT Preference
11a. Should the effective date be changed from 3 months to 8 months after the passage of the ordinance?	