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Best Practices: Hiring Procedures in Public Employment Analysis of Conviction History and Use of Background Checks

All of Us or None and a network of allies offer these proposed best practices to facilitate discussion of crucial issues regarding employment discrimination. Because of the disproportionate rate of arrest, conviction, and imprisonment of people of color, using conviction history to disqualify job applicants actually results in racial discrimination, which is prohibited by law. We urge you to adopt these best practices in order to promote equal opportunity for employment for all, and to assist in rebuilding communities suffering from the impact of mass incarceration.

1. We urge all employers to first consider whether it is actually necessary to do a background check for the job they have available. Many employers are using any conviction history as a way to eliminate applicants from consideration, without ever looking at their qualifications. This practice is illegal under Title VII of the 1964 Civil Rights Act, because of the disproportionate effect of this practice on people of color. This practice also eliminates many people who are qualified for the job they are seeking, reducing the pool of qualified people from which an employer can select a final candidate. This is discrimination based on past mistakes for which the applicant has already served some type of punishment.

For example, in the City of Boston, nearly half of all city job categories DO NOT require a background check. Of 8000 city jobs in Boston, only 1200 require a background check -- those involving unsupervised contact with finances or elderly, youth, or disabled people.

Questions to consider in making an evaluation of whether a job requires a background check:

Are there base-line legal restrictions about who can work in a given job category? (For example, California law prohibits people with convictions for sex offenses related to children from working in public schools.)

Will the employee have unsupervised contact with populations traditionally considered “vulnerable” -- youth and children, elderly people, disabled people? (If there is no unsupervised contact as part of the job, a background check is unnecessary.)

If there are no current city/county/state regulations requiring that all employees must be fingerprinted, this practice should not be introduced. Background checks are often inaccurate. Fingerprinting may be a more accurate method than name and birthdate as a means of accessing

conviction histories. But fingerprinting also yields RAP (Record of Arrests and Prosecutions) sheets that are not limited to conviction information. Even though most states prohibit employers from considering anything but convictions in a hiring process, using RAP sheets for background checks automatically reveals information that should not be considered.

2. Only past convictions with a direct relationship to job responsibilities should be considered at any point in the application process. Title VII of the Federal Civil Rights Act of 1964, as well as more recent EEOC Guidances, indicate that past convictions may only be considered for employment purposes if the conviction is job-related. Clear guidelines for determining job-relatedness of past convictions should be established. Defining “job-relatedness” is difficult, and subjective prejudices and fears often surface in this process. There is no scientific basis for past criminal convictions being viewed as predictors of future criminal activity, nor should past convictions be used as a “character test.” For example, past convictions for drug sales or use has nothing to do with a person’s ability to fulfill the job responsibilities of a secretary. Consideration of these convictions would be a prejudicial “character test” that people who haven’t been arrested don’t face. Even if a conviction is job-related, the law states that it may be considered, not that it must result in disqualification or ineligibility.

We recommend in making the “substantial relationship” determination the following factors should be considered:

- a. Whether the prospective job provides an opportunity for the commission of a similar offense(s);
- b. Whether the circumstances leading to the offense(s) will recur;
- c. Whether the person has committed other offenses since the conviction or his conduct since conviction makes it likely that he will commit other offenses;
- d. The time elapsed since the offense(s).

3. Hiring procedures should reflect a presumption of rehabilitation: once a person has completed their sentence (including probation or parole), a past conviction should not be considered anywhere in the hiring process. Completion of one’s sentence is all that is required by law. When someone has completed his/her sentence, that person should be considered on the basis of his/her qualifications for the job, on an equal footing with any other candidate for employment. Many employers check for convictions occurring within the past 7 or 10 years; others require disclosure of all adult convictions going back to the age of 18. We oppose the practice of going back a specified and arbitrary number of years, and **urge adoption of a standard that reflects a presumption of rehabilitation when a person has completed their sentence.**

Employers may be protected in this practice. One court used presumed rehabilitation logic in reaching its conclusion that a bar owner was *not negligent* in hiring a bartender who ultimately shot a customer, and who had prior assault convictions that the owner was not aware of: “when one has completed a criminal sentence or has been paroled, the employer to some extent is entitled to rely upon the determination of the government’s criminal justice system that the individual is ready to again become an active member of society.” Evans v. Morsell, 395 A2d 480 (Md. 1978) Other courts have found that employers are protected against negligent hiring claims when they have 1) a written application; 2) check an applicant’s references; and 3) conduct an in-person interview.

Job Announcements

- **Announcements for job openings should list any legal barriers that exist for people with past convictions.** For example, laws in many states require that applicants for police and law enforcement-related jobs must never have been convicted. State or local laws also prohibit many school districts from hiring people who have prior convictions related to sex offenses with children. If there are categories of convictions that will disqualify an applicant from a particular job, these should be clearly listed on the job announcement. Applicants who know that a past conviction will disqualify them will not bother applying for the job.
- **If a job will require a background check, applicants should be informed on the job announcement.** It should also state that only job-related convictions will be considered and will not necessarily disqualify an applicant, in accordance with Federal and state employment laws.

Application

- **The application should start with a non-discrimination statement** that includes language protecting people from discrimination based on past convictions or prior imprisonment. Model language in the Boston application: *“In compliance with Federal and State Equal Employment Laws, Equal opportunity will be afforded to all applicants regardless of race, color, sex, age, religious creed, disability, national origin, ancestry, sexual orientation, marital status, ex-offender status, prior psychiatric treatment or military status.”* Instead of “ex-offender status,” we recommend “incarceration or conviction history.”
- **There should be no inquiry into conviction history on the initial application.** Most job categories should not require a background check of any kind. If a background check will be done later in the hiring process, this practice should be disclosed on the application along with assurances that past convictions will not be considered unless they have a direction relationship to specific job responsibilities.

Disclosure of Conviction History

- For most jobs, there should be no requirement for an applicant to disclose their conviction history. If required, consideration of past convictions should be limited to convictions directly related to job responsibilities for a specific job. This “substantial relationship to the job” should be determined using the standards listed above.
- If an employer determines there is a need for a background check, the request for conviction history information should be made after a candidate has passed all other eligibility tests, including civil service examinations, physical tests, and evaluations of prior experience. We believe that consideration of past convictions should only occur at the finalist stage of the application procedure, ideally after a conditional offer of employment has been made. This will guarantee that selection has been made on the basis of qualifications and experience.

- Requiring only a limited number of applicants to disclose past convictions is a definite cost-benefit for employers. Rather than completing expensive background checks and processing disclosure information on all candidates, the employer will do background checks only for the finalist for the specific job position, and only if the nature of the job requires it.
- If a background check is required, we recommend that it should be done after a conditional job offer has been made, conditional on job-relatedness of any conviction history.

Process of Reviewing Records

- **Only a very limited number of people should have access to the conviction history information required from finalist applicants.** This is very personal and highly prejudicial information and should be treated with highest guarantees of confidentiality.
- **We urge employers to institutionalize a standard of presumption of rehabilitation: whenever a candidate has completed a sentence, including completion of parole or probation, that conviction should be considered irrelevant to the application procedure.**
- **Review of conviction history information should be centralized**, both to limit the number of people with access to the background checks and to assure a high level of training for staff who will be determining whether or how a conviction is job-related. For example, in Alameda County, conviction history information will not be requested until the finalist stage of the application process. Review of this information will be centralized in a small staff in the central office of the Department of Human Resource Services. These staff will be trained in determining how a conviction may or may not be job-related. Unless a conviction is considered job-related, conviction history information will never be seen by anyone except these staff members. The hiring officer or department head will not be informed of past convictions unless they are determined to be job-related.
- Traditional language in Title VII of the Civil Rights Act of 1964 and rulings by the EEOC suggests that the following criteria be used in considering job-relatedness of a conviction:
 1. the nature, number and circumstances of the offenses for which the individual was convicted;
 2. the length of time intervening between the conviction for the offense(s) and the employment decision;
 3. the individual's employment history; and
 4. the individual's efforts at rehabilitation

More recently these criteria have been summarized as **recency, relevance, and rehabilitation** by the County of San Mateo and the City and County of San Francisco.

We oppose the use of “nature and gravity of the offense” as a criterion, because this language is extremely vague and invites subjectivity and prejudice. Without guidelines, a reviewing officer’s personal interpretation of this factor may influence their decision without the opportunity for explanation from the applicant. **We also disagree with the use of “number” or “frequency of convictions,”** since that may also be inappropriately used as a character test with no guidelines.

No matter what a person's past convictions may be, we firmly believe in the possibility of change, rehabilitation, redemption, transformation, and a second chance.

- **If an applicant is rejected from employment because of a past conviction, it is crucial that the applicant receive written notice of the reasons for the rejection**, including which conviction is being considered job-related, and how that conviction is related to the job responsibilities of the position.

- **Any applicant should have the right to a copy of the results of any fingerprinting that is done during the application process.** This is the only way applicants will be able to verify or challenge the accuracy of the RAP sheet.

- Whenever a conviction history is considered in the process of the application procedure, **the applicant should have the right to submit evidence of their own process of rehabilitation**, including letters of recommendation from community members and certificates of completion of programs or education.

Fingerprinting

- **We oppose the practice of fingerprinting all employees.** Fingerprinting and background checks are required by law in some cities/counties, or for some job categories, but they constitute another discriminatory obstacle for people who have past convictions. There is no scientific evidence that a past conviction is an accurate indicator of increased potential for future criminal activity.

- **RAP (Record of Arrests and Prosecutions) sheets are often inaccurate.** Often fingerprinting and official background checks are used as a "truth test" regarding past convictions. Discrepancies between self-disclosed conviction histories and information on official RAP sheets are often viewed as falsehoods, and may result in rejecting applicants or dismissing employees for "falsifying the application." The use and availability of conviction information has increased because private companies, in addition to Departments of Justice, are now providing this information via the Internet. These companies are virtually unregulated and are not accountable for the accuracy or timeliness of the information they provide. If a person pursues legal remedies that may be available to "clear up" their RAP sheet, private companies are not required to maintain updated databases that reflect this information.

- **RAP sheets are inherently prejudicial because they reflect information that should not be considered, including all arrests and detentions without conviction.** In some states, employers are restricted to consideration of convictions only, so considering other information on the RAP sheet is prejudicial and potentially illegal.

- **We oppose the requirement that applicants fill out conviction history forms.** If a job requires a background check, then it should be done after a conditional offer of employment has been made, and the applicant should have known in advance through the job announcement. Doing a background check for job-related convictions should be sufficient. Discrepancies between a self-disclosure conviction history questionnaire and a background screening could be the result of many variables, including bad memory, being arrested for one crime/charged with another/convicted of something else or not at all, and lack of clarity about disclosure of arrests.

Determining Job-Relatedness

- **Employers should adopt clear standards for evaluating how a past conviction may or may not be job-related.** Any consideration of past convictions should be within the overall context of presumption of rehabilitation: that is, when a person has completed a sentence imposed by the court, that conviction should be irrelevant to any consideration.
- **Job-relatedness means that a conviction is directly related to duties and responsibilities of the position.** For example, convictions for drunk driving might appropriately be considered for a job involving driving jobs. A conviction for bank robbery might appropriately be considered in reviewing applications for a bank teller job, though it would be inappropriate to consider that conviction for a secretarial position. Most criminal convictions, however, do not occur on jobsites. Employers should ask themselves: will the job provide the opportunity for a similar offense to occur? Are the circumstances leading to the prior offense the same? Has the candidate committed other offenses since his/her conviction, does his/her behavior make it likely that s/he will commit new offenses? How long has it been since the prior conviction occurred?
- Convictions for drug sales, manufacturing, or possession are often inappropriately used as a character test in considering applicants. **Past drug convictions of any kind should not be considered** except for positions in pharmacies or other places where access to drugs is part of the job. **Any applicant should be allowed to present evidence of recovery and rehabilitation.**

Appeal Procedure

- The appeal process should also be centralized, to minimize the number of people with information about the applicant's conviction history.
- If fingerprinting is used as a method of verifying conviction history information, the applicant should receive a copy of the RAP sheet that is returned from the Department of Justice.
- The applicant should have the right to submit additional evidence of his/her rehabilitation process, and to correct the RAP sheet if there are inaccuracies.
- Sufficient time should be allowed for the appeal procedure.
- In some instances, particularly public employment, applicants have the right to appeal a denial of employment to the Civil Service Commission. Adequate time and technical assistance should be given to any applicant alleging discrimination because of a conviction history.

Additional Recommendations for Government Employers:

- All businesses contracting with government employers should be required to adopt the same revised hiring practices used by the government human resources department.
- State, local, and federal government should adopt legislation similar to that adopted in Philadelphia, which would require any business with more than 10 employees to eliminate discrimination based on past convictions.