

Testimony of  
Michelle Natividad Rodriguez  
National Employment Law Project

In Support of a  
City-Wide Policy for Ban the Box – Fair Chance  
Initiative for Hiring

Before the  
Economic Development Committee

November 17, 2015



Michelle Natividad Rodriguez  
Senior Staff Attorney  
National Employment Law Project  
405 14<sup>th</sup> Street, Suite 401, Oakland CA 94612  
mrodriguez@nelp.org

Thank you to the members of the Economic Development Committee members for the opportunity to provide testimony. My name is Michelle Natividad Rodriguez and I am a Senior Staff Attorney of the National Employment Law Project. I am honored to testify in support of a city-wide policy aimed at reducing barriers to employment for individuals with arrest or conviction histories. NELP applauds the work of A New Way of Life, All of Us or None, Homeboy Industries, LA Voice, and many others in leading this effort.

## **The National Employment Law Project (NELP) Promotes Workers' Rights**

Over forty-five years ago, NELP was founded to promote the employment rights of the working poor and unemployed. Today, NELP is one of the nation's leading voices promoting employment policies that deliver on the nation's promise of economic opportunity. From our locations throughout the country, we shape model employment policies at the local, state and national levels through empirical research, legal and policy advocacy, and building alliances. One of our focus areas is to reduce employment barriers for people with prior arrests and convictions.

NELP has been a leader in the national movement for fair-chance hiring reforms, which have included "ban the box." We have had the privilege of working on dozens of successful fair-chance campaigns and providing expertise to support this legislation across the country. In California, NELP was a lead sponsor for California's AB 218 (statewide ban the box for public employment) and the San Francisco Fair Chance Ordinance. We also worked closely with community partners in Richmond, California on their fair hiring policy, which was expanded to contractors. Through a national lens, we will highlight the relevant best practices and the most effective components of fair-chance laws that have been developed, tried, and tested.

## **Collateral Consequences Exact a Heavy Toll, But Jobs Turn Lives Around**

NELP estimates that there are 70 million adults with arrest or conviction records in the United States—or about one in three adults.<sup>1</sup> Unfortunately, finding a job is all too difficult for many people with records as reported in the *New York Times* article, "Out of Trouble, but Criminal Records Keep Men Out of Work." Men with criminal records account for about 34 percent of all nonworking men between the ages of 25-54 (generally considered to be prime working age), according to the New York Times/CBS

---

<sup>1</sup> In 2012, there were 100,596,300 subjects ("individual offenders") according to a Bureau of Justice Statistics survey of the criminal history files within the 50 states, American Samoa, Guam, and Puerto Rico. U.S. Dept. of Justice, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2012* (Jan. 2014) at 2, <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>. To account for duplication in the survey of the state criminal record repositories (that is, individuals who may have criminal records in more than one state and deceased individuals who have not been removed from the state record systems), NELP conservatively reduced the numbers cited in the state survey by 30 percent to arrive at a total of 70,417,410 individuals with state arrest or conviction records. The U.S. Census 2012 population estimate for those 18 years and over was 240,185,952. *Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and States April 1, 2010 to July 1, 2012* (U.S. Census Bureau, Population Division, June 2013, [www.census.gov](http://www.census.gov)). Using these estimates, 29.3 percent of U.S. adults, or nearly one in three, have a criminal history on file with states.

News/Kaiser Family Foundation poll.<sup>2</sup> And the Great Recession made it even worse; for example, in one state researchers found that before the Recession 40 percent of the formerly incarcerated were employed, but in 2008 the proportion had dropped to 10 percent.<sup>3</sup>

The “box” on a job application is a barrier to jobs because it has a chilling effect that discourages people from applying. It also artificially narrows the applicant pool of qualified workers when employers toss out applications with the “box” checked, regardless of the applicant’s qualifications or relevancy of the conviction to the job. Both the employer and job applicant lose out. Research affirms that having a criminal record reduces a call-back for a job applicant by 50 percent.<sup>4</sup> When candidates answer “yes” to the conviction question on a job application, they are marked with a modern-day scarlet letter.

Persistent joblessness translates into economic losses with far-reaching consequences. One study found that lowered job prospects of people with felonies and formerly incarcerated people cost the U.S. economy between \$57 and \$65 billion in lost output in 2008 alone.<sup>5</sup> At the individual level, serving time reduces annual earnings for men by 40 percent,<sup>6</sup> meaning families too often fall into a poverty trap.<sup>7</sup>

Conversely, new job opportunities for workers with prior records could translate into economic benefits for all. A 2011 study found that securing employment for just 100 formerly incarcerated people would increase their combined lifetime earnings by \$55 million, increase their tax contributions by \$1.9 million, and boost sales tax revenues by \$770,000, all while saving more than \$2 million annually by keeping them out of the criminal justice system.<sup>8</sup>

Clearing the path to employment for people with prior records not only can boost the local economy, but it can also significantly increase public safety. Stable employment has been found to be a significant factor in reducing the likelihood of reoffending.<sup>9</sup> One

---

<sup>2</sup> Binyamin Appelbaum, “Out of Trouble, but Criminal Records Keep Men Out of Work,” *New York Times* (Feb. 28, 2015) ([http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?\\_r=0](http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?_r=0)). Poll available at <http://kff.org/other/poll-finding/kaiser-family-foundationnew-york-timescbs-news-non-employed-poll/>.

<sup>3</sup> “Educational Attainment, Employment and Incarceration, Part 2,” Seattle, WA: Seattle Jobs Initiative, 2012. ([http://www.seattlejobsinitiative.com/wp-content/uploads/BeyondHeadlines\\_MAR2012.pdf](http://www.seattlejobsinitiative.com/wp-content/uploads/BeyondHeadlines_MAR2012.pdf))

<sup>4</sup> Devah Pager, “The Mark of a Criminal Record,” *American Journal of Sociology* 108(5), 2003: 937-975, available at [http://scholar.harvard.edu/files/pager/files/pager\\_ajs.pdf](http://scholar.harvard.edu/files/pager/files/pager_ajs.pdf).

<sup>5</sup> John Schmitt and Kris Warner, “Ex-offenders and the Labor Market,” Washington, D.C.: Center for Economic and Policy Research, (2010) available at <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

<sup>6</sup> Bruce Western and Becky Pettit, “Collateral Costs: Incarceration’s Effect on Economic Mobility,” Washington, D.C.: The Pew Charitable Trusts, (2010) available at [http://www.pewtrusts.org/uploadedFiles/Collateral\\_Costs.pdf?n=8653](http://www.pewtrusts.org/uploadedFiles/Collateral_Costs.pdf?n=8653).

<sup>7</sup> John Tierney, “Prison and the Poverty Trap,” *The New York Times* (Feb. 19, 2013) at p. D1, available at [http://www.nytimes.com/2013/02/19/science/long-prison-terms-eyed-as-contributing-to-poverty.html?pagewanted=all&\\_r=0c](http://www.nytimes.com/2013/02/19/science/long-prison-terms-eyed-as-contributing-to-poverty.html?pagewanted=all&_r=0c).

<sup>8</sup> “Economic Benefits of Employing Formerly Incarcerated Individuals in Philadelphia,” Philadelphia, PA: Economy League of Greater Philadelphia (2011) available at [http://economyleague.org/files/ExOffenders\\_-\\_Full\\_Report\\_FINAL\\_revised.pdf](http://economyleague.org/files/ExOffenders_-_Full_Report_FINAL_revised.pdf).

<sup>9</sup> “Safer Foundation Three-Year Recidivism Study, 2008,” Chicago, IL (2008) available at <http://saferfoundation.org/files/documents/Safer%20Recidivism%20Study%202008%20Summary.pdf>.

study found that a 1 percent drop in the unemployment rate causes between a 1 to 2 percent decline in some offenses.<sup>10</sup>

## **The National Movement for Fair-Chance Hiring Reform**

Fair-chance hiring helps to lift the stigma of the “record” and allows a person's skills and qualifications to come first. Momentum for the policy reform has grown exponentially, particularly in recent years. Today, there are 19 states and over 100 U.S. localities across the country that have removed the conviction history question from the job application and delayed background checks until later in hiring.<sup>11</sup> Tallying the populations in the states and local cities and counties with ban-the-box, more than 100 million Americans—or one-third of the U.S. population—now live in a jurisdiction with a policy.

The breadth of support for fair chance speaks to its commonsense appeal. Policymakers are including fair-hiring laws as part of a “smart on crime” agenda to reduce criminal justice spending and increase public safety. In New Jersey, Governor Chris Christie signed state legislation applying to private employers. He stated: “Today we are also going further to reform our criminal justice system by signing legislation that continues with our promise and commitment to give people a second chance.”<sup>12</sup>

Federally, President Obama has directed the Office of Personnel Management to delay conviction history inquiries for federal agency hiring, as a result of an initiative that NELP launched with partners this year. NELP also continues to advocate for an executive order and presidential action that would encompass federal contractors and expand the policy to include additional fair hiring components to increase effectiveness.

Seven states—Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island—have removed the conviction history question on job applications for private employers. In addition to these states, Washington D.C., and 26 cities and counties now extend the fair-chance policy to government contractors or private employers. Of the localities, Baltimore, Buffalo, Chicago, Columbia (MO), Montgomery County (MD), New York City, Newark, Philadelphia, Prince George’s County (MD), Rochester, San Francisco, Seattle, and Washington D.C. extend their fair-chance laws to private employers in the area.

---

<sup>10</sup> Steven Raphael and Rudolf Winter-Ebmer, “Identifying the Effect of Unemployment on Crime,” *The Journal of Law and Economics*, University of Chicago Law School 44, (2001) available at <http://www.jstor.org/stable/10.1086/320275>.

<sup>11</sup> NELP, *U.S. Cities, Counties, and States Adopt Fair Hiring Policies to Reduce Unfair Barriers to Employment of People with Criminal Records*, available at <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

<sup>12</sup> State of New Jersey, Office of Governor, “We’re Giving People a Second Chance by Banning the Box,” Gov. Chris Christie (Aug. 11, 2014) available at <http://www.state.nj.us/governor/news/news/552014/approved/20140811g.html>.

## Features of a Robust and Effective Fair-Chance Ordinance

The City of Los Angeles has the benefit of the significant experience from cities and states across the nation to shape a fair-chance hiring ordinance that is both robust in its coverage, but also in its implementation.

**Limiting Criminal Record Inquiry Until After a Conditional Offer of Employment:** NELP recommends the conditional offer threshold for the criminal history inquiry because of the clarity it provides in the hiring decision-making process and the benefit to enforceability. We have provided the rationale for delaying inquiries until the conditional offer stage in the publication, *Fair-Chance Hiring Best Practice: Delaying Inquiries Until Conditional Offer*, which is included as an attachment.<sup>13</sup>

**Integrating the U.S. Equal Employment Opportunity Commission’s Best Practices and Guidelines to Ensure Individualized Assessment.** NELP recommends that the legislation be consistent with the U.S. Equal Employment Opportunity Commission (EEOC) criminal records guidelines and best practices, which require public and private employers considering convictions to take into account the age of the offense, whether the offense is related to the job position, and evidence of rehabilitation.

The bipartisan EEOC guidance issued in April 2012 clarified the standards under Title VII of the Civil Rights Act of 1964 that regulate criminal background checks for the employer community.<sup>14</sup> It made clear that blanket prohibitions against hiring people with criminal records, such as hiring practices rejecting anyone with a prior arrest or conviction, generally violate Title VII. Legislation including the job-related analysis and an individualized assessment would benefit employers by providing concrete steps that will help ensure that employers are aligned with the best practices recommended by the EEOC. NELP’s best practices are outlined in its publication *Best Practices and Model Fair-Chance Policies*, which in part, is included as an attachment.<sup>15</sup>

**Strong Standards of Accuracy and Transparency.** The federal Fair Credit Reporting Act requires that employers provide job applicants a copy of the commercially-prepared background check that is the basis of the denial, prior to an adverse action. In addition, the employer is required to provide reasonable time for the job seeker to correct any inaccuracies. These are important standards of consumer protection that help ensure that background check errors are not responsible for an individual losing a job opportunity. An ordinance should be consistent with these basic provisions to ensure accuracy. It would also provide the job seeker an opportunity to understand his or her denial and provide mitigation or rehabilitation evidence that an employer may find persuasive.

---

<sup>13</sup> The publication is available at <http://www.nelp.org/publication/fair-chance-hiring-best-practice-delaying-inquiries-until-conditional-offer/>.

<sup>14</sup> U.S. Equal Employment Opportunity Commission, “EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964” (April 25, 2012).

<sup>15</sup> Available at <http://www.nelp.org/publication/best-practices-model-fair-chance-policies/>.

**Strong penalties, including compensation to the complainant.** The enforcement agencies handling fair-chance hiring laws have struggled with low complaints, which has impacted the ability to enforce the laws. With limited time and resources, marginalized people from low-income communities are unable to engage in a process with a government agency that will likely not result in a job. Moreover, people with arrest and conviction records are deeply stigmatized by their record and are often distrustful of government agencies because of negative experiences with the criminal justice system.

In a letter dated March 5, 2014 to Councilmember Tommy Wells of the District of Columbia, staff attorney Brendan Lynch of Community Legal Services of Philadelphia detailed the problems with enforcement for Philadelphia's ban the box law. The law had been in place two years at the time of the letter, which is excerpted below:

*In my view, one critical omission from Philly's ordinance is the lack of any compensation to those whose reports of violations result in fines against businesses. I think this has had a direct impact on the number of complaints being filed, which in turn has hurt the city's ability to enforce the law, and has limited the business community's awareness of the law.*

*In Philadelphia, Ban the Box has been enforced by the Philadelphia Commission on Human Relations ("PCHR"). An employer who inquires about an applicant's criminal history prior to completion of an employment application and a first interview is subject to a \$2,000.00 fine. The PCHR has been entirely reactive, waiting for complaints to come in from the public before conducting any enforcement. This makes it all the more important to make it easy and worthwhile for people to file complaints. Unfortunately, complainants in Philadelphia do not receive any portion of fines that may be assessed – the money all goes to the city's general fund – or any other incentive. Thus, complainants must take time away from their job search to track down the complaint form, fill it out and submit it, yet see no benefit from doing so. Obviously, unemployed job seekers have much higher priorities than going out of their way to complain about an illegal job application form – especially low-income job seekers, who are disproportionately affected by criminal record exclusions in employment.*

*I am convinced that this is one major reason why official complaints about Ban the Box violations in Philadelphia have been so low. This is a great shame, because we know that violations of the law are still widespread – community activists have collected proof that dozens and dozens of local employers are still in violation. If job seekers could reasonably expect some small compensation when they file complaints which turn out to be valid, I am confident that complaints would greatly increase, thus allowing the PCHR to do its job, and reducing a barrier to work at hundreds of local employers.*

After learning of the problems of enforcement in other jurisdictions, policymakers in the District of Columbia included in the Fair Criminal Records Screening Act of 2014 a

provision that provided complainants with half of the penalties. The Office of Human Rights (OHR), the enforcement agency in the District of Columbia responsible for the new law, has reported the most complaints filed for any fair-chance law in the country thus far.

Other enhanced tools to deter violators that the enforcement agency could use include examples from the wage theft context:

- Pursuing the full back wages, damages, interest, and other penalties;
- Treating individual worker complaints as covering the entire workplace so that other workers who fear coming forward will benefit from the agency's investigation;
- Seeking injunctive relief (an order prohibiting the employer from engaging in certain conduct), with monitoring for future compliance, in high-priority cases.<sup>16</sup>

Additional components from the experiences of other jurisdictions to ensure enforcement and implementation include the following:

- **Adequate funding for investigation and outreach.**
- **Community-based partnerships to leverage enforcement resources.**
- **Agency-initiated investigations.**

The experiences of the enforcement agencies in Seattle, San Francisco, and the District of Columbia responsible for fair-chance laws all point to the need for adequate resources and the appropriate staff to engage in implementation and enforcement. These case studies are detailed in the NELP publications, *Best Practices in Fair-Chance Enforcement* (included as attachment) and *Fair-Chance Implementation Case Studies for Government Agencies*.<sup>17</sup>

---

<sup>16</sup> Haeyoung Yoon & Tsdeye Gebreselassie, Building Robust Labor Standards Enforcement Regimes in Our Cities and Counties (March 2015), NELP at 3.

<sup>17</sup> These publications are available at <http://www.nelp.org/publication/best-practices-in-fair-chance-enforcement/> and <http://www.nelp.org/publication/fair-chance-implementation-case-studies-for-government-agencies/>.

# Best Practices and Model Policies: Creating a Fair Chance Policy

*As you craft a fair chance policy, including “ban the box,” here are the top ten principles to follow. These have been distilled from our work with jurisdictions across the country and are applicable to any state or region.*

1. **Avoid stigmatizing language** such as “ex-offenders” or “ex-felons.” Use terms that lead with “people,” such as “people with records.” NELP was educated by the [language campaign](#) of the Center for NuLeadership on Urban Solutions on this point.
2. **A background check may be unnecessary for a job position** because most jobs do not involve unsupervised access to sensitive populations or handling sensitive information. If the background check is not legally required, it may be cost-saving to forego. Even if a background check is legally mandated, it is unnecessary to exempt a position from the majority of these best practices as these practices do not interfere with conducting background checks.
3. **Avoid blanket exclusions and instead include an equal opportunity statement on job applications** to indicate that a record will not automatically disqualify anyone from a job, unless there is a specific legal exclusion. If a background check is required or if there is a specific legal barrier, inform applicants that “a background check will be conducted for this position.” However, avoid phrases such as “must pass a background check,” or “clean background only” as this language may be interpreted as a categorical exclusion.
4. **If a background check is necessary, only consider those convictions with a direct relationship to job duties and responsibilities and consider the length of time since the offense.** Follow the best practices of the [2012 U.S. Equal Employment Opportunity Commission guidance](#) in evaluating convictions and avoid consideration of records of arrest not followed by a valid conviction. Do not consider sealed, dismissed, or expunged convictions, misdemeanor convictions where no jail sentence can be imposed, and infractions.
5. **Remove inquiries into convictions from the job application.** The most effective policy is to delay all conviction inquiries, oral or written, until after a conditional offer of employment. Do not include a provision to permit “voluntary disclosure” of background check information from the applicant. “Voluntary disclosure” circumvents “ban the box” as applicants are often directed to provide background check information by job services.



6. **Remove self-reporting questions about conviction history.** Discrepancies between self-disclosed information and background checks are often caused by workers' misunderstanding of their own records, and too often are inaccurate "truth tests." If a background check will be run, there is no benefit to this additional step, which trips up well-intentioned workers. Prior to any discussion about the applicant's conviction history, provide the applicant with a copy of any background check.
7. **If a job applicant is rejected because of a record, inform the applicant.** Provide the applicant with written notice of the specific item in the background check report that is considered job-related and provide the applicant with a copy of the report. Background check reports are often inaccurate, so give applicants the chance to verify or challenge the information.
8. **Provide the applicant the right and sufficient time to submit evidence of mitigation or rehabilitation** when a record is considered in hiring. Evidence may include letters of recommendation from community members and certificates from programs or education. Hold the position open until the review is complete.
9. **Expand the fair chance policy to private employers.** To maximize the impact of the fair chance policy, apply the policy to government contractors and private employers. Another method of strengthening the policy for government contractors is to combine it with targeted hiring, as shown in "Community Hiring Model Language" in the Appendix.
10. **Combine data collection and effective enforcement.** At a minimum, a government agency should have the infrastructure to process complaints and to audit compliance. If the policy applies to private employers, the ability to bring a lawsuit based on a violation of the ordinance may be an effective means of enforcement. With government contractors, the ability to rescind the contract is motivation to comply. Data collection to ensure that the policy is opening job opportunities for people with records will also support enforcement.

Ultimately, a robust enforcement regime will ensure that the law or policy is not just well-intentioned, but effective. NELP is currently developing a chapter for the Fair Chance Toolkit on best practices that are specific to enforcement and implementation.

## A Key Fair-Chance Hiring Best Practice: Delaying Conviction Inquiries Until the Conditional Job Offer

BY MICHELLE NATIVIDAD RODRIGUEZ AND NAYANTARA MEHTA

*As one of the leading technical assistance providers for fair-chance hiring laws, we often receive inquiries about our [best practice](#) recommendations. Although all of our recommendations complement each other to reduce hiring biases against job-seekers with records, this brief highlights one important component of a robust fair-chance policy: delaying conviction inquiries until the conditional job offer.*

### Introduction

---

NELP estimates that there are 70 million people in the United States—nearly one in three adults—who have arrest or conviction records.<sup>1</sup> A record creates a serious barrier to employment for millions of workers, especially in communities of color hardest hit by decades of over-criminalization. Fair-chance hiring policies are intended to help dismantle this employment barrier by ensuring that job applicants with records are assessed on their merits, rather than on negative stereotypes associated with having a record.

Today, 18 states and more than 100 cities and counties have embraced “ban the box,” which delays conviction inquiries, and seven states extend their policies to private employers.<sup>2</sup> In addition, federal agencies have promoted the policy as a best practice, and it has been adopted by major employers such as Walmart, Target, Starbucks, and Koch Industries.<sup>3</sup>

#### Snapshot of Key Fair-Chance Hiring Best Practices<sup>4</sup>

- **Avoid stigmatizing language** such as “ex-offender” or “ex-con.”
- **Background checks may be unnecessary** for many jobs.
- **Limit information considered**, e.g., avoid considering arrests; dismissed, expunged, or sealed convictions; infractions; and irrelevant convictions.
- **“Ban the box” on the job application.** Remove the conviction history inquiry.
- **Delay conviction inquiries until conditional offer.** Also, refrain from asking candidates to self-disclose conviction records.
- **Require individualized assessment.** Consider time passed since the offense, job-relatedness, and evidence of rehabilitation. A clear standard reduces biases.
- **Provide a candidate the opportunity** to dispute both the accuracy of records and the employer’s rationale for potential denial.
- **Plan for effective enforcement and data collection to assess policy compliance.** This information will help to ensure that the policy works as intended.

One crucial element of an effective policy is determining the stage in the hiring process when employers may ask about a candidate's conviction history.<sup>5</sup> NELP recommends delaying the conviction history inquiry until the employer makes a conditional job offer to the candidate. Of the jurisdictions with these policies, Hawaii and 43 cities and counties (including the District of Columbia and New York City) require employers to wait until the conditional-offer stage. This tally of jurisdictions does not include the additional 11 localities and two states that delay inquiries until the finalist stage.<sup>6</sup>

## **The Benefits of Delaying Conviction Inquiries Until a Conditional Job Offer**

---

Delaying conviction inquiries until an employer has made a conditional offer of employment increases the effectiveness of a fair-chance hiring policy, which is a benefit to job candidates with records. However, this component of the policy also offers benefits to employers, such as clarity in decision-making and potential cost-reduction in the hiring process. Finally, the government agency charged with compliance or enforcement will save investigation costs and be in a better position to ensure that the policy is upheld.

### **Cost-Effective for Employers**

By waiting to ask about conviction history until the conditional-offer stage and forgoing collecting and analyzing conviction information generated earlier in the process, employers have identified cost savings. According to the City of Minneapolis's human resources agency, "considering criminal history information at the time of a job offer decreased the amount of transactional work for staff" without slowing down the background check process.<sup>7</sup> Alameda County human resources staff noted that delaying background checks until the conditional-offer stage "has actually been a much more effective use of County resources."<sup>8</sup> Employers of all sizes benefit from waiting to inquire about conviction history until the conditional-offer stage, because this process allows employers to choose the best candidate from a wide pool of applicants.

### **Maintaining Public Safety**

Delaying conviction inquiries until the conditional-offer stage does not encroach upon the public safety needs of the employer. The policy does not change an employer's decision of *whether* a conviction history inquiry is made, but simply *when* an inquiry may be made. For example, a human resources staff member of Alameda County, California testified before a state legislative committee that under the county's fair-hiring policy, which includes background checks at the conditional-offer stage, the "background screening process is [in] no way less rigorous." During the six years of the policy being in place, there had been "no negative or adverse consequences," and instead, the county had received only "overwhelmingly positive" feedback.<sup>9</sup> Any concerns about legally mandated disqualifying offenses may be alleviated by informing applicants in job announcements of the disqualifying offenses that are enumerated in the law.

### **Minimizing the Influence of Negative Stereotypes in Hiring**

Delaying conviction history until a conditional offer ensures that the employer has been able to consider the individual's job qualifications to the fullest, without the stigma of the record affecting the employer's assessment of the candidate. Studies have shown that the existence of a criminal record reduces job callbacks by 50 percent on average, and by 60 percent for

black male job candidates specifically.<sup>10</sup> The biases against people with records, including the fear-provoking stereotype of a “criminal,” influences a hiring manager’s perception, whether consciously or unconsciously.<sup>11</sup> To avoid unfounded stereotypes from encroaching on the hiring process, the background check should only be considered after the hiring manager has weighed all the other objective criteria for the job. This is consistent with recommendations to minimize unconscious biases in hiring.<sup>12</sup>

### **Increasing Clarity in Decision-Making**

If an individual is denied a job at the conditional-offer stage, there is clarity that the rationale for the denial is the background check results, rather than the applicant’s job qualifications. This transparency in the hiring process is a benefit to the job candidate and to the employer. If an inquiry is only made at the conditional-offer stage, the candidate can be assured that up until that point, his or her merits, accomplishments, and skill set were considered fairly.

However, a candidate who is asked about his or her record prior to receiving a conditional offer faces ambiguity and uncertainty about the role his or her past conviction played in the employment decision. The employer may turn down the candidate for a variety of reasons unrelated to a prior conviction. Regardless, the applicant is unclear about the reason for denial. An employer that waits to inquire into a conviction history until the conditional-offer stage will not cause this uncertainty. The employer can assure the job candidate, and any enforcement agency that is investigating a complaint, that the individual was considered fully for the position.

### **Effective Enforcement**

Delaying the inquiry into conviction history until the conditional-offer stage increases the efficiency and effectiveness of an agency charged with compliance and enforcement of the policy. If a conditional offer has been made and then rescinded, it will be clearer whether a candidate was not offered a job due to his or her past conviction. In contrast, if the inquiry into conviction history is permitted before the conditional-offer stage, it will be less clear what role the past conviction played in disqualifying the applicant. Any resulting investigation would be more complicated and require a greater investment of time by the enforcing agency. Thus, a conditional-offer threshold can help streamline enforcement and better utilize a government compliance agency’s limited resources.

#### **D.C. Office of Human Rights’ Experience with the Conditional-Offer Inquiry<sup>13</sup>**

The District of Columbia’s Fair Criminal Record Screening Amendment Act of 2014 requires private employers to delay background check inquiries until the conditional-job-offer stage. The Office of Human Rights (OHR), charged with investigating complaints under the new law, has commented on this aspect of the law:

- **It upholds the spirit of the law.** Biases in hiring are reduced when employers review only the qualifications of job candidates.
- **Applicants can identify potential violations.** If the background check occurs prior to a conditional offer, applicants are unclear as to the rationale of the denial.
- **Investigations are easier for the enforcement agency.** Employers and job applicants generally will agree that the reason for a denial is the background check. This helps shorten the investigation.

## Consistent with Federal Hiring Best Practices

In addition, the conditional-offer threshold inquiry is aligned with the U.S. Equal Employment Opportunity Commission's guidelines regulating the use of arrest and conviction records by employers.<sup>14</sup> Limiting record inquiries until a conditional offer of employment is also consistent with the Office of Personnel Management best practices, which apply to federal agency and federal contractor hiring. OPM recommends waiting until the conditional-offer-of-employment stage to make inquiries because it is "more practical and cost-effective to first ensure that the applicant is eligible for the position."<sup>15</sup>

## Conclusion

---

These laws have the potential to create opportunities for millions of Americans struggling to find work. As public sector and private sector employers adhere to the fair-chance hiring framework in multiple jurisdictions, a new baseline will emerge in which all employers must consider job-seekers with records based on their qualifications and skills first. ■

## End Notes

---

<sup>1</sup>NELP, "Advancing a Federal Fair Chance Hiring Agenda: Background Check Reforms in Over 100 Cities, Counties & States Pave the Way for Presidential Action," (Jan. 2015) at fn. 2 ([www.nelp.org/publication/advancing-a-federal-fair-chance-hiring-agenda/](http://www.nelp.org/publication/advancing-a-federal-fair-chance-hiring-agenda/)).

<sup>2</sup> Numbers were accurate as of September 24, 2015. See NELP, "Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies to Reduce Barriers to Employment of People with Conviction Records" ([www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/](http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/)).

<sup>3</sup> The U.S. EEOC [Enforcement Guidance](#) officially endorses removing conviction questions from job applications. In 2013, The U.S. Department of Labor Office of Federal Contract Compliance Programs issued a [Directive](#) for federal contractors and subcontractors, which adopted the EEOC's Enforcement Guidance. President Obama's initiative, My Brother's Keeper Task Force 90-day [report](#) recommends "ban the box" as well. NELP's "Voices in Support" includes private employer endorsements, ([www.nelp.org/publication/voices-support-leaders-community-support-fair-chance-policies/](http://www.nelp.org/publication/voices-support-leaders-community-support-fair-chance-policies/)).

<sup>4</sup> For the complete description of NELP's best practices see, "Best Practices and Model Policies" Creating a Fair-Chance Policy" ([www.nelp.org/publication/best-practices-model-fair-chance-policies/](http://www.nelp.org/publication/best-practices-model-fair-chance-policies/)). Enforcement best practices are discussed in NELP's "Best Practices in Fair-Chance Enforcement" ([www.nelp.org/publication/best-practices-in-fair-chance-enforcement/](http://www.nelp.org/publication/best-practices-in-fair-chance-enforcement/)).

<sup>5</sup> We refer to the "conviction inquiry" as opposed to the "criminal record inquiry" because we assume that other criminal record information (e.g., arrests) are not included in the background check.

<sup>6</sup> See fn. 2.

<sup>7</sup> Minneapolis Conviction History Summary 2004-2008 YTD (March 16, 2009). See NELP, "Research Supports Fair-Chance Policies" ([www.nelp.org/publication/research-supports-fair-chance-policies/](http://www.nelp.org/publication/research-supports-fair-chance-policies/)).

<sup>8</sup> See fn. 7.

<sup>9</sup> Statement of Jody Pollak, Alameda County Human Resources (June 26, 2013); See NELP, "State Fair-Chance Campaign Materials" ([www.nelp.org/publication/state-fair-chance-campaign-materials/](http://www.nelp.org/publication/state-fair-chance-campaign-materials/)).

<sup>10</sup> See NELP, "Research Supports Fair-Chance Policies" ([www.nelp.org/publication/research-supports-fair-chance-policies/](http://www.nelp.org/publication/research-supports-fair-chance-policies/)).

<sup>11</sup> See NELP blog, "Fair-Chance Hiring: An Antidote to Race-Coding and Inequality" ([www.nelp.org/blog/fair-chance-hiring-an-antidote-to-race-coding-and-inequality/](http://www.nelp.org/blog/fair-chance-hiring-an-antidote-to-race-coding-and-inequality/)).

<sup>12</sup> See Kirwan Institute, "State of the Science: Implicit Bias Review 2015" ([kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf](http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf)).

<sup>13</sup> Letter of Elliot Imse, Director of Policy & Communications of the District of Columbia Office of Human Rights, to Mayor Charlie Hales of Portland, Oregon (dated Aug. 12, 2015) ([www.nelp.org/content/uploads/ConditionalOffer-OHR-8-12-15.pdf](http://www.nelp.org/content/uploads/ConditionalOffer-OHR-8-12-15.pdf)).

<sup>14</sup> See fn. 3, EEOC guidance.

<sup>15</sup> 5 C.F.R. §731.103(d).

# Best Practices in Fair-Chance Enforcement: Ensuring Work Opportunity for People with Convictions

BY ZOË POLK<sup>1</sup> AND MICHELLE NATIVIDAD RODRIGUEZ

*The lessons learned and best practices are synthesized from [three case studies](#) of fair chance hiring laws from San Francisco, Seattle, and the District of Columbia. These briefs are intended to support government agency efforts to reduce barriers for people with conviction records.<sup>2</sup>*

## Introduction

---

An estimated 70 million people in the United States—nearly one in three adults—have arrest or conviction records.<sup>3</sup> Many are discouraged from applying for work due to the application “check-box” asking about criminal history. The “box” becomes an even greater barrier when employers toss out all the applications with the checked box, arbitrarily narrowing the pool of jobseekers without regard to qualifications.

Removing conviction inquiries from job applications is known as “ban the box.” Fair-chance hiring policies include ban-the-box and other policies that create a structured hiring process to ease barriers. Today, 17 states and more than 100 cities and counties have embraced fair-chance hiring; six states extend it to private employers.<sup>4</sup> It has been promoted as a federal best practice and adopted by employers such as Walmart, Target, and Koch Industries.<sup>5</sup>

### Key Components of Fair-Chance Legislation for Stronger Enforcement

- **Ban-the-box and delay conviction history inquiries until conditional offer.** Job-application violations are straightforward to investigate. Waiting until the final hiring stage clarifies the rationale for an adverse decision, facilitating enforcement.
- **Require individualized assessments** considering the age of the offense, its job relevance, and evidence of rehabilitation. A clear standard reduces blanket bans.
- **Provide the candidate notice** of the rationale for the potential denial and the opportunity to review background-check results, before a denial. Background checks are rife with errors. This step avoids misinformed decisions.
- **Strong penalties for employers and incentives for complainants**, such as directing the penalty funds to complainants, or having significant monetary remedies available will incentivize employers to comply and jobseekers to come forward.
- **Anonymity and retaliation protection** help jobseekers and workers come forward.
- **Agency-directed investigations** ensure that agencies are not wholly relying on complaints and can direct their resources to high-impact cases.

## Takeaways from San Francisco, Seattle, and the District of Columbia

---

Although each of the three jurisdictions have variations in their fair-hiring laws and are at different stages of implementation and enforcement, common themes arise. From these local experiences, we have identified the best practices for government agencies invested in upholding the civil rights, human rights, or labor standards of their local communities.

### Laying the Groundwork for the Law

Even before legislation is contemplated, there are steps a government agency with a human rights or civil rights mandate may take that will set the stage for any fair-chance law and will facilitate effective enforcement. [Read more](#) about the enforcement agency's comprehensive strategy at this preliminary stage in this brief about San Francisco.

- **Leverage a Civil or Human Rights Mandate.** In the federal context, the U.S. Equal Employment Opportunity Commission has identified the use of arrest- or conviction-record information as a concern under the enforcement of Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, national origin, and other protected categories.<sup>6</sup> Taking the EEOC's lead, a local entity with a civil or human rights mandate could include information on bias experienced by persons with arrest or conviction records in all government anti-discrimination trainings.
- **Take Formal Positions.** Legislation is not the only avenue for action. Some municipal human rights, civil rights, or human relations entities have the authority to pass resolutions or issue letters supporting fair-chance efforts. Work with these entities to pass a resolution or take formal positions that prohibit the arbitrary discrimination of people with arrest or conviction records. For example, an agency could issue "letters of concern" when employers are identified as having discriminatory practices.
- **Stakeholder Meetings and Trainings.** To encourage dialogue and critical thinking about bias against people with records, convene public meetings in all of your jurisdiction's diverse communities. In that same vein, invite businesses and others to stakeholder meetings to collect information about any concerns with hiring people with records and to conduct anti-bias training.
- **Engage Law Enforcement.** There is a national effort to engage law enforcement in adopting an anti-discrimination culture and being a partner in reducing recidivism. Support law enforcement leaders on their "smart on crime" and rehabilitation efforts, making the connection to the civil and human rights efforts to destigmatize people with past records and expand employment opportunities.

### Be Prepared Before the Law Goes into Effect

After the law has been passed, there is a critical window before the effective date. This is an opportunity for the agency to set the tone for effective enforcement of the law.

- **Build Community Relationships.** Develop and maintain strong relationships with community-based organizations and the employer community, particularly with people with records in leadership. The agency's positive reputation will help maximize its outreach about the new law and pave the way for jobseekers and employers to engage

with the agency. [Read more](#) about how San Francisco, Seattle, and the District of Columbia provide examples of this strategy.

- **Stakeholder Group.** Create a collaborative stakeholder group to provide counsel and feedback on implementation and enforcement of the law. Participants in the group could include the enforcement agency, legal-advocate community groups, jobseekers with records, and employers. As appropriate, the group could disseminate regular findings to help identify opportunities to strengthen the outcomes. [More information](#) about a formalized stakeholder group can be found in the Seattle brief.
- **Accessible Materials.** Through consultation with stakeholders, ensure that any materials developed are language-accessible and disseminated broadly through the venues that will maximize outreach to employers and jobseekers. Recommended materials include those tailored specifically to jobseekers and to employers, FAQs about the law and filing complaints, a model notice of rights, and complaint forms. Examples of materials are provided [here](#).
- **A Complaint Process That Works.** To cultivate trust, it is critical that the enforcement agency develop an accessible, transparent complaint process that is thorough, yet responsive. A key component is a triaged complaint process that can fast-track certain cases. For example, job-application violations can be quickly resolved. [Read more](#) in the policy brief on the District of Columbia for an effective complaint process.

### **The Early Stages of When the Law Goes into Effect**

As a new law becomes effective, this critical initial stage of implementation requires significant education and outreach to the community and stakeholders. These strategies are maximized with an appropriate, earmarked budget for outreach, education, and staff.

- **Robust Employer Outreach.** To ensure that employers understand the new law, develop targeted strategies for small, medium, and large companies and include anti-bias education. Focus on employers who lack access to typical avenues of information, such as immigrant-owned businesses. To maximize success, designate staff to manage relationships with employers. [Read more](#) about Seattle’s strategy, which included earned media, ethnic media, public service announcements, and bus and radio ads.
- **Reach Marginalized Jobseekers.** Providing know-your-rights trainings and resources to jobseekers will help ensure they are able to exercise their rights. Conducting trainings and holding forums in community spaces that formerly incarcerated people trust will maximize outreach. Local community groups have deep local ties and skills in popular education that are critical to connecting with hard-to-reach jobseekers. For example, in San Francisco the enforcement agency contracted with community groups to provide outreach and facilitate the complaint process for wage-and-hour laws.<sup>7</sup>
- **Leverage Community Resources.** Provide regular trainings for community-based leaders and service providers on all the laws within the agency’s purview using a “train the trainers” framework. Armed with this information, these trained individuals serve as a trusted source of counsel for jobseekers. In addition, these trainings facilitate connections between community-based organizations and agency staff, which promotes transparency and reciprocity. [Read more](#) about the District of Columbia’s model.



## Ensuring Strong Compliance

The early stages of implementation of the law focus on education and outreach. To maximize the enforcement strategy, monitor compliance and identify enforcement gaps.

- **Promulgate Formal Rules.** Adopt formal rules interpreting the local law within the first year of implementation. These rules are an opportunity for the agency to maximize the levers provided in the law to ensure enforcement. Feedback through the stakeholder group can ensure the rules address enforcement gaps.
- **Track Complaints and Document Compliance.** Document the complaints received including demographic information, the type of complaint, industry, and method and time expended to resolve. Identify opportunities to collect information on compliance through other enforcement activities. For example, if the agency conducts any site visits or conducts surveys for other laws within the agency’s purview, take advantage of these opportunities to gauge compliance. For [more information](#), see San Francisco’s model.
- **Leverage Resources and Be Creative.** Local jurisdictions have agencies that regularly interface with the public. As in San Francisco, train staff in these departments on the fair-chance laws to help support referrals. Besides partnerships with obvious stakeholders such as community-based organizations and formerly incarcerated-led groups, consider additional partnerships to maximize your resources. In Seattle, the enforcement agency partnered with business students to conduct employer outreach. Social media and earned media are low-cost methods of educating the public about the law. [Read more](#) about the District of Columbia’s exemplary model for cutting-edge media.
- **Strategic, Directed Investigations.** After ample outreach and education, agencies should engage in agency-directed investigations. Efficient use of limited government resources requires prioritization. By directing its investigations to the industries and occupations that are identified as high-risk or may have a large impact, these agency-directed investigations can have a positive ripple effect. [Seattle](#) provides an example.

## Next Steps: Making Fair Chance a Priority

---

San Francisco, Seattle and the District of Columbia offer multiple approaches to becoming a “fair chance” jurisdiction. In each locality, however, the fair-chance law is enforced by agencies with a civil rights and nondiscrimination purview. An initial exploration should entail a review of the municipal non-discrimination and equal employment opportunity laws, including understanding enforcement.

While each jurisdiction has varied financial and staff resources as well as differing political environments, they are aligned in their prioritization of changing the narrative about people with records. Staff and allies who are willing to tap into the breadth of support and increased national awareness of the barriers faced by people with records are essential in this effort. Moreover, as each of the jurisdictions has demonstrated, government staff working in partnership with community based experts make successful teams. ■

## End Notes

---

<sup>1</sup> Zoë Melissa Polk, Esq. is the Director of Policy and Social Justice of the San Francisco Human Rights Commission. Established in 1964, the San Francisco Human Rights Commission provide leadership and advocacy to secure, protect and promote human rights. The SFHRC enforces City Non Discrimination Ordinances and policies and promotes social and economic progress for all.

<sup>2</sup> The authors would like to thank Donna Mandel, Compliance Officer, San Francisco Office of Labor Standards Enforcement and the National Employment Law Project's staff Norman Eng, Nayantara Mehta, Maurice Emsellem, Rebecca Smith, and Haeyoung Yoon for their expertise. We are especially grateful to Karina Bull, Senior Policy Analyst and Business Liaison, City of Seattle Office for Civil Rights, Office of Labor Standards, and Elliot Imse, Director of Policy and Communications District of Columbia Office of Human Rights, for their extensive review, feedback, and participation in this publication.

<sup>3</sup> Maurice Emsellem and Michelle Natividad Rodriguez, "Advancing a Federal Fair Chance Hiring Agenda: Background Check Reforms in Over 100 Cities, Counties & States Pave the Way for Presidential Action," NELP (Jan. 2015) at fn. 2 ([www.nelp.org](http://www.nelp.org))

<sup>4</sup> Numbers were accurate as of June 1, 2015. See NELP, "Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies to Reduce Barriers to Employment of People with Conviction Records" (June 2015) ([www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/](http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/))

<sup>5</sup> The U.S. EEOC issued an [Enforcement Guidance](#) on the consideration of criminal records in 2012, officially endorsing removing conviction questions from job applications. In addition, President Obama's initiative, My Brother's Keeper Task Force, issued a 90-day [report](#) recommending "ban the box."

<sup>6</sup> See U.S. Equal Employment Opportunity Commission, "EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (April 25, 2012).

<sup>7</sup> Diego Rondón Ichikawa and Rebecca Smith, "Delivering \$15: Community-Centered Wage and Hour Enforcement in Seattle," NELP (Oct. 2014) at 13.