

Bill No. 070684
Fair Criminal Record Screening Standard
Testimony of Sharon M. Dietrich, Managing Attorney
Community Legal Services, Inc.

Good afternoon, Chairman Goode and City Council members. I am Sharon Dietrich, Managing Attorney for Employment and Public Benefits at Community Legal Services, Inc. (CLS). Thank you for this opportunity to testify about Bill No. 0707684, an important piece of legislation that would help level the playing field for people with criminal records who just want to work and support their families.

As you know, the playing field for ex-offenders seeking employment sorely needs leveling. At CLS, the most common reason people seek employment representation is because of their criminal records. When I started at CLS as an employment attorney 20 years ago, this was not even an issue. Now, every year we see more clients than the year before with this problem, and the situation is only getting worse.

Why is this bill needed, given that Council recently passed the Philadelphia Re-Entry Employment Program (PREP) for Ex-Offenders?

The passage of PREP was a welcome development for ex-offenders seeking work in Philadelphia. The centerpiece of the ordinance is the tax credit that is available to employers which provide good jobs to qualified ex-offenders. However, not all ex-offenders in Philadelphia will be qualified to participate. Persons with less serious or old convictions are excluded, even though they too face enormous discrimination based on their criminal records. Moreover, a maximum of 1,000 ex-offenders can participate in that program at one time.

With respect to general criteria for hiring ex-offenders, PREP charges the Personnel Director to come up with criteria for the hiring of ex-offenders by the City. The ordinance places very modest hiring-related obligations on city contractors: (1) they must identify job opportunities for ex-offenders; and (2) they must report on the number of ex-offenders hired and explain why other ex-offenders were rejected.

By contrast, the Fair Criminal Record Screening Standard, which is modeled on a similar ordinance in Boston and on the City's Living Wage Ordinance, establishes far more concrete hiring standards on the City and its contractors. It builds on existing federal and state laws in addressing issues such as consideration of non-convictions; the circumstances under which criminal background checks can be conducted; the source and timing of criminal background checks; notice of a tentative employment decision based on a criminal record; and factors to be considered when making an employment decision on a criminal record.

The Fair Criminal Record Screening Standards bill builds upon existing law

To understand the extent that the Fair Criminal Record Screening Standard bill builds on existing law, it is worth beginning by examining the patchwork of laws governing the employment of people with criminal records. The three primary sources of law that govern employer discretion on hiring people with criminal records are the following.

- (1) **Title VII of the Civil Rights Act of 1964**, the federal race discrimination law, which prohibits overbroad policies for rejecting workers with criminal records, because such policies usually have a disparate impact based on race. The Equal Employment Opportunity Commission (EEOC), the agency which enforces Title VII, has three policy statements concerning the rejection of workers with criminal records who are African American or Hispanic.
- (2) **Section 9125 of the Criminal History Record Information Act (CHRIA)**, a state law, which provides in relevant part: “Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant’s suitability for employment in the position for which he has applied.”
- (3) **The Fair Credit Reporting Act (FCRA)**, the federal law which sets standards for consumer reports, governs standards for creation and use of criminal background reports that are compiled by credit reporting agencies (such as ChoicePoint).

While these three statutes provide important legal protection for people with criminal records, they do not apply in all situations. Title VII, for instance, may not cover white persons with criminal records. FCRA does not cover situations where employers do not use credit reporting agencies to prepare background checks, but rather perform background checks themselves. Moreover, the three statutes are isolated and obscure provisions of law, and few employers are aware of them. They each have different remedies and enforcement mechanisms.

By contrast, the Fair Criminal Record Screening Standards bill would create a comprehensive and visible ordinance that would apply to the City and its contractors. In addition to synthesizing existing law, the bill would fill in gaps that are currently unaddressed. It would balance employer needs to protect property and safety against worker needs not to be rejected in circumstances in which they do not present a realistic threat.

What are the most important features of the bill?

1. ***Employers are prohibited from denying jobs based on arrests for which the disposition of the charges was other than a conviction (such as a dismissal, not guilty verdict, etc.). Employers may not ask workers about such arrests.***

The Pennsylvania Superior Court has interpreted CHRIA (the state law) to mean that employers may not base employment decisions on arrests that did not lead to convictions. EEOC's Title VII policy on arrests requires an employer which wants to consider arrests to investigate the circumstances that led to the arrest and warns that employment rejections based on arrests will seldom be warranted. As this backdrop shows, the bill's provision providing that employers cannot consider arrests builds little on existing law, but would heighten public awareness of it.

However, as a general rule, existing law does permit employers to ask about arrests, even though they are not supposed to consider them under CHRIA or Title VII. This distinction makes no sense. Allowing employers to obtain arrest information only puts employers in the position to illegally consider it. The bill would eliminate this temptation.

2. ***Employers are not permitted to perform criminal background checks unless: (a) required by law; or (b) they make a good faith determination that the sensitivity of the position warrants the check.***

Under existing law, any employer with the inclination can perform a criminal background check on any worker. (There are some limitations under FCRA about how the check can be performed by a credit reporting agency, such as requiring written notice and authorization.)

In this respect, the bill would improve upon existing law by requiring the covered employers to make a good faith determination of whether a criminal background check is needed for a particular job. This requirement has been particularly noteworthy in the Boston ordinance. That City has determined that the majority of City jobs do not require background checks to be performed.

3. ***Criminal background checks must be done through the Pennsylvania State Police (the PSP), not criminal court records.***

This provision of the bill is not addressed by existing law. However, there are numerous reasons why PSP records, rather than court records, are preferable sources of criminal background information.

- * Court records generally provide arrests along with convictions, while PSP reports generally contain only convictions.
- * The PSP has a well established procedure for correcting errors, while the courts do not.
- * The PSP has agreed to procedures to correct proven cases of criminal identity theft, while the courts have no similar procedure.
- * PSP records contain Social Security numbers, so that exact matches can be made to ensure that the person convicted of a particular offense is the person whose background is being checked. However, court records do not contain Social Security Numbers, and matching

mistakes are often made. This problem is particularly dire with a new website of criminal court docket sheets created by the Administrative Office of Pennsylvania Courts (AOPC), which provides only year of birth, not even date of birth.

- * Court records are not meant to serve the purpose of criminal background checks, but rather are primarily case management tools. They are much more susceptible to misunderstanding by lay people than PSP records are, which are meant to be background check reports.
- 4. ***Criminal background checks cannot be performed until the employer has decided that the worker is otherwise qualified.***

This provision is an important part of the Boston ordinance. Also, San Francisco, Minneapolis, Saint Paul and several smaller communities have decided to “ban the box,” taking the question about whether a person has a criminal record off of the initial application. This gives persons with criminal records a fair opportunity to present their credentials, rather than being rejected immediately based on a check mark in “the box.”

Requiring an initial screening of qualifications before getting to the criminal background check also helps isolate that the criminal record was in fact the reason why the ex-offender has been rejected. The Americans with Disabilities Act (the ADA) uses a similar device to avoid covert disability discrimination by requiring a conditional offer of employment to be made before questions about disabilities can be asked.

- 5. ***Before an offer of employment is refused/revoked, the employer must give the applicant notice of the tentative decision and a copy of the criminal record report. The worker must have five business days to respond.***

This concept is drawn from FCRA, which requires provision of a criminal background report prepared by a credit reporting agency before a decision is made not to hire based on that report. The five day response period is based on a Federal Trade Commission interpretation of a “reasonable” period for the worker to respond to such a report. The Boston ordinance also permits workers to provide information to the employer about the accuracy and relevance of the criminal record.

CHRIA, the state law, does require Pennsylvania employers to notify workers if they are rejected based in whole or part on criminal record information. However, it does not require employers to provide copies of the report nor to provide that information before the decision has been finalized so that the worker can respond.

There are several compelling reasons for this provision. First, many ex-offenders are not sure what is on their criminal record; it is only fair that an employer considering a criminal record make that information available to the worker. Second, in my experience, the criminal background report obtained by an employer is often incorrect, and the worker ought to have the opportunity to check its accuracy. For instance, a common problem is that the background check mixes up two people

of the same name and attributes offenses to a person who was not involved with them. Third, even if a criminal record is accurate, notice of the pending decision allows the job applicant to put his or her best foot forward, providing ameliorating information such as the circumstances of the offense or efforts to turn his or her life around.

6. ***For it to reject a worker based on a criminal record, the employer must conclude: (a) there is a direct relationship between the job and the offenses; or (b) employing the ex-offender would involve an unreasonable risk to property or safety. Factors to be considered:***

a. The City's public policy encouraging employment of people with criminal records;

b. The offenses' bearings on the specific duties and responsibilities of the job;

c. The time that has elapsed since the occurrence of the offenses;

d. The person's age;

e. The seriousness of the offenses;

f. Any information that the person has produced about rehabilitation and good conduct;

g. The employer's legitimate interest in protecting property and safety.

This part of the bill, also similar to the Boston ordinance and to a policy adopted by Chicago Mayor Daley, requires an employer to perform a balancing test, rather than simply reject the person based on the criminal record. The employer may consider concerns that the persons with the criminal record poses a risk to people and property and may indeed reject that person if it judges that the risk is too high.

However, the employer must also consider issues that may weigh in favor of the ex-offender, depending on the circumstances of the particular case. Several of these considerations come directly from EEOC's policies interpreting Title VII as it applies to persons with criminal records. EEOC's policy statements require employers to consider the time that has elapsed, the job relatedness of the offenses, and the seriousness of the offenses.

The elapsed time is a particularly important consideration. Research has shown that the longer a person who previously has been convicted remains crime-free, the less likely he or she is to recidivate. In fact, a recent study that happened to examine data from the Philadelphia court system concluded that after seven or eight years, a former offender is little more likely to commit a crime than a person who has never been convicted. Nevertheless, CLS constantly sees situations in which job applicants are rejected for offenses that are decades old.

Early reports from the City of Boston about their ordinance are encouraging.

As I have note, the bill that is under consideration today is modeled on an ordinance passed by the City of Boston, that applies to both the City and its contractors. The bill was passed in October 2005 and went into effect in July 2006. In that City's limited experience with the ordinance, it is safe to say that "the sky has not fallen."

This summer, I spoke to Bill Kessler, of Boston's Human Resources department, about how the ordinance is working out vis a vis City jobs. He said that the policy for city employees is working very well.

The reason for the policy was to create a city-wide standard, applicable to all city jobs. The Human Resources Department developed it, because they were concerned that there was no consistency on consideration of criminal records from department to department. They also wanted to encourage ex-offenders to be able to get work.

Under the policy, the City does not perform a criminal background check if they think that the job does not require it. They have concluded that the majority of jobs do not require background checks; the main areas in which they perform checks are jobs involving persons with disabilities, children or the elderly. Applicants know up front whether a background check will be performed, based on the job posting.

Mr. Kessler did not have statistics as to whether more ex-offenders have been hired by Boston under the policy. Anecdotally, he has been hearing that more people with criminal records are applying.

One of my CLS colleagues spoke with Bill Hannum, Boston's purchasing director, for information about application of the ordinance to city contractors. Mr. Hannum stated that so far, implementation of the ordinance has been going quite well, in fact more smoothly than he had expected. It has been a learning process for companies, but there has been a good success rate in getting companies to respond. While there is some confusion about the ordinance, companies haven't been objecting to it. Overall, he sounded positive about it.

Thank you for considering my remarks. On behalf of my clients, I hope that Council will soon enact this bill.