

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

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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.¹ 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.² 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.³

Snapshot of Key Fair-Chance Hiring Best Practices⁴

- **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.⁵ 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.⁶

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.⁷ 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."⁸ 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.⁹ 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.¹⁰ The biases against people with records, including the fear-provoking stereotype of a “criminal,” influences a hiring manager’s perception, whether consciously or unconsciously.¹¹ 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.¹²

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 Inquiry¹³

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.¹⁴ 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."¹⁵

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

¹NELP, "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/).

² 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/).

³ 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/).

⁴ 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/). Enforcement best practices are discussed in NELP's "Best Practices in Fair-Chance Enforcement" (www.nelp.org/publication/best-practices-in-fair-chance-enforcement/).

⁵ 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.

⁶ See fn. 2.

⁷ 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/).

⁸ See fn. 7.

⁹ 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/).

¹⁰ See NELP, "Research Supports Fair-Chance Policies" (www.nelp.org/publication/research-supports-fair-chance-policies/).

¹¹ 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/).

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

¹³ 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).

¹⁴ See fn. 3, EEOC guidance.

¹⁵ 5 C.F.R. §731.103(d).