

An Employer's Brief on Fair Chance Hiring

Understanding More about the Rewards of Fair Chance Hiring

Why pursue Fair Chance Hiring of those convicted?

Fair Chance Hiring refers to delaying inquiries into a job applicant's criminal or credit history until after their qualifications for the position are fully examined. It opens up a talent pool that would be lost if prejudicial decisions are made based on early knowledge of a possible offense.

For employers, Fair Chance hiring means:

- Access to an **expanded labor pool** that demonstrates **loyalty**. A Harvard University and University of Massachusetts Amherst research study tracked 5,000 felons admitted to the military after receiving moral character waivers. They found "that individuals with felony-level criminal backgrounds are promoted more quickly and to higher ranks than other enlistees." Another study by Cornerstone (formerly Evolv), a national human resources company, reported that they found "employees with criminal records are 1 to 1.5 percent as productive as employees without records. On a large scale, those differences in diligence can translate into massive monetary differences of up to tens of millions in profit and loss gain."
- A commitment to **diversity and inclusion** and a workforce that reflects the City's population and **moves families out of poverty**. Rutgers University found 1 child in every 28 children has an incarcerated parent which increases the risk of living in poverty.
- An **improved business climate** as costs to the city and other government offices decrease and services can be better funded. The Center for Economic and Policy Research estimated that in 2008 the U.S. lost 1.5 to 1.8 million workers as those formerly convicted failed to find work. The resulting loss of productive output was between \$57 and \$65 billion.
- The Department of Justice figures show that employment reduces recidivism and thus **reduces crime and the impact of crime on business**. The Pennsylvania Economy League estimated in 2011 that lifetime increased earnings would total \$55.2 million for 100 of those formerly convicted – leading to \$1.9 million in increased wages taxes; \$770,000 in increased sales taxes and a reduction in court and correctional costs of \$2 million.

"We found an unusually high percentage of formerly incarcerated making it into management because they understand principles of business. Besides the hard work of the grocery business, they grasped ideas like sales, margins, accountability and shrinkage." Jeffrey Brown, President & CEO of Brown's Super Stores

"I got off of probation and parole at [age] 40 and I'd never had a job before. Once I got that job it was the turning point in my life. [Brown's Shop-Rite] gave me a chance to earn a decent living. Mr. Brown gave me the motivation to "perform and produce." - Anthony Jackson, Frozen Food Manager, Brown's Shop-Rite

What policies pose challenges for employers?

Employers in some industries face intricate rules when hiring those formerly convicted. Balancing concerns about **negligent hiring** with avoiding challenges for **discriminatory hiring** complicates hiring decisions. The **emphasis in the law on considering the individual situation** of a job applicant creates a complex landscape for hiring.

Some types of **jobs are restricted by Pennsylvania law and unavailable to those with certain convictions** such as working with children or the elderly or in some public sector positions. This increases the burden of comparing results of background checks with applicant qualifications and job description. For the **majority of job positions there is no defined restriction.**

The law is evolving. For example, the Pennsylvania Commonwealth Court recently struck down permanent, lifetime restrictions for those formerly convicted in long-term care facilities for the elderly. Lifetime restrictions are generally not favored. **Employers in industries where restrictions have been the norm need to stay informed of changes in the law.**

Recognizing employer concerns about negligent hiring lawsuits, some states have adopted negligent hiring protections that limit employer liability. At least 12 states have some protection. These protections take three common forms:

- Limit the use of an employee's criminal history as evidence during a trial if the employee reoffends.
- Establish a state-issued certificate which functions as a bond to protect the employer.
- If the employer has complied with the law to conduct a quality criminal background check, the employer is presumed not to be liable.

Pennsylvania does not have any such legislation.

Other policy challenges identified by employers are:

- **Disruptions at work when parole or court meetings** are scheduled during the employee's regular work time that lead to lost productivity.
- Identifying how often an employer may need to **periodically complete background checks of current employees**. ADP suggests that up to 25 percent of employers are investing in periodic background checks.

Building consensus around keeping those employed and on parole at work and productive across all systems might build solutions that benefit employers while maintaining the legal requirements of the parole.

Employers' voices are critical in suggesting policy that reduces the burden of hiring applicants who were formerly convicted and challenging policy that increases costs. Feedback on challenges, solutions and needed resources can be sent to **Sue Hoffman, Philadelphia Works**: shoffman@philaworks.org (215-717-2006).

Where can I get help with Fair Chance Hiring?

Employers often feel adrift with the complexities of Fair Chance Hiring – but there is help!

Philadelphia Commission on Human Relations provides information and explanations of Fair Chance Hiring and enforces the Philadelphia Fair Criminal Record Screening Standards Ordinance (Ban-the-Box). The PCHR consults with employers to help avoid discriminatory hiring or violations to Fair Chance Hiring law. www.phila.gov/humanrelations

Pennsylvania Human Relations Commission provides in-depth training and brief presentations on topics including civil rights law & PHRC jurisdiction; cross-cultural communication; and preventing discrimination in the workplace. www.phrc.state.pa.us

See the "Resources" section below for more help.

Understanding More about the Rewards of Fair Chance Hiring and the Consequences of Failing to be Compliant: More Detail

What are the relevant laws for Fair Chance Hiring of those formerly convicted?

Employers need to educate their human resources department and/or hiring managers about the relevant laws.

Be aware of federal, state and local laws that govern employers' compliance with Fair Chance Hiring:

- **Pennsylvania:** Employers **may not consider arrests** or accusations that do not lead to a conviction. Employers may only consider felony and misdemeanor criminal convictions in hiring if the convictions “relate to the applicant's suitability for employment in the position for which he has applied” and the applicant must be notified in writing if the employer does not hire the applicant due in whole or in part because of the criminal record. (18 PA C.S. §9125).
- **Philadelphia:** Fair Criminal Record Screening Standards Ordinance (Ban-the-Box) - **employers with one or more employees** may not check criminal history until a **conditional offer of employment** has been made. Employers may not consider convictions further back than **7 years** from the date of inquiry. An offer of employment may only be withdrawn if the conviction bears a direct relationship to the candidate's ability to perform the job and may not reject candidates solely on the basis of their record unless it **bears a relationship to the employment sought**. Applicants rejected based on their criminal history must receive written notice of the decision and **provide 10 days** for the candidate to prove the record is false or provide an explanation.
- **New Jersey:** Opportunity to Compete Act (Ban-the-Box) – **employers with 15 or more employees** may not check criminal history until after the first interview
- **Federal:** Fair Credit Reporting Act – governs both employers' actions and the quality of the information supplied by third party background check vendors. Employers are required to get an applicant's **written permission** before any background check. Before an adverse action is taken against an applicant, the employer must with sufficient and timely notification of its intent to take an adverse action, provide the applicant a copy of the report used and a summary of rights under the FCRA. Applicants who are ultimately rejected based on a background check must be notified in writing and given a copy. **Third party vendors are responsible for the quality** of the information; **employers must show they use a reputable source** or check the information against official records.
- **Federal:** Equal Employment Opportunity Commission – does not prohibit use of background checks but using criminal records to make employment decisions could

violate the Civil Rights Act of 1964, as amended. Employers **may not use different hiring practices** for those with similar criminal histories differently (disparate treatment) **based on race, national origin, sex, religion or other protected classes** or adopt neutral screening criteria based on criminal histories that is unrelated to “business necessity” and disproportionately impacts (disparate impact) members of a protected class.

What benefits result from background checks?

When background screening goes wrong

The Fair Credit Reporting Act requires accuracy in using records to inform employment decisions. Penalties occur when:

- Employers fail to validate reports (negligent violations). Damages to the applicant must be proven.
- Employers are improperly using background checks or using sources they know are not accurate (willful violations). These have statutory damages and penalties.

For large employers, class action suits claim willful violations and focus on penalties for each named injured party. These lawsuits have resulted in penalties in the millions of dollars. For small employers, penalties or damages can be disruptive to finances.

Employers are obligated to provide **safe work environments**. Background checks can help avoid business losses associated with **customer safety**. Background checks completed consistent with the law provide **applicants individual consideration** and help identify quality employees. Background checks, along with an individual consideration, also reduce possible **negligent hiring** lawsuits. Pennsylvania does not protect employers from liability if criminal activity of an employee was **“foreseeable.”**

Using background checks to protect your business makes good sense. Using background checks consistent with the law is imperative. Recent case law shows that employers must be **intentional and transparent** about obtaining permission for background checks. For example, including a check box as proof of permission for a background check in an on-line application was found insufficient notice. **Accuracy of the report counts** – some contain expunged records, list arrests or complaints that did not result in convictions, or are otherwise inaccurate. Many third-party reports **contain records that go back beyond the 7 years** permitted in Philadelphia.

Using official records as a second source, such as the Pennsylvania State Police, the Commonwealth’s “official repository,” can help with accuracy. After receiving a copy of the background check, **applicants may be able to explain** the context of the violation, which may be minor (unpaid parking tickets or even unpaid library fees) or **show evidence that the information is faulty**.

Discriminatory hiring by systematically disqualifying applicants with past criminal convictions has negative legal consequences for your business.

What specific benefits are there to hiring those with criminal convictions?

We cited the most obvious reasons as the **increased talent pool** an employer has for selecting the most qualified candidate for an open position; the **loyalty** such employees exhibit and the **economic benefits**. The City of Philadelphia, through its "Fair Hiring Ordinance" states that one-fifth of Philadelphia's population has a criminal record. It is important to note that many individuals with a criminal record never served a day in jail or prison. Further, according to the Countywide Blueprint produced by The Philadelphia Reentry Coalition, every year, around 35,000 inmates from local jails and state and federal prisons are released back into the County of Philadelphia, contributing to the population of nearly 50,000 parolees and probationers living within the county in any given year. Despite their criminal justice contact, **these individuals have skills and qualifications** that can serve employers well. In fact, employers who hire individuals with a criminal record note that they are often **eager to prove themselves** and are **loyal to the employer** who will give them a chance.

- Philadelphia employers can claim **up to \$30,000 in tax credits over 3 years** for a qualifying hire of an individual formerly convicted through the **Philadelphia Re-entry Employment Program (P.R.E.P.)**. The Mayor's Office of Reintegration Services (R.I.S.E.) can provide assistance in applying for and receiving the P.R.E.P. credit.
- The **Federal Bonding Program** funded through the U.S. Department of Labor provides **fidelity insurance bonds to indemnify employers for losses** sustained through theft, forgery, larceny and embezzlement. The program is administered through the Pennsylvania Department of Labor & Industry. These bonds are good through 6 months and up to the amount of \$5,000 at no cost. Employers call the bonding coordinator on the employees start date, receives a confirmation letter and the bond is issued directly to the employer from McLaughlin Company
- **Work Opportunity Tax Credit (WOTC)** offers employers up to **40 percent of first year wages** in tax credits when hiring an applicant formerly convicted of a felony. The credit also applies to other target groups such as veterans. WOTC is also administered by the Pennsylvania Department of Labor & Industry.

"Wash Cycle Laundry has been hiring [returning citizens] for the past 4 years and currently employs about 15-20 individuals with criminal convictions. We began working with RISE about one year ago and recently hired our first referral from the program, who is now on a management track within the company. RISE provided concierge-style service to help our business navigate the process of applying for and obtaining the PREP tax credit.

Unlike federal tax credits, The PREP credits can be used against city taxes on business income and receipts, providing the closest thing to a direct cash infusion for a qualifying business. While tax credits were never the impetus for our hiring of [Returning Citizens], there are significant benefits to using available credits to positively impact the bottom line for a growing small business." -- Gabriel Mandujano, founder and President, Wash Cycle Laundry

Using best practices in Fair Chance Hiring

Creating a positive, pro-active approach in identifying the best employees for your business is consistent with Fair Chance Hiring. Whenever hiring, the first rule is to **consider the qualifications of the individual for the job position in question.**

- Use a **consistent and intentional process** for candidate searches, reviewing records and resumes, asking for permissions and informing applicants of the results of background checks.
- **Educate human resources staff and hiring managers** to match candidates based on the relevant information. Candidates should not be treated according to stereotypes. Teach staff **how to read a criminal record**; arrests are not convictions and juvenile adjudications are not convictions.
- **Know or research which convictions disqualify an applicant** or have **time limits imposed** that delay employment in specific jobs such as those listed in the Pennsylvania Child Protection Services Law, in healthcare or for gaming occupations.
- **Post Fair Credit Reporting guidance** on on-line hiring sites and in hiring offices.
- Use a disclosure and consent for background check form that is easily **understood and stands separate from other requests** for sharing information. The form should be **written by or reviewed by an expert**. The form should request a signature agreeing to the background check.
- **Use a reputable source for background checks** and confirm any findings with an official source. Cheap services may not provide employer protection.
- **Do not consider any information outside criminal convictions.** Other events that did not result in a conviction may not be used in consideration for employment under Pennsylvania law.
- **In Philadelphia, do not perform a background check until a conditional offer** of employment has been made. Only consider convictions in the **past 7 years from the date of inquiry**. **In New Jersey**, do not perform a background check until after the first interview.
- **Provide candidates with a copy of their background check** – this is required for any refusal of employment based on the record – but a best practice for all candidates.
- Allow time **for the applicant to dispute any disqualifying events** on the background check before making a final hiring decision; there may be errors in the records or events once explained may be minor.
- **Protect a candidate's privacy.**
- **Follow the law:** federal, state and local. Keep abreast of changes in the law.

What employers should know about recidivism:

- More than half of those convicted and imprisoned who are rearrested are arrested within 3 years of the initial release.
- Technical parole violations account for more than one-third of all recidivism.
- After 5 years, rates of re-arrest decline dramatically even for the crimes most linked to recidivism.
- The older a person is at first arrest, the less likely they are to reoffend.
- Every person is different.
Predictions of future behavior are difficult to make.

How to Partner with a Nonprofit That Provides Reentry Services

1. Find a nonprofit partner that provides employment and support services to individuals with criminal convictions – find listings at www.phillyreentry.com
2. Work with the partner to identify job openings to focus recruitment efforts based on the firm's talent pool
3. Gain internal consensus among leadership and hiring managers
4. Work with the nonprofit partner to organize and implement recruitments at either the company site and/or nonprofit site.
5. Onboard and orient newly hired candidates using the partner to develop post hiring support needs.

Resources and Websites

Philadelphia Works: resource page on fair chance hiring (where you can download this entire document and more) <http://www.philaworks.org/employers-businesses/fair-chance-hiring>
Or contact Business Services: 800-892-2288 or business@philaworks.org.

Tax Credits

Philadelphia business tax credits, including the PREP tax credit for hiring qualified returning citizens

<http://www.phila.gov/Revenue/taxpro/Pages/TaxCredits.aspx>

Federal Work Opportunity Tax Credit, including for hiring ex-felons, veterans, TANF recipients

<https://www.doleta.gov/business/incentives/opptax/wotcEmployers.cfm>

Pennsylvania Criminal Records Resources

Information about Pennsylvania Criminal History Records

<http://www.psp.pa.gov/Pages/Request-a-Criminal-History-Record.aspx>

Pennsylvania Access to Criminal History ("PATCH") web site

<https://epatch.state.pa.us/Home.jsp>

"Legal Remedies and Limitations on the Employment of People with Criminal Records in Pennsylvania" includes a list of occupations in which criminal records must be considered and which legally prohibit employment of some ex-offenders. Scroll down to the end of this Community Legal Services blog post to download the document.

<https://clsphila.org/learn-about-issues/legal-remedies-and-limitations-employment-people-criminal-records-pennsylvania>

“Ban the Box” Laws

Blog post summarizing Philadelphia's “Ban the Box” ordinance as last amended in December 2015 <http://www.hrlegalist.com/2015/12/employers-handle-with-care-philadelphia-gives-added-protections-to-job-applicants-with-criminal-histories/>

Philadelphia “Ban the Box” FAQs

<http://www.phila.gov/HumanRelations/DiscriminationAndEnforcement/Pages/BanTheBoxFAQ.aspx>

Blog post summarizing New Jersey's “Ban the Box” law and regulations

<http://www.hrlegalist.com/2016/01/new-jerseys-new-ban-the-box-regulations-not-too-bad/>

Agency Guidance on Background Checks

EEOC guidance on background checks – “What Employers Need to Know”

https://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm

PHRC Policy Guidance Concerning the Disparate Impact Discrimination Implications of a Denial of Employment Based on a Criminal Record

<http://www.pabulletin.com/secure/data/vol39/39-48/2209.html>

Background checks under the Older Adults Protective Services Act

<http://www.aging.pa.gov/organization/advocacy-and-protection/Pages/Criminal-History-Background-Checks.aspx>

Fair Credit Reporting Act

A copy of the FCRA may be obtained by visiting www.ftc.gov/os/statutes/fcrajump.shtm

Blog post summarizing requirements for background check disclosure forms

<http://www.hrlegalist.com/2016/03/spring-cleaning-check-you-background-disclosure-form-for-fcra-violations/>

For more information on the Fair Credit Reporting Act see www.ftc.gov/credit

Government Agencies and Non-Profits Supporting Employers to Hire and Retain Individuals with Criminal Records

The best listing of reentry nonprofits in Philadelphia can be found on this resource website.

Choose the “Employment” category then “Job Search/Placement.” www.phillyreentry.com

Philadelphia Works guides employers to access workforce services: business@philaworks.org or 800-892-2288 or online at <http://www.philaworks.org/employers-businesses/welcome>

Find economic development and all other business services offered by the City of Philadelphia through their on-line business portal <https://business.phila.gov/>

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