CRIMINAL BACKGROUND CHECKS TOOLKIT

National Apartment Association

A Guide to Addressing Housing and Employment Protections for Ex-Offenders

Acknowledgments

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Kenneth J. Bohan
The Liberty Group

William Bower
Contemporary Information Corp.

Carey Bradburn
The Bradburn Group

Kathy D. Carlton
Apartment Association of Greater Dallas

Jason Charcut, CAM
Madison Apartment Group LLC

Cindy Clare
Kettler Management

Mike Clark
Alpha-Barnes Real Estate Services

Terry Clemans
National Consumer Reporting Association

Amy Coletti
Michaelson Real Estate Group

Victoria Cowart, CPM
Darby Development Co. Inc.

Jeannette Cox, CAPS
Oddo Development Co. Inc.

Dan Firestone, CAS
Contemporary Information Corp.

David Flad, CPM
Schochet Associates Inc.

Becky Gipson
Riverstone Residential Group

Christopher B. Hanback
Holland & Knight LLP

Linda Hart
Melrose Property Management Corp.

Laura Heiselman
Florida Apartment Association

Michael Holmes
Easlan Management Co. Inc.

Mary Hubbell
The Liberty Group

Nicholas J. Kikis
New Jersey Apartment Association

April Lash
Land & Co.

Raymond R. Maggi, CAPS
MPMS Inc.

Ian McIntosh
Residentcheck

Montserrat Miller
Arnall Golden Gregory LLP

John Modlin
APT Companies

Susan E. Passmore, CAM, CAPS
Blue Ridge Property Management

Rick Phillips
East 18th Street Associates

Joseph Puckett
Washington Multi-Family Housing Association

John Raftery, Esq.
Offit Kurman

Linda M. Richer
AmRent, An Affiliate of CBCInnovis

Judith Roettig
Chicagoland Apartment Association

Jeff Rogo
Bay Area Apartment Association

Jack Schwartz
Burnham & Brown

Kelle Senyé, ARM
Apartment Association of New Mexico

Jon D. Smock, Esq.
Apartment Association of Orange County

Jodi Spurrell, CAPS
Milestone Management

Debra Stockson
RealPage, Inc.

Eileen Subinsky, CPM
Michael Stevens Interests

Andrew Teas, CAE
Houston Apartment Association

Robert Tinning
Churchill Residential

Gene, Vance, Esq.
Vance, Chavez & Associates

Dennis Watts, CAPS, CPM
ConAm Management

Susan E. Weston, CAM, CAPS
The Susan Weston Co.

Steve Williams
Cohen Seglias Pallas Greenhall & Furman, P.C.

Tracy S. Williams, CAM, CAPS
WRH Realty Services

Sarah Wood
Gene B Glick Co. Inc.

Carl D. York, NALP,CAM, CAPS,
Sentinel Real Estate Corp.

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INTRODUCTION

In recent years, NAA has seen a surge in policymakers promoting legislative proposals that restrict a property owner's ability to consider arrest and conviction records in resident and employee screening. As these issues directly impact the multifamily industry, policy proposals that give ex-offenders (individuals with criminal histories) protections under both fair housing and employment laws have become a major industry concern.

As the 2012 chairwoman of the NAA Legislative Committee, Cindy Clare formed the Ex-Offender Protections Working Group to review ex-offender protections proposals. The group discussed strategies that the industry may employ when faced with criminal background protection proposals locally. The NAA staff worked with the working group to develop several documents, including a criminal background checks almanac and model legislation with an accompanying memo. Also, NAA conducted a survey in October 2012 regarding member screening policies at the request of the group.

NAA Criminal Background Checks Almanac

NAA Government Affairs publishes Issue Almanacs for key state and local issues affecting the apartment industry. The almanacs contain background information, talking points, and a political and legislative outlook for the coming year. The criminal background check almanac covers legislative and regulatory proposals prohibiting the use of arrest and criminal records in screening procedures for prospective residents and employees as well as disparate impact litigation.

Model Legislation

NAA's intent in drafting and circulating model legislation is not to urge members to pursue the measure in their respective jurisdictions but rather to recognize the likelihood that similar legislation may surface. The accompanying memo reiterates that the model legislation is not an industry standard. If the issue arises, it is meant to be a tool in the arsenal to help advance the apartment industry's interests in deliberations with lawmakers and other stakeholders.

Member Screening Policy Survey

NAA staff surveyed a mix of screening companies and property owners and managers from independent owner-operators to NAA's largest management company members. The survey revealed that respondents apply a variety of standards in screening for criminal history. Most respondents' search parameters include a prospective resident or employee's criminal history from the last five to ten years, while others search the prospect's full criminal history. Also, eighty-four percent of respondents review and consider the type and degree of the crime committed by the individual under consideration for tenancy or employment as opposed to a policy that denies all residents with criminal histories. The survey yielded invaluable information that staff used to craft model legislation on this issue.

The Criminal Background Checks Toolkit includes the work product of the Ex-Offender Protections Group (the NAA Criminal Background Checks Almanac, model legislation on this issue and an analysis of the Member Screening Policy Survey) as well as examples of enacted and proposed legislation addressing housing and employment protections for individuals with criminal histories. The toolkit contains resources that members and affiliate staff may utilize should the issue arise in their state or locality.

NAA's intent in drafting and circulating this toolkit is not to urge members to pursue legislation proactively in their respective jurisdictions; but rather, we recognize the likelihood that legislative and regulatory proposals giving housing and employment protections to ex-offenders may arise. As such, the information provided herein is not legal advice nor intended to establish any industry standard. This toolkit should be used for informational purposes only to advance the apartment industry's interests in deliberations with lawmakers and other stakeholders.

Criminal Background Checks

Policy Background

A growing number of lawmakers and advocates express concerns with the ability of ex-offenders to successfully transition back to society outside of the correctional system. They promote legislative and regulatory proposals prohibiting the use of arrest and criminal records in screening procedures for employees and prospective residents of apartment homes. Proposals restricting a property owner or manager's ability to conduct such criminal background checks inhibit their ability to ensure a safe, secure environment for residents and employees. Additionally, these restrictions leave owners and managers vulnerable to potential legal liability.

Housing

Proposals to limit the use of criminal background checks in the housing context appear in a variety of forms at the federal, state and local levels of government. Under the federal Fair Housing Act (FHA), it is unlawful to deny housing to persons on the basis of race, color, religion, sex, handicap, familial status or national origin. These groups of individuals are designated as "protected classes." State and local policymakers are considering proposals to add individuals with arrest and conviction records to this list.

Seattle, San Francisco, Washington, D.C. and the state of Illinois have considered such proposals. However, only a handful of cities and counties in Illinois and Wisconsin have successfully enacted such laws (the cities of Champaign and Urbana in Illinois, Dane County and the cities of Appleton and Madison in Wisconsin). Though while not giving full protected class status to individuals with arrest and conviction records, in September 2012 Newark, N.J. passed an ordinance that greatly restricts a property owner's ability to consider arrest and criminal records in resident and employee screening.

Jurisdictions remain divided concerning protections for ex-offenders. In 2011, the Wisconsin State Legislature passed a law that repealed the existing discrimination laws in Appleton, Dane County and Madison, Wis. The law also preempts localities from enacting ordinances in the future that limit rental property owners' ability to consider certain information in the resident screening process, including arrest and conviction records.

Some localities have focused on combating crime by specifically targeting ex-offenders. For example, an ordinance has been proposed in Sunbury, Pa., requiring property owners and managers to perform criminal background checks on potential residents in response to a spike in drug-related arrests. If the applicant is a "convicted illegal substance distributor," the ordinance prohibits a property owner or manager from renting to the applicant. According to the proposal, such persons would be prohibited from inclusion on the owner or manager's rental permit list of authorized occupants. If the owner or manager violates the ordinance, he may face denial of renewal, suspension or revocation of his rental permit.

Ex-offender protection laws may also conflict with existing rules that restrict property owners and managers from accepting individuals convicted of certain crimes. Public Housing Authorities (PHAs) and owners and managers of public housing are required to perform criminal background checks on all potential residents. The U.S. Department of Housing and Urban Development (HUD) has a blanket prohibition against accepting lifetime registered sex offenders in federally-assisted public housing. In addition, federal statutes and regulations put heavy restrictions on accepting ex-offenders in public housing, particularly those with a history of drug-related or violent offenses.[1]

While this is the case, successful reintegration of ex-offenders is also on the minds of federal policymakers. In March 2012, HUD Secretary Shaun Donovan asked owners and managers of HUD-subsidized housing as well as PHAs to "strike a balance between allowing ex-offenders to reunite with families that live in HUD-subsidized housing, and ensuring the safety of all residents of its programs."

[1] 42 U.S.C. § 13661 allows PHAs and owners of federally-assisted housing to deny housing to potential residents who they find to be or have been, "engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises."

Employment

The issue of criminal background checks also appears in the area of employment. While some jurisdictions have enacted legislation making individuals with arrest and criminal records a fully protected class, others have been more successful in enacting lesser degrees of protection. Twelve states, the District of Columbia and approximately 51 cities and counties have adopted so-called "Ban the Box" ordinances that prohibit employers from asking about an applicant's prior criminal history on an initial job application. Ban the Box proposals do not give individuals with prior arrest or conviction records the distinction of a fully protected class as criminal background checks may be used later in the hiring process.

On April 25, 2012, the Federal Equal Employment Opportunity Commission (EEOC) released proposed guidance for the use of arrest and conviction records in the hiring process. The guidance prohibits an employer from using a potential employee's criminal record in its hiring practices unless the practice is "job related for the position in question and consistent with business necessity." Otherwise, according to the guidance, considering an applicant's prior arrest or conviction record may constitute discrimination via "disparate impact" under Title VII of the Civil Rights Act of 1964.

Disparate Impact

Frustrated by the pace of progress in securing new protections for ex-offenders through the legislative process, tenants' rights groups and some government officials are looking to the courts to achieve their goals. Much of this litigation is based upon the legal theory of "disparate impact." According to this theory, a policy has a disparate impact when it is neutral on its face, but has a disproportionate, negative impact on protected groups. Therefore, by virtue of this disparate impact, that policy is illegal under federal, state and local fair housing and employment laws.

In 2013, HUD published its final rule for determining whether a housing practice has a discriminatory effect in violation of the federal Fair Housing Act. In the final rule, HUD establishes its views on disparate impact and how the agency will enforce the rule in such cases. HUD released the rule under pressure from pending litigation. In Magner v. Gallagher, the U.S. Supreme Court agreed to take up the issue of disparate impact and decide whether disparate impact claims are recognized under the Fair Housing Act (FHA). Action by the agency would carry weight in any court decision.

Although Magner was dismissed at the request of the plaintiff, the Supreme Court faces the same challenge in Mount Holly v. Mount Holly Gardens Citizens in Action, Inc. On June 17, 2013, the U.S. Supreme Court agreed to hear the Mount Holly case; however, counsel for the Township of Mount Holly has requested an extension in the merits briefing schedule citing ongoing settlement discussions. Should the Court determine that disparate impact theory is not recognized under the FHA, the decision would negate HUD's rule and any previous lower federal court rulings on this topic. Should Mt. Holly settle, a Washington D.C. case, filed in July of 2013, could prove to be the next vehicle for testing the validity of disparate impact liability under the FHA.[2] Two insurance industry trade groups filed a lawsuit in federal district court challenging HUD's final rule regarding disparate impact and whether disparate impact claims are available under the FHA.[3]

Regardless of the Supreme Court's decision, state and local governments will maintain their ability to legislate and enforce their own disparate impact regimes. As the outcome of disparate impact claims under state and local laws will need to be settled by local courts, litigation in this area continues to surface around the country. One local government has filed lawsuits against several apartment communities for violations related to their resident screening policies. The city claims that the practice of denying applicants based on felony criminal convictions adversely affects African Americans and Hispanics and is thus illegal. This approach of applying a disparate impact argument to tenant and employee screening policies is being replicated in other communities around the country. Local civil rights commissions are spreading this idea nationwide.

Apartment Industry Policy: Lawmakers should oppose proposals to prohibit or restrict rental housing providers from considering prior arrest or conviction records in the resident or employee screening process.

[2] Kaplinsky, Alan S. "More on new disparate impact suit against HUD." *CFPB Monitor.* Ballard Spahr Law Firm, 2 July 2013. Web. 23 July 2013.
[3] American Insurance Association and National Association of Mutual Insurance Companies v. United States Department of Housing and Urban Development and Shaun Donovan.

State and Local Policy Considerations

• State and local policymakers should not inhibit property owners and managers from doing their due diligence by checking the prior arrest or conviction records of a potential new resident or employee. Such interference could compromise the safety of current residents and employees of apartment communities and opens up property owners and managers to potential liability.

• In many states, property owners and managers are liable for "foreseeable acts" committed by their residents upon other residents. Also, local nuisance or "vicarious liability" ordinances, and crime-related training programs have looked to hold landlords accountable for resident behavior. If owners and managers cannot use arrest or conviction records in their screening procedures, then they should be granted a shield against being held liable for the actions of their residents.

• Apartment industry stakeholders should consider proposing legislation at the state level to preempt localities from enacting ordinances that limit rental property owners' ability to consider arrest and conviction records. In 2012, Wisconsin enacted legislation that prohibits localities from passing ordinances that place restrictions on certain information in the resident screening process, including rental history, credit information or criminal history.[4]

• There is no uniformity in the system of laws and regulations governing the use of criminal background checks in employment and housing. Often owners who operate in multiple jurisdictions are subject to a patchwork of laws across states and localities and must strike a balance in following federal requirements as well.

In many cases, rules issued by one body of government may be in direct contradiction with those issued by another.

Policymakers should take such contradictions into account when they develop policies.

Outlook

While more state and local governments are contemplating additional protections for ex-offenders in the housing and employment contexts, the change has only been incremental. However, if those advocating for these changes are successful in enacting major changes in a high profile state or major metropolitan area, a domino effect could occur where more jurisdictions propose and enact ex-offender protection legislation.

NAA predicts that efforts to expand protections for ex-offenders will expand throughout the states as litigation in the area of disparate impact remains prevalent, forcing new precedent on the topic. In response to member concerns, NAA, NMHC, the National Leased Housing Association and the New Jersey Apartment Association filed an amicus brief asking the court to accept the Mount Holly case for review and plan to file a brief on the merits as the case has been accepted by the Court. This case's outcome could have wide-ranging impacts for a host of issues, including ex-offender protections. As NAA awaits Supreme Court action on the Mount Holly case, NAA continues to monitor pending litigation.

In addition to monitoring proposed legislation and litigation on this issue, NAA formed a task force in 2012 to work on strategies and solutions. The Ex-Offender Protections Working Group created a toolkit that includes reference materials and strategies that the industry may employ when dealing with criminal background protection proposals.

[4] Wisconsin Stat. 66.0104

Resources

- ***Housing and Employment Protections for Ex-Offenders, NAA website***
  http://www.naahq.org/learn/government-affairs/federal-state-local-issues/ex-offenders

- ***NAA/NMHC Comment Letter on Proposed HUD Disparate Impact Rule***
  http://www.naahq.org/sites/default/files/naa-documents/government-affairs/protected/business-management-operations/fair-housing/2012-01-17-NMHC-NAA-Comment-Package-re-HUD-Proposed-Rule-on-Disparate-Impact.pdf

- ***HUD Memo to Owners on Housing Ex-Offenders***
  http://www.naahq.org/sites/default/files/naa-documents/government-affairs/protected/business-management-operations/fair-housing/March-2012-Donovan-Letter-on-EOs.pdf

- ***Disparate Impact, NAA Website***
  http://www.naahq.org/learn/government-affairs/federal-state-local-issues/disparate-impact

- ***Final Rule Issued by HUD on the Implementation of the Fair Housing Act's Discriminatory Effects Standard***
  http://www.naahq.org/sites/default/files/naa-documents/government-affairs/protected/business-management-operations/fair-housing/HUD-Final-Rule-on-Disp-Impact-2-2013.pdf

Please alert Nicole Upano at nicole@naahq.org or government_affairs@naahq.org if this issue is being addressed in your area.

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National Apartment Association

For more information, please contact us
4300 Wilson Blvd., Suite 400 • Arlington, VA 22203
703/518-6141 • Fax 703/248-9440
www.naahq.org • government_affairs@naahq.org

1. Do you have different procedures for tenant and employee screening?

Yes: 33% - No: 67% (Total 96 responses)

If yes, how do they differ?

Answer	Responses
No employees to screen (Family-owned or independent owner-operators with few to no employees)	16
Do not screen employees	1
No credit check on employees	7
No criminal background check on tenants	3
More guidelines for employee screening (such as drug tests)	6
Federal housing requirements less stringent that employee screening policies	1
Rental history and income screened on tenants only	1
Employees requirement background checks by local law enforcement	1

2. Is there a "ban the box "ordinance in your area? Ban the box laws prohibit asking potential employees about prior criminal history until after an initial interview.

Yes: 7% - No: 93% (Total 82 responses)

If yes, how has this ordinance affected your business?

Applicable comments
It means that we cannot automatically rule out certain applicants who we may not have chosen to hire because of the type of prior criminal activity they were involved in. This sometimes wastes time when we call folks back for a follow-up interview, only to find out then that we cannot hire them.
The local ban the box legislation prevents employers from inquiring about a prospective employee's criminal history prior to conducting an interview. As this has always been our practice, it has not affected us.
I really don't know because when a prospect brings in the properly filled in application we do the background check.
I'm not sure if there is or not, but we don't normally ask this question until the initial interview anyway.

3. Do you conduct criminal and/or arrest background screening on potential residents and employees?

Employees: 5%
Residents: 44%
Both: 43%

Neither: 8%
(Total 100 responses)

4. What additional information do you evaluate during resident and employee screening? (Check all that apply)

Eviction: 87%
Credit: 91%
Other: 50% *
(Total 92 responses)

* Other Write-In Response	Percent
Employment / Income	16%
Rental history	11%
Criminal	9%
Drug	2%
National Sex Offender Registry	2%
Terrorism	2%
Personal interview	3%
Public records / liens / back child support	3%
Social security validation	2%
Any information obtained	1%
Application information	1%
Check Scan	1%
References	2%
Voting record	1%

5. How many years back do you search when looking for criminal history?

Answer	Number of Responses
5	9
6	1
7	7
8	1
10	13
12	1
20	1
Full History	24
No set time / depends on offense / state	5
Unsure, outside agency does report	15

6. With regard to criminal background checks, do you review and consider the type and degree of the crime committed?

Yes: 84% - No: 16% (Total 97 responses)

If yes, how does this factor into your screen process?

Crime	Responses
Felonies	22
Crimes against persons / violent crimes / domestic violence / murder	17
Subjective determination / Nature of crime and length of time	14
Drugs	12
Sex offenders	8
Fraud / theft / burglary	7
Repetitive crimes	5
Property damage	4
Firearms / weapons	2
Crimes involving children	2
Prostitution	1
Arson	1
Financial crimes	1
DWI	1
No criminal can rent	1

7. How often do you review and update your screening process policy?

Answer	Responses
Rarely	3
Every 5 years	1
Every 4 years	1
Every 3-4 years	2
Every few years	1
Every 2 years	1
Annually	26
Every 6 months	3
Quarterly	2
Monthly	1
As needed	22
Have not updated	5
No policy	1

8. Has your company received any complaints of discrimination based on your criminal background screening process?

Yes: 2% - No: 98% (Total 91 responses)

9. How did you develop your screening procedures?

Answer	Responses
Management company / Apartment association / Screening company **	33
Experience	24
Industry standards & best practices	11
Reference books / research	6
Legal counsel	6
Advice from other industry professionals	5
Local law enforcement	3
HUD guidelines / Regulatory agencies	2
City requirements	2
Training seminars	2
Personal preference	1
Derived from employment law	1
Business plan	1

Housing Protections for Individuals with Arrest and Conviction Records

Disclaimer: This is not intended for use as legal advice

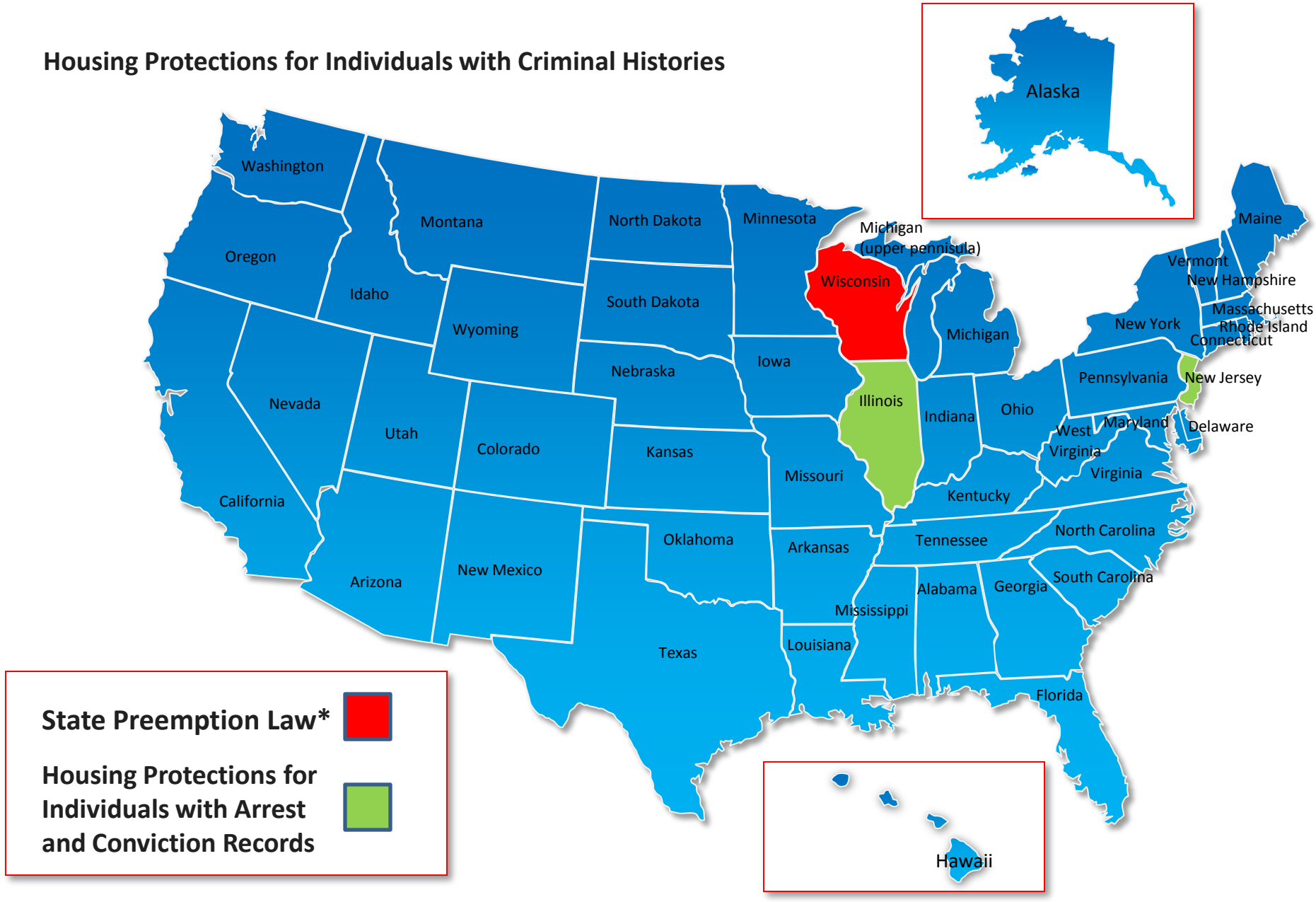
For more information, please contact:
Nicole Upano
Manager of State and Local Government Affairs
nicole@naahq.org
703-797-0646

State	Locality	Statute	Description
Illinois		*none*	
	Champaign	Champaign Municipal Code §§ 17-3, 17-71	It is unlawful to discriminate against an individual based on prior arrest or conviction record in housing.
	Urbana	Urbana Code of Ordinances §§ 12-39, 12-64	It is unlawful to discriminate against an individual based on prior arrest or conviction record in housing.
Wisconsin		Wisconsin Stat. 66.0104 (2)	Repealed existing discrimination laws in Appleton, Dane County and Madison, Wis. The law also preempts localities from enacting ordinances in the future that limit rental property owners' ability to consider certain information in the resident screening process, including arrest and conviction records.

REPEALED in 2012	Appleton	Municipal Code of Appleton §§ 8-26, 8-30	Subject to other provisions of this article, no person may discriminate in the rental of housing or commit any sale or discriminatory housing practice against any person on the basis of arrest or conviction record. This ordinance does not prohibit eviction or refusal to rent or lease residential property because of the conviction record of the tenant or applicant or a member of the tenant's or applicant's household, if the circumstances of the offense bear a substantial relationship to tenancy. The exclusion for certain convictions shall not apply if more than two (2) years have elapsed since the applicant or member of the tenant's or applicant's household was placed on probation, paroled, released from incarceration or paid a fine for offenses set forth in paragraph (1) unless the offense is one which must be reported under the Sex Offender Reporting Requirement of §973.048, Wis. Stats.
REPEALED in 2012	Dane County	Dane County Code of Ordinances §§ 31.03, 31.10 and 31.11	It is unlawful to discriminate against an individual based on arrest or conviction record in housing. Exception: (1) Nothing in this chapter shall prohibit discrimination: ...(e) on the basis of conviction record, if less than two years have passed since the applicant or member of applicant's household completed their sentence, was released from incarceration, completed probation or parole, completed electronic monitoring, or paid any outstanding fines or forfeitures related to the offense, and the circumstances of the offense bear a substantial relationship to the tenancy... The two year limitation on this exception shall not apply to a conviction for the crime of arson, including a conviction of violation of Wis. Stat. ss. 943.02 to 943.06;
REPEALED in 2012	Madison	Madison Code of Ordinances §39.03	It is unlawful to discriminate against an individual based on prior arrest or conviction record in housing. This ordinance does not prohibit eviction or refusal to rent or lease residential property because of the conviction record of the tenant or applicant or a member of the tenant's or applicant's household, if the circumstances of the offense bear a substantial relationship to tenancy. The exclusion for certain convictions shall not apply if more than two (2) years have elapsed since the applicant or member of the tenant's or applicant's household was placed on probation, paroled, released from incarceration or paid a fine for offenses set forth in Paragraph 1. unless the offense is one which must be reported under the Sex Offender Reporting Requirement of Wis. Stat. § 973.048.

New Jersey		*none*	
	Newark	Ordinance No. 12-1630	In connection with any rental, lease, or sublease, a. Subject to the terms of this Article, a landlord or real estate broker shall be permitted to inquire about i. indictable offense convictions for eight (8) years following the sentencing thereof, including termination of any period of incarceration;ii. disorderly persons convictions or municipal ordinance violations for five (5) years following the sentencing thereof, including termination of any period of incarceration; and iii. pending criminal charges, which shall include cases that have been continued without a finding until such time as the case is dismissed. b. Notwithstanding subsection (a), prior disorderly persons and indictable offense conviction records shall be available for the entire period that the subject's last available conviction record is available under subsection (a). c. Notwithstanding subsection (a), supra, and subject to the terms of this Article, a landlord or real estate broker shall be permitted to inquire about convictions for murder, voluntary manslaughter, and sex offenses requiring registry as defined under N.J. S.A. Title 2C Chapter 7 that are punishable by a term of incarceration in state prison, regardless of the length of time that has passed since the disposition thereof. d. It shall not be permissible for a landlord or real estate broker to conduct any criminal history inquiry, require any person to disclose or reveal, or to take any adverse action against any person on the basis of i. any arrest or criminal accusation made against such person, which is not then pending against that person and which did not result in a conviction; ii. any records which have been erased, expunged, the subject of an executive pardon, or otherwise legally nullified; iii. any juvenile adjudications of delinquency or any records which have been sealed.

Housing Protections for Individuals with Criminal Histories



*Prevents localities from enacting ordinances that limit rental property owners' ability to consider certain information in the resident screening process, including arrest and conviction records. Also makes existing discrimination laws to that effect unenforceable.

Proposal to Add Anti-Discrimination Language to Seattle's Municipal Code Regarding People with Arrest and Conviction Records

Definitions

"Arrest" means information indicating that a person has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority.

"Conviction" means an adjudication of guilt that includes a verdict of guilty, a finding of guilty, and/or acceptance of a plea of guilty.

"Discrimination," and/or "discriminate," means any act, by itself or as part of a practice, which is intended to or results in different treatment or differentiates between or among individuals or groups of individuals due to the existence of an arrest or conviction record.

"Direct relationship" means that the nature of criminal conduct for which the person was convicted has a direct bearing on the fitness or ability to perform the duties or responsibilities of the job in employment situations and the ability to carry out the duties or responsibilities of occupancy or tenancy in the case of housing.

"Vacated" refers to an offense that has been the subject of an expungement, pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, or a conviction that has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

Unfair Employment Practices

It is unfair employment practice within the city for any:

Employer, employment agency, or labor organization to deny employment or carry out an adverse action due to an employee or applicant's arrest record or other criminal record if the arrest or charge did not lead to a conviction of a crime.

Employer, employment agency, or labor organization to deny employment or carry out an adverse action due to an employee or applicant's conviction record that has been vacated or when a juvenile record has been sealed.

Employer, employment agency, or labor organization to deny employment or carry out an adverse action due to an employee or applicant's conviction record when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses except as follows in **Exclusions from unfair practices**.

Exclusions from Unfair Practices

The provisions above, insofar as they declare discrimination on the basis of a conviction record, do not apply to:

1. Situations where there is a direct relationship between the conviction and the employment sought or held by the individual.

2. Situations where the granting or continuation of employment would involve unreasonable risk of substantial harm to property or to the safety of individuals or the public.

3. Positions working with children, developmentally disabled persons and vulnerable adults when there is a conviction record as described in RCW 43.43.830, including findings of domestic violence, abuse, sexual abuse, neglect, abandonment, violation of a professional licensing standard regarding a child or vulnerable adult, or exploitation or financial exploitation of a child or vulnerable adult under any provision of law. This does not prohibit use of a certificate of rehabilitation as described in RCW43.43.830.

4. Law enforcement agencies.

5. Situations where an employer must comply with any federal or state law or regulation pertaining to background checks.

6. The right an employer may have with respect to an intentional misrepresentation in connection with an application for employment made by a prospective employee or previously made by a current employee.

Unfair Housing Practices

It is an unfair practice for any landlord, housing provider or seller to deny occupancy or carry out an adverse action due to a tenant's, applicant's or a member of the tenant's or applicant's household's arrest record or other criminal records if the arrest or charge did not lead to a conviction of a crime.

It is an unfair practice for any person to discriminate by denying occupancy or carrying out an adverse action based solely on a conviction record of the tenant's, applicant's or a member of the tenant's or applicant's household when the conviction record has been vacated or when a juvenile record has been sealed.

It is an unfair practice for any person to discriminate by denying occupancy or carrying out an adverse action due to a tenant's, applicant's or a member of the tenant's or applicant's household's conviction record when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses except as follows in **Exclusions- Unfair Housing Practices**.

Unfair Inquiries or Advertisements

It is an unfair practice for any person to:

Publish, print, circulate, issue or display or cause to be published, printed, circulated, issued or displayed, any communication, notice, advertisement, or sign of any kind relating to a real estate transaction or listing of real property which indicates directly or indicates an intention to make any preference, limitation or specification based on the existence of an arrest or conviction record.

Exclusions – **Unfair Housing Practices**
Nothing in the sections above relating to unfair housing practices shall prohibit discriminationon the basis of a conviction record in:

1. Situations where there is a direct relationship between the conviction and occupancy;

2. Situations where occupancy would involve unreasonable risk of substantial harm to property or to the safety of individuals or the public.

The provisions above, insofar as they declare discrimination on the basis of a conviction record, do not apply to any right a landlord, housing provider or seller may have with respect to an intentional misrepresentation in connection with an application for occupancy made by a prospective occupant or previously made by an occupant.

Contracting
It is prohibited for any employer, employment agency, or labor organization to deny a contract or carry out an adverse action due to a person's arrest record or other criminal records if the arrest or charge did not lead to a conviction of a crime.

It is prohibited for any employer, employment agency, or labor organization to deny a contract or carry out an adverse action due to a person's conviction record that has been vacated or when a juvenile record has been sealed, except as follows in **Exclusions from unfair practices**.

Exclusions from Unfair Practices – **Contracting**
The provisions **above,** insofar as they declare discrimination on the basis of arrest and conviction record, do not apply to:

1. Situations where there is a direct relationship between the conviction and the contract sought or held by the individual.

2. Situations where the granting or continuation of the contract would involve unreasonable risk of substantial harm to property or to the safety of individuals or the public.

3. Contracts involving working with children, developmentally disabled persons and vulnerable adults when there is a conviction record as described in RCW 43.43.830, including findings of domestic violence, abuse, sexual abuse, neglect, abandonment, violation of a professional licensing standard regarding a child or vulnerable adult, or

exploitation or financial exploitation of a child or vulnerable adult under any provision of law. This does not prohibit use of a certificate of rehabilitation as described in RCW43.43.830.

4. Law enforcement agencies.

5. Situations where the contracting parties must comply with any federal or state law or regulation pertaining to background checks.

6. The right an employer may have with respect to an intentional misrepresentation in connection with an application made by a prospective contractor or previously made by a current contractor.

Rules
The draft rules below provide guidance for the public and the Seattle Office for Civil Rights in how the proposed ordinance would be enforced.

Relating to Exclusions – Unfair Employment Practices
1. Examples of situations where there may be a direct relationship between the conviction and the employment sought or held by the individual include but are not limited to:

a. Positions handling money and convictions of theft (1st and 2nd degree).
b. Positions involving driving motorized vehicles or handling hazardous equipment and a conviction of driving under the influence.

2. Examples of situations where the granting or continuation of employment could involve unreasonable risk of substantial harm to property or to the safety of individuals or the public may include but are not limited to the following:

Convictions involving murder (1st and 2nd degree), assault (1st and 2nd degree), rape (all counts), arson (1st and 2nd degree).

3. If a direct relationship or unreasonable risk is established, additional factors that employers should consider include: evidence of rehabilitation; the time that has elapsed since the conviction occurred; and/or the age of the person at the time the conviction occurred.

Relating to Exclusions – Unfair Housing Practices
1. Situations where there may be a direct relationship between the conviction and occupancy or situations where occupancy would involve an unreasonable risk of substantial harm to property or to the safety of individuals or the public include but are not limited to the following:

Convictions involving murder (1st and 2nd degree), assault (1st and 2nd degree), rape (all counts), arson (1st and 2nd degree), possession with intent to manufacture.

2. If a direct relationship or unreasonable risk is established, additional factors that housing providers should consider include: evidence of rehabilitation; the time that has elapsed since the conviction occurred; and/or the age of the person at the time the conviction occurred.

Relating to Exclusions from Unfair Contracting Practices
1. Examples of situations where there may be a direct relationship between the conviction and the contract sought or held by the individual include but are not limited to:

a. Positions handling money and convictions of theft (1st and 2nd degree).
b. Positions involving driving motorized vehicles or handling hazardous equipment and a conviction of driving under the influence.

2. Examples of situations where the granting or continuation of a contract could involve unreasonable risk of substantial harm to property or to the safety of individuals or the public include but are not limited to the following:

Convictions involving murder (1st and 2nd degree), assault (1st and 2nd degree), rape (all counts), arson (1st and 2nd degree).

3. If a direct relationship or unreasonable risk is established, additional factors that employers should consider include: evidence of rehabilitation; the time that has elapsed since the conviction occurred; and/or the age of the person at the time the conviction occurred.

Memorandum

To: NAA Members and Affiliate Associations
From: NAA Government Affairs
Date: June 12, 2013
Re: NAA's Criminal Background Checks Model Legislation

Background

NAA has seen a surge in policies promoting proposals to give ex-offenders protections under both fair housing and employment laws. A growing number of lawmaker and advocates have made the transition of ex-offenders back into society a legislative priority – unfortunately a central part to their strategy includes promoting legislative and regulatory proposals designed to limit property owners and managers ability to consider arrest and conviction records in resident and employee screening. While the industry supports owners and managers who give ex-offenders the opportunity to become productive members of society, property owners must have knowledge of the prospective tenant's past to make an informed choice.

In response to mounting concern over this issue, Cindy Clare, 2012 chairwoman of the NAA Legislative Committee, formed the Ex-Offender Protections Working Group. The working group created the attached *Criminal Background Checks Model Legislation* document as part of a toolkit that the industry can use when dealing with criminal background check proposals.

Model Legislation

The model legislation represents similar provisions enacted in existing housing and employment discrimination laws and regulations at the federal, state and local levels. NAA's intent in drafting and circulating the model legislation is not to proactively urge members to pursue the measure in their respective jurisdictions; but rather, recognize the likelihood that similar legislation may surface. On that premise, this measure may be used as an example of language to help advance the apartment industry's interests in deliberations with lawmakers and other stakeholders.

Proposals restricting property owners or managers from considering information obtained during a criminal background screening may inhibit their ability to ensure a safe, secure environment for current residents and employees. Additionally, these restrictions leave owners and managers vulnerable to potential legal liability. This document contains two vital components that allay these concerns: (1) exceptions giving property owners and managers the ability to screen potential residents and employees who pose the greatest risk and (2) a waiver of liability that shields owners and managers from liability should a resident or employee who was approved under the proposal commit a crime on the property.

NAA members and affiliate associations who wish to promote this measure as an alternative to more stringent forms of existing and proposed legislation are encouraged to amend it, as necessary, to meet their unique needs. For example, the number of years in sections C(1)(i) and E(1)(i) are bracketed for this purpose. In accordance with a survey conducted by NAA staff, NAA suggests that pending charges and convictions from the last five to ten years should be exempted as most members screening policies fall within this range. Per the instructions of the Ex-Offender Working Group, in October of 2012 staff surveyed a varied mix of screening companies and property owners and managers from independent owner-operators to NAA's largest management company members regarding company screening policies.

Please note this model was developed by NAA staff for informational and educational purposes only; it is not intended to establish or represent legal guidance or an industry standard in regards to its subject matter.

Wisconsin Preemption Law

In the alternative, the Wisconsin State Legislature passed a law in 2011 that repealed the existing discrimination laws in Appleton, Dane County and Madison. The law also preempts localities from enacting ordinances in the future that limit rental property owners' ability to consider certain information in the resident screening process, including rental history, credit information and arrest and conviction records. The Wisconsin preemption statute may serve as example language for affiliates and members who wish to address the issue proactively. See Wis. Stat. § 66.0104.

Enclosure

NAA's intent in drafting and circulating this measure is not to urge members to proactively pursue such legislation in their respective states and localities. Rather, recognizing the likelihood that legislation restricting property owners and managers' ability to consider arrest and conviction records in resident and employee screening may surface in states and localities, we offer this measure as an example of language that may be used to promote apartment industry interests in deliberations with lawmakers and others stakeholders. NAA members and affiliated associations who wish to promote this measure as an alternative to more stringent forms of existing and proposed legislation are encouraged to amend it, as necessary, to meet their unique needs. This model was developed by NAA staff for informational and educational purposes only; it is not intended to establish or represent legal guidance or an industry standard in regards to its subject matter.

A. Definitions
   1. "Arrest record" includes, but is not limited to, information indicating that a person has been charged, detained, or arrested for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority that was resolved by dismissal, acquittal or has not been resolved by any method.
   2. "Conviction record" includes but is not limited to, information indicating that a person has been charged with commission of a felony or misdemeanor, and either convicted by a court of law or subject to pretrial diversion, deferred adjudication, court-ordered community supervision or probation, as a result of the charge that such person committed a felony or misdemeanor.
   3. "Discrimination" means any practice or act which is based wholly or partially on the perception of an individual based on race, color, national origin, religion, sex, familial status, handicap or prior arrest or conviction record unless such practice or act is permitted as an exception in this Chapter.
   4. "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—
      i. a parent or another person having legal custody of such individual or individuals; or
      ii. the designee of such parent or other person having such custody, with the written permission of such parent or other person.

      The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.
   5. "Handicap" means, with respect to a person—
      i. a physical or mental impairment which substantially limits one or more of such person's major life activities,
      ii. a record of having such an impairment, or
      iii. being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance.

6. “National origin” means the place in which a person or one of his or her ancestors was born.
7. ”Pending charge” means a case in which a person is arrested and the charge has been continued without a finding until such time as the case is dismissed.
8. “Race” means a class or group of individuals involving a distinct physical type with certain unchanging characteristics, such as color of skin.
9. “Religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he or she is unable to reasonably accommodate an employee's or prospective employee's religious observance without undue hardship on the conduct of the employer's business.
10. “Sex” means the state of being male or female.

B. Housing Discrimination. It shall be an unlawful discriminatory housing practice for any person:
   1. To refuse to sell or rent after the making of a bona fide offer or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, national origin, religion, sex, familial status, handicap or prior arrest or conviction record;
   2. To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in the connection therewith to any person because of race, color, national origin, religion, sex, familial status, handicap or prior arrest or conviction record;
   3. To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination or an intention to make any such preference, limitation or discrimination based on race, color, national origin, religion, sex, familial status, handicap or prior arrest or conviction record;
   4. To represent to any person because of race, color, national origin, religion, sex, familial status, handicap or prior arrest or conviction record that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available;
   5. To deny any person access to membership in or participation in any multiple listing service, real estate brokers' organization, or other service, organization or facility relating to the business of selling or renting dwellings, or to discriminate against such person in the terms or conditions of such access, membership, or participation because of race, color, national origin, religion, sex, familial status, handicap or prior arrest or conviction record;
   6. To include in any transfer, sale, rental, or lease of housing, any restrictive covenant that discriminates because of race, color, national origin, religion, sex, familial status, handicap or prior arrest or conviction record or for any person to honor or exercise, or attempt to honor or exercise any such discriminatory covenant pertaining to housing;
   7. To induce or attempt to induce to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, national origin, religion, sex, familial status, handicap or prior arrest or conviction record.

C. Exceptions.
   1. This section does not prohibit discrimination against a person for the following:

i. On the basis of pending charge(s) or conviction(s) of crimes of dishonesty or against persons or property, if less than [XX years][1] have passed since the applicant or member of applicant's household was arrested or completed their sentence, was released from incarceration, completed probation or parole, completed electronic monitoring, or paid any outstanding fines or forfeitures related to the offense, or

ii. Because of the applicant or member of the applicant's household's pending charge(s) or conviction(s), the applicant or member of the applicant's household poses an unreasonable risk of harm to property or to the safety of other residents or employees, or

iii. the applicant or member of the applicant's household has pending charge(s) or been convicted under federal law or the law of any state of the illegal manufacture, use possession or distribution of a controlled substance, or

iv. the applicant or member of the applicant's household is subject to a registration requirement under any state sex offender registration program; or

v. where any federal, state or local law or regulation requires the consideration of an applicant's criminal history for the purposes of housing.

D. Employment Discrimination. It shall be an unlawful employment practice:

1. For an employer, by himself or through an agent, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment because of race, color, national origin, religion, sex, familial status, handicap or prior arrest or conviction record, unless based on a bona fide occupational qualification;
2. For any employer or employment agency, to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment, or to make an inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to the race, color, national origin, religion, sex, familial status, handicap or prior arrest or conviction record of a qualified applicant, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification.

E. Exceptions.

1. This section does not prohibit discrimination against a person for the following:
   i. On the basis of pending charge(s) or conviction(s) of crimes of dishonesty or against persons or property, if less than [XX years][2] have passed since the applicant was arrested, completed their sentence, was released from incarceration, completed probation or parole, completed electronic monitoring, or paid any outstanding fines or forfeitures related to the offense; or
   ii. where it is reasonably foreseeable that employing the applicant will result in harm or injury to persons or property; or

[1] Amend as necessary. An amount between five and ten years is suggested.
[2] Amend as necessary. An amount between five and ten years is suggested.

iii. the applicant has pending charge(s) or been convicted under federal law or the law of any state of the illegal manufacture, use, possession or distribution of a controlled substance; or

iv. the applicant or member of the applicant's household is subject to a registration requirement under any state sex offender registration program; or

v. where any federal, state or local law or regulation requires the consideration of an applicant's criminal history for the purposes of employment.

F. Waiver from liability.

1. Any individual or entity who grants residency or employment to a person under the arrest and conviction records provisions of this chapter shall be absolved of any civil liability to third parties which may arise as the result of granting residency or employment to those individuals.

66.0104. Prohibiting ordinances that place certain limits or requirements on a landlord.

(1) In this section:

(a) "Premises" has the meaning given in *s. 704.01 (3) (b)* "Rental agreement" has the meaning given in *s. 704.01 (3m) (c)* "Tenancy" has the meaning given in *s. 704.01 (4)*

(2) (a) No city, village, town, or county may enact an ordinance that places any of the following limitations on a residential landlord:

1. Prohibits a landlord from, or places limitations on a landlord with respect to, obtaining and using or attempting to obtain and use any of the following information with respect to a tenant or prospective tenant:

a. Monthly household income.

b. Occupation.

c. Rental history.

d. Credit information.

e. Court records, including arrest and conviction records, to which there is public access.

f. Social security number or other proof of identity.

2. Limits how far back in time a prospective tenants credit information, conviction record, or previous housing may be taken into account by a landlord.

3. Prohibits a landlord from, or places limitations on a landlord with respect to, entering into a rental agreement for a premises with a prospective tenant during the tenancy of the current tenant of the premises.

4. Prohibits a landlord from, or places limitations on a landlord with respect to, showing a premises to a prospective tenant during the tenancy of the current tenant of the premises.

(b) No city, village, town, or county may enact an ordinance that places requirements on a residential landlord with respect to security deposits or earnest money or pretenancy or posttenancy inspections that are additional to the requirements under administrative rules related to residential rental practices.

(3) If a city, village, town, or county has in effect on December 21, 2011, an ordinance that is inconsistent with sub. (2), the ordinance does not apply and may not be enforced.

HISTORY: History: 2011 a. 108.

Criminal Background Checks and Disparate Impact Claims

I. Introduction

The information and recommendations in this paper are meant to assist landlords and property managers by educating them on issues related to potential discrimination claims for violations of the Fair Housing Act under a disparate impact theory. Most apartment management companies are careful to avoid discriminatory practices when selecting tenants. Policies are generally applied equally and fairly to every applicant, regardless of the applicant's individual characteristics or situation. It is counterintuitive and difficult to rationalize that this same commitment to equal treatment of applicants could be the subject of a discrimination complaint. The law related to unintentional discrimination under a disparate impact theory is complex and still evolving in the housing context. This paper is meant to serve as an introduction to the issues relevant to disparate impact claims in the context of criminal background checks of tenant applicants and includes some general recommendations about best practices to consider when crafting tenant screening policies. Every apartment management company has different needs and concerns and should seek legal counsel when adopting new policies or if faced with a discrimination claim.

II. The State of the Law: Housing and Disparate Impact Claims

The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, generally regulates fair housing in the U.S. Under the Act it is illegal to deny housing to an applicant on the basis of race, color, religion, sex, handicap, familial status, or national origin.[1] These categories are considered "protected classes." Many state and local governments have adopted laws and ordinances based on the Fair Housing Act. For example, Kansas City Missouri's Municipal Code Sec. 38-133 adopts the language of the Fair Housing Act but adds to the list of protected classes "sexual orientation or gender identity."[2] The Fair Housing Act does not explicitly mention claims brought under disparate impact theory, and the Supreme Court has yet to rule on the applicability of disparate impact claims to the Fair Housing Act, most of the Federal Circuit Courts, including the Eighth Circuit in Missouri, have held that disparate impact claims are allowed.

Disparate impact is unintentional discrimination that results from a facially neutral policy. Disparate impact cases are most common in the employment law context whereby a facially neutral policy has an adverse effect on a protected class. The seminal case in Title VII employment law is *Griggs v. Duke Power Co.* in which the Supreme Court held that a policy requiring job applicants to have a high school diploma, although neutral on its face, had a disparate impact on black applicants.[3] Some attorneys and scholars argue that the Fair Housing Act, unlike other civil rights laws, does not allow disparate impact claims.[4]

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[1] 42 U.S.C. §3604

[2] Kansas City, Missouri Code of Ordinances 38-133(a)

[3] However, it should be noted that the discrimination that was considered by the Court was discrimination against the individual on the basis of failure to complete a specified course of academic study—not on the basis of the commission of a serious illegal act.

[4] *See, e.g.* Jenson and Naimon, *The Fair Housing Act, Disparate Impact Claims, and Magner v. Gallagher: An Opportunity to Return to the Primacy of the Statutory Text*, 129 Banking L.J. 99 (2012) (arguing that recent Supreme Court decisions and the statutory text of the Fair Housing Act cast doubt on federal circuit court opinions

While the Federal Circuit Courts that have ruled on the issue have ruled in favor of allowing disparate impact claims, they each have articulated slightly different standards for the burden the defendant must meet.[5] For example, the Tenth Circuit requires a defendant to rebut a showing of disparate impact by demonstrating that "the discriminatory practice has a manifest relationship to the housing in question"[6] while the Ninth Circuit held that the defendant's rebuttal "normally requires a compelling business necessity" and then required the defendants show that the policy was "reasonable."[7] The Eighth Circuit, in *Charleston Housing Authority v. U.S. Department of Agriculture*, held that the defendant must demonstrate that the proposed policy "has a 'manifest relationship' to the legitimate non-discriminatory policy objectives and 'is justifiable on the ground it is necessary to' the attainment of these objectives."[8]

The Supreme Court granted certiorari on June 17th, 2013 to hear a case addressing the issue of whether disparate impact claims are cognizable under the Fair Housing Act. The Third Circuit in *Township of Mount Holly* held that disparate impact claims are recognized under the Fair Housing Act. The case arose after the township decided to redevelop an area of low-income housing that primarily housed minority residents. Although the Court has only agreed to resolve the issue of whether disparate impact claims may be brought under the Act, housing groups and other interested parties are hoping the Court will give additional guidance.[9]

This year, the U.S. Department of Housing and Urban Development (HUD) released a final rule on disparate impact claims establishing a three-part burden shifting test for determining when a policy violates the Fair Housing Act. Under the test:

1. The plaintiff (charging party) has the initial burden of proving that a "practice results in, or would predictably result in, a *discriminatory effect* on the basis of a protected characteristic"
2. If the plaintiff proves this initial burden, the defendant must prove that the "challenged practice is *necessary* to achieve one or more of its *substantial legitimate*, nondiscriminatory *interests*"

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allowing disparate impact claims); Brief for National Leased Housing Association, et. al. as Amici Curiae Supporting Respondents, Township of Mount Holly, New Jersey v. Mt. Holly Gardens Citizens in Action, Inc. (2013) (No. 11-1507), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/07/11-1507-Nat-Leased-Housing-Amicus.pdf.

[5] Eleven courts of appeals have recognized disparate impact claims under the Fair Housing Act.

[6] Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Development, 56 F.3d 1243, 1254 (10th Cir. 1995).

[7] Pfaff v. U.S. Dept. of Housing and Urban Development, 88 F.3d 739, 747–48 (9th Cir. 1996).

[8] Charleston Hous. Auth. V. U.S. Dept. of Agric., 419 F.3d 729, 741 (8th Cir. 2005) (quoting in part Oti Kaga, Inc. v. South Dakota Housing Development Authority, 342 F.3d 871, 883 (8th Cir. 2003)).

[9] The initial petition asked the Supreme Court to decide (1) Whether disparate impact claims are cognizable under the Fair Housing Act; and (2) whether, if such claims are cognizable, they should be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test: (a) what the correct test is for determining whether a prima facie case of disparate impact has been made; (b) how the statistical evidence should be evaluated; and (c) what the correct test is for determining when a defendant has satisfied its burden in a disparate impact case.

3. If defendant satisfies this burden, the plaintiff may still prove liability by "proving that the substantial, legitimate, nondiscriminatory interest could be served by *a practice* that has a *less discriminatory effect*"[10]

1. Discriminatory Effect

In the context of screening tenants for criminal records, a plaintiff would have to initially show that the seemingly neutral policy has a significantly greater discriminatory impact on applicants of a protected class. Typically, the plaintiff will use statistical evidence to attempt to prove the disparate impact. There is little consistency in what statistical data is used in housing discrimination cases but in this context a plaintiff would attempt to show that, because of the higher conviction rates for African Americans and Hispanics generally, the policy has a disproportionate negative effect on African American and Hispanic applicants.[11] The court would likely attempt to determine the relevant population (whether it is the particular neighborhood, the metropolitan area, or the state).[12] After identifying the relevant population, courts will likely analyze the policy's effect within that population. Unlike employment discrimination cases, housing cases tend to use rejection rates rather than selection rates.[13] The difference between using rejection rates or acceptance rates can have an important impact on the disparate impact analysis and landlords should consult a competent statistician when faced with litigation.[14]

2. Business Justification

In its final rule, HUD declined to give examples of business necessity sufficient to overcome a prima facie showing of disparate impact. The HUD regulation does stipulate that the defendant's justification must be supported by evidence and may not be "hypothetical or speculative." While the standard articulated in the *Charleston* case included some of the language of the new HUD standard, it did not modify legitimate with "substantial." How substantial the legitimate business interest must be is unclear. Whether the Eighth Circuit, or other federal circuits, will adopt this new stricter burden for the

[10] HUD Implementation of the Fair Housing Act's Discriminatory Effects Standard: Final Rule, 78 Fed. Reg. 32, 11460 (Feb. 15, 2013) (to be codified at 7 C.F.R. pt. 100).

[11] More than likely this is true for violent and property crimes committed in Missouri, but not for sex offenses.

[12] Courts have interpreted the issue of relevant population broadly in some cases and narrowly in others. *See, e.g.* Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984) (deciding whether a decision to evict tenants with children from one building in a three building complex had a disparate impact on Blacks, the court determined that the narrowest population— the building in question— was the relevant population); Metropolitan Housing Development Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975) (deciding whether the refusal to permit the construction of a low-income housing project had a disparate impact on Blacks, the court determined that the broadest population, the entire Chicago metropolitan area, was the relevant population). *See* The Statistics of Discrimination, *Housing Discrimination- Disparate Impact Claims* § 8:2 (2012) (discussing the range of relevant populations used in housing discrimination cases and the relatively broad populations permitted in employment cases).

[13] An example of an 8th Circuit case using rejection rates is U.S. v. City of Black Jack, Missouri, 508 F.2d 1179, 1186 (8th Cir. 1974) (determining that 85% of Blacks were unable to obtain housing in the city because of existing housing policies).

[14] For an illustration of when the use of rejection rates were used to prove a disparate impact *see* Greater New Orleans Fair Housing Action Center v. St. Bernard Parish, 641 F. Supp. 2d 563 (E.D. La. 2009) (using rejection rates rather than acceptance rates as the appropriate measure, where acceptance rates would not have shown a disparate impact).

defendant is yet to be seen. Many federal appeals courts have affirmatively rejected a heightened standard.[15]

3. Less Discriminatory Alternatives

According to the new HUD guidelines, and the 2005 Eighth Circuit case *Darst Webbe Tenant Association v. St. Louis Housing Authority*, even if a defendant is able to show a legitimate non-discriminatory reason for its policy, the burden shifts once again to the plaintiff to "offer a viable alternative that satisfies the legitimate policy objectives while reducing…the discriminatory impact."[16] In this third stage of the burden-shifting analysis, even if a plaintiff successfully established that a blanket policy of rejecting potential tenants for past convictions had a disparate impact on minorities, it is difficult to see how a narrower policy, for example limiting the policy to convictions that occurred ten years earlier, would reduce the disparate impact. While adopting a narrower policy would likely affect fewer people, any screening—regardless of the number of years back —would affect minority populations at higher rates if the relevant populations have higher rates of conviction.[17] Additionally, HUD has not articulated the position that blanket policies denying applicants with criminal convictions is a violation of the law, although it has discouraged such policies. Landlords and apartment management companies should strive to tailor their screening policies in ways that thoughtfully address the primary concerns of safety and property preservation.

III. Landlord Concerns

The overarching concerns being addressed by policies requiring potential tenants to undergo criminal background checks is the safety of the other tenants, the safety of the employees and vendors that work at the property, the preservation of the property and property value, and liability related to illegal acts committed on the property by tenants that the landlord knows have previously been convicted of serious crimes. Apartment landlords and management companies want to provide a safe environment for their tenants, employees and vendors, maintain a good reputation, and encourage applicants to rent available units regardless of their membership in a protected class—thereby increasing the property value.

The increase in landlord liability claims, local nuisance or "vicarious liability" ordinances, and crime related training programs have altered the roles of landlords in the tenant-landlord relationship. Criminal activity on the premises can result in claims against the landlord or management company, violations of local ordinances, disturbances to other residents, and disruptions in leases.

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[15] *See* Mountain Side Mobile Estates v. Secretary of Housing and Urban Development, 56 F.3d 1243, 1254–55 (10th Cir. 1995) ("there is no requirement that the defendant establish a 'compelling need or necessity' for the challenged practice to pass muster since this degree of scrutiny would be almost impossible to satisfy."); Langlois v. Abington Hous. Auth., 207 F.3d 43, 51 (1st Cir. 2000) (defendant needs to provide a "legitimate and substantial goal of the measure in question" but does not need to demonstrate that the business reason outweighed the disparate impact); Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 747–49 (9th Cir. 1996) (declining to apply a HUD's standard of "compelling business necessity" and instead applying a "reasonableness" standard).

[16] Darst-Webbe Tenant Ass'n Bd. V. St. Louis Housing Authority, 339 F.3d 702 (2003).

[17] See, e.g., Robert J. Wise, *Felons and Fair Housing*, 6 KC PROPERTIES MAG. 4, 11 (Issue 2, 2011) (explaining that reducing screening policies to only consider a specific number of years since conviction would still have the same impact on any population with higher conviction rates).

Landlords in Missouri can be held liable if they fail to use reasonable care to protect tenants from foreseeable risk of harm.[18] Moreover, if a special relationship or special circumstances exist, a landlord may be held liable for injuries to tenants from criminal attacks by a third person. In cases of "an intentional infliction of injury by known and identifiable third persons" a landlord may be held liable.[19] Generally, a landlord has no duty to "protect another from a deliberate criminal attack by a third person"[20] however, under "special circumstances" a duty may arise.[21] The court in *Advance Rental Centers* advanced situations that may qualify as special circumstances, including cases in which the landlord:

(1) Was in a superior position to be aware of criminal acts and guard against them;
(2) Was aware of prior similar occurrences; or
(3) Retained control over the area where the [crime] occurred.

Whether a court would hold the landlord liable for criminal acts by one tenant against another based on foreseeability of the criminal act depends on the facts and circumstances of the individual case. Because of this uncertainty, courts are hesitant to dismiss these types of claims. The low rate of dismissal creates a value for settling the claim and avoiding the cost of litigation, which may encourage plaintiffs to file claims. To avoid this, landlords often try to prevent victimization by screening potential applicants.[22]

Despite the current local public policy emphasis on easing restrictions for ex-offenders, competing policies and ordinances exist. Nuisance laws have evolved in recent years and now most states have statutes that allow claims against owners of crime-ridden apartment buildings.[23] For example, in Missouri the attorney general can bring action against a landlord to prohibit occupancy of a property for up to a year if it is declared to be a public nuisance because of gang activity.[24] Some local governments are proactively holding landlords responsible for criminal activity that may take place in their apartment complexes.[25] Moreover, landlord training programs, like Crime-Free Multi-Housing, emphasize screening tenants for criminal backgrounds to reduce the potential for crime in and around the housing units.[26]

Around the country there has been an uptick in competing public policy initiatives. Two municipalities in Illinois and three in Wisconsin have actually gone as far as to include individuals with arrest and conviction records as a protected class under local statutes mimicking Fair Housing Act language. Also, while not giving full protected class status to individuals with arrest and conviction

[18] Madden v. C&K Barbecue Carryout Inc., 758 S.W.2d 59 (Mo. 1988) (en banc).
[19] Timothy J. Tryniecki, 18A Mo. Prac., Real Estate Law: Transactions & Disputes §53:7 (3d ed.) (2012) (citing Schlep v. Cohen-Esrey Real Estate Services, 889 S.W.2d 848, 851 (Mo. Ct. App. 1994)).
[20] Hebron v. City Parking Corp., 734 S.W.2d 270, 272 (Mo. Ct. App. 1987).
[21] Advance Rental Centers, Inc. v. Brown, 729 S.W.2d 644 (Mo. Ct. App. 1987).
[22] David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 Law & Soc. Inquiry 5, 14–15 (2008).
[23] *Thacher* at 15.
[24] V.A.M.S. § 578.430.
[25] *See, e.g.*, A.P., Police to Pursue Drug Dealers' Landlords, FREDERICK NEWS POST (June, 4 2013), *available at* http://www.fredericknewspost.com/news/crime_and_justice/article_ba587e33-7d33-5fa7-a98e-f5fcbc5ab92c.html
[26] *Thacher* at 16–17. *See also* Kansas City Crime Free Multi-Housing, *available at* http://www.kcmo.org/police/Services/CrimeFreeMulti-Housing/ and Crime Free Rental Housing, *available at* http://www.crime-free-association.org/rental_housing.htm (including minimum criminal screening criteria as part of the offered training programs).

records, in September of 2012 Newark, NJ passed an ordinance that greatly restricts a property owner's ability to consider arrest and criminal records in resident and employee screening. On the other end of the spectrum, all federally-subsidized housing managers are required to conduct criminal background checks on all tenants and at least one municipality in Pennsylvania has passed a local ordinance requiring all private property managers to conduct criminal background checks. Also, the ordinances in Wisconsin were ultimately preempted by statute. Wisconsin Act 108, creating Wis. Stat. § 66.0104 preempts local ordinances that restrict landlords from considering publicly available records, including arrest and conviction records.

The Fair Housing Act protects against discrimination on the basis of a protected class, including: race, color, national origin, religion, sex, disability, and families with children. All seven categories represent classifications that are an inherent part of a person and not a choice that a person made. By contrast, committing a crime is a choice, or series of choices, that an individual made. The protected classes covered by the Fair Housing Act are characteristics and classifications that are entirely irrelevant in determining what type of tenant an applicant will be. A criminal record, on the other hand, is relevant in determining whether the applicant will be a good tenant because the record provides an indication of past disregard for another's safety or property, and that the applicant has acted outside the bounds of acceptable social behavior.

IV. Business Justification

Not all discrimination is illegal. Even policies that tend to have a disparate impact on protected classes are legal if justified by a legitimate business necessity. Concern for potential harm to tenants, employees and vendors, destruction of property and property value, disturbances, and landlord liability are the prevailing business reasons for screening applicants for criminal history. Courts have recognized these concerns as legitimate justifications.[27]

Public housing authorities, and owners and managers of public housing are required to perform background checks on all potential tenants and have the latitude to deny applicants who have been "engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises."[28] HUD also has an explicit ban on lifetime registered sex offenders and persons involved in methamphetamine production on federally-assisted property.

In the employment law context, the Equal Employment Opportunity Commission (EEOC) has issued guidance on the use of criminal records when screening applicants for employment. In a disparate impact case, the defendant must show that it considered three factors to determine whether its decision was justified by business necessity:

[27] *See, e.g.* Evans v. UDR Inc., No. 7:07-CV-136-FL, 2009 U.S. Dist. LEXIS 31844, at *26 (E.D.N.C. Mar. 24, 2009) (recognizing that screening policies prohibiting tenancy to applicants with criminal histories is "based primarily on the concern that individuals with criminal histories are more likely than others to commit crimes on the property than those without such backgrounds…[and] is thus based [on] concerns for the safety of other residents of the apartment complex and their property."); Talley v. Lane, 13 F.3d 1031, 1034 (7th. Cir. 1994) ("[I]t is within the [Chicago Housing Authority]'s discretion to find that individuals with a history of convictions for property and assaultive crimes would be a direct threat to other tenants and deny their applications").

[28] 42 U.S.C. § 13661.

(1) The nature and gravity of the offense or offenses;
(2) The time that has passed since the conviction and/or completion of the sentence; and
(3) The nature of the job held or sought.[29]

While these factors do not fit exactly to the housing context, when crafting screening policies apartment management companies also should consider the nature of criminal convictions, the time that has passed without a new conviction, the relationship of the crime to the safety of tenants, employees and vendors, and preservation of property and property value.

In contrast to the employment context, it is neither feasible nor desirable for leasing agents to be tasked with making judgments about each individual tenant's suitability to rent. Putting the onus on leasing agents to determine on an individual basis what type of criminal conduct should prohibit tenancy, to make judgments about whether the individual applicant has sufficiently been rehabilitated, or to weigh the facts and circumstances surrounding the individual's conviction are beyond the ability and expertise of most agents. In the employment context, an employer necessarily weighs a multitude of factors including an applicant's qualities, personal characteristics, past experience, and expertise to suit a particular job description. In the housing context, those personal qualities are irrelevant except as they relate to the safety and security of tenants and employees, the security of the property itself, and the ability of that individual to follow through on the lease term of their contract. Leasing companies apply tenant screening policies uniformly to avoid the possibility of discriminatory selection.[30]

V. Best Practices

Although the legal framework around disparate impact claims brought under the Fair Housing Act is uncertain, it is important for apartment managers to attempt to craft their resident selection criteria in a way that limits the likelihood of liability under the Fair Housing Act while still protecting tenants, employees, venders, and the property. This balancing of interests can be difficult for apartment managers. Policies need to be clear and easy to understand so that less-experienced leasing agents can implement them with ease. While it is more likely that blanket prohibitions against criminal convictions violate the Fair Housing Act because of a disparate impact upon African Americans and Hispanics than screening criteria containing selective prohibitions against criminal convictions, it is unclear exactly how narrow the scope must be to fully comply with the Act. Outlined below are considerations and recommendations on best practices for screening applicants using criminal background checks. Each management company should consider its own unique circumstances when adopting tenant screening criteria. Additionally,

[29] EEOC, *Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended*, available at http://www.eeoc.gov/policy/docs/convict1.html (listing factors outlined by the court in Green v. Missouri Pacific Railroad, 549 F.2d 1158 (8th Cir. 1977)). The court in *Green* found an employer's policy of barring all applicant's with a criminal record was not justified by business necessity but the court held that an employer may use an applicant's criminal record as one factor in making individual hiring decisions, as long as the employer also considered "the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied." *Green* at 1160. The defendant employer must also take into consideration the three factors listed above.

[30] A recent study suggests that, in the employment context, criminal background checks may actually decrease discriminatory hiring. *See, e.g.,* Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451 (2006) (finding that employers who check criminal backgrounds are more likely to hire African Americans than those who do not).

management companies should work with third party screening companies or consult a local attorney who specializes in fair housing to ensure any adopted policies are in compliance with all applicable federal, state and local laws.

Arrest Records

While the Fair Credit Reporting Act allows tenant screeners to access arrest records up to seven years old, management companies should use extreme caution in relying on arrest records to make a decision about tenancy. In a country where the accused are presumed innocent until proven guilty, arrest records have little probative value in a court of law. The Supreme Court has commented that "the mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct."[31] In the employment context the EEOC does not prohibit the use of them entirely; they warn that relying on an arrest record alone does not create justifiable grounds to deny employment.[32] Similarly, when considering an applicant, arrest records are unlikely to provide justifiable grounds for denying tenancy.

Recommendation: Arrest records should not be used as a basis for determining tenancy.

Expunged, Purged, and Sealed Convictions

In Missouri, official records of arrests that are not followed by a criminal charge within 30 days are closed.[33] If an individual is charged with an offense after the arrest but the case is dismissed or the individual is found not guilty, the records are also closed.[34] Juvenile court records are not open to inspection or disclosure except by order of the court.[35] Moreover, after the age of seventeen, a juvenile can petition the court to have all records sealed.[36] The availability of expungement depends on the offense type, length of time since conviction, and the court's determination of whether the applicant's circumstances and behavior warrant expungement and whether expungement is in the best interest of the public.

A convicted felon can petition the court for expungement 20 years after completing a term of imprisonment, probation, or parole (10 years if a misdemeanor). Offenses for which expungement will be granted include: driving under the influence, passing a bad check, fraudulently stopping payment of an instrument, fraudulent use of a credit card, negligent burning or fire setting, second degree property damage and tampering with property in the second degree, 1st degree trespass, illegal gambling, and disturbing the peace.

Recommendation: Apartment managers should disregard any records that are expunged, sealed, or closed. Criminal records checks should not contain expunged, sealed, or closed records but, due to potential errors in third party systems and court documentation, may show them in any case. Because of the

[31] Schware v. Bd. of B. Exam. of State of N.M., 353 U.S. 232, 241 (1957).
[32] EEOC, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, April 2012, *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote103sym.
[33] V.A.M.S. § 610.100.
[34] V.A.M.S. § 610.105.
[35] V.A.M.S. § 211.321(1).
[36] V.A.M.S. §211.321(4).

possibility of errors in reporting crimes, tenant applicants should be given an opportunity to clear up the error with the third party reporting system or court and reapply for tenancy.

Time since Conviction and Nature of Crime

Recidivism rates depend on a multitude of factors, including the amount of time "clean." Studies show that age and type of crime committed affect the likelihood of an individual reoffending. For example, studies have shown that crimes related to monetary gain have the highest rate of recidivism (burglary, robbery, larceny, and motor vehicle theft).[37] Age also plays a significant role in determining risk of recidivism. The risk is highest in late teens and early to mid-twenties and tapers off as a person ages.[38] An early violent criminal record predicts more serious and chronic offending later in life. Additionally, factors like marital status, education, and employment history can affect recidivism rates.

Many studies have reported on the strong correlation between past criminal behavior and future criminal behavior.[39] Authors of recidivism studies generally agree that the risk of recidivism declines the more years of being crime free. One study of ex-felons tracked over twenty years showed that among the felons who stayed crime free for ten years, only 3.3% were reconvicted in the next 10 years.[40] One widely circulated study comparing recidivism risk of offenders who offended by age eighteen with the risk of eighteen year-old non-offenders committing a crime, found that "if a person with a criminal record remains crime free for a period of about 7 years, his or her risk of a new offense is similar to that of a person without any criminal record."[41]

This study, however, is wrought with many statistical challenges and is not sound to use to set one's screening policy. The study focused on 670 males (excluding the female data) followed through age 32 that were born in Racine, Wisconsin in 1942, and the definition of "offense" in the study was a much lower standard than felony conviction or even arrest—utilizing the overly broad category of *"police contacts"* for each year of age from ages 8 to 30.[42] By way of example, (to illustrate the inapplicability of the data cited in tenant screening policies in 2013) offenses such as the following were included as *police contacts* in the study: traffic violations, parking, necking, homosexual tendencies, impersonating opposite sex, expectant of illegitimate child, forcible rape, and assault to rape.[43] The inclusion of benign offenses (e.g. traffic violations, parking, necking, homosexual tendencies, impersonating opposite sex, and

[37] Patrick A. Langan & David J.Levin, *Recidivism of Prisoners Released in 1994*, Bureau of Justice Statistics (June 2002), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1134.
[38] Robert J. Sampson & John H. Laub, *Crime and Deviance over the Life Course: The Salience of Adult Social Bonds*, 55 AM. SOC. REV. 609 (1990).
[39] *See, e.g.*, Alex R. Piquero, David P. Farrington, & Alfred Blumstein, *The Criminal Career Paradigm*, Crime and Justice: A Review of Research, University of Chicago Press (2003).
[40] Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009) (citing Community Legal Services, Inc. 2005. *Declaration of Jeffrey Fagan, Ph.D.*, available at http://www.clsphila.org/Fagan_declaration.htm).
[41] Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Prediction of Future Criminal Involvement*, 53 CRIME & DELINQUENCY 64, 80 (2007).
[42] Amy V. D'Unger, Kenneth C. Land, Patricia L. McCall & Daniel S. Nagin, *How Many Latent Classes of Delinquent/Criminal Careers?, American Journal of Sociology, Volume 103 Number 6, May 1998*, pp. 1604-1605.
[43] Franklin E. Zimring, Alex R. Piquero & Wesley G. Jennings, *Sexual Delinquency in Racine*, Criminology & Public Policy, Volume 6, Issue 3, August 2007, p. 514.

expectant of illegitimate child) together with very serious crimes (e.g. forcible rape, and assault to rape) significantly dilutes the usefulness of the "Hazard Rates" that are calculated to the point of irrelevance.

While the *Kurlychek* study gives an average number of years for all offenses, another more recent study authored by Alfred Blumstein and Kiminori Nakamura attempts to account for age and crime type (to a limited degree) to determine long-term recidivism rates.[44] In this study, the authors focused on three offenses: robbery, burglary, and aggravated assault committed at 16, 18, and 20 years of age. They also looked at a broad swath of convictions and categorized them as property or violent crimes. The authors found that the younger a person commits a crime, the longer it takes for that person to be of comparable risk to a non-offender. The authors also found that it takes longer for violent offenders to get to a similar risk point as non-offenders than it does for offenders who committed property crimes. For example, an individual who committed robbery, a violent crime, at age 18 was found to have slightly more than a 10% probability of re-arrest after seven years and approximately 6% after ten years.[45] The data in this study focused only on New York State and did not reflect crimes committed in other states, which tends to decrease the calculated probabilities.[46]

Deciding on an acceptable risk ratio is difficult for any property manager tasked with the safety and well-being of tenants, employees, and vendors. According to the data, accepting a tenant with a robbery conviction, or other violent crime conviction after seven years could mean accepting a one in ten chance of that person reoffending. There is reason to believe that the rates are even higher than the studies' findings because recidivism studies only track arrests or convictions. The Bureau of Justice Statistics estimates that 52% of all violent crimes go unreported every year and 60% of property crimes go unreported.[47] Additionally, the data used in recidivism studies are limited to the geographic area of the population and does not account for crimes committed outside of that area.

While generalized recidivism rates may be somewhat helpful to apartment management companies and landlords when crafting tenant screening policies, the risk posed by more violent and heinous crimes is far greater than the risk of other lesser crimes. A rapist who reoffends ten years after the first conviction causes far greater harm, and potential liability, than a tenant who uses cocaine ten years after a first conviction. The drastic difference between these types of crimes makes this type of general recidivism data only marginally helpful and illustrates the need for policies that err on the side of conservatism. While a low chance of reoffending may be acceptable for lesser non-person crimes, that same chance of a violent offender recidivating may not be acceptable when considering the enormous harm that could result.

In Missouri, recidivism rates have been calculated up to five years from release from prison or start of probation between 1999 and 2008. After five years, the recidivism rate for prisoners returning to

[44] Alfred Blumstein & Kiminori Nakamura, Redemption in the Presence of Widespread Criminal Background Checks, 47 CRIMINOLOGY 327 (2009).
[45] *Blumstein* at 337.
[46] *Blumstein* at 344 ("One study on the recidivism of prisoners estimated that 7.6 percent of the released prisoners were rearrested out of state").
[47] Lynn Langton, Marcus Berzofsky, Christopher Krebs & Hope Smiley-Mcdonald, *National Crime Victimization Survey: Victimizations Not Reported to the Police, 2006-2010*, Bureau of Justice Statistics (2012).

prison has consistently been over 50% (between 51.4% and 55.4% for years 1999 to 2003).[48] For offenders sentenced to probation, 37% are imprisoned within five years of the start of probation, and 24.2% have a new conviction within five years.[49] Recidivism rates for prisoners returning to prison and convicted of violent crimes were 53.2% after five years, 29.5% for sex and child abuse, 58% for nonviolent crimes, 52% for drug related crimes, and 45.5% for DWIs.[50] These high rates of recidivism caused Missouri to implement new standards to reduce the number of ex-prisoners returning to prison for technical violations, which has had the effect of reducing the overall recidivism rate for offenders returning to prison.[51] The data cited are only moderately helpful in determining tenant screening policies both because most recidivism studies track rates only a few years after conviction, and because there are a considerable number of factors that influence risk of recidivism. Considering age or marital and family status, for example, could expose an apartment management company to additional discrimination complaints, even though it may give a more accurate picture of an individual's risk of reoffending.

Most states that limit criminal background checks within the employment context, limit them to seven years including: California, Colorado, Kansas, Massachusetts, Montana, Nevada, New Hampshire, New Mexico, New York, Texas, and Washington. Missouri does not have a statute restricting criminal background checks to seven years and abides by the Fair Credit Reporting Act requirements that background checks contain arrest records up to seven years old and all convictions regardless of time passed. There is no overwhelming evidence that seven years is a magic number in terms of predicting recidivism risk. *Blumstein* commented on the problem in establishing firm cutoffs:

> "[t]he absence of reliable empirical guidelines leaves employers no choice but to set their own arbitrarily selected cutoff points based on some intuitive sense of how long is long enough…Although 7 years seems to be a common restorative period, perhaps based on a view that 5 years is too short and 10 years is too long…"[52]

Bushway, a co-author of the *Kurlychek* study (based upon the 1942 Racine, Wisconsin male-only cohort) suggesting that the "Hazard Rate" seven years after offending was equivalent to the risk of non-offenders committing an offense, recommends that employers consider candidates who have been non-offenders for more than 7 to 10 years, in a later published paper.[53] Other studies have estimated criminal career lengths and the results vary widely, from a few years to over 17 years.[54] Moreover, Kurlychek, et. al. warns that

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[48] George Lombardi, *A Profile of the Institutional and Supervised Offender Population*, Missouri Dept. of Corrections 41 (2008).
[49] *Recidivism and the System of Recommended Sentences*, Missouri Sentencing Commission 2 (2009).
[50] *Lombardi* at 44.
[51] Pew Center, Missouri Drops Recidivism Rate by Tackling Technical Violations, State of Recidivism Report (April 2011) *available at* http://www.pewstates.org/research/reports/state-of-recidivism-85899377338?p=3 (reporting that "46 percent of offenders released in fiscal year 2004, were returned to prison within two years, either for a new crime or technical violation. Since then, that rate has dropped steadily, and reached a low of 36.4 percent for offenders released in fiscal year 2009").
[52] *Blumstein* at 332.
[53] Shawn D. Bushway & Gary Sweeten, *Abolish Lifetime Bans for Ex-Felons*, 6 Criminology & Public Policy 697, 702 (2007).
[54] See Alex R. Piquero, David P. Farrington & Alfred Blumstein, *The Criminal Career Paradigm*, 30 Crime & Just. 359, 444–46 (2003) (summarizing career length estimates from prominent studies).

"involvement in some offenses may predict future behavior better than involvement in other types of offenses."[55]

The State of Missouri classifies specific crimes as "dangerous felonies." These include: first degree arson, first degree, attempted forcible rape and sodomy, forcible rape and sodomy, kidnapping, second degree murder, first degree assault of law enforcement officers, first degree domestic assault, first degree elder abuse, first degree robbery, first degree statutory rape or sodomy, child abuse and kidnapping. These felonies are a starting point for determining the types of crimes that may possess such a high risk to tenants, that they warrant special attention. The Fair Housing Act carves out an explicit exception for drug manufacturing and distribution convictions, stating "nothing in this [Act] prohibits conduct against a person because such person has been convicted … of the illegal manufacture or distribution of a controlled substance".[56] HUD subsidized housing also delineates drug manufacturing and distribution from other types of drug convictions. This delineation, and the increased risk associated with these types of drug-related behaviors, is important to recognize when determining tenant screening policies addressing drug related convictions. Other violent crimes, property crimes, drug-related crimes and sex crimes should be considered when making policy decisions as well.

Recommendation: In light of these diverging studies, and the overarching concerns of property managers to ensure the safety and security of tenants, employees, and vendors, and to protect property and property value, policies should be crafted with care. It may be reasonable to have differing policies for different crimes. Property crimes, violent crimes, and sex offenses, may warrant a policy prohibiting applicants from tenancy for more years from the date of conviction than other lesser crimes. Drug-related convictions may be differentiated depending on the charge, for example, a drug distribution conviction may present a higher risk than a drug possession conviction. Likewise, the number of convictions an applicant has may also be a consideration when crafting screening policies.

Sex Offenders

Federal law prohibits applicants who are subject to a lifetime registration requirement under a state sex offender registration from being admitted to public housing. From this policy alone, it is difficult to discern why private housing companies would accept registered sex offenders as tenants. While recidivism for sex offenders is considerably lower than other offender populations, it is considerably higher for reoffending with a new sex offense. This type of predatory conduct puts tenants at heightened risk. The public nature of the sex offender registry means that any apartment complex that allows registered sex offenders is at risk of facing a decline in applications, outrage by its tenants, and harm to its reputation.

Moreover, renting to registered sex offenders would not likely reduce any disparate impact on Blacks or Hispanics. In Missouri in 2008, 71.4% of sex offenders either incarcerated or under supervision were white, 25.7% were Black, and 2.4% were Hispanic. Census demographics for Kansas City, Missouri for 2010 report 59.2% of the population as white, 29.9% Black, and 10% Hispanic.

[55] *Kurlychek et. al.* at 81.
[56] 42 U.S.C. 3607(b)(4).

Currently, the Missouri legislature is debating a bill that would create a tiered system for the Missouri Sex offender registry.[57] Only high risk offenders would be included in the public database and lower tiered offenders would be able to petition to be removed from the list after a number of years have passed. At the time of writing this paper, the bill has passed the House and is being debated in the Senate. If the legislature determines that certain offenders no longer pose a high enough risk to be included on the registry, those individuals would not show up in a search run by apartment managers or screening companies. Until that legislation goes into effect, there is no compelling reason for apartment managers to approve registered sex offenders for occupancy.

Recommendation: Adhere to a policy prohibiting registered sex offenders.

[57] H.B. 589, 97th General Assembly (Mo. 2013).

Ban the Box Statutes

Employment Protections for Individuals with Arrest and Conviction Records

Disclaimer: This is not intended for use as legal advice

For more information, please contact:
Nicole Upano
Manager of State and Local Government Affairs
nicole@naahq.org
703-797-0646

State	Locality	Statute	Applies to Private Employers (or Vendors)	Applies to Public Employers	Background Checks for Certain Positions	Background Checks Allowed After Conditional Offer or Finalists Selected
California		Adminstrative Directive per the California State Personnel Board		x	x	
	Alameda County	City Hiring Policy		x		
	Berkley	City Hiring Policy		x	x	
	Carson	Resolution 12-022		x		
	Compton	Resolution 23,293 (Page 37)	x	x		
	East Palo Alto	City Hiring Policy		x		
	Oakland	City Hiring Policy		x	x	x
	Richmond	Resolution No. 110-11		x	x	
	San Fancisco	City Hiring Policy; San Francisco Board of Supervisors Resolution No. 764-05		x		x
	Santa Clara County	City Hiring Policy		x		
Colorado		C.R.S. 24-5-101		x	x	x
Connecticut		Conn. Gen. Stat. § 46a-80		x	x	
	Bridgeport	City Hiring Policy		x		

	Hartford	Hartford Municipal Code §§ 2-385 and 2-789 (Vendors)	x	x	x	x
	New Haven	New Haven Code of Ordinances §§ 2-851 to 2-856	x	x		x
	Norwich	Code of Ordinances City of Norwich § 16-11		x		x
Delaware		*none*				
	Wilmington	Executive Order 2012-3		x		x
District of Columbia		D.C. Code §§ 1-620.41 to 1-620.44		x	x	
Florida		*none*				
	Jacksonville	Jacksonville Ordinance Code §§116.1601-116.1603		x		x
	Tampa	Ordinance No. 2013-3		x		x
Georgia		*none*				
	Atlanta	City Hiring Policy		x		x
Hawaii		HRS §§ 378-2*,378-2.5	x	x	x	x
Illinois		*none*				
	Chicago	City Hiring Policy		x		x
Maryland		Senate Bill 4 (Approved by the Governor 5/2/13)		x	x	x
	Baltimore	City Hiring Policy		x	x	
Massachusetts		ALM GL ch. 151B, § 4	x	x	x	
	Boston	City of Boston Municipal Code § 4-7	x	x	x	
	Cambridge	Cambridge Municipal Code § 2.112.060	x	x		
	Worcester	City of Worcester Revised Ordinances of 2008 § 37	x	x	x	
Michigan		*none*				
	Detroit	Detroit City Code §13-1	x	x		
	Kalamazoo	City Hiring Policy		x		
	Muskegon County	Resolution in Support of "Move-the-Box" Initiative Regarding Criminal Background Checks		x		
Minnesota		Senate File 253 (Signed by the Governor 5/13/13)	x	x	x	x

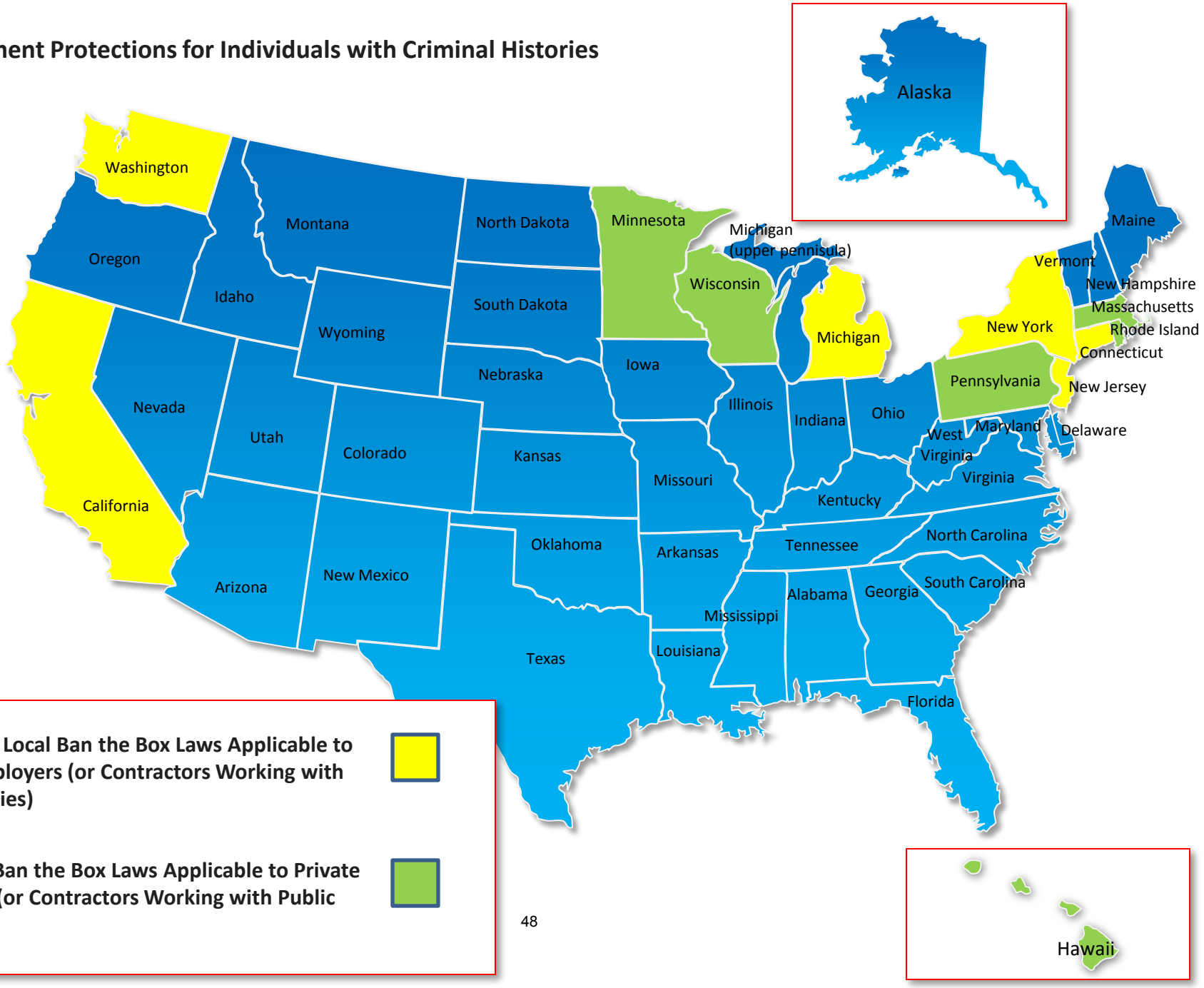
	Minneapolis	Resolution of the City of Minneapolis		x	x	
	St. Paul	St. Paul City Council Resolution		x	x	
Missouri		*none*				
	Kansas City	Ordinance No. 130230		x		x
New Jersey		*none*				
	Atlantic City	Atlantic City Code §§ 30-1 to 30-8	x	x		x
	Newark	Ordinance No. 2012-1630	x	x	x	x
New Mexico		N.M. Stat. Ann. § 28-2-3		x	x	x
New York		New York State Correction Law Article 23-A*	x	x		
	Buffalo	Ordinance Passed by Buffalo Common Council and signed by Mayor Brown June 2013	x	x		
	New York	Executive Order No. 151	x (Applies to contractors doing business with the Human Services Dept.)	x		
North Carolina		*none*				
	Carrboro	Town Hiring Policy		x		
	City of Durham	City Hiring Policy		x		x
	Durham County	City Hiring Policy		x		x
	Cumberland County	Cumberland County Board of Commissioners Approved Motion Background Check Policy		x		
	Spring Lake	City Hiring Policy		x		
Ohio		*none*				
	Canton	Canton Civil Service Rules Rule IV, Section 15		x		x
	Cincinnati	Cincinnati City Council Motion in Support of Fair Hiring		x		

	Cleveland	City Hiring Policy		x		
	Stark County	City Hiring Policy		x		
Oregon		*none*				
	Multnomah County	City Hiring Policy		x		
Pennsylvania		18 Pa.C.S. § 9125	x	x	x	
	Philadelphia	Philadelphia Code §9-3504	x	x		x
	Pittsburgh	Ordinance No. 2012-0013 (City Employment)		x		x
		Ordinance No. 2012-1015 (Contractors)	x			
Rhode Island		Senate Bill 0357 Substitute A (Signed by the Governor 7/15/13)	x	x	x	
	Providence	City Hiring Policy		x		
Tennessee		*none*				
	Memphis	Ordinance No. 5363		x		
Texas		*none*				
	Austin	Resolution No. 20081016012		x	x	
	Travis County	Guidelines for Hiring Ex-Offenders established by Travis County Commissioner's Court		x	x	x
Virginia		*none*				
	Newport News	City Hiring Policy		x		
	Richmond	Resolution 2013-R87-85		x		
Washington		*none*				
	Seattle	Council Bill Number: 117796 passed as amended June 10, 2013*	x	x		x
Wisconsin		Wis. Stat. §§ 111.321*, 111.335	x	x	x	

*prohibit discrimination based on a criminal record

Updated July 2013

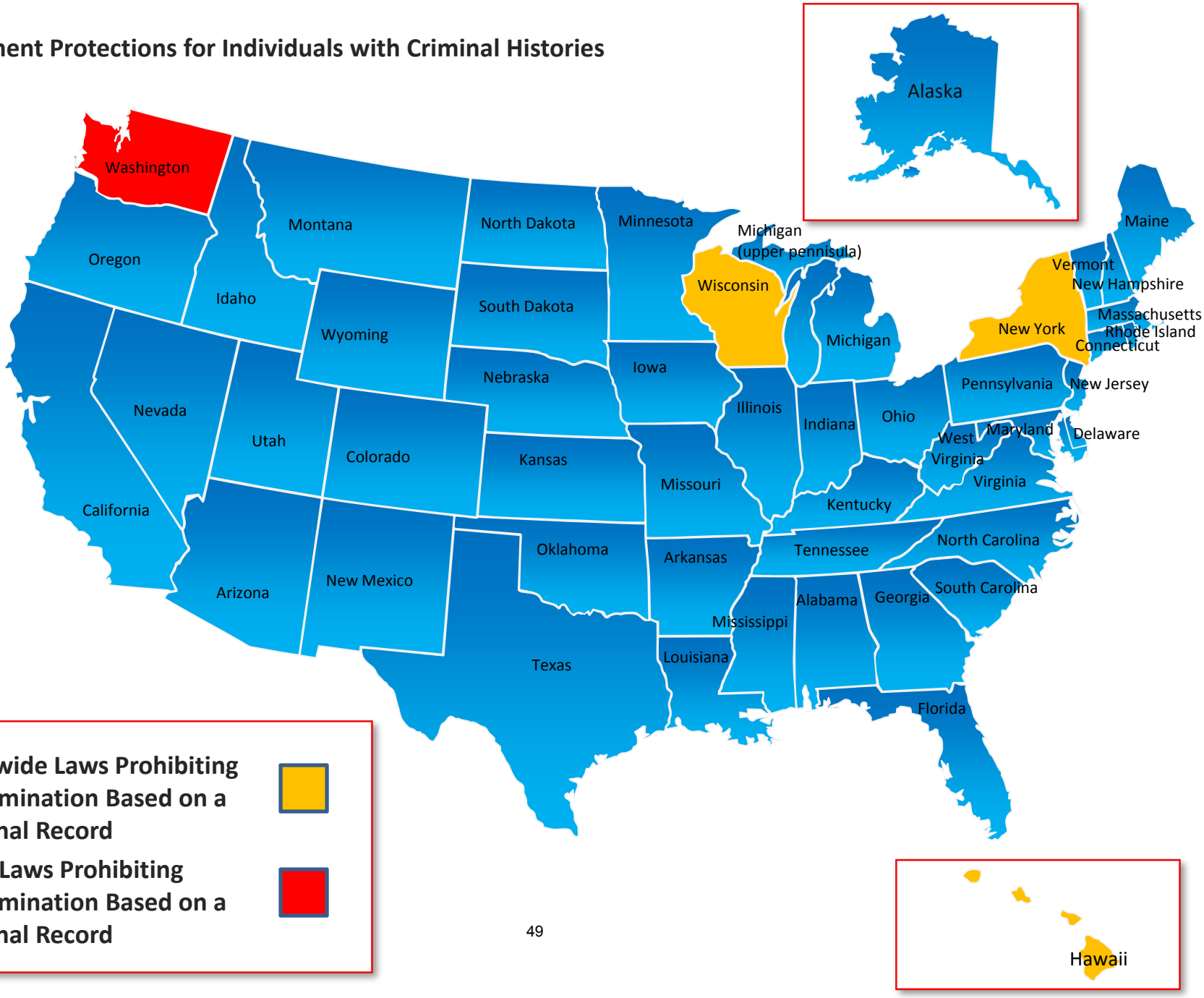
Employment Protections for Individuals with Criminal Histories



States with Local Ban the Box Laws Applicable to Private Employers (or Contractors Working with Public Entities)

Statewide Ban the Box Laws Applicable to Private Employers (or Contractors Working with Public Entities)

Employment Protections for Individuals with Criminal Histories



CITY OF SEATTLE

ORDINANCE _____

COUNCIL BILL _____

AN ORDINANCE seeking to increase public safety and job assistance through reducing criminal recidivism and enhancing positive reentries to society by prohibiting certain adverse employment actions against individuals who have been arrested, convicted, or charged with a crime; and adding Chapter 14.17 to the Seattle Municipal Code.

WHEREAS, the incarceration rate of the United States has tripled since 1980 and is nearly eight times its historic average; and

WHEREAS in 2011 there were 1,537,415 individuals serving sentences of more than one year in federal and state prisons; and

WHEREAS in addition to the increased incarceration rate, the PEW Center (PEW Center) on the States reports an increased number of individuals on probation and parole resulting in 1 in 31 or 3.2% of the nation's population under criminal justice supervision in 2007; and

WHEREAS, from 1982 to 2007 in Washington State there has been a 101% increase in the incarceration rate of adults in jail and prison rising from .32% of adults or one in every 312 adults to .64% or one in every 155 adults; and

WHEREAS in 2011 in Washington State there were over 17,000 individuals in the state's 12 prison facilities and approximately 16,000 offenders under supervision in the community by the Department of Corrections; and

WHEREAS, in 2011 over 680,000 people were released from state and federal prisons including 7,600 people released from Washington State prisons; and

WHEREAS, an estimated one in every three to four adults in the United States has a criminal record on file in state criminal history databases; and

WHEREAS, it is in the interest of the entire community that persons reentering society after incarceration become productive members of society, and the ability of these persons to obtain employment is a major factor contributing to their successful reentry; and

WHEREAS, persons reentering society after incarceration often find that their criminal records prevent them from obtaining or even applying for employment; and

WHEREAS, the hiring standards that some employers use bar the employment of ex-offenders who present no risk in the specific employment setting; and

WHEREAS, persons who have paid their debts to society deserve a fair chance at employment; and

WHEREAS, the continued unemployment of ex-offenders interferes with their rehabilitation and contributes to criminal recidivism, and thus jeopardizes the safety of the entire community and increases the cost of the criminal justice system; and

WHEREAS, while African Americans are 3.8% of Washington's population they account for nearly 19% of the state's prison population and Native Americans who are 1.8% of the state population are 4.3% of the state's prison population; and

WHEREAS, these examples of large racial disparities in incarceration rates mean that blanket exclusions from employment based on any criminal history may have a disparate impact on racial minorities and damage minority racial communities; and

WHEREAS, the City Council believes that reducing adverse employment actions against persons with criminal records will help these persons reenter society and become productive citizens, make the community safer from recidivism and victimization, reduce racial disparities in criminal justice and community well-being, and reduce the cost of criminal justice and save tax dollars; and

WHEREAS, the state of Massachusetts and other states, the cities of Jacksonville, Florida and Chicago, Illinois and dozens of other municipalities have provided various job application protections for people with arrest or conviction records; and

WHEREAS, this ordinance does not and is not intended to conflict with State or federal law, and is a valid exercise of the City's police power pursuant to Article XI, section 11 of the Washington State Constitution.

NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. A new Chapter 14.17 of the Seattle Municipal Code is added as follows:

14.17 The Use of Criminal History in Employment Decisions

14.17.010 Definitions

For the purposes of this chapter

"Agency" shall mean the Seattle Office for Civil Rights.

"Arrest record" shall mean information indicating that a person has been apprehended, detained, taken into custody, held for investigation, or restrained by a law enforcement agency or military authority due to an accusation or suspicion that the person committed a crime.

"City" shall mean the City of Seattle.

"Charging party" means a person who files an Agency charge claiming he was aggrieved by an alleged violation of this chapter.

"Commission" means the Seattle Human Rights Commission.

"Conviction Record" and "Criminal History Record Information" is meant to be consistent with RCW 10.97 and means information regarding a final criminal adjudication or other criminal disposition adverse to the subject, including a verdict of guilty, a finding of guilty, or a plea of guilty or nolo contendere. A criminal conviction record does not include any prior conviction that has been the subject of an expungement, vacation of conviction, sealing of the court file, pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, or a prior conviction that has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. It does include convictions for offenses for which the defendant received a deferred or suspended sentence, unless the adverse disposition has been vacated or expunged.

"Criminal background check" shall mean requesting or attempting to obtain, directly or through an agent, an individual's Conviction Record or Criminal History Record Information from the Washington State Patrol or any other source that compiles and maintains such records or information.

"Director" means the Director of the Office for Civil Rights.

"Employee" shall mean any individual who performs any services for an employer, when the physical location of such services is in whole or in substantial part (at least 50% of the time) within the City. For purposes of this chapter, "employee" does not include an individual whose job duties or prospective job duties include law enforcement, policing, crime prevention, security, criminal justice, or private investigation services. In addition, "employee" does not

include an individual who will or may have unsupervised access to children under sixteen years of age, developmentally disabled persons, or vulnerable adults during the course of his or her employment.

"Employer" shall mean any person who has one or more employees, or the employer's designee or any person acting in the interest of such employer. For purposes of this chapter, "employer" includes job placement, referral, and employment agencies. "Employer" does not include any of the following:

1. The United States government;

2. The State of Washington, including any office, department, agency, authority, institution, association, society or other body of the state, including the legislature and the judiciary;

3. Any county or local government other than the City.

"Job applicant" shall mean any individual who applies or is otherwise a candidate to become an employee, as defined in this Chapter.

A "legitimate business reason" shall exist where, based on information known to the employer at the time the employment decision is made, the employer believes in good faith that the nature of the criminal conduct underlying the conviction or the pending criminal charge either:

1. Will have a negative impact on the employee's or applicant's fitness or ability to perform the position sought or held, or

2. Will harm or cause injury to people, property, business reputation, or business assets, and the employer has considered the following factors:

a. the seriousness of the underlying criminal conviction or pending criminal charge, and;

b. the number and types of convictions or pending criminal charges, and;

c. the time that has elapsed since the conviction or pending criminal charge, excluding periods of incarceration, and;

d. any verifiable information related to the individual's rehabilitation or good conduct, provided by the individual, and;

e. the specific duties and responsibilities of the position sought or held, and;

f. the place and manner in which the position will be performed.

"Pending criminal charge" means an existing accusation that an individual has committed a crime, lodged by a law enforcement agency or military authority through an indictment, information, complaint, or other formal charge, where the accusation has not yet resulted in a final judgment, acquittal, conviction, plea, dismissal, or withdrawal.

"Respondent" means any employer who is alleged or found to have committed a violation of this chapter.

"Tangible adverse employment action" means a decision by an employer to reject an otherwise qualified job applicant, or to discharge, suspend, discipline, demote, or deny a promotion to an employee.

14.17.020 Prohibited Use of Arrest and Conviction Records

A. No employer shall advertise, publicize, or implement any policy or practice that automatically or categorically excludes all individuals with any arrest or conviction record from any employment position that will be performed in whole or in substantial part (at least 50% of the time) within the City.

B. An employer may perform a criminal background check on a job applicant or require a job applicant to provide criminal history information, but only after the employer has completed an initial screening of applications or resumes to eliminate unqualified applicants.

C. An arrest is not proof that a person has engaged in unlawful conduct. Employers shall not carry out a tangible adverse employment action solely based on an employee's or applicant's arrest record.

D. Employers may inquire about the conduct related to an arrest record. Employers shall not carry out a tangible adverse employment action solely based on the conduct relating to an arrest unless the employer has a legitimate business reason for taking such action.

E. Employers shall not carry out a tangible adverse employment action solely based on an employee's or applicant's criminal conviction record or pending criminal charge, unless the employer has a legitimate business reason for taking such action.

F. Before taking any tangible adverse employment action solely based on an applicant's or employee's criminal conviction record, the conduct relating to an arrest record, or pending criminal charge, the employer shall identify to the applicant or employee the record(s) or information on which they are relying and give the applicant or employee a reasonable opportunity to explain or correct that information.

G. Employers shall hold open a position for a minimum of two business days after notifying an applicant or employee that they will be making an adverse employment decision solely based on their criminal conviction record, the conduct relating to an arrest record, or pending charge in order to provide an applicant or employee a reasonable opportunity to respond, correct or explain that information. After two business days, employers may, but are not required, to hold open a position until a pending charge is resolved or adjudicated or questions about an applicant's criminal conviction history or conduct relating to an arrest are resolved.

14.17.030 Effect on Collective Bargaining Rights And Other Laws

A. This chapter shall not be construed to interfere with, impede, or in any way diminish any provision in a collective bargaining agreement or the right of employees to bargain collectively with their employers through representatives of their own choosing concerning wages or standards or conditions of employment.

B. This chapter shall not be interpreted or applied to diminish or conflict with any requirements of state or federal law, including Title VII of the Civil Rights Act of 1964, the

federal Fair Credit Reporting Act, 15 U.S.C. 1681, as amended, the Washington State Fair Credit Reporting Act, RCW 19.182, as amended, the Washington State Criminal Records Privacy Act, RCW 10.97, as amended, and state laws regarding criminal background checks, including those related to individuals with access to children or vulnerable persons, RCW 43.43.830, *et seq*., as amended. In the event of any conflict, state and federal requirements shall supersede the requirements of this chapter.

C. This chapter shall not be interpreted or applied as imposing an obligation on the part of an employer to provide accommodations or job modifications in order to facilitate the employment or continued employment of an applicant or employee with a conviction record or who is facing pending criminal charges.

D. Nothing in this chapter shall be construed to discourage or prohibit an employer from adopting employment policies that are more generous to employees and job applicants than the requirements of this chapter.

E. This chapter shall not be construed to create a private civil right of action to seek damages or remedies of any kind.

14.17.040 Regulations

A. The Agency shall be authorized to coordinate implementation and enforcement of this chapter and shall promulgate appropriate guidelines or regulations for such purposes. The Agency shall convene a panel of stakeholders with a balance of perspectives, including members of the employer, social service, legal community and the Seattle Human Rights Commission to help develop the appropriate guidelines and regulations to implement this ordinance, and to oversee and provide input and feedback to the Director on the implementation of this ordinance for at least the first six months after the ordinance's effective date. Upon the written request of an employer, the Director has the authority to extend the implementation date for that employer, for a reasonable amount of

time, to provide the employer time to make the necessary changes to their employment systems or forms.

B. The Agency will maintain data on the number of complaints filed pursuant to this chapter, demographic information on the complainants, the number of investigations it conducts and the disposition of every complaint and investigation. This data shall be submitted to the City Council every six months for the two years following the date this ordinance takes effect.

14.17.050 Exercise of Rights Protected; Retaliation Prohibited

A. It shall be a violation for an employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this chapter.

B. It shall be a violation for an employer or any other person to retaliate against an employee or job applicant because the employee or applicant has exercised in good faith the right to file a complaint with the Agency about any employer's alleged violation of this chapter, the right to cooperate in the Agency's investigation, or the right to oppose any policy, practice, or act that is unlawful under this chapter.

C. The protections afforded under subsection 14.17.050.B shall apply to any person who mistakenly but in good faith alleges violations of this chapter.

14.17.060 Enforcement

A. The same complaint, investigation, and enforcement procedures set forth in SMC 14.16.080 apply under this chapter, except that when there is a determination that a respondent has violated this chapter, the exclusive remedy available under this chapter is a notice of infraction and offer of Agency assistance for the first violation; an order requiring the respondent to pay a monetary penalty of up to $750, payable to the charging party, for the second violation; and a monetary penalty of up to $1000, payable to the charging party, for each subsequent violation. In the event the Hearing Examiner (or panel majority) determines that a respondent

has committed a violation of this chapter, the Hearing Examiner (or panel majority) may order the respondent to pay the Agency's attorney's fees in addition to a monetary penalty. No other remedies, damages, or affirmative action may be ordered by the Agency, Commission, or Hearing Examiner.

B. The Agency has the authority to initiate investigation procedures on its own, without a complaint from a Charging Party, and enforcement procedures after a complaint has been received either from an applicant who feels unjustly treated, or from the applicant's representative, or when the Agency has reasonable cause based on substantial and verifiable information to believe that an employer has violated subsection SMC 14.17.020.A of this chapter.

Section 2. Section 1 of this ordinance shall take effect on November 1, 2013.

Section 3. This ordinance shall take effect and be in force 30 days after its approval by the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it shall take effect as provided by Seattle Municipal Code Section 1.04.020.

Passed by the City Council the ____ day of _____, 2013, and signed by me in open session in authentication of its passage this _____ day of _____, 2013.

_____

President _____of the City Council

Approved by me this ____ day of _____, 2012.

_____

Michael McGinn, Mayor

Filed by me this ____ day of _____, 2013.

_____

Monica Martinez Simmons, City Clerk

(Seal)