"BAN THE BOX"
MODEL POLICIES

NELP
National Employment Law Project

TOP TEN BEST PRACTICES
FOR FAIR CHANCE POLICIES

As you craft a fair chance policy, here are the top ten principles to follow. NELP partnered with All of Us or None in developing "best practices" for implementation of California's new legislation, available here. The top ten best practices below are applicable to any state or region.

1. **Avoid stigmatizing language** such as "ex-offenders" or "ex-felons." Use terms that lead with "people," such as "people with records."

2. **A background check may be unnecessary for a job position** because most jobs do not involve unsupervised access to sensitive populations or handling sensitive information. If the background check is not legally required, it may be cost-saving to forego. Even if a background check is legally mandated, it is unnecessary to exempt a position from the majority of these best practices as these practices do not interfere with conducting background checks.

3. **Avoid blanket exclusions and instead include an equal opportunity statement on job applications** to indicate that a record will not automatically disqualify anyone from a job, unless there is a specific legal exclusion. If a background check is required or if there is a specific legal barrier, inform applicants that "a background check will be conducted for this position." However, avoid phrases such as "must pass a background check," or "clean background only" as this language may be interpreted as a categorical exclusion.

4. **If a background check is necessary, only consider those convictions with a direct relationship to job duties and responsibilities and consider the length of time since the offense.** Follow the best practices of the 2012 U.S. Equal Employment Opportunity Commission guidance in evaluating convictions and avoid consideration of records of arrest not followed by a valid conviction. Do not consider sealed, dismissed, or expunged convictions, misdemeanor convictions where no jail sentence can be imposed, and infractions.

5. **Remove inquiries into convictions from the job application.** The most effective policy is to delay all conviction inquiries, oral or written, until after a conditional offer of employment. Do not include a provision to permit "voluntary disclosure" of background check information from the applicant. "Voluntary disclosure" circumvents "ban the box" as applicants are often directed to provide background check information by job services.

6. **Remove self-reporting questions about conviction history.** Discrepancies between self-disclosed information and background checks are often caused by workers' misunderstanding of their own records, and too often are inaccurate "truth tests." If a background check will be run, there is no benefit to this additional step, which trips up well-intentioned workers. Prior to any discussion about the applicant's conviction history, provide the applicant with a copy of any background check.

7. **If a job applicant is rejected because of a record, inform the applicant.** Provide the applicant with written notice of the specific item in the background check report that is considered job-related and provide the applicant with a copy of the report. Background check reports are often inaccurate, so give applicants the chance to verify or challenge the information.

8. **Provide the applicant the right and sufficient time to submit evidence of mitigation or rehabilitation** when a record is considered in hiring. Evidence may include letters of recommendation from community members and certificates from programs or education. Hold the position open until the review is complete.

9. **Expand the fair chance policy to private employers.** To maximize the impact of the fair chance policy, apply the policy to government contractors and private employers. Another method of strengthening the policy for government contractors is to combine it with targeted hiring, as shown in Community Hiring Model Language.

10. **Combine data collection and effective enforcement.** At a minimum, a government agency should have the infrastructure to process complaints and to audit compliance. If the policy applies to private employers, the ability to bring a lawsuit based on a violation of the ordinance may be an effective means of enforcement. With government contractors, the ability to rescind the contract is motivation to comply. Data collection to ensure that the policy is opening job opportunities for people with records will support enforcement.

MODEL ADMINISTRATIVE MEMO FOR CITIES OR COUNTIES

A mayor, city manager, or human resources director ready to enact a fair chance policy may be able to do so by developing an administrative memo or by executive order. This could be the most viable option if a local council or board is unwilling to entertain a fair chance policy. Legislation is a more permanent solution, but an administrative change may provide the foundation for a new law. However, an administrative policy change may be inappropriate if the goal of the campaign is to apply the fair chance policy to non-government employers.

This model administrative memo provides a comprehensive approach. A more limited approach could be taken by omitting sections below. Note that local- and state-specific terms, such as criminal justice related terms, must be adjusted for local law. For examples, see Oakland, California and Durham, North Carolina. A Word version of the model policy is available.

Sec. 1. Policy

The City will not conduct background checks on applicants unless it is required by law or the City has made a good faith determination that the relevant position is of such sensitivity that a background check is warranted. Applicants will be considered for employment opportunities on the merits of their skills and experience related to the position sought, and will not be denied employment solely or in part because of a prior conviction, unless the City determines that the conviction is job-related. If the City has determined that a background check is warranted for the position, the background check will be conducted after the City has selected the best candidate for the position. If a background check yields information that is of concern to the City, the applicant will be provided an individualized assessment. The applicant will be given an opportunity to review the background check findings and present information regarding inaccuracy, mitigating circumstances, and rehabilitation.

Sec. 2. Definitions

"Adverse action" means to refuse to hire, to not promote, to discharge a person, or to revoke an applicant's conditional offer of employment.

"Applicant" means a person who has filed an application for examination to a City job position.

"City" means the City, department, agency, or office thereof.

Sec. 3. Existing Law

The City will comply with state and federal law requiring background checks for certain positions and dictating certain disqualifying offenses and other existing law. An employer's use of an individual's arrest and conviction record in making employment decisions to automatically disqualify applicants

may violate the prohibition against employment discrimination under federal law, Title VII of the Civil Rights Act of 1964.

The U.S. Equal Employment Opportunity Commission ("EEOC") Guidance recommends employers adopt the following best practices to avoid violating federal law. The employer should only consider job-related convictions taking into account length of time since the conviction. In addition, the guidelines recommend that the employer perform an individualized assessment on the applicant, which would allow the applicant to demonstrate that the conviction history is inaccurate or provide evidence of mitigating circumstances or of rehabilitation.

The federal Fair Credit Reporting Act, 15 U.S. Code Sec.1681, *et seq.*, governs the use of commercially-prepared background reports. The subject of the background report must authorize the report. These reports should not include information on arrests older than seven years and the applicant should be provided a copy of the report prior to any adverse action.

Sec. 4. Considering Conviction History in Employment Decisions

1. **Identifying position as requiring background check.** Human Resources analyst performs initial review of position to determine if the position is of such sensitivity that a background check is warranted or if a background check is required by law.

2. **Posting job announcements.** All job announcements and position descriptions shall contain the following statement if the position requires a background check, unless otherwise required by law: *"This position is subject to a background check for any convictions directly related to its duties and responsibilities. Only job-related convictions will be considered and will not automatically disqualify the candidate."*

3. **Job applications.** Job applications shall not inquire into an applicant's conviction history.

4. **Examination process.** A list of eligible applicants will be created based on examination results and the list will be sent to the hiring department. The hiring department will conduct interview(s) and select an individual from the list of eligible applicants.

5. **Notice of rights.** Once an individual has been selected, the hiring department shall notify Human Resources (HR), and HR shall send the individual a conditional offer letter, notice of rights under this policy, and a request for authorization to conduct a background check, if so required.

6. **Limitation to conviction history.** HR shall not use or access the following criminal records in relation to a background check: records of arrest not followed by a valid conviction, sealed, dismissed, or expunged convictions, misdemeanor convictions where no jail sentence can be imposed, and infractions.

7. **Conviction history inquiry.** If required, HR shall consider job-related convictions only. If a statute explicitly requires that certain convictions are automatic bars to employment, then those convictions shall be considered as well. Otherwise, no person shall be disqualified from employment, solely or in part because of a prior conviction, unless it is a job-related conviction. In determining if a conviction is job-related, HR shall consider:

    (a) Whether the conviction is directly related to the duties and responsibilities of that employment position;

    (b) Whether the position offers the opportunity for the same or a similar offense to occur; and

    (c) Whether circumstances leading to the conduct for which the person was convicted will recur in the position; and

    (d) The length of time since the offense occurred.

8. **Pre-adverse action notice.** If an applicant's conviction history contains information that may be the basis for an adverse action, HR shall:

    (a) Identify the conviction item(s) that are the basis for the potential adverse action;

    (b) Provide a copy of the conviction history report, if any;

    (c) Provide examples of mitigation or rehabilitation evidence that the applicant may voluntarily provide; and

    (d) Provide the applicant with an individualized assessment as described below.

9. **Individualized assessment.** A job-related conviction shall not be the basis for an adverse action if the applicant can show evidence of mitigation or rehabilitation and present fitness to perform the duties of the position sought. The applicant shall have ten (10) business days, after issuance of the notice, to respond with any information rebutting the basis for the adverse action, including challenging the accuracy of the information and submitting mitigation or rehabilitation evidence. HR shall hold the position open until it makes the final employment decision based on an individualized assessment of the information submitted by the applicant and the factors recommended by the EEOC.

10. **Evidence of mitigation or rehabilitation.** Evidence of mitigation or rehabilitation may be established by:

    (a) Evidence showing that at least one year has elapsed since release from any correctional institution without subsequent conviction of a crime; and evidence showing compliance with terms and conditions of probation or parole; or

(b) Any other evidence of mitigation or rehabilitation and present fitness provided, including, but not limited to, letters of reference.

11. **Final notice.** If HR makes an adverse decision, the applicant shall be informed of the final decision, the appeal process, and that the applicant may be eligible for other City positions.

12. **Appeal.** Applicants may appeal the final decision to the Director of Human Resources.

13. **Confidentiality.** Any information pertaining to an applicant's background check obtained in conjunction with the hiring process shall remain confidential, and shall not be used, distributed, or disseminated by the City or any of its agencies, or its vendors, to any other entity, except as required by law.

14. **Data Collection.** The Human Resources Department shall maintain a record of the number of positions requiring background checks and for those positions, shall maintain a record of the number of applicants: (a) for a position; (b) who were found eligible for a position; and (c) who were provided a conditional offer for a position. In addition, the Department shall maintain a record of the number of applicants with a record for a position: (a) who were provided a pre-adverse action notice; (b) who provided evidence of mitigation or rehabilitation; (c) who were provided a final adverse notice; and (d) who were hired. The Department shall also regularly conduct a confidential, anonymous survey of employees in positions, in which background checks are not conducted, to determine the number of people with records hired.

15. **Audit.** The Human Resources Department shall conduct a quarterly audit and submit a report to the City Council which will review the City's hiring practices in an effort to ensure that people with records are not unreasonably denied employment with the City.

MODEL RESOLUTION FOR CITIES OR COUNTIES

A resolution, as a formal expression of the intention or position of the city or county, often entails a simpler process than legislation. Although an ordinance has the benefit of typically being more detailed and thus, potentially more effective, a resolution may be the best course for a fair chance policy that applies only to public employment. In addition, a resolution may be appropriate as an initial step if you need to build your campaign to push for an ordinance that applies to private employers.

This model resolution provides a comprehensive and effective approach. A more limited approach can be achieved by omitting sections. Note that local- and state-specific terms, such as criminal justice related terms, must be adjusted for local law. For examples of resolutions, see Minneapolis, Minnesota and Petersburg, Florida. A Word version of the model policy is available.

Purpose

Ensuring that the hiring practices of the City do not unfairly deny people with arrest and conviction records employment with the City and further encouraging rehabilitation of people with records to strengthen communities.

WHEREAS, the ability of people with records to successfully reintegrate into their communities contributes to reduced recidivism, strengthens families, and leads to safer communities; and

WHEREAS, people with records suffer from pervasive discrimination in many areas of life, including employment, housing, education, and eligibility for many forms of social service benefits; and

WHEREAS, people of color are arrested, convicted, and incarcerated in numbers disproportionate to their representation in the population as a whole; and

WHEREAS, many people with records in the City are likely to be unemployed or underemployed; and

WHEREAS, people with records represent a workforce that have skills to contribute and a desire to add value to their community; and

WHEREAS, the City seeks to assist the rehabilitation of people with records and ensure healthier, safer communities; and

WHEREAS, studies indicate that stable employment is one of the best predictors of post-conviction success; and

WHEREAS, states and cities across the country have adopted fair chance hiring policies to remove unfair barriers to employment of people with records; and

WHEREAS, the U.S. Equal Employment Opportunity Commission, to maximize compliance with federal anti-discrimination law, recommends delaying inquiry of a job applicant's conviction history and considering the job-relatedness of the conviction taking into account length of time since conviction, and providing an individualized assessment affording the opportunity to correct any inaccuracies and to submit evidence of mitigation or rehabilitation; and

WHEREAS, it is the public policy of the City to encourage the employment of people previously convicted.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY, that the City Human Resources Department shall enact a fair chance policy and prohibit inquiry into conviction history information on all City employment applications unless required by state or federal law; and be it

FURTHER RESOLVED, that the City shall make a good faith determination as to which specific positions of employment are of such sensitivity that a background check is warranted or are required by law; and shall conduct background checks for these positions only; and be it

FURTHER RESOLVED, if it has been established that a position requires a background check, the City shall not conduct the check until after the applicant has been provided a conditional offer of employment; and be it

FURTHER RESOLVED, the City shall not use or access the following criminal records in relation to a background check: records of arrest not followed by a valid conviction, sealed, dismissed, or expunged convictions, misdemeanor convictions where no jail sentence can be imposed, and infractions; and be it

FURTHER RESOLVED, that the City shall consider job-related convictions taking into account the length of time since the offense occurred, such that no person shall be disqualified from employment, solely or in part because of a prior conviction, unless it is a job-related conviction; and be it

FURTHER RESOLVED, that if an applicant has been convicted of an offense that is directly related to the position sought, the Human Resources Department shall notify the applicant and conduct an individualized assessment that permits the applicant to submit information regarding inaccuracy of the record and evidence of mitigation or rehabilitation, as appropriate; and be it

FURTHER RESOLVED, the Human Resources Department shall conduct an audit and submit a report to the City Council which will review the City's hiring practices in an effort to ensure that people with records are not unreasonably denied employment with the City; and be it

FURTHER RESOLVED, that the City urges private employers and government contractors to adopt fair hiring practices that encourage the rehabilitation and employment of people with records.

MODEL ORDINANCE FOR CITIES OR COUNTIES

Enacting local law is the best option for regulating private employers. Because it has the force of law, an ordinance is more permanent and authoritative than a resolution. This model ordinance provides a comprehensive approach including the government, vendors, and an option for private employers. A more limited approach could be taken by omitting sections. Note that local- and state-specific terms, such as criminal justice related terms, must be adjusted for local law. For examples, see New Haven, Connecticut and San Francisco, California. A Word version of the model policy is available.

[EXAMPLE OF PREAMBLE ARE PROVIDED IN "WHEREAS" SECTION OF MODEL RESOLUTION]

Sec. 1. Definitions

"Adverse action" means to refuse to hire, to not promote, to discharge a person, or to revoke an applicant's conditional offer of employment.

"Applicant" means any person considered for, or who requests to be considered for, employment or any employee considered for, or who requests to be considered for, another employment position, by the employer.

"Awarding authority" means any department, agency, or office of the City that authorizes a vendor to provide requested goods and/or perform services.

"City" means the City, department, agency, or office thereof.

"Employer" means the City; [IF APPLYING TO PRIVATE EMPLOYERS, THEN INCLUDE:] any person regularly employing five or more persons; any person acting as an agent of an employer, directly or indirectly; or any person undertaking for compensation to procure employees or opportunities for employment.

"Employment" means any occupation, vocation, job, or work for pay, including temporary or seasonal work, contracted work, contingent work and work through the services of a temporary or other employment agency; or any form of vocational or educational training with or without pay.

"Vendor" means any vendor, contractor, or supplier of goods or services to the City.

Sec. 2. Considering Conviction History in Employment Decisions

1. **Identifying position as requiring background check.** The employer shall not conduct background checks on applicants unless the employer has made a good faith determination that the relevant position is of such sensitivity that a background check is warranted or if a background check is required by law.

2. **Posting job announcements.** All job announcements and position descriptions shall contain the following information if the position requires a background check, unless otherwise required by law: *"This position is subject to a background check for any convictions directly related to its duties and responsibilities. Only job-related convictions will be considered and will not automatically disqualify the candidate."*

3. **Job applications.** Job applications shall not inquire into an applicant's conviction history.

4. **Notice of rights.** Prior to any conviction history check, the employer shall send the applicant a conditional offer letter, notice of rights under this ordinance, and a request for authorization to conduct a background check, if so required.

5. **Limitation to conviction history.** The employer shall not use or access the following criminal records in relation to a background check: records of arrest not followed by a valid conviction, sealed, dismissed, or expunged convictions, misdemeanor convictions where no jail sentence can be imposed, and infractions.

6. **Conviction history inquiry.** The employer shall not inquire into or consider an applicant's conviction history until after the applicant has received a conditional offer. If the employer is considering the conviction history of the applicant, the employer shall consider job-related convictions only. If a statute explicitly requires that certain convictions are automatic bars to employment, then those convictions shall be considered as well. Otherwise, no person shall be disqualified from employment, solely or in part because of a prior conviction, unless it is a job-related conviction. In determining if a conviction is job-related, the employer shall consider:

    (a) Whether the conviction is directly related to the duties and responsibilities of that employment position;

    (b) Whether the position offers the opportunity for the same or a similar offense to occur;

    (c) Whether circumstances leading to the conduct for which the person was convicted will recur in the position; and

    (d) The length of time since the offense occurred.

7. **Pre-adverse action notice.** If an applicant's conviction history contains information that may be the basis for an adverse action, the employer shall:

    (a) Identify the conviction item(s) that are the basis for the potential adverse action;

    (b) Provide a copy of the conviction history report, if any;

    (c) Provide examples of mitigation or rehabilitation evidence that the applicant may voluntarily provide; and

(d) Provide the applicant with an individualized assessment as described below.

8. **Individualized assessment.** A job-related conviction shall not be the basis for an adverse action if the applicant can show evidence of mitigation or rehabilitation and present fitness to perform the duties of the position sought. The applicant shall have ten (10) business days, after issuance of the notice, to respond with any information rebutting the basis for the adverse action, including challenging the accuracy of the information and submitting mitigation or rehabilitation evidence. The employer shall hold the position open until it makes the final employment decision based on an individualized assessment of the information submitted by the applicant and the factors recommended by the U.S. Equal Employment Opportunity Commission.

9. **Evidence of mitigation or rehabilitation.** Evidence of mitigation or rehabilitation may be established by:

   (a) Evidence showing that at least one year has elapsed since release from any correctional institution without subsequent conviction of a crime; and evidence showing compliance with terms and conditions of probation or parole; or

   (b) Any other evidence of mitigation or rehabilitation and present fitness provided, including, but not limited to, letters of reference.

10. **Final notice.** If the employer makes an adverse decision, the applicant shall be informed of the final decision and that he or she may be eligible for other positions.

11. **Appeal.** If denied employment by the employer, applicants may appeal adverse decisions to the Enforcement Agency.

12. **Confidentiality.** Any information pertaining to an applicant's background check obtained in conjunction with the hiring process shall remain confidential, and shall not be used, distributed, or disseminated by the employer or any of its agencies, or its vendors, to any other entity, except as required by law.

Sec. 3. Vendors [CONSIDER COMBINING WITH TARGETED HIRING]

1. The City shall do business only with vendors that have adopted and employ conviction history policies, practices, and standards that are consistent with City standards outlined in this chapter.

2. During the bid or contracting process, the Awarding Authority shall review all vendors' conviction history policies for consistency with City standards. The vendors' conviction history standards shall be part of the criteria to be evaluated by the City when determining whether to award a City contract. Further, the City will be able to evaluate a vendor's execution of the conviction history standards as a part of the performance criteria of said City contract(s). The Awarding Authority shall consider any vendor's deviation from these conviction history standards as grounds for fines or rejection, rescission, revocation, or any other termination of the contract, or debarment from all City contracts.

Sec. 4. Compliance

1. **Enforcement Agency.** The employer shall retain application forms, records of employment, and other pertinent data and records required under this chapter, including but not limited to, communication with the applicant, for a minimum of three years, and shall allow the Enforcement Agency access to such records to monitor compliance with this chapter. Any person who is aggrieved by an employer's violation of these provisions may contact the Agency to report any problems, concerns, or suggestions regarding the implementation, compliance, and impact of these sections, and the Agency shall keep a record. In addition, the Agency shall conduct periodic reviews to assess compliance with these sections. The Agency shall investigate and review complaints. The Agency shall report quarterly on complaints, investigations, and reviews.

2. **Data Collection.** The employer shall maintain a record of the number of positions requiring background checks and for those positions, shall maintain a record of the number of applicants and the number of applicants who were provided a conditional offer. In addition, the employer shall maintain a record of the number of applicants with a record for a position: (a) who were provided a pre-adverse action notice; (b) who provided evidence of mitigation or rehabilitation; (c) who were provided a final adverse notice; and (d) who were hired. The City shall also regularly conduct a confidential, anonymous survey of employees in City positions, in which background checks are not conducted, to determine the number of people with records hired.

3. **Audit.** The Human Resources Department shall conduct an audit and submit a report to the City Council which will review the City's hiring practices in an effort to ensure that people with records are not unreasonably denied employment with the City.

[IF APPLYING TO PRIVATE EMPLOYERS, THEN INCLUDE:]

4. **Penalty.** The Enforcement Agency may issue a fine of up to $1000 for a first violation of this chapter and provide counseling to the private employer to ensure future compliance. Subsequent violations are subject to fines of up to $2000 per violation. In addition, an individual may bring a civil action in any court of competent jurisdiction against the employer or other person violating this chapter, and upon prevailing, shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, but not limited to damages, injunctive relief, and reasonable attorney's fees and costs. Where an employer does not maintain or retain adequate records documenting compliance or does not allow the Enforcement Agency reasonable access to such records, it shall be presumed that the employer did not comply, absent clear and convincing evidence otherwise.

MODEL STATE EXECUTIVE ORDER

In both California (2010) and Illinois (2013), the governors were committed to enacting a fair chance policy at a time when passing a bill was not feasible. Although legislation is a more permanent solution, it is also resource-intensive to initiate a statewide campaign. With the governor's backing assured, an executive order may be an appropriate first step in a legislative campaign. However, if the goal of the fair chance campaign is to apply the policy to private employers, a bill may be the only vehicle.

This model executive order provides a comprehensive approach for state agencies. A more limited approach could be taken by omitting sections. Note that state-specific terms, such as criminal justice related terms, must be adjusted for state law. For an example of a state administrative order, see Illinois. A Word version of the model policy is available.

Sec. 1. Scope

This Order shall apply to all positions in State agencies, boards, and commissions. This Order also urges private employers and government contractors to adopt similar fair hiring practices that encourage the rehabilitation and employment of people with records.

Sec. 2. State Employment Applications

The State Personnel Department shall modify the application for state employment to remove any questions about the applicant's conviction history.

Sec. 3. Authorization of Release of Background Check

To the extent a background check is conducted for the position being filled, each agency, board, and commission shall use an Authorization for Release form that obtains an applicant's consent to acquire information relating to the applicant's conviction history. The form shall indicate that the State shall not base employment decisions on the information contained in the background check of an applicant unless the law prohibits hiring an individual with a certain conviction for the position sought or the applicant's conviction is directly related to the duties and responsibilities of the position sought. The form shall indicate that job-related convictions will not automatically disqualify the candidate.

Sec. 4. Considering Conviction History in Employment Decisions

1. **Establish procedure.** Each agency, board, and commission shall establish a documented review process: (a) to determine whether the relevant position is of such sensitivity that a background check is warranted or if a background check is required by law; and (b) to evaluate an applicant's background check in accordance with procedures below.

2. **Limitation to conviction history.** The agency, board, or commission may not inquire into or consider records of arrest not followed by a valid conviction, sealed, dismissed, or expunged convictions, misdemeanor convictions where no jail sentence can be imposed, and infractions.

3. **Conviction history inquiry.** The agency, board, or commission shall not inquire into or consider an applicant's conviction history until after the applicant has received a conditional offer. If the agency, board, or commission is considering the conviction history of the applicant, the agency, board, or commission shall consider job-related convictions only. If a statute explicitly requires that certain convictions are automatic bars to employment, then those convictions shall be considered as well. Otherwise, no person shall be disqualified from employment, solely or in part because of a prior conviction, unless it is a job-related conviction. In determining if a conviction is job-related, the agency, board, or commission shall consider:

    (a) Whether the conviction is directly related to the duties and responsibilities of that employment position;

    (b) Whether the position offers the opportunity for the same or a similar offense to occur;

    (c) Whether circumstances leading to the conduct for which the person was convicted will recur in the position; and

    (d) The length of time since the offense occurred.

4. **Pre-adverse action notice.** If an applicant's conviction history contains information that may be the basis for an adverse action, the agency, board, or commission shall:

    (a) Identify the conviction item(s) that are the basis for the potential adverse action;

    (b) Provide a copy of the conviction history report, if any;

    (c) Provide examples of mitigation or rehabilitation evidence that the applicant may voluntarily provide; and

    (d) Provide the applicant with an individualized assessment as described below.

5. **Individualized assessment.** A job-related conviction shall not be the basis for an adverse action if the applicant can show evidence of mitigation or rehabilitation and present fitness to perform the duties of the position sought. The applicant shall have ten (10) business days, after issuance of the notice, to respond with any information rebutting the basis for the adverse action, including challenging the accuracy of the information and submitting mitigation or rehabilitation evidence. The agency, board, or commission shall hold the position open until it makes the final employment decision based on an individualized assessment of the information submitted by the applicant and the factors recommended by the U.S. Equal Employment Opportunity Commission.

6. **Evidence of mitigation or rehabilitation.** Evidence of mitigation or rehabilitation may be established by:

    (a) Evidence showing that at least one year has elapsed since release from any correctional institution without subsequent conviction of a crime; and evidence showing compliance with terms and conditions of probation or parole; or

    (b) Any other evidence of mitigation or rehabilitation and present fitness provided, including, but not limited to, letters of reference.

7. **Final notice.** If the agency, board, or commission makes an adverse decision, the applicant shall be informed of the final decision, the appeal process, and that the applicant may be eligible for other State positions.

8. **Appeal.** Applicants may appeal the final decision to the Personnel Department.

9. **Confidentiality.** Any information pertaining to an applicant's background check obtained in conjunction with the hiring process shall remain confidential, and shall not be used, distributed, or disseminated by the State, except as required by law.

10. **Data Collection.** The State Personnel Department shall maintain a record of the number of positions requiring background checks and for those positions, shall maintain a record of the number of applicants and the number of applicants who were provided a conditional offer. In addition, the Department shall maintain a record of the number of applicants with a record for a position: (a) who were provided a pre-adverse action notice; (b) who provided evidence of mitigation or rehabilitation; (c) who were provided a final adverse notice; and (d) who were hired. The Department shall also regularly conduct a confidential, anonymous survey of employees in positions, in which background checks are not conducted, to determine the number of people with records hired.

11. **Audit.** The State Personnel Department shall conduct an audit and submit a report to the Governor's Office which will review the State's hiring practices in an effort to ensure that people with records are not unreasonably denied employment with the State.

MODEL STATE LEGISLATION

Out of the total of ten states with a statewide fair chance policy, nine of those states have had the policy passed through the legislative process. The first state, Hawaii, has had its fair chance statute in place since 1998. Given these facts, it's not surprising that each year an increasing number of legislatures are introducing fair chance bills.

The model legislation below provides a comprehensive example applying to all public employment, including the government and licensing, and contractors with an option for private employers. A more limited approach could be taken by omitting sections. Note that state-specific terms, such as criminal justice related terms, must be adjusted for state law. For an example of a comprehensive state law, see Minnesota. For an example of a more modest state law, see California. A Word version of the model legislation is available.

Sec. 1. Policy

The Legislature finds and declares that reducing barriers to employment for people with arrest and conviction records, and decreasing unemployment in communities with concentrated numbers of people with records, are matters of statewide concern. The Legislature further finds and declares that increasing employment opportunities for people with records will reduce recidivism and improve economic stability in our communities.

Sec. 2. Definitions

"Applicant" means any person considered for, or who requests to be considered for, employment or any employee considered for, or who requests to be considered for, another employment position, by the employer.

"Employer" means the State, its agencies, or political subdivisions; [IF ADDING PRIVATE EMPLOYERS, THEN ADD:] and any person in this State employing four (4) or more individuals; any person acting in the interest of an employer directly or indirectly; or any person undertaking for compensation to procure employees or opportunities for employment.

"Hiring authority" shall mean the person, board, commission, or department of the State, its agencies or political subdivisions, responsible by law for the hiring of persons for public employment.

"Licensing authority" shall mean the person, board, commission, or department of the State, its agencies or political subdivisions, responsible by law for the licensing of persons for occupations.

"License" includes all licenses, permits, certificates, registrations, or other means required to engage in an occupation which are granted or issued by the State, its agents, or political subdivisions before a person can pursue, practice, or engage in any occupation.

"Occupation" includes all occupations, trades, vocations, professions, businesses, or employment of any kind for which a license is required to be issued by the State, its agencies, or political subdivisions.

Sec. 3. Availability of Records

(a) The following criminal records shall not be used, distributed, or disseminated by the State, its agents, or political subdivisions in connection with any application for employment nor in connection with an application for a license:

(1) Arrest not followed by a valid conviction.

(2) Convictions which have been sealed, dismissed, or expunged.

(3) Misdemeanor convictions for which no jail sentence can be imposed or infractions.

(b) Any information pertaining to an applicant's background check obtained in conjunction with the hiring process shall remain confidential, and shall not be used, distributed, or disseminated by the State, its agents, or political subdivisions, except as required by law.

Sec. 4. Considering Conviction History

(a) An employer or hiring authority shall not inquire into or consider an applicant's conviction history until after the applicant has received a conditional offer.

(b) A licensing authority shall not inquire into or consider the conviction history of an applicant for licensing until after an applicant is found to be otherwise qualified for the license.

(c) Job applications and licensing applications shall not inquire into an applicant's conviction history.

Sec. 5. Relation of Conviction to Employment or Occupation

(a) No person shall be disqualified from employment, nor shall a person be disqualified from pursuing, practicing, or engaging in any occupation for which a license is required, solely or in part because of a prior conviction, unless it is a directly related conviction to the position of employment sought or to the occupation for which the license is sought. If a statute explicitly requires that certain convictions are automatic bars to employment or licensing, then those convictions shall be considered as well. Otherwise, no person shall be disqualified from employment or licensing, solely or in part because of a prior conviction, unless it is a directly related conviction to the position of employment sought or to the occupation for which the license is sought.

(b) In determining if a conviction directly relates to the position of employment sought or the occupation for which the license is sought, the employer, hiring authority, or licensing authority shall consider:

(1) Whether the conviction is directly related to the duties and responsibilities of that employment position or occupation;

(2) Whether the position or occupation offers the opportunity for the same or a similar offense to occur;

(3) Whether circumstances leading to the conduct for which the person was convicted will recur in the position or occupation; and

(4) The length of time since the offense occurred;

Sec. 6. Notification of Denial of Employment or Disqualification from Occupation

(a) If an employer, hiring authority, or licensing authority intends to deny an applicant a position of employment or intends to disqualify an applicant from pursuing, practicing, or engaging in any occupation for which a license is required, solely or in part because of the applicant's prior conviction of a crime, the employer, hiring authority, or licensing authority shall notify the applicant in writing of the following, prior to a final decision:

(1) Identify the conviction item(s) that are the basis for the potential denial or disqualification;

(2) Provide a copy of the conviction history report, if any; and

(3) Provide examples of mitigation or rehabilitation evidence that the applicant may voluntarily provide.

(b) The applicant who has been convicted of an offense which directly relates to the employment sought or to the occupation for which a license is sought shall not be disqualified from the employment or occupation if the applicant can show evidence of mitigation or rehabilitation and present fitness to perform the duties of the employment sought or the occupation for which the license is sought.

(c) The applicant shall have ten (10) business days, after issuance of the notice, to respond with any information, including challenging the accuracy of the information and submitting mitigation or rehabilitation evidence. The employer or hiring authority shall hold the position open until it makes the final employment decision based on an individualized assessment of the information submitted by the applicant and the factors recommended by the U.S. Equal Employment Opportunity Commission.

(d) Evidence of mitigation or rehabilitation may be established by:

(1) Evidence showing that at least one year has elapsed since release from any correctional institution without subsequent conviction of a crime; and evidence showing compliance with terms and conditions of probation or parole; or

(2) Any other evidence of mitigation or rehabilitation and present fitness provided, including, but not limited to, letters of reference.

(e) If an employer, hiring authority, or licensing authority denies an applicant a position of employment or disqualifies the applicant from pursuing, practicing, or engaging in any occupation for which a license

is required, solely or in part because of the applicant's prior conviction of a crime, the employer, hiring authority, or licensing authority shall notify the applicant in writing of the following:

(1) The final denial or disqualification;

(2) The appeal process;

(3) The applicant may be eligible for other employment or occupation; and

(4) The earliest date the applicant may reapply for a position of employment or a license.

Sec. 7. Contractors

(a) It shall be the policy of the State to do business only with contractors that have adopted and employ written policies, practices, and standards that are consistent with the requirements of Sections 1-6.

(b) State agencies shall review all contractors' background check policies for consistency with the policies of the State as expressed in Sections 1-6, and shall consider background check policies and practices among the performance criteria in evaluating a contract.

Sec. 8. Compliance

(a) The employer shall retain application forms, records of employment, and other pertinent data and records required under Sections 1-6, including but not limited to, communication with the applicant, for a minimum of three years, and shall allow the Enforcement Agency access to such records to monitor compliance with Sections 1-6. Any person who is aggrieved by an employer's violation of these provisions may contact the Agency to report any problems, concerns or suggestions regarding the implementation, compliance and impact of these sections, and the Agency shall keep a record. In addition, the Agency shall conduct periodic reviews to assess compliance with these sections. The Agency shall investigate and review complaints. The Agency shall report quarterly on complaints, investigations, and reviews.

(b) The employer shall maintain a record of the number of positions requiring background checks and for those positions, shall maintain a record of the number of applicants and the number of applicants who were provided a conditional offer. In addition, the employer shall maintain a record of the number of applicants with a record for a position: (a) who were provided a pre-adverse action notice; (b) who provided evidence of mitigation or rehabilitation; (c) who were provided a final adverse notice; and (d) who were hired. Public employers shall also regularly conduct a confidential, anonymous survey of employees in public employment positions, in which background checks are not conducted, to determine the number of people with records hired.

(c) Any appeals or complaints or grievances concerning violations of these sections by public employers shall be processed and adjudicated in accordance with established State procedures.

(d) The State Personnel Department shall conduct an audit to review the State's hiring practices in an effort to ensure that people with records are not unreasonably denied employment with the State.

[IF ADDING PRIVATE EMPLOYERS, THEN ADD:]

(e) The Enforcement Agency may issue a fine of up to $1000 for a first violation of Sections 1-6 and provide counseling to the private employer to ensure future compliance. Subsequent violations are subject to fines of up to $2000 per violation. In addition, an individual may bring a civil action in any court of competent jurisdiction against the employer or other person violating Sections 1-6, and upon prevailing, shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, but not limited to damages, injunctive relief, and reasonable attorney's fees and costs. Where an employer does not maintain or retain adequate records documenting compliance or does not allow the Enforcement Agency reasonable access to such records, it shall be presumed that the employer did not comply, absent clear and convincing evidence otherwise.

Sec. 9. Application

The provisions of these sections shall prevail over any other laws and rules which purport to govern the granting, denial, renewal, suspension, or revocation of a license or the initiation, suspension, or termination of employment on the grounds of conviction of an offense. In deciding to grant, deny, revoke, suspend, or renew a license, or to deny, suspend, or terminate employment for a lack of good moral character or the like, the hiring or licensing authority may consider evidence of conviction of an offense but only in the same manner and to the same effect as provided for these sections. Nothing in these sections shall be construed to otherwise affect relevant proceedings involving the granting, denial, renewal, suspension, or revocation of a license or the initiation, suspension, or termination of employment.