

# Fair Chance Hiring is Necessary for a Fair and Equitable Austin

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## **Appendix**

- City of Austin – HRD – Employment Services, Fair Chance Hiring Stakeholder Meeting, July 21, 2015, Breakout Group Notes

## **Background and Purpose**

On May 21, 2015, the Austin City Council passed a resolution to consider requiring private employers in Austin to follow Fair Chance Hiring practices. Following the resolution, the City's Human Resources Department (HRD) held a series of four stakeholder meetings to identify what residents of Austin wanted to see in a Fair Chance Hiring ordinance. The Economic Opportunity Committee heard testimony from a few independent advocates at its September 14th meeting, and then heard a presentation from HRD on their research findings along with testimony from all interested stakeholders at its October 12th meeting.

The October 12th meeting of the Economic Opportunity Committee resulted in HRD being directed to draft an ordinance for only one small piece of a full Fair Chance Hiring policy, while all other issues involved in a comprehensive and effective Fair Chance Hiring policy were tabled. The issues related to a robust Fair Chance Hiring policy in Austin were disoriented and the urgent nature of implementing this critical piece of local legislation was cast aside.

In response to the October 12th meeting of the Economic Opportunity Committee, a group of individuals, both those personally impacted by hiring practices that discriminate against individuals with criminal records and their allies, submit this document to lay out what must be included in an effective Fair Chance Hiring policy and to address the concerns and misinformation presented at the meeting.

## **What is Fair Chance Hiring?**

Fair Chance Hiring is a policy that allows individuals to be considered for employment based on their merit, not their criminal history, without sacrificing public safety or employer discretion.

An effective Fair Chance Hiring policy is made up of several components, including:

- providing clear definitions of terms;
- removing the question about criminal history from employment applications;
- waiting until a conditional offer of employment is made to ask about criminal history or run a background check;
- providing education and technical assistance for employers;
- exempting positions that interact with vulnerable populations or are otherwise exempted by federal or state law;
- requiring employers to give a copy of the background check to the applicant and provide an opportunity for the applicant to provide mitigating evidence (in accordance with EEOC guidance on hiring individuals with criminal records);
- enforcing policy based on best practices (e.g., progressive civil penalties);
- requiring that employers do not retaliate against applicants who report a violation; and
- providing robust pre-implementation education.

## **Frequently Asked Questions and Misconceptions**

### **Should Fair Chance Hiring be separate from a Ban the Box policy?**

No, Fair Chance Hiring and Ban the Box is the same policy initiative. Removing the question about criminal history from employment applications and waiting until a conditional offer of employment is made to ask about criminal history or run a background check is a necessary element of a comprehensive Fair Chance Hiring policy.<sup>1</sup>

The widespread use of “Ban the Box” as a marketing term should not be confused with a simplistic and ineffective practice of merely removing the criminal history question from employment applications without the other critical elements of a comprehensive Fair Chance Hiring policy.

### **Does a Fair Chance Hiring policy make businesses more vulnerable to liability or litigation?**

Some jurisdictions have chosen to create a private right of action against businesses that violate the Fair Chance Hiring policy. However, creating a private right of action is not necessary in Austin if the City adopts an effective enforcement mechanism, to include progressive civil penalties. Any fears of liability

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<sup>1</sup> National Employment Law Project, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

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stemming from delaying the question of criminal history until later in the hiring process are unfounded and distract from the ultimate goal of curbing the social stigma that attaches to individuals with a criminal record.

Further, Texas passed House Bill 1188 (83R) in 2013 to provide business owners more hiring options by limiting their liability on charges of negligently hiring or failing to adequately supervise an employee who has a criminal record.<sup>2</sup> This law was passed by the Texas Legislature because our lawmakers understood that providing employers with a wider pool of applicants and reducing the barriers faced by people with criminal records is better for Texas businesses and families.

It is important to note, however, that attempts by employers to enforce blanket exclusions against individuals with criminal records may ultimately expose them to potential disparate impact litigation under Title VII of the Civil Rights Act. See the *What does Fair Chance Hiring have to do with race? Isn't Fair Chance Hiring about people with criminal records?* section below for more information about the disproportionate effect of criminal records on employment.

### **Will a Fair Chance Hiring policy create criminal penalties for businesses that do not comply with its provisions? Can a Fair Chance Hiring policy send business owners to prison?**

No. Although some jurisdictions have included criminal penalties in their enforcement schemes (e.g., Columbia, MO; Baltimore, MD), Austin stakeholders have never suggested that criminal penalties should be implemented.

The City of Austin's Human Resources Department (HRD) held a series of stakeholder meetings, which included a majority of criminal justice reform advocates (e.g., MEEEL Justice Center, XOffenders' Council, Austin/Travis County Reentry Roundtable, Texas Civil Rights Project, Texas Advocates for Justice, Equal Justice Center, Texas Criminal Justice Coalition). While the stakeholder recommendations presented by HRD at the Economic Opportunity Committee meeting on October 12, 2015, did not reflect this position, it was clearly reflected in the Breakout Group Notes from the meeting held on July 21, 2015.<sup>3</sup> In this meeting, attending stakeholders made very clear that they desired only civil penalties be levied against not-complying businesses. As many of the stakeholders were advocates for criminal justice reform, it would have been counter-effective to ask for criminal penalties in a state, and a local jurisdiction, with an already oversized criminal justice system.

### **Why do we need a Fair Chance Hiring policy? Why don't we incentivize Fair Chance Hiring rather than penalize businesses?**

Applicants who indicate their criminal record on the initial job application are less likely to receive a callback interview. A study by sociologist Dr. Devah Pager found that among white job applicants, 34% *without* a criminal record and 17% *with* criminal records were contacted for a second interview. Only 4% of African American job applicants with criminal records received a call about a follow-up interview.<sup>4</sup>

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<sup>2</sup> "A cause of action may not be brought against an employer, general contractor, premises owner, or other third party solely for negligently hiring or failing to adequately supervise an employee, based on evidence that the employee has been convicted of an offense." [Texas Civil Practice and Remedies Code, Section 142.002\(a\)](#) (2013).

<sup>3</sup> See Appendix 1: City of Austin – HRD – Employment Services, Fair Chance Hiring Stakeholder Meeting, July 21, 2015, Breakout Group Notes.

<sup>4</sup> Pager, D. (2003). The mark of a criminal record, *American Journal of Sociology*, 108(5), 947–49.

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Several incentives to hire individuals with a criminal record exist currently. The Work Opportunity Tax Credit allows employers to earn a \$2,400 tax credit for hiring someone who has been convicted of a felony (within one year of conviction or release from prison),<sup>5</sup> and the Federal Bonding Program insures employers against any type of theft, forgery, larceny, or embezzlement through a bond of up to \$5,000 (which is unnecessary in Texas because of our employer liability law).<sup>6</sup> In addition, the Texas Department of Licensing and Regulation conducts an individualized assessment of applicants with a criminal record, ensuring that qualified individuals may hold occupational licenses.<sup>7</sup>

However, these incentives have not been effective on their own to limit the barriers to employment faced by individuals with a criminal record. Dr. Peter Capelli of the University of Pennsylvania examined the effectiveness of the Work Opportunity Tax Credit and found that potential employers are apt *not* to hire WOTC-certified individuals with criminal records, rendering this hiring incentive ineffective absent a robust Fair Chance Hiring policy.<sup>8</sup>

### What does Fair Chance Hiring have to do with race? Isn't Fair Chance Hiring about people with criminal records?

In Texas, there is a notable disparity between the races and ethnicities that make up the population of those who are arrested. For instance, even though African American individuals make up only 12.5% of the population, they make up nearly 25% of those who are arrested. And even though White non-Latino individuals make up 43.5% of the population, they account for only 38.3% of those arrested.<sup>9</sup> Because such a gross disparity exists in our criminal justice system population, the Equal Employment Opportunity Commission (EEOC) has stated that “an employer’s use of an individual’s criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964.”<sup>10</sup> Specifically, the EEOC provides:

A covered employer is liable for violating Title VII when the plaintiff demonstrates that the employer’s neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity.<sup>11</sup>

The City of Austin must decide how to respond to the issue of racial inequities in our city—inequities perpetuated by the overrepresentation of individuals of color in the criminal justice system. It is crucial to implement a comprehensive Fair Chance Hiring policy that includes protections in form of requiring

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<sup>5</sup> United State Department of Labor, Employment and Training Administration, Work Opportunity Tax Credit, <http://www.doleta.gov/business/incentives/opptax/eligible.cfm>.

<sup>6</sup> United State Department of Labor, Federal Bonding Program, <http://www.bonds4jobs.com/assets/brochure.pdf>.

<sup>7</sup> [16 Texas Administrative Code, Chapter 60](#).

<sup>8</sup> Capelli, P. (2011). *Assessing the Effect of the Work Opportunity Tax Credit*. The Wharton School at the University of Pennsylvania, 11.

<sup>9</sup> Texas Department of Public Safety, *Crime in Texas: 2014* (2015), 80-81 (total number of arrestees identified as Black: 216,379; total number of arrestees identified as White and non-Hispanic: 335,560; total number of arrestees: 876,601), available at <http://www.dps.texas.gov/crimereports/12/citCh9.pdf>; United States Census Bureau, State & County QuickFacts: Texas (2015) (percentage of individuals identified as Black or African American: 12.5%; percentage of individuals identified as White non-Hispanic: 43.5%), available at <http://quickfacts.census.gov/qfd/states/48000.html>.

<sup>10</sup> Equal Employment Opportunity Commission (EEOC), EEOC Enforcement Guidance, Number 915.002 (April 25, 2012), 1, [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf).

<sup>11</sup> *Ibid*, at 8.

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private employers to conduct an individualized assessment of applicants with criminal records in accordance with EEOC guidance.

### Why should we implement a policy like Fair Chance Hiring when there is no evidence that it works?

There *is* evidence that Fair Chance Hiring policies work effectively. Criminal justice researchers from Florida International University published a peer-reviewed research study on the effect of Hawaii's Fair Chance Hiring policy, passed statewide in 1998, and found that repeat felony offending decreased in Honolulu County by 11.4% and that individuals prosecuted in Honolulu County for a felony were 57% less likely to have a prior criminal conviction.<sup>12</sup>

There is also evidence Fair Chance Hiring policies positively impact employment outcomes for applicants with criminal records. After the City of Durham, North Carolina, implemented a comprehensive Fair Chance Hiring policy, the percentage of applicants with criminal records hired by the City increased from 2.5% in 2011 to 15.53% in 2014.<sup>13</sup>

Additionally, after Durham County passed a Fair Chance Hiring policy, the recommendation-for-hire rate of applicants with criminal records grew from 35% to 97% from 2011 to 2013. In 2012, 96% of Durham County employment applicants with criminal records that were recommended for employment were ultimately hired. The Durham study also notes "none of the people with a criminal record who were hired have been terminated because of illegal conduct."<sup>14</sup>

Lastly, a study of human resources statistics found that "employees with criminal backgrounds are 1 to 1.5 percent more productive on the job than people without criminal records."<sup>15</sup>

### Why the rush to implement a Fair Chance Hiring policy so soon? Shouldn't we wait to do more research and identify other jurisdictions' successes and failures?

**WE CANNOT WAIT.** There is substantial evidence showing the positive impact Fair Chance Hiring policies have had and we know that the job market in Austin is exponentially growing more competitive as the population soars. Jobs are becoming more competitive with Austin's rapid population growth over recent years. Austin's population is projected to increase at rates that will bypass both state and national growth<sup>16</sup>. Additionally, racial inequities continue to be perpetuated through overrepresentation of people of color in our criminal justice system. We must act now to ensure equitable access to employment opportunities for all individuals, regardless of race or ethnicity.

According to the Texas Department of Criminal Justice, nearly 2,200 people released from prison in Texas every year return to the Austin area.<sup>17</sup> Combined with the fact that more than one in three adults

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<sup>12</sup> D'Alessio, S.J., Stolzenberg, L., and Flexon, J. (2015). The effect of Hawaii's ban the box law on Repeat Offending *American Journal of Criminal Justice*, 40(2), 336-352.

<sup>13</sup> Atkinson, D. V. and Lockwood, K. (2015). The benefits of ban the box: A case study of Durham, NC. *Southern Coalition for Justice*. [http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox\\_WhitePaper.pdf](http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper.pdf)

<sup>14</sup> Ibid.

<sup>15</sup> Javers, E. (12 Feb. 2014). Inside the wacky world of weird data: What's getting crunched, *CNBC*, <http://www.cnbc.com/id/101410448>.

<sup>16</sup> See the Austin Chamber of Commerce report available at [https://www.austinchamber.com/site-selection/business-climate/the-economy/ei-archive/2014\\_12\\_16.php](https://www.austinchamber.com/site-selection/business-climate/the-economy/ei-archive/2014_12_16.php)

<sup>17</sup> Texas Department of Criminal Justice, Statistical Report: Fiscal Year 2014, p. 40, [http://tdcj.state.tx.us/documents/Statistical\\_Report\\_FY2014.pdf](http://tdcj.state.tx.us/documents/Statistical_Report_FY2014.pdf).

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in Texas have a criminal record,<sup>18</sup> a substantial percentage of the population faces major barriers to employment in Austin. The public-safety implications are significant, given that the number one factor in preventing recidivism is employment stability. There is also an economic development imperative. As of August, 2015, the unemployment rate in Austin was 3.2%.<sup>19</sup> Expanding employment opportunity to a wider applicant pool is imperative so as not to slow economic growth in this city.

Fair Chance Hiring policies are an innovative approach to improving public safety and reducing individuals' reliance on public support. Right now, the City of Austin has a unique opportunity to lead Texas in reducing recidivism while strengthening our economy, and should take this opportunity to conduct robust data collection in order to show other jurisdictions how Fair Chance Hiring policies have a positive effect on our community.

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<sup>18</sup> In 2012, the Bureau of Justice Statistics found that nearly 12 million individuals are included in Texas' criminal history database, and the U.S. Census found that, in 2010, the population of Texas was just over 25 million. Dennis A. DeBacco & Owen M. Greenspan, "Survey of State Criminal History Information Systems, 2012," (Bureau of Justice Statistics, U.S. Department of Justice, 2014): Table 1, <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>. The number of individual offenders in the state criminal history file was 11,824,200. United States Census Bureau, QuickFacts Beta: Texas, <http://quickfacts.census.gov/qfd/states/48000.html>. The number of individuals included in the Texas population in 2010 was 25,145,561.

<sup>19</sup> U.S. Bureau of Labor Statistics, Austin Area Economic Summary, [http://www.bls.gov/regions/southwest/summary/blssummary\\_austin.pdf](http://www.bls.gov/regions/southwest/summary/blssummary_austin.pdf).