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**REPORT ON LEGISLATION BY THE  
CIVIL RIGHTS COMMITTEE AND  
CORRECTIONS AND COMMUNITY REENTRY COMMITTEE**

**Int. 0318-2014** Council Members Williams, Johnson, Torres, Miller, Gibson, Chin, Palma, the Public Advocate (Ms. James), Arroyo, Cornegy, Dromm, Koo, Levine, Reynoso, Richards, Espinal, Levin, Menchaca, Dickens, Barron, Rosenthal, Cumbo, Rose, Rodriguez, King, Koslowitz, Wills, Mendez, Kallos, Lander, Eugene, Cabrera, Constantinides, Ferreras and Maisel (by the request of the Manhattan Borough President)

A Local Law to amend the administrative code of the city of New York, in relation to prohibiting discrimination based on one's arrest record or criminal conviction.

**THIS BILL IS APPROVED**

**INTRODUCTION**

Despite State and City anti-discrimination protections, New Yorkers returning home from prison still face formidable barriers when reentering society. According to the Society for Human Resource Management, over 90% of companies conduct criminal background checks of some applicants during the hiring process, with over 75% of employers conducting checks on all applicants.<sup>1</sup> The Equal Employment Opportunity Commission has emphasized its continuing concern that such checks harm minority communities.<sup>2</sup> Int. 0318-2014 (“the Bill”) would prohibit employers from checking into applicants’ criminal histories until later in the hiring process where such information would be less likely to lead to unlawful discrimination.

So-called “ban the box” bills, which limit employers’ ability to inquire about an applicant’s criminal history,<sup>3</sup> have passed in 26 states as well as the District of Columbia.<sup>4</sup> This list includes cities

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<sup>1</sup> *Background Checking: Conducting Criminal Background Checks SHRM Poll*, Society for Human Resource Management, Jan. 22, 2010, available at <http://www.shrm.org/research/surveyfindings/articles/pages/backgroundcheckcriminalchecks.aspx#sthash.nVAZKu43.dpuf>.

<sup>2</sup> *EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, U.S. Equal Employment Opportunity Commission, Apr. 25, 2012, available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

<sup>3</sup> The name refers to the check box common on employment applications which asks whether the applicant has ever been convicted of a crime.

<sup>4</sup> *Ban The Box Resource Guide*, National Employment Law Project, Jan. 2015, available at <http://www.nelp.org/page/-/SCLP/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf?nocdn=1>.

from Boston and Chicago to San Francisco, Philadelphia, and Newark. New York State already explicitly bars public or private employers from denying any license or employment application on account of an applicant's criminal record in most circumstances or on account of an arrest that did not result in conviction.<sup>5</sup> The Bill would expand these protections in order to allow more New Yorkers to successfully reenter the workforce.

## **EXISTING PROTECTIONS**

The New York State Human Rights Law, Article 23-A of the Corrections Law, and the New York City Human Rights Law all prohibit – subject to certain exceptions – discrimination in employment based on an applicant's criminal history. However, these laws remain drastically underenforced.

NYS Correction Law § 752 provides that:

No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless: (1) There is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Section 753 outlines the eight factors employers must consider in making a determination under Section 752, such as the particular duties of the position, the relevance of the offense, and the seriousness of the offense.<sup>6</sup> Under Article 23-A, applicants are also entitled, at their request, to a written explanation of why they were denied employment or a license within 30 days of their request.

While in theory NYS Executive Law Section 296 and NYS Correction Law Article 23-A offer significant protection against criminal record discrimination, in practice they are difficult to enforce. First, neither provision prohibits employers from immediately soliciting a job applicant's criminal history which allows employers to easily screen out applicants with criminal records. Additionally,

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<sup>5</sup> N.Y. Correction Law § 752; N.Y. Executive Law § 296(15).

<sup>6</sup> Specifically, those factors are: "(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses. (b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person. (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities. (d) The time which has elapsed since the occurrence of the criminal offense or offenses. (e) The age of the person at the time of occurrence of the criminal offense or offenses. (f) The seriousness of the offense or offenses. (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct. (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public." N.Y. Correction Law § 752.

many employers fail to properly apply the balancing test required by NYS Correction Law Article 23-A and place excessive weight on criminal convictions occurring several years prior. Finally, employers need supply an explanation of their decision only at the applicant's request which places a heavy and unrealistic burden on job applicants who are unlikely to be aware of their rights under New York State law.

#### **INT. 0318-2014**

The Bill would expand upon these existing protections. The Bill amends the New York City Human Rights Law to bar employers from inquiring into an applicant's criminal history until the employer has decided that the applicant is otherwise qualified and has extended a conditional offer of employment. And prior to taking adverse action based on that criminal history, the employer must provide a written copy of the background inquiry to the applicant; provide a written copy of the analysis of the applicant required under Article 23-A of the Correction Law; and give the applicant a reasonable time to respond, defined as at least seven business days. During this time, the employer must hold the position open for the applicant but, after the time has passed, need not wait for a response. Failure to comply with these requirements gives rise to a rebuttable presumption that the employer has engaged in an unlawful discriminatory practice. Finally, the Bill would prohibit employers from taking adverse action against job applicants based on felony convictions more than ten years old and misdemeanor convictions more than five years old, with the period of time measured from the latter of the date judgment was entered or the release from incarceration.

The Bill's major change over existing law is that it specifies when it is appropriate to solicit an applicant's criminal record: after the applicant has been found otherwise qualified. By this stage of the application process, the employer will already have likely invested time and resources into interviewing the applicant, which raises the cost to the employer of discriminating against applicants with criminal records. Further, by this stage in the hiring process, the employer has already decided that it wants to hire the applicant which makes it more likely that the employer will actually engage in the balancing required by Article 23-A before rejecting the applicant on the basis of their criminal history. If at this point, the employer has concerns about the applicant's criminal history, the five year misdemeanor and ten year felony bars ensure that employers will give due consideration to applicants because those bars simplify the balancing test and eliminate consideration of such convictions. Finally, if after the employer performs the requisite analysis under Section 23-A of the Correction Law the employer intends to take adverse action on the applicant's employment application, the employer must provide a written statement of its inquiry and analysis to the applicant automatically, rather than waiting for the applicant's request, and allow the applicant a brief period to respond. Thus, the Bill transfers the burden of verifying compliance from the applicant to the employer, and, in turn, grants even the least legally-savvy applicant an opportunity to respond to the employer's concerns.

In sum, the Bill constitutes a modest but meaningful expansion of existing law prohibiting discrimination on the basis of criminal records. The Bill's procedural reforms will act as a vital prophylactic measure to help ensure that employers do not violate existing anti-discrimination laws.

## CRIMINAL RECORD CHECKS HAVE A DISPARATE IMPACT ON PEOPLE OF COLOR

“Banning the box” is critical because criminal record checks have a disparate impact on people of color. Federal law does not explicitly bar discrimination based on criminal history, given that having a criminal record is not listed as a protected basis in Title VII of the Civil Rights Act of 1964. However, the Equal Employment Opportunity Commission (EEOC) has cautioned employers to carefully establish procedures to show they are not using criminal records to discriminate by race or national origin, particularly because members of some minority groups are much more likely to be arrested and convicted than whites.

African Americans and Hispanics are arrested at a rate that is 2 to 3 times their representation in the general population.<sup>7</sup> The EEOC estimates that while about 1 in 17 White men are expected to serve time in prison during their lifetime;<sup>8</sup> this rate climbs to 1 in 6 for Hispanic men; and to 1 in 3 for African American men.<sup>9</sup> Additionally, African American ex-offenders pay a significantly higher penalty for having a criminal record relative to otherwise similar whites.<sup>10</sup> In turn, the Bureau of Labor Statistics also finds overall unemployment among African Americans has consistently been twice that of white workers.<sup>11</sup>

An employer's reliance on a criminal record to deny employment may violate Title VII based on its disparate impact that such policies have on Black and Latino Applicants. Disparate impact discrimination occurs when an employer uses a particular employment practice, such as a criminal background check, that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the employer fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity. In practice, however, employers still have considerable leeway to consider an applicant's criminal history in making employment decisions.<sup>12</sup> Therefore, state and local “ban the box” measures are essential in order to promote equal opportunities for people of color.

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<sup>7</sup> *EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, U.S. Equal Employment Opportunity Commission, Apr. 25, 2012, (citing Unif. Crime Reporting Program, Fed. Bureau of Investigation, *Crime in the U.S. 2010*, at Table 43a (2011), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-43/10tbl43a.xls>; U.S. Census Bureau, *The Black Population: 2010*, at 3 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> (reporting that in 2010, "14 percent of all people in the United States identified as Black, either alone, or in combination with one or more races")).

<sup>8</sup> *Id.* (citing THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 3 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf>).

<sup>9</sup> *Id.*

<sup>10</sup> Devah Pager and Bruce Western, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men*, Oct. 2009, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf>.

<sup>11</sup> *Labor Force Characteristics by Race and Ethnicity: 2013*, U.S. Bureau of Labor Statistics Aug. 2014, available at <http://www.bls.gov/cps/cpsrace2013.pdf>.

<sup>12</sup> Robb Mandelbaum, *U.S. Presses on Illegal-Bias Against Hiring Those with Criminal Records*, N.Y. TIMES, June 20, 2012, available at [http://www.nytimes.com/2012/06/21/business/smallbusiness/us-presses-on-illegal-bias-against-hiring-those-with-criminal-records.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/06/21/business/smallbusiness/us-presses-on-illegal-bias-against-hiring-those-with-criminal-records.html?pagewanted=all&_r=0).

## EMPLOYMENT REDUCES RECIDIVISM

Barriers to employment of the formerly incarcerated not only hurt the individuals returning home and their families, but also the community and the City as a whole. For this reason it is the explicit policy of New York State to encourage the employment of ex-offenders.<sup>13</sup> Employment substantially reduces the rate of recidivism.<sup>14</sup> Nevertheless, surveys of the formerly incarcerated suggest that well over half remain jobless up to a year after release.<sup>15</sup> Ex-offender employment is particularly important in Upper Manhattan, the South Bronx, and Central Brooklyn, neighborhoods which welcome thousands of New Yorkers returning home from prison each year, according to data produced by the Justice Mapping Center.<sup>16</sup>

Ultimately, “[g]iven the high cost of crime and incarceration, almost any program that reduces recidivism will pass social benefit-cost tests.”<sup>17</sup> As then-New York Governor Hugh Carey, who signed the prohibition on discrimination on the basis of criminal record into law, explained in 1976, “The great expense and time involved in successfully prosecuting and incarcerating the criminal offender is largely wasted if upon the individual’s return to society his willingness to assume a law-abiding and productive role is frustrated by senseless discrimination.”<sup>18</sup> In 2011, the New York Court of Appeals reiterated Carey’s principle, declaring, “Barring discrimination against those who have paid their debt to society and facilitating their efforts to obtain gainful employment benefits the community as a whole.”<sup>19</sup>

## CONCLUSION

Accordingly, the Civil Rights Committee and the Corrections and Community Reentry Committee of the New York City Bar Association urge the New York City Council and Mayor de Blasio to support the Bill and “ban the box” in New York City.

February 2015

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<sup>13</sup> Corrections L § 753(1)(a).

<sup>14</sup> See Jeffrey D. Morenoff, David J. Harding, *Final Technical Report: Neighborhoods, Recidivism, and Employment Among Returning Prisoners*, Nov. 2011, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/236436.pdf>.

<sup>15</sup> Devah Pager and Bruce Western, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men*, Oct. 2009, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf>.

<sup>16</sup> Justice Mapping Center, *Justice Atlas of Sentencing and Corrections*, 2010, <http://www.justiceatlas.org/>.

<sup>17</sup> Richard Freeman, *Can We Close the Revolving Door?: Recidivism vs. Employment of Ex-Offenders in the U.S.*, Urban Institute Reentry Roundtable, May 19, 2003, available at [http://www.urban.org/uploadedpdf/410857\\_freeman.pdf](http://www.urban.org/uploadedpdf/410857_freeman.pdf).

<sup>18</sup> McKinney’s Sess Laws, 1976 pp 2458-2459.

<sup>19</sup> *Matter of Acosta v New York City Dept. of Educ.*, 16 N.Y.3d 309, 320 (2011).