



September 29, 2014

Dear Council President Rice and members of the County Council,

Thank you for the opportunity to provide the business perspective on proposed legislation in Bill 36-14. We recognize the spirit of the initiative and look forward to working with you to make it a meaningful and constructive piece of legislation for all parties involved.

To that end, there are four main areas we, as a group, would like to recommend be modified to address real concerns expressed by our members. Those areas include timing, notification, protection for employers, and penalties.

Timing

For many employers, background information is an integral part of the application process—and certainly, for most others, it is a critical part of the interview process. **We request that inquiry into the background of an applicant be allowed during the interview stage of the application process.**

Based on our understanding of the September 2014 report on the National Employment Law Project website, 13 states, including Maryland, have passed some type of Ban the Box legislation. Of those, only six -- Hawaii, Illinois, Massachusetts, Minnesota, New Jersey and Rhode Island -- apply the law to private employers. Hawaii is the only state that requires the private employer to wait to conduct a background check until after the conditional offer.

Of the 70 local jurisdictions (cities and counties) that have enacted “Ban the Box” legislation, only 8 apply the law to private employers (13 others apply it to only private employers that are local government contractors). Of the 8, only 3 -- D.C., Baltimore, and Newark, NJ – allow a background check only after a conditional offer of employment has been made. The others allow the question at or after the first interview.

Notification

We urge that the Montgomery County legislation be amended to read as the newly established law in the District of Columbia does with regard to notification. That is, an applicant/employee must affirmatively request copies of the criminal background information obtained and/or considered by the employer. The initial burden of action is, therefore, on the applicant who may suspect that inappropriate or unlawful consideration was given. This is a more reasonable approach that limits the potential burden on employers and still fully supports the intent and enforcement of the law.

Employer Protections

As currently drafted, there is great ambiguity in the language in the bill that exposes an employer to increased liability in exercising his or her experience and judgment in the hiring process. As the County Attorney's memo suggests, **we request clear delineation of criteria and standards in the arbitration process.** There should also be language inserted that minimizes the opportunity for frivolous allegations and ensures that an employer's time and resources are not drained when trying resolve these situations.

As suggested during the public hearing, there needs to be greater certainty around voluntary disclosure and inquiry into employment gaps and protection for an employer who unwittingly engages in off limit topics (note, this is a non-issue if the legislation allows the topic to be discussed at the interview stage). If, at any time, an applicant/employee voluntarily discloses criminal background information—as, for instance, many ex-offender programs encourage or require their clients to do-- or does so in response to an employer's innocent inquiry about an extended employment gap, **the bill should make clear that subsequent inquiry by the employer will not be considered actionable.**

Penalties

As currently drafted, the 'certain relief,' as well as civil penalties paid to the County, are problematic. There are inherent conflicts of interest created by such provisions, both for the individual and the Office of Human Rights. The Council should avoid creating potential financial incentives for alleging violations; we note that the recently enacted District of Columbia law makes the Office of Human Rights complaint process **the exclusive remedy, and believe that your bill should do likewise. We request that penalties, such as they are assigned, should be clear and objective.** Fines should be paid solely to the County and dedicated to a special fund that supports pre-release programs in Montgomery County.

To stay in business, employers are responsible for the successful operation and delivery of products and services to their customers, tenants and clients. In that capacity, they manage

employees and serve the public. Employers must concern themselves with the well-being of employees, clients, tenants and customers, shareholders and the general public.

It is the employer who is held liable when things go wrong. The hiring process is one of the most integral aspects of running a business. Legislation that balances the fair treatment of all applicants/employees with the legitimate needs of the employer is the goal we should strive to achieve in Bill 36-14. We believe our recommendations further that goal.

Thank you for addressing these concerns.

Respectfully,

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cc: County Executive Ike Leggett