

MINNESOTA EMPLOYERS'  
FAIR CHANCE

# HIRING GUIDE

**TWIN  
CITIES  
R!SE**

in partnership with

**ROOT &  
REBOUND**  
REENTRY ADVOCATES

## **ABOUT THE AUTHOR**

Root & Rebound is a reentry legal education and resource center, and the primary drafter of this Hiring Guide. Its mission is to increase access to justice and opportunity for people in reentry from prison and jail, and to educate and empower those who support them, fundamentally advancing and strengthening the reentry infrastructure. Its model combines direct services, public education, and systems reform. Learn more at [www.rootandrebounce.org](http://www.rootandrebounce.org).

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For individuals, TCR fosters the self-confidence and self-reliance necessary to succeed at work and at life. For employers, TCR provides skilled, dependable, and capable workers who are willing to work hard and are eager to succeed. Learn more at [www.twincitiesrise.org](http://www.twincitiesrise.org)

Root & Rebound would like to thank the Twin Cities RISE team for its partnership, contributions, and encouragement. We would also like to acknowledge and thank the many business, nonprofit, and government partners who contributed to this Hiring Guide to make it the highest quality resource for Minnesota employers. Thank you!

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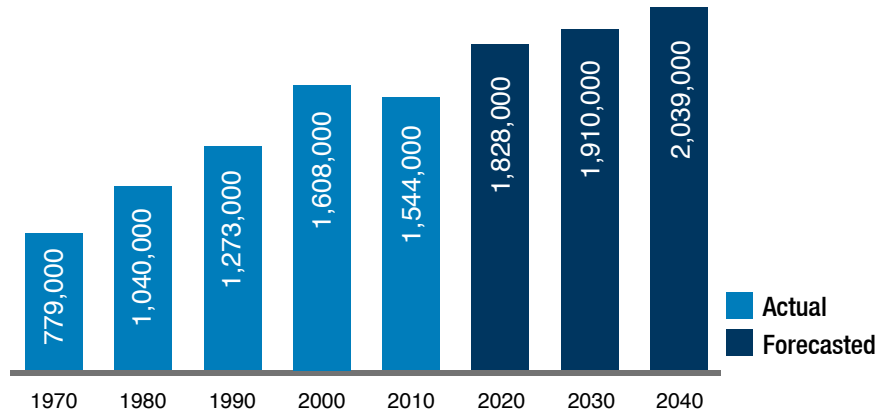
# TABLE OF CONTENTS

- 4 | Executive Summary
  
- 6 | Introduction
  
- 8 | Checklist of Action Steps
  
- 11 | Section I:  
Legal Compliance & Minimizing Risks
  
- 21 | Section II:  
Choosing A Reliable Background Check Company
  
- 23 | Section III:  
Rewards Of Hiring Fair Chance Workers
  
- 28 | Section IV:  
Common Questions About Business Insurance
  
- 30 | Section V:  
Best Practices For Onboarding & Training Fair Chance Workers
  
- 34 | Appendices
  - Appendix A: Sample List of Evidence of Rehabilitation
  - Appendix B: Sample Notices
    - “A Summary of Your Rights Under the Fair Credit Reporting Act”
    - Sample Adverse Action Notice
  - Appendix C: Relevancy Screen & Matrix
  - Appendix D: Summary of Minnesota Ban-The-Box-Laws: State & Local
  
- 40 | Endnotes
  
- 43 | Sponsors

# EXECUTIVE SUMMARY

Employers in Minnesota have unique and serious challenges in meeting their workforce needs of the future. They are faced with a dwindling supply of workers due to Baby Boomers' upcoming retirements, high talent demand, increasing wages, and many other changing workforce factors. Employers in Minnesota, and elsewhere, will need to look to untapped talent pools to fulfill their workforce needs. One such pool of talented but untapped workers is individuals with criminal records. In the past, workers with records have been ignored and marginalized, often leaving them under-employed or severely unemployed. As employers focused on other talent pipelines, this talent source continues to increase and remain largely unrealized in the world of work. Looking ahead, our traditional recruiting efforts and hiring practices will no longer yield the necessary amount of talent to meet employment demands.

**FIGURE 8. JOBS IN THE TWIN CITIES REGION, 1970-2040**



Source: Metropolitan Council analysis of Minnesota Department of Employment and Economic Development (DEED) Quarterly Census of Employment and Wages 1970-2010. Metropolitan Council Regional Forecast (June 2017). The latest forecasts are available at [metro council.org/forecasts](http://metro council.org/forecasts)

Over 100,000 Minnesotans are under some form of community supervision<sup>1</sup> and roughly 1,000 Minnesotans will likely return home from prison this year.<sup>2</sup> This presents Minnesota employers with a new and challenging environment, as there is a growing pool of job applicants with criminal records looking for employment in Minnesota. This Hiring Guide refers to these potential new hires as “Fair Chance workers.”

**“The best thing someone . . . can do to reintegrate into the community is get a job.”**  
- State Senator Roger Chamberlain

Fair Chance employment raises competing concerns for employers: banning all people with records makes it almost impossible to meet the growing need for capable employees and risks serious liability under federal and state law, but employers fear that hiring someone with a record will expose them to risks of harm that must be assessed. There are also great potential rewards and financial incentives for hiring people with records, but how do employers access them? Today, one in three Americans has a criminal record.<sup>3</sup> Despite Minnesota's lower prison population relative to other states, it has one of the highest rates of people on probation, parole, and supervised release.<sup>4</sup>

- 1 United States Department of Justice, Office of Programs—Bureau of Justice Statistics. (Last revised 2017). Probation and Parole in the United States, 2015. Retrieved from <https://www.bjs.gov/content/pub/pdf/ppus15.pdf>
- 2 Minnesota Department of Corrections. (2017). Adult Prison Population Summary. Retrieved from [https://mn.gov/doc/assets/Minnesota%20Department%20of%20Corrections%20Adult%20Prison%20Population%20Summary%207-1-2017\\_tcm1089-303705.pdf#false](https://mn.gov/doc/assets/Minnesota%20Department%20of%20Corrections%20Adult%20Prison%20Population%20Summary%207-1-2017_tcm1089-303705.pdf#false)
- 3 The Sentencing Project. (2015). Americans with a Criminal Record. Retrieved from <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf>
- 4 Mannix, A. Star Tribune. “Yes, Minnesota has a low prison population, but that's not the whole story.” (2017, April 2.) Retrieved from <http://www.startribune.com/yes-minnesota-has-a-low-prison-population-but-that-s-not-the-whole-story/416958333/>; U.S. Department of Justice, Probation and Parole in the United States, 2015. (2017, February.)

**This Hiring Guide is designed to help employers navigate this new environment successfully.<sup>5</sup> It contains valuable information on:**

### **1. LEGAL COMPLIANCE & MINIMIZING RISKS**

How can employers meet their competing legal obligations under federal and state equal employment laws, background check laws, and negligent hiring risks? In this section, employers will learn basic procedures to virtually eliminate the associated risks of liability.

### **2. CHOOSING A RELIABLE BACKGROUND CHECK COMPANY**

By following the tips in this section and asking a few basic questions, employers can avoid untrustworthy companies and work with screening partners that will help them comply with the law.

### **3. REWARDS OF HIRING FAIR CHANCE WORKERS**

In this section, hear from both large and small employers such as Koch Industries, Dave's Killer Bread, and Johns Hopkins Hospital, who highlight the benefits that Fair Chance workers' loyalty and hard work have brought to their businesses and operations.

### **4. COMMON QUESTIONS ABOUT BUSINESS INSURANCE**

This section dispels this myth of insurance hikes and gives a general overview on how business insurance can help mitigate a variety of risks.

### **5. BEST PRACTICES FOR ONBOARDING & TRAINING FAIR CHANCE WORKERS**

Onboarding, training, and retaining any employee is tough, and requires a serious investment of employers' time and resources. Choose the best practices that will help your business identify, onboard, and train these potential new hires to meet your business needs.

### **CONCLUSION**

By learning how to evaluate such applicants, employers can increase their supply of talented employees, meet their legal obligations, and improve their communities. The time is now, for both moral and economic reasons, that Minnesota employers engage in an intentional and proactive strategy to move these marginalized workers into the mainstream of our hiring practices. We hope this 'how to' guide will become an active roadmap for employers to start hiring talented individuals into their workforce.

*“Twin Cities R!SE, a long nationally recognized pioneer in training low income adults for employment, is pleased to present this important guide at a critical time for employers in our community.”*

*- Tom Streitz, Chief Executive Officer, Twin Cities R!SE*

## **FOLLOW-UP WITH ROOT & REBOUND**

If you would like to request follow-up support or request a training for your business or community:

### **CALL**

Please call Root & Rebound's Reentry Legal Hotline any Friday (except Holiday closures) at (510) 279-4662.

### **EMAIL**

E-mail Root & Rebound's legal team at [info@rootandrebound.org](mailto:info@rootandrebound.org), with subject line: MN EMPLOYER HIRING GUIDE.

### **WRITE**

Write by postal mail to Root & Rebound's office at 1730 Franklin Street, Suite 300, Oakland, CA 94612.

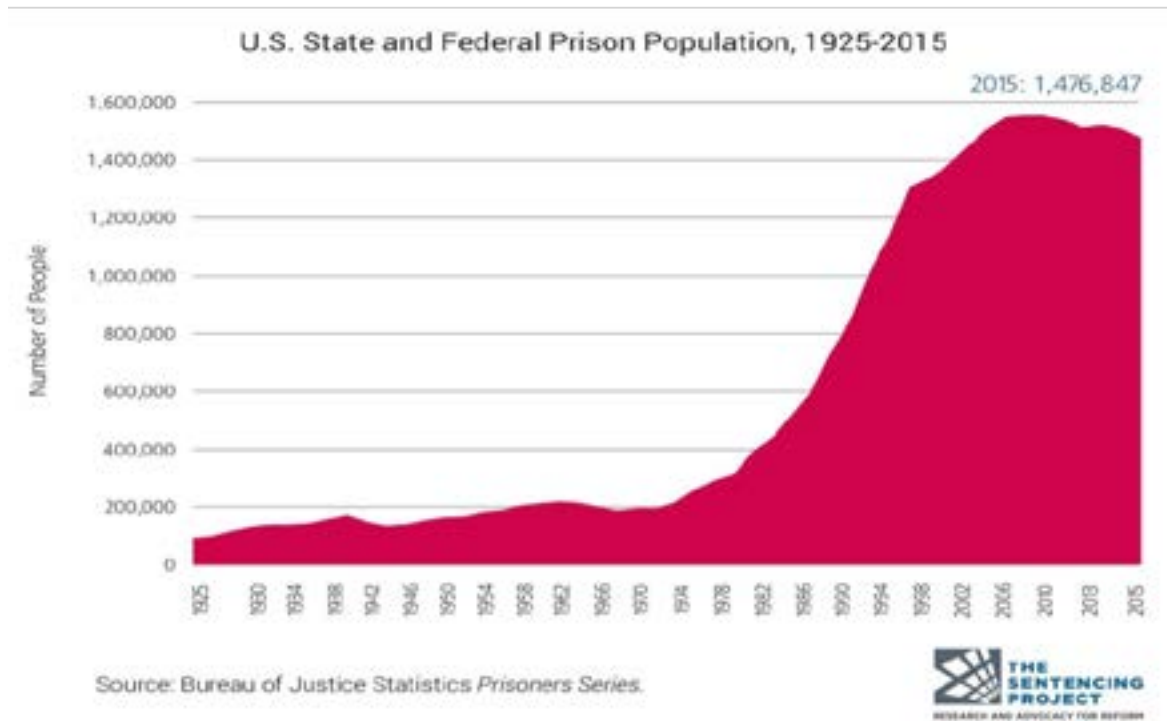
4 Please note: Most information in this Hiring Guide applies to all Minnesota employers. Where particular laws apply to only a subset of employers or state licensing agencies, this distinction is noted in the text. For example, many of Minnesota's state "Fair Chance Hiring" laws are required only of public employers (meaning state and local government agencies) and state occupational licensing agencies.

# INTRODUCTION

## HOW WE GOT HERE

Over the past four decades, the number of Americans with criminal records has soared. In 1980, only one out of every 20 Americans had a criminal record. Today, the number is approaching one in three.<sup>6</sup> In Minnesota in particular, new criminal penalties and longer sentences are bringing more people into contact with the criminal justice system.<sup>7</sup>

*“The growth in incarceration rates in the United States over the past 40 years is historically unprecedented and internationally unique.” - National Academy of Sciences, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*.*



As Seen Above:

- Minnesota's prison population has grown by roughly 350% since 1990.<sup>9</sup>
- In 2010, the cost to Minnesota taxpayers to imprison one person for a year was \$41,364 per person.<sup>10</sup>

6 The Sentencing Project. (2015). Americans with a Criminal Record. Retrieved from [http://www.sentencingproject.org/doc/publications/cc\\_HiT\\_CriminalRecords\\_profile\\_1.pdf](http://www.sentencingproject.org/doc/publications/cc_HiT_CriminalRecords_profile_1.pdf).

7 Mannix, A. Star Tribune (2016, February). Decades of new laws caused Minnesota's prison population spike. Retrieved from <http://www.startribune.com/decades-of-new-laws-caused-minnesota-s-prison-population-spike/367934361/>

9 The Sentencing Project. (2015). State-by-State Data: Minnesota, Population Over Time. Retrieved from <http://www.sentencingproject.org/the-facts/#map>.

10 Vera Institute of Justice. (2012.) The Price of Prisons. Retrieved from <https://www.vera.org/publications/price-of-prisons-what-incarceration-costs-taxpayers>.

This unprecedented change in our criminal justice system has profound implications for Minnesota employers. As the state's prison and supervised population has grown, so has the cost. Due to tougher laws and sentencing, the state of Minnesota now spends significantly more on corrections, reducing state resources available for education and employment services. Furthermore, mass incarceration has largely impacted our most disadvantaged communities and families: people of color, the poor, people with disabilities, and people lacking formal education.

*“There’s little doubt that the current system is dysfunctional. . . . We have a two-tiered system, with the wealthy and the well-connected experiencing a much better system than the poor, oftentimes regardless of guilt or innocence. A growing number of Americans recognize this — nearly 80 percent of the country supports reform.”*  
– Mark Holden, General Counsel at Koch Industries<sup>11</sup>

Having a criminal record is one of the leading barriers to employment for people returning from jail or prison in Minnesota.<sup>12</sup> Criminal records are made public by the Department of Corrections for 15 years following the completion of the sentence,<sup>13</sup> making it even more challenging for people with a past, minor or significant, to re-enter into the community and find gainful employment despite studies that show that post-incarceration employment reduces recidivism.<sup>14</sup>

## WHERE DO WE GO FROM HERE?

Criminal justice reform is an increasingly relevant and bipartisan effort, with organizations like the American Civil Liberties Union and Koch Industries working together to reduce unnecessary incarceration. While criminal justice reform is a complex issue requiring cross-sector collaboration and dedicated resources, there are ways that each of us can contribute to change.

Businesses that are looking for loyal workers can help by hiring from this untapped pool of talent. Employment is a key factor in reducing recidivism and decreasing crime.<sup>15</sup> Employment helps build confidence and self-worth, reunite families, and allows individuals to contribute to their local economies. This Hiring Guide has the information businesses need to improve their policies and practices, protect themselves, and positively impact their communities.

**On any given day, about 9,000 people nationwide are in prison or jail for violating the probation or parole requirement to hold a job.<sup>16</sup>**

*“Don’t look at this as a social program, and don’t look at this as being altruistic. Look at it as a business decision.... These are good, loyal, solid workers.”*  
– Vice President of Human Resources at John Hopkins Health System

**The U.S. Economy as a whole lost as much as \$87 billion in gross domestic product because of the barriers to employment facing formerly incarcerated people and people with felony convictions.**

11 Holden, M. (2016.) The Factual Case for Criminal Justice Reform. Medium. Retrieved from <https://medium.com/@Mark.Holden/the-factual-case-for-criminal-justice-reform-d6ed0a5c6635>.

12 Mallak, E. (2015, September.) Prisoner's Dilemma, Employment Barriers to Re-Entry. Retrieved from <https://mn.gov/deed/newscenter/publications/trends/september-2015/prisoner-dilemma.jsp>.

13 Minn. Stat. § 13.87.

14 Mallak, E. (2015, September.) Prisoner's Dilemma, Employment Barriers to Re-Entry. Retrieved from <https://mn.gov/deed/newscenter/publications/trends/september-2015/prisoner-dilemma.jsp>.

15 Berg, M. & Huebner, B. (2011). Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism. Justice Quarterly 28, no. 2, 382–410.

16 Zatz, N., Koonse, T., Zhen, T., Herrera, L., Lu, H., Shafer, S. & Valenta, B. (2016, March). Get to Work or Go To Jail: Workplace Rights Under Threat. UCLA Labor Center. Retrieved from <http://www.labor.ucla.edu/publication/get-to-work-or-go-to-jail/>.

# CHECKLIST OF ACTION STEPS

After reading the Hiring Guide, we encourage you to use this Checklist of Action Steps to improve your business's "Fair Chance Hiring" policies and practices and better protect your company from liability.

**KNOW & SHARE THE FACTS - KNOW & SHARE THIS HIRING GUIDE!**

**FOLLOW UP WITH ROOT & REBOUND FOR QUESTIONS AND SUPPORT USING THE HIRING GUIDE.**

Call Root & Rebound at (510) 279-4662 for further assistance and legal consultation.

**FOLLOW THE E.E.O.C. GUIDANCE ON THE CONSIDERATION OF CONVICTIONS AND ARRESTS.**

(This is federal regulatory guidance to help employers comply with Title VII law. Please note that the state of Minnesota has also made many aspects of this guidance mandatory for public employers--meaning state and local government agencies). Read more on page 11.

**STEP 1** – Apply the "Nature-Time-Nature" test to focus background checks on relevant conviction history that is "consistent with business necessity."

**STEP 2** – Individually assess those applicants with relevant conviction history.

**STEP 3** – Apply hiring policies uniformly (regardless of job applicants' race, ethnicity, age, gender, disability, and the like).

It is very difficult to implement this guidance without legal counsel. "Engage Your Own Legal Counsel" is listed as an additional action step on page 11 because it is a critical best practice before your company or agency develops a Human Resources policy on background screening.

**CREATE A "RELEVANCY SCREEN" to limit irrelevant information you could receive from a background check company (also called a "consumer reporting agency" or CRA).**

For free consultation, contact expert Lew Maltby, President of the National Workrights Institute, by e-mail at: LMaltby@workrights.org. Read more about developing a relevancy screen in APPENDIX C.

**BAN THE BOX! WAIT TO ASK ABOUT AN APPLICANT'S CONVICTION HISTORY until after selecting him/her for an interview, or if no interview, before a conditional offer of employment.**

(This is required by state law of both public and private employers in Minnesota.) Read more on page 15. Please note: In addition to the state of Minnesota's state "Ban the Box" law, the cities of Minneapolis and St. Paul, both City Councils have passed resolutions that removed questions about criminal history from the initial application for city jobs; directed their cities' human resources departments to make a "good faith" determination as to which city jobs require background checks and which do not; and for jobs determined to require background checks, to delay screening until after an applicant had been determined to have the minimum qualifications of the job.

**CONSIDER EVIDENCE OF REHABILITATION AND MITIGATING FACTORS as you assess job applicants.**

See Hiring Guide page 13 and APPENDIX A for a sample list of items your company may wish to consider. Additionally, create a policy on how to be upfront with applicants and staff about individualized assessments and how you will be considering mitigating and rehabilitative evidence.



## **FOLLOW STATE AND FEDERAL BACKGROUND CHECK LAWS.**

(This is required by state and federal law.) Read more on page 21.

- Notify a candidate in writing if you plan to run a background check.
- Get the candidate's written permission to run a background check.
- Give the candidate a copy of the report with proper notices.
- Give the candidate a chance to explain further and reasonable time to correct errors.
- Consider evidence of rehabilitation and mitigating circumstances.
- Even if you do not use a third-party background check company and pull public records from Minnesota's Bureau of Criminal Apprehension (BCA) open-access website, you must still notify the job applicant.

## **ARRESTS ARE NOT PROOF OF GUILT. DON'T CONSIDER THEM.**

Please note: Public employers<sup>17</sup> and licensing agencies cannot consider an arrest that didn't lead to conviction in determining whether to hire a job applicant. While private employers are not barred from using arrest information, the Equal Employment Opportunity Commission and the Minnesota Department of Human Rights advise that solely using the fact of an arrest without additional information would likely violate federal and state anti-discrimination laws.

## **WHEN CONDUCTING IN-HOUSE BACKGROUND CHECKS, USE SOMEONE DISCONNECTED FROM THE HIRING PROCESS TO PERFORM THE SEARCHES. THEY CAN THEN PROVIDE THE HIRING PERSONNEL ONLY PERTINENT INFORMATION.**

This ensures that information about things that should not be considered during the hiring process, such as protected class status, are not known by the individuals responsible for making the hiring decision.

## **CHOOSE A RELIABLE BACKGROUND CHECK COMPANY.**

(also called a "consumer reporting agency" or CRA). Read more on page 22.

**STEP 1** – Go online to the National Association of Professional Background Screeners (NAPBS), the trade association for background check companies, at <https://www.napbs.com/>. Click "Find a Screening Partner" to find an NAPBS-accredited CRA.

**STEP 2** – Ask a potential CRA the following questions to ensure it is reliable:

- Do you confirm all of the information you obtain with the original criminal justice source? CRA should answer yes.
- Are "matches" reported only when a full name (including middle name) and at least one additional identifier are the same? CRA should answer yes.
- Are "matches" reported only when all the identifiers the CRA has in its possession match? CRA should answer yes.
- How do you maintain the quality and accuracy of your information?
- Do you perform regular independent audits of your research agents and processes?
- Has the information in the report been updated within 30 days of receipt OR has the information been verified with the data source within 90 days as being up-to-date? CRA should answer yes.
  - Please note: In Minnesota, background check companies may only report records that have been updated within 30 days prior to receipt OR records that have been verified as up-to-date with the original data source within 90 days prior to receipt.<sup>18</sup>
- Do you have an attorney on staff to provide legal guidance? CRA should answer yes.

<sup>17</sup> Endnote 5.

<sup>18</sup> Minn. Stat. § 332.70, subd. 2.

## **ENGAGE YOUR OWN LEGAL COUNSEL.**

Lawyers can help employers develop lawful screening procedures that respect job applicants' rights and help employers collect criminal history information relevant to the job at hand. Additionally, special types of jobs—like those with access to vulnerable populations, law enforcement, health care jobs, etc.—may require a heightened background check. Some background check companies also have legal counsel that will provide such guidance to their clients.

## **FOLLOW INDUSTRY BEST PRACTICES FOR ONBOARDING & RETAINING FAIR CHANCE WORKERS.**

Read more on page 31.

- See the whole person, not just the record.
- Offer a well-structured orientation and onboarding program.
- Offer mentorship.
- Provide ongoing training for all staff, especially human resources personnel.
- Keep records confidential.
- Have a Diversity Policy.
- Engage legal counsel.
- Connect with Workforce Readiness Agencies who do the hard work for your company!

# **ADDITIONAL FAIR CHANCE EMPLOYMENT ACTION STEPS**

## **VISIT DAVE'S KILLER BREAD FOUNDATION'S "SECOND CHANCE PLAYBOOK" for educational videos and interviews with Fair Chance employers here: <https://www.dkbfoundation.org/second-chance-employer-roadmap/>**

(Create a user name and password, and the content is free).

## **CONNECT WITH A COMMUNITY OF FAIR CHANCE EMPLOYERS & LEADERS.**

Employers who wish to partner with Fair Chance organizations and find out how it can meet your employment needs can do so by contacting:

- Twin Cities RISE at [employerservices@twincitiesrise.org](mailto:employerservices@twincitiesrise.org), or call its main office at phone number (612) 279-5835.
- EMPLOY - fill out the form at [http://www.employmn.com/contact\\_form.asp](http://www.employmn.com/contact_form.asp), or call by phone at (651) 361-7512.
- Goodwill Easter-Seals at [ksohriakofs@gesmn.org](mailto:ksohriakofs@gesmn.org), or call by phone at (651) 900-5274.

## **REQUEST A ONE-ON-ONE BUSINESS CONSULTATION WITH ROOT & REBOUND ON IMPROVING H.R. PRACTICES AT YOUR COMPANY ON THE CONSIDERATION OF CONVICTIONS IN HIRING.**

Email us at [info@rootandrebond.org](mailto:info@rootandrebond.org), or call us at 510-279-4662 for more information.

# I. LEGAL COMPLIANCE & MINIMIZING RISKS

In Section 1, learn about complex federal, state, and local laws and regulations on hiring people with records in Minnesota, so your company can stay compliant and plan for areas of potential risk.

In Minnesota, there are federal, state, and sometimes municipal laws that affect how employers screen and hire people with criminal records, who are referred to as “Fair Chance workers” in this Hiring Guide. While employers can consider prior convictions, the business practices described in this section will help employers comply with the relevant laws and minimize their exposure to liability. In other words, this section explains the WHAT, WHEN, and HOW for employers to lawfully consider and collect job applicants’ criminal history information.

*“If your candidate has a criminal background, the first step is to educate yourself on the top legal issues. . . . Your focus should be on compliance with [background check laws] and anti-discrimination laws.” – Angela Preston, Vice President of Compliance and General Counsel at background screening firm EmployeeScreenIQ<sup>19</sup>*

## WHEN CONSIDERING RECORDS: HOW TO COMPLY WITH ANTI-DISCRIMINATION LAWS

The **Equal Employment Opportunity Commission (EEOC)** is the federal government agency responsible for enforcing federal anti-discrimination laws in employment, including Title VII of the Civil Rights Act, which prohibits employers with 15 or more employees from discriminating against employees or job applicants based on a number of protected personal characteristics, including race. In Minnesota, the “**Minnesota Human Rights Act**” (MHRA) prohibits any employer with one or more employees from discriminating against job applicants based on race and other protected characteristics.<sup>20</sup>

In 2012, the EEOC issued legal guidance on the consideration of applicants’ prior arrest and conviction history as it relates to Title VII. While the guidance is not law, the EEOC’s recommendations were issued to help employers comply with Title VII. The EEOC concluded that because African Americans and Latinos are arrested and convicted in numbers far greater than their representation in the general U.S. population, employment policies that exclude all people with prior criminal justice system involvement have an unfair or “**disparate impact**” on racial minorities, likely violating Title VII. Furthermore, employers could be liable under Minnesota’s state anti-discrimination law if their policies have a disparate impact of excluding people of color.<sup>21</sup>

In a state like Minnesota, where the racial disparity in the arrests and convictions of Black and Latino people is one of the worst in the country and starkly higher than the national average,<sup>22</sup> Minnesota employers are particularly at risk for violating Title VII and should beware of potential disparities in their screening and hiring practices.

The EEOC’s guidance is intended to help employers make sure that: (1) criminal history screening policies are **consistent with business necessity** and (2) applicants are **individually assessed**. Many call this the “Nature-Time-Nature” Test (explained more fully on the next page).

19 Maurer, R. (2014, May). When Background Screens Turn Up Criminal Records. Society for Human Resources Management. Retrieved from <https://www.shrm.org/resourcesandtools/hr-topics/risk-management/pages/background-screens-criminal-records.aspx>.

20 See generally Minn. Stat. § 363A.08, subd. 2. For exceptions, see Minn. Stat. § 363A.20.

21 See Minn. Stat. § 363.08, subd. 2(3).

22 Data Showing Racial Disparities in Low Level Arrests in Minneapolis (2004-2012), American Civil Liberties Union. Retrieved from <https://www.aclu-mn.org/en/press-releases/aclu-releases-data-showing-racial-disparities-low-level-arrests-minneapolis>. Nellis, A. (2016, June). The Color of Justice: Racial and Ethnic Disparity in State Prisons. The Sentencing Project. Retrieved from <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

# The “Nature-Time-Nature” Test: Steps to Picking the Right Candidate with a Record

## STEP 1 – THE “NATURE-TIME-NATURE” TEST:

To maintain a lawful hiring practice and determine which convictions are relevant to a hiring decision (i.e., “consistent with business necessity”), all Minnesota employers should apply this test where applicable--and Minnesota public (government) employers<sup>23</sup> and licensing agencies must apply this test:<sup>24</sup>

### 1. Consider the NATURE and seriousness of the offense(s) for which the applicant was convicted.<sup>25</sup>

- Consider Only the Convictions that are Directly Related to the Job Position, Occupation, or License Sought.<sup>26</sup> Employers should identify the risks presented by the job and screen only for the convictions whose nature has a direct relationship to those risks (e.g., screening Chief Financial Officers for embezzlement or other theft convictions; drivers for DUIs; or firemen for arson makes sense under this test!). The connection between certain jobs and risks may be obvious, but other times will require judgment calls. It is best practice to engage a lawyer with expertise on consumer protection and criminal records to structure your policy.
- See “3” below to help determine if the conviction directly relates to the position.

### 2. Consider the TIME that has passed since the applicant committed the offense or conduct, and/or completion of their sentence (as well as other evidence of rehabilitation and mitigating factors further described on page 13).<sup>27</sup>

- Consider Only Convictions Recent Enough to Indicate a Present Risk. The risk of recidivism decreases over time.<sup>28</sup> Where possible, employers should consider setting a cut-off time or “look-back period” that reflects available evidence. One study found the risk of repeat offending is negligible after 3, 5, or 7 years, depending on the offense.<sup>29</sup>

### 1. Consider the NATURE of the job held or sought, including:

- The duties and responsibilities of the open position or occupation;<sup>30</sup>
- The job’s essential and most important functions;
- The circumstances under which the job is performed (e.g., the level of supervision, oversight, and the amount of agency or autonomy the employee has); and the environment in which the job’s duties are performed (e.g., outside, in a warehouse, or in a private home).<sup>31</sup>

23 See Endnote 5.

24 See *Green v. Missouri Pac. R.R.*, 549 F.2d 1158 (8th Cir. 1975); Minn. Stat. § 364.03.

25 Minn. Stat. § 364.03, subd. 2(1); Unlawful Employment Practices, 42 U.S.C. § 2000e-2; Equal Opportunity Employment Commission. (2012, April 25) Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (hereinafter “E.E.O.C. Guidance”), 15; *Green v. Missouri Pac. R.R.*, 549 F.2d 1158 (8th Cir. 1975).

26 Minn. Stat. § 364.03, subd. 2(2).

27 Minn. Stat. § 364.03, subd. 3(a)(2); E.E.O.C. Guidance, 15.

28 E.E.O.C. Guidance, 15; *Green v. Missouri Pac. R.R.*, 549 F.2d 1158 (8th Cir. 1975).

29 Blumstein, A. & Nakamura, K.. (2009, June). Redemption in an Era of Widespread Criminal Background Checks. *NIJ Journal* No. 263, 13.

30 Minn. Stat. § 364.03, subd. 2(3).

31 Unlawful Employment Practices, 42 U.S.C. § 2000e-2; E.E.O.C. Guidance, 15; *Green v. Missouri Pac. R.R.*, 549 F.2d 1158 (8th Cir. 1975).

**Applying this test is important for employers to comply with fair hiring laws and regulations. It also helps employers get the information they actually need to make informed hiring decisions.**

## **ACTION STEP**

Create a “Relevancy Screen” to limit irrelevant information that you could receive from a background check company (also called a consumer reporting agency or “CRA”). Relevancy screens not only help employers comply with the law, they also reduce administrative burdens by weeding out records that are irrelevant to the job. For free consultation on developing relevancy screens contact expert Lew Maltby, President of the National Workrights Institute, by e-mail at: LMaltby@workrights.org. Read more in APPENDIX C.

## **STEP 2 - INDIVIDUALIZED ASSESSMENTS:**

Once an employer has decided which convictions directly relate to the duties of the job, it should conduct **individualized assessments** of job candidates with such convictions.<sup>32</sup> Policies that ban all people with records (called “blanket bans”) likely violate both state and federal law.

Please note that Minnesota’s law does not prohibit employers from notifying applicants that **particular** criminal records will disqualify the applicant from certain positions.<sup>33</sup>

When making a hiring or employment decision that relies upon conviction history information, a Fair Chance employer likely engages in an individualized assessment by considering and weighing the following factors: (Blue bullets denote factors that public employers are required to consider under Minnesota law.<sup>34</sup>)

- The number of offenses for which the individual was convicted;
- The nature and seriousness of the offenses for which the individual was convicted;<sup>35</sup>
- Circumstances relative to the crime(s), including mitigating circumstances or social conditions surrounding the commission of the crime(s);<sup>36</sup>
- The age of the person at the time the crime or crimes were committed;<sup>37</sup>
- The length of time elapsed since the crime or crimes were committed (this is part of the Nature-Time-Nature test and also evidence of rehabilitation);<sup>38</sup>
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;<sup>39</sup>
- Evidence that the individual participated in training programs, employment experience, and/or educational opportunities during or after incarceration;
- The length and consistency of employment history before and after the offense or conduct;
- Whether the individual is bonded under a federal, state, or local bonding program;<sup>40</sup>
- Evidence of rehabilitation,<sup>41</sup> which can be shown by:
  - A copy of the local, state, or federal release order; AND
    - Evidence showing that at least one year has elapsed since release from any local, state, or federal correctional institution without subsequent conviction of a crime AND evidence showing compliance with all terms and conditions of probation or parole; or
    - A copy of the relevant Department of Corrections discharge order or other documents showing completion of probation or parole supervision.<sup>42</sup>
  - A certified copy of a person’s United States Department of Defense form DD-214 showing the person’s honorable discharge or separation under honorable conditions from the U.S. Armed Services for military services performed after the criminal conviction;<sup>43</sup> or
  - All other competent evidence of rehabilitation and present fitness presented, including, but not limited to, letters of reference by persons who have been in contact with the applicant since their release from incarceration.<sup>44</sup>

32 E.E.O.C. Guidance, 18-20.

33 Minn. Stat. § 364.021(c).

34 Minn. Stat. § 364.03, subd. 3.

35 E.E.O.C. Guidance, 15; Green v. Missouri Pac. R.R., 549 F.2d 1158, 1160 (8th Cir. 1975); Minn. Stat. § 364.03, subd. 3(b)(1).

36 E.E.O.C. Guidance, 18. Minn. Stat. § 364.03, subd. 1(b)(2).

37 Minn. Stat. § 364.03, subd. 3(b)(3).

38 Minn. Stat. § 364.03, subd. 3(b)(4).

39 E.E.O.C. Guidance, 18-20.

40 E.E.O.C. Guidance, 18-20.

41 Minn. Stat. § 364.03, subd. 3(a); Minn. Stat. § 364.03, subd. 3(c).

42 Minn. Stat. § 364.03, subd. 3(a).

43 Minn. Stat. § 364.03, subd. 3(a).

44 Minn. Stat. § 364.03, subd. 3(b)(5).

### **ACTION STEP**

Consider evidence of rehabilitation and mitigating circumstances surrounding the offense as you assess job applicants. See APPENDIX A for a sample list of additional items your company may wish to consider.

## **STEP 3 - APPLY HIRING POLICIES UNIFORMLY**

To comply with the law, employers must apply hiring policies uniformly to all applicants across all backgrounds—regardless of race, gender, religion, age, disability, and so on.<sup>45</sup>

### **ACTION STEP**

To limit exposure to liability under Title VII, employers should follow these steps:

**STEP 1 – Apply the Nature-Time-Nature to get conviction information that is relevant to the job you’re hiring for and “consistent with business necessity.”**

**STEP 2 – Individually assess applicants with relevant criminal backgrounds. This includes considering evidence of rehabilitation.**

**STEP 3 – Apply employment policies uniformly.**

## **STEP 3 - BE UPFRONT ABOUT YOUR PRACTICES**

It is a good practice for employers to be upfront about their plans to make individualized assessments and consider evidence of rehabilitation and mitigating factors. Being clear about the process will save you time and prevent unnecessarily screening out qualified applicants, and the Minnesota Department of Human Rights has advised that failing to inform applicants of what mitigating or rehabilitative evidence will be considered could be considered discriminatory.<sup>46</sup>

### **ACTION STEP**

Create a policy to be upfront about your plans to make individualized assessments and consider evidence of rehabilitation and mitigating factors.

<sup>45</sup> E.E.O.C. Guidance, 1, 6.

<sup>46</sup> Minnesota Department of Human Rights - Hiring and Interviewing - Arrest and Criminal Records. Retrieved from <https://mn.gov/mdhr/employers/hiring-and-interviewing/120-arrest-%26-criminal-records.jsp>.

# When Collecting Records: How To Comply With Background Check & “Ban-The-Box” Laws

Not only are there laws and regulations governing WHAT criminal records an employer can consider; there are also laws that govern HOW & WHEN an employer can collect criminal records.

## STEPS A MINNESOTA EMPLOYER MUST TAKE IN RUNNING BACKGROUND CHECKS

To comply with both the federal Fair Credit Reporting Act (FCRA) and Minnesota’s “Access to Consumer Reports” state law, Minnesota employers must take the following steps if collecting criminal history information from a third-party background check company (also called a background screening service, “consumer reporting agency” or CRA):

- **Notice to and Written Permission by the Applicant:** A Minnesota employer must provide the job applicant clear notice that it will be using a background screening service AND get the applicant’s written permission before running the check.<sup>47</sup>
  - Please Note: **Minnesota public (government) employers**<sup>48</sup> must also provide applicants with a **“Tennessee Warning,”** which requires the employer to give the applicant details about why any private or confidential data is being collected, how it will be used, with whom it will be shared, and any consequences for refusing to provide the information.<sup>49</sup> This warning is typically provided as a written notice, such as on the back of a form.
- **A Copy of the Background Report:** In Minnesota and some other states, the job applicant must be shown a copy of the report upon request. If the applicant requests a copy of the background check, he/she must be provided a copy within 24 hours of the employer receiving the report. The applicant cannot be charged for a copy of the report.<sup>50</sup>
- If any employer is going to take a **negative or “adverse” action** against the job applicant or an employee based on information in a background report (e.g., not hiring the applicant or firing a recently-hired employee), it must follow these steps:
  - STEP 1 – Provide the applicant a **“Pre-Adverse Action Notice”** – which includes a copy of the report and a copy of the Federal Trade Commission document “Summary of Your Consumer Rights under FCRA.” before the negative action is taken—giving the applicant a reasonable opportunity to clear up any inaccuracies in the report.<sup>51</sup>
  - STEP 2 – After a **reasonable time for the applicant to correct errors and explain the report**, if the employer wants to move forward with the “adverse action,” it must provide an **“Adverse Action Notice”** in writing – which includes 1) the reason for the adverse action and 2) the applicant’s right, and procedure, to dispute the accuracy or completeness of the report.<sup>52</sup> Additionally, the employer must provide the name, address, and phone number of the CRA that sold the report and a statement that the CRA selling the report did not make the hiring decision.<sup>53</sup> Minnesota public employers must also include the earliest date that the applicant may reapply and a statement that evidence of rehabilitation will be considered upon reapplication.<sup>54</sup>

### ACTION STEP

See an example of an “Adverse Action” letter and a copy of the document “Summary of Your Consumer Rights under FCRA” in APPENDIX B.

47 Minn. Stat. § 13C.02, subd. 1; Minn. Stat. § 13.87, subd. 3(f); 15 U.S.C. § 1681b(b)(2)(A).

48 See Endnote 5.

49 Minn. Stat. § 13.04, subd. 2.

50 Minn. Stat. § 13C.02, subd. 2.

51 15 U.S.C. § 1681b et seq.; Minn. Stat. § 364.06.

52 15 U.S.C. § 1681(m)(a) et seq.

53 15 U.S.C. § 1681(m)(a)(3)(b); Minn. Stat. § 13C.03.

54 15 U.S.C. § 1681b et seq.; Minn. Stat. § 364.05; Minn. Stat. § 364.06.

## WHAT BACKGROUND CHECK COMPANIES CANNOT REPORT

State and federal law limit the types and age of records that background check companies (or CRAs) can report. Because many CRAs produce reports with errors, an employer should only use a company that is proven reliable and lawful in its reporting methods.

Key rules to be aware of:

- **Under federal law, CRAs cannot report arrests older than 7 years to any type of employer** (public or private), unless the job has a salary of \$75,000 or more.<sup>55</sup> This federal restriction applies only to arrests, and not convictions.
- **Under state law, CRAs must promptly delete records that are sealed, expunged, or pardoned.**<sup>56</sup>

Minnesota state law does not further restrict what criminal history information can be reported by a CRA. Although employers in Minnesota have broad access to criminal record information, a statewide “Ban-the-Box” law governs when an employer can inquire into a job applicant’s record (see page 15).

## WHAT EMPLOYERS CAN CONSIDER AND HOW

**Public (government) employers and licensing agencies cannot consider the following:**

- Arrests not leading to a conviction;
- Convictions that have been expunged or annulled; and
- Misdemeanor convictions for which no jail time can be imposed.<sup>57</sup>
- **IMPORTANT EXCEPTION:** Many public employers, law enforcement, health facilities, and licensing agencies are exempted and can see much more or often full conviction and arrest history information.<sup>58</sup> Such employers should **consult with a lawyer** to ensure their policies are meeting all relevant requirements for background screens.

**Private employers have fewer restrictions:**

- Private employers have more discretion in what criminal history information they can access, but still must notify applicants about looking into their public record even if they are not using a CRA.<sup>59</sup>
- Under Minnesota law, criminal history data related to convictions, confinement, and sentencing is considered “public” for **15 years** from the date the sentence ended,<sup>60</sup> and the BCA has an open-access website where the public can access these records. However, state law requires that if the information gained through this website will be used for employment, credit, or housing purposes, the applicant must be informed about the background check in writing.<sup>61</sup>

55 15 U.S.C. § 1681c(a)(2); 15 U.S.C. § 1681c(b)(3).

56 Minn. Stat. § 332.70 subd. 3a.

57 Minn. Stat. § 364.04. See definition of public employers in Endnote 5.

58 Minn. Stat. § 364.09.

59 Minn. Stat. § 13.87 subd. 3(f).

60 Minn. Stat. § 13.87 subd. 1(b).

61 Minn. Stat. 13.87 subd. 3(f).



Even though Minnesota employers may be able to learn about old or unrelated convictions does not mean it is lawful or a best practice to consider them. Instead, return to the “Nature-Time-Nature” test on pages 12-13.

**ACTION STEP**

Arrests are not proof of guilt. Unless required by law, don't consider them.

Private employers aren't explicitly barred by state or federal law from considering arrests, but the EEOC and the MDHR have advised that denying an applicant employment based solely on arrests would likely be considered discrimination and open an employer up to civil liability.<sup>62</sup>

**ACTION STEP**

Since FCRA only applies to credit reporting agencies, if you are conducting your own in-house background check using public records, there are very few restrictions on what information can be collected. However, as a matter of best practice, it is a good idea to have a disconnected human resources employee perform the searches and provide the hiring personnel only pertinent information that passes the “Nature-Time-Nature Test.” This avoids reliance on improper information, such as protected class status.

To find a reliable background check company, or CRA, see page 21.

## **‘Ban-The-Box’ Laws Quickly Expanding: When A Minnesota Employer Can Collect Criminal History Information**

Over 150 cities and counties and 29 states across the U.S., including Minnesota, have now adopted “Ban-The-Box” laws that postpone questions about conviction histories until after the employer has determined the applicant meets minimum job qualifications.<sup>63</sup> The federal government followed suit: in November 2015, President Obama called upon congress to “ban-the-box” in federal hiring and by federal contractors.<sup>64</sup>

There are stronger protections in certain cities and counties: for a detailed breakdown of Ban-The-Box laws across cities and counties in Minnesota, see the chart in Appendix D, adapted from the National Employment Law Project.

In Minnesota, both public and private employers can ask applicants about their criminal histories only after the applicant has been selected for an interview, or if no interview, before a conditional offer of employment is made to the applicant.<sup>65</sup> Both St. Paul and Minneapolis, two of Minnesota's largest cities, have adopted “Fair Chance Hiring” policies.<sup>66</sup> See APPENDIX D for local law requirements.

62 E.E.O.C. Guidance, 13.

63 Hernandez, P. & Avery, B. (2017, August). Ban the Box: US Cities, Counties, and States Adopt Fair Hiring Policies. National Employment Law Project. Retrieved from <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>.

64 The White House, Office of the Press Secretary. (2015, November 2). FACT SHEET: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated. Retrieved from <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation>.

65 Minn. Stat. § 364.021(a).

66 See City of St. Paul's Pre-Employment Verification Policy. Retrieved from <https://www.stpaul.gov/sites/default/files/Media%20Root/Human%20Resources/Pre-Employment%20Verification%20Policy.pdf>; and City of Minneapolis Background Check Procedures – Roles and Responsibilities. Retrieved from [http://www.ci.minneapolis.mn.us/www/groups/public/@hr/documents/webcontent/convert\\_271683.pdf](http://www.ci.minneapolis.mn.us/www/groups/public/@hr/documents/webcontent/convert_271683.pdf).

**When Minneapolis banned the box in 2007, more than 50% of job seekers with criminal convictions, whose records were previously marked as a “concern,” were hired for public employment in the first year.<sup>67</sup>**

There is an exception to these rules for jobs that require criminal background checks by law, such as law enforcement positions. Check Minnesota Statute 324.09 for a list of exempt employers.<sup>68</sup>

*After the City of Minneapolis implemented its policy, they found that removing the criminal disclosure box from initial applications and postponing background checks until after a conditional offer of employment was made decreased the amount of transactional work for City staff, did not slow down the hiring process, and resulted in more than half of applicants with convictions being hired.<sup>69</sup>*

– National Employment Law Project

Employers who fail to follow Minnesota’s Ban-the-Box law can be reported to the **Minnesota Commissioner of Human Rights** (private employers) and **Minnesota’s Administrative Procedures Act** (public employers)<sup>70</sup>. Penalties range from:

- Employers with 10 or fewer persons at a site: up to \$100 for each violation, not to exceed \$100 in a calendar month.
- Employers with 11 to 20 persons at a site: up to \$500 for each violation, not to exceed \$500 in a calendar month
- Employers with more than 20 persons at one or more sites: up to \$500 for each violation, not to exceed \$2,000 in a calendar month.<sup>71</sup>

Avoid expensive penalties and potential lawsuits by following the Action Steps laid out in this Hiring Guide.

### **PROTECTION FROM CIVIL LIABILITY WHEN YOU COMPLY WITH BAN-THE-BOX**

Minnesota also has a law that protects employers who comply with Ban-the-Box from certain liabilities. If a civil suit is filed against a private employer based on the conduct of their employee, the employee’s criminal record cannot be used as evidence against the company if the action is based solely on the employer’s compliance with the Ban-the-Box policy.<sup>72</sup>

#### **ACTION STEP**

Wait to ask about conviction history until after granting an interview, or if no interview, before a conditional offer of employment is made.

67 McCammond, A. (2016, June 16). Politico. How effective is “ban the box” in helping ex-offenders get a job? Retrieved from <http://www.politico.com/story/2016/06/how-effective-is-ban-the-box-in-helping-ex-offenders-get-a-job-224418>.

68 Minn. Stat. § 364.09; Minn. Stat. § 364.021(b).

69 National Employment Law Project (NELP). Research Supports Fair Chance Policies. Retrieved from <http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf>, citing letter from City Council Member Elizabeth Glidden with Attachment of City of Minneapolis Conviction History Summary 2004-2008 YTD (March 16, 2009) (<http://www.nelp.org/page/-/SCLP/2014/Guides/Glidden-Ltr-Minneapolis2004-2008.pdf?nocdn=1>).

70 Minn. Stat. § 364.06, subd. 1 & 2(a).

71 Minn. Stat. § 364.06, subd 2(b)(c)(d)

72 Minn. Stat. § 181.981, subd 1(4).

# Are There Legal Risks To Hiring Fair Chance Workers?

Employers have a legitimate concern for the care and safety of their company and staff, and for minimizing their exposure to lawsuits. When hiring someone with a record, employers may worry:

- Is the employee going to steal from the company?
- Is the employee going to harm someone on the job?
- Can someone sue me if an employee with a record does something wrong on the job?

## NEGLIGENT HIRING LIABILITY: LOW RISK AND LOW COST TO EMPLOYERS

Employers can only be found liable for hiring an employee with a criminal record if the employer: (1) knew or had reason to know of a specific risk posed by the employee's record (so that the harm was foreseeable) and (2) that the specific risk caused the victim's injuries while the employee was on duty. This kind of liability is called negligent hiring. However, **negligent hiring** liability can be nearly eliminated by putting in place fair and lawful screening procedures, as outlined in this Hiring Guide.

Furthermore, courts have been hesitant to find an employer at fault for hiring someone with a conviction history who later causes harm, particularly where the employer made reasonable efforts to check a person's background for red flags. This is another reason why individual assessments are critical, because they help show a court that an employer made reasonable efforts to identify any obvious risks under the "Nature-Time-Nature Test," described on page 12.

## TYPES OF JOBS WITH INCREASED NEGLIGENT HIRING RISK

The few cases of negligent hiring that are filed—approximately 300 per year across the country—almost always involve one of the following types of jobs:

- Access to a vulnerable population (e.g., patients, children, or elderly people)
- Access to cash
- Operating a motor vehicle
- Law enforcement
- Use of firearms

### **For all other jobs, negligent hiring cases are virtually non-existent.**

In one of the more recent studies of negligent hiring cases, there were none in which an employer was found at fault when they followed best practices for considering criminal history information, as outlined in this Hiring Guide.<sup>73</sup> In sum, the risk of exposure for negligent hiring is extremely low, and employers can virtually eliminate that risk by implementing fair and lawful hiring and screening practices, especially for job positions with access to sensitive populations, cash, or weapons.

#### **ACTION STEP**

Engage your own legal counsel (if possible). Lawyers can help employers develop lawful screening procedures that respect job applicants' rights and help employers collect criminal history information relevant to the job at hand. Additionally, special types of jobs—like those with access to vulnerable populations, law enforcement, health care jobs, etc.—may require a heightened background check. Some background check companies also have legal counsel that will provide such guidance to their clients.

#### **ACTION STEP**

For an insider perspective on "Second Chance" employment, visit the Dave's Killer Bread Foundation website dedicated to educating employers through videos and interviews on best practices of Second Chance employment. In particular, see the "Risk Mitigation" video. Sign-up and content is free online at: <https://www.dkbfoundation.org/second-chance-employer-roadmap/>.

*“To . . . hold that ex-felons are inherently dangerous and that any harmful acts they commit against persons encountered through employment will automatically be considered foreseeable . . . would deter employers from hiring workers with a criminal record and ‘offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community.’”*  
— Judge Harriet Lansing, author of the unanimous 3-0 opinion in *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 423 (1993). The Court found the Employer was not liable in this case in which the family of a deceased man sued the Employer, claiming it failed to properly screen and supervise an employee with a felony record who shot and killed his co-worker.

### **NEGLIGENT HIRING LIABILITY: LOW RISK, LOW COST**

- Over the last decade, the average cost to an employer related to defending negligence claims for hiring a person with a record was only \$5 per worker.<sup>74</sup>
- A study of negligent hiring claims filed in 2003 showed that only 10% involved the hiring of persons with criminal histories, and only half of those claims had favorable decisions.<sup>75</sup>
- Only about 1% of employers have ever been sued for negligent hiring of a person with a criminal record—and the percent is significantly lower for the cases where employers were actually found liable.<sup>76</sup>

### **NEGLIGENT HIRING LIABILITY: LOW RISK, LOW COST**

Hiring is a difficult task for all employers, with inherent risks that it won't work out with every employee hired. As shown by the data above, however, negligent hiring liability of someone with a record is very uncommon and not a low risk and low cost to employers. On the other hand, a variety of employee issues can arise on the job, not unique to Fair Chance workers or any other group.

Because of the inherent risk in hiring and running a businesses, it is important for business to protect themselves from all sorts of risks in hiring. **See Section IV (page 29) for more detailed information about mitigating your company's risk through business insurance.**

74 McClain, R. (2015, October 26). Employers' Practical Exposure to Negligent Hiring Liability [Presentation]. Chicago: Lawyers' Committee for Civil Rights Under Law.

75 Frazier, A. (2008). Negligent Hiring: Myth or Reality for Employers. National H.I.R.E. Network.

76 McClain, R. (2015, October 26). Employers' Practical Exposure to Negligent Hiring Liability [Presentation]. Chicago: Lawyers' Committee for Civil Rights Under Law.

## II. CHOOSING A RELIABLE BACKGROUND CHECK COMPANY

In Section 2, learn best practices for choosing the right background check company for your business so you can both meet your business needs and satisfy legal obligations.

While there is no law requiring the majority of employers to conduct criminal background checks on prospective employees, most employers feel it is important to do so, especially for jobs with access to sensitive populations or items. For employers who do choose to screen their job applicants—or in some cases, are required by law to screen them—it is vitally important that background check companies provide accurate and reliable reports.

Erroneous reports can result in:

- Employers turning away the most qualified applicant for the job.
- Hiring people whose records may make them unsuitable for certain jobs.
- Liability for employers who rely on information they cannot legally view or use.

*“With the advent of the internet, and the many tools available, you enter in “background checks” in any search engine and all of a sudden you have 55 opportunities to spend \$29.95. But these tend to be horrible background checks. ...Background checks aren’t a commodity; there is no such thing as an instant-background-check.”*  
– Fred Giles, Senior Executive at Carco, a Qualified Consumer Reporting Agency

**Not all CRAs are created equal.** Even the FBI estimates that an astonishing 50% of its criminal records contain errors.<sup>77</sup> Employers need to evaluate prospective CRAs carefully so they get reliable information and avoid violating the rights of job applicants. Many CRAs try to attract business by offering results cheaply and quickly online. But these reports are not reliable. An accurate criminal background check requires using multiple criminal justice sources, some of them in person, which cannot be done through the Internet alone. **Employers should work with experienced, reputable CRAs in order to conduct background screening.** In Minnesota, criminal history records held by private businesses are called “business screening services” and are held to specific requirements.

### WHAT ARE SOME COMMON MISTAKES IN BACKGROUND CHECKS?

- Information about a different person.
- Dismissed, sealed, or expunged records are reported.
- Incomplete records (e.g., ones that have no disposition).
- Misleading displays of information (e.g., report a single charge multiple times or in multiple sections of the report).
- Reporting inactive, “quashed” warrants.
- Misclassifications of the type of offense.<sup>78</sup>

To better avoid the pitfalls and liability that come with erroneous background checks, employers can follow the “best practice” steps on the next page for choosing a reliable, qualified background check company.

77 Maltby, L. (2011, August 24). How to Fairly Hire Applicants with Criminal Records. DiversityInc. Retrieved from <http://www.diversityinc.com/legal-issues/how-to-fairly-hire-applicants-with-criminal-records/>.

78 Yu, P. S. & Dietrich, S. M. (2012, April). Broken Records. National Consumer Law Center. Retrieved from <https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf>.

# Best Practices For Choosing A Reliable, Qualified Background Check Company

## STEP 1 - FIND AN ACCREDITED CRA.

An employer should verify that any prospective CRA is accredited with the National Association of Professional Background Screeners (NAPBS), the trade association for background check companies.

A CRA without NAPBS accreditation is unlikely to have written policies and procedures that ensure accurate and legally compliant reports, putting both potential employees and employers at risk.

NAPBS accreditation alone, however, is not enough. It represents minimum standards that all reputable CRAs should meet. The best CRAs can and do exceed this standard.

### ACTION STEP

Go online to <https://www.napbs.com/>, and click “Find a Screening Partner” to find an NAPBS-accredited CRA. Ask any potential CRA the questions listed under Step 2 of this section.

## STEP 2 - ASK THE RIGHT QUESTIONS OF THE CRA TO DETERMINE IF IT IS RELIABLE.

As recommended by industry experts, employers should ask a potential CRA the following questions to determine if it is producing reliable, accurate reports.<sup>79</sup>

### ACTION STEP

Ask a potential CRA the following questions:

- Do you confirm all of the information you obtain with the original criminal justice source? CRA should answer yes.
- Are “matches” reported only when a full name (including middle name) and at least one additional identifier are the same? CRA should answer yes.
- Are “matches” reported only when all the identifiers the CRA has in its possession match? CRA should answer yes.
- How do you maintain the quality and accuracy of your information?
- Do you perform regular independent audits of your research agents and processes?
- Has the information in the report been updated within 30 days of receipt OR has the information been verified with the data source within 90 days as being up-to-date? CRA should answer yes.
  - **Please note:** In Minnesota, background check companies may only report records that have been **updated within 30 days prior to receipt OR records that have been verified as up-to-date with the original data source within 90 days prior to receipt.**<sup>80</sup>
- Do you have an attorney on staff to provide legal guidance? CRA should answer yes.

**REMEMBER:** Employers should not select a CRA based on price alone. There is no single database that contains all the information that is needed to create an accurate, legally compliant report on a person’s background. Choose an NAPBS-accredited CRA that follows the best practices in this section to minimize your company’s exposure and get reliable information about job applicants.

79 Interview with Frederick Giles, CARCO (notes on file with the author).

80 Minn. Stat. § 332.70, subd. 2.

# III. REWARDS OF HIRING FAIR CHANCE WORKERS

**In Section 3, learn about the enormous rewards—increasing the pool of talented, loyal workers, and taking advantage of financial incentives—of hiring Fair Chance workers.**

The success of any business depends on hiring the right people. When nearly 1 in 3 Americans has a criminal record,<sup>81</sup> employers severely limit their talent pool if they don't carefully consider Fair Chance job candidates. By hiring and recruiting such workers, employers create more opportunities to hire talented, loyal employees.

Fair Chance employment does not require an employer to hire someone unfit for a particular job—rather, it opens opportunities to workers who are often wrongly overlooked, increasing the talent pool as well as boosting the economic growth of Minnesota and its businesses.

Still, many fear that someone with a criminal record may be dangerous, unreliable, or untrustworthy. In fact, many Fair Chance workers have experiences and characteristics that make them ideal employees, and available data shows that they perform equal to or better than their counterparts without records.

This section will share some of the rewards of and incentives for hiring talented employees through Fair Chance policies.

*“We as a business community need to understand that unless we cultivate a successful pool of candidates, we won't have enough talent to manage our business.”<sup>82</sup>*

*– Kenyatta Brame, Executive Vice President at Cascade Engineering.*

## Reward: Performance On The Job

**The following case studies demonstrate that qualified employees with prior records represent an untapped talent pool that should have a fair chance at being considered for work—to the benefit of employers and employees alike.**

### EMPLOYERS - BOTH LARGE AND SMALL - HAVE EXPERIENCED DOCUMENTED SUCCESS IN HIRING FAIR CHANCE WORKERS

- **Johns Hopkins Health System & Hospital has employed hundreds of people with criminal records since 2000, making up 5% of its yearly hires.**

A study conducted among their workforce found that, over a four-year period, evaluations of employees with criminal records were not significantly different from employees without records. Furthermore, the Fair Chance workers had a retention rate of 43%, significantly better than the rate for those without a record. Their Vice President of Human Resources also reported that they had never fired one of their employees with records due to problematic behavior.<sup>83</sup>

- **DAVE'S KILLER BREAD, one of the fastest-growing baking companies in North America, has been a private sector leader in hiring Fair Chance workers and has put the practice at the heart of the company's identity.**

Dave's Killer Bread reports that its Fair Chance hiring practices have led to a lower turnover rate than the baking industry as a whole, helping them secure a significant advantage over their competitors. The company is currently undergoing a study with partnering businesses to assess the economic impacts of hiring Fair Chance workers.

81 The Sentencing Project. (2015, November). Americans with Criminal Records. Retrieved from <http://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf>.

82 Hutchinson, C. (2016, March 21). Grand Rapids Company Unlocks the Potential of Former Inmates. Next City. Retrieved from <https://nextcity.org/daily/entry/grand-rapids-company-former-inmates-jobs>.

83 Alternative Staffing Alliance. (2010, October 29). Persuading Employers to Hire Ex-Offenders [transcript], 9-10. Retrieved from [http://altstaffing.org/wp-content/uploads/2013/01/Persuading-Employers-to-Hire-Ex-offenders\\_Transcript.pdf](http://altstaffing.org/wp-content/uploads/2013/01/Persuading-Employers-to-Hire-Ex-offenders_Transcript.pdf).

· **BUTTERBALL FARMS, INC., the largest supplier of specialty butters in North America, has been a private sector leader in hiring Fair Chance workers.**

In 2015, 57% of Butterball's hires had criminal records. Butterball found that turnover rates for hires with felony backgrounds were nearly identical to turnover rates for employees without felony backgrounds.<sup>84</sup> These practices inspired nearby Michigan-based employers Cascade Engineering and Grand Rapids Community College to come together to start a new initiative: 30-2-2, which is enlisting 30 companies to employ two formerly incarcerated workers for two years each. Today the program has placed over 100 employees at 19 companies and recently inspired local leaders in New Orleans to launch their own version of the program.<sup>85</sup>

· **THE UNITED STATES ARMY– the nation's largest employer – presents an interesting test case.**

Between 2002 and 2009, the Army granted an unusually high number of waivers allowing people with prior felony convictions to enlist who were previously barred. Researchers found that enlistees with felony waivers were no more likely to be subject to early termination and showed no higher rates of overall negative performance than enlistees without felony waivers. In fact, enlistees with felony waivers were also more likely to receive promotions – including high-level promotions above the rank of sergeant – than their counterparts without waivers.<sup>86</sup>

· **VIRGIN GROUP, the multinational group headed by billionaire Richard Branson, has been an international leader in second chance employment.**

In 2015, 3% of the company's new hires had criminal records. The Virgin Group has published materials designed to help introduce other multinational employers to second chance employment.<sup>87</sup>

· **MINNESOTA DEPARTMENT OF CORRECTIONS CASE STUDY: Minncor's EMPLOY Program positively impacts prospective employees:**

To evaluate the effectiveness of EMPLOY, the DOC examined recidivism and post-release employment outcomes among 464 offenders released from prison between 2006 and 2008.

Participation in EMPLOY significantly decreased the risk of recidivism. It achieved the following:

- 35% reduction in rearrests;
- 32% reduction in reconvictions;
- 55% reduction in re-incarcerations for new offenses;
- 63% reduction in re-incarcerations for a revocation on a technical violation of supervision; and
- 72% increase in an individual's chances of securing post-release employment.
- EMPLOY participants worked over 400 more hours during the follow-up period than offenders in the comparison group, earning nearly \$5,500 more, on average, than offenders in the comparison group.

84 Mroczek, B. (2015, October 26). Butterball Farms, Inc. Fair Hiring. Presentation at the Midwest Regional Summit on Fair Housing. Retrieved from <https://lawyerscommittee.org/pages/midwestern-regional-summit-on-fair-hiring/>.

85 Hutchinson, C. (2016, March 21). Grand Rapids Company Unlocks the Potential of Former Inmates. Next City. Retrieved from <https://nextcity.org/daily/entry/grand-rapids-company-former-inmates-jobs>.

86 Lundquist, J., Pager, D. & Strader, E. (2016, March 31). Do Criminal Records Predict Worker Performance? Evidence from America's Largest Employer. Presentation at the Annual Meeting of the Population Association of America. Retrieved from <https://paa.confex.com/paa/2016/meetingapp.cgi/Paper/2871>.

87 Petroff, A. (2016, July 20). Richard Branson wants you to hire an ex-con. CNN Money. Retrieved from <http://money.cnn.com/2016/07/20/news/richard-branson-virgin-jobs-prison-offenders-convicts/>.



# Reward: Loyalty of Fair Chance Workers

The success of any business depends on hiring employees who are committed to the success of their employer and who support the culture and goals of the workplace. Many employers report that their Fair Chance workers feel a special connection and loyalty to the company.

In the boxes below, hear Fair Chance business leaders and prized workers share their experiences of company loyalty.

## FAIR CHANCE EMPLOYERS (ON COMPANY LOYALTY)

*We have been hiring returning citizens for several years. We have found that these employees genuinely appreciate the opportunity to participate in the workforce and often end up being the most productive members of our team.*

– Mark Peters, CEO, Butterball Farms, Inc. <sup>88</sup>

*Many of these employees are our best employees, people who truly and sincerely made a mistake and have turned their lives around and have done great things with themselves and their careers.*

– Keith Maki, Director of Marketing, Cascade Engineering <sup>89</sup>

## FAIR CHANCE WORKERS (ON COMPANY LOYALTY)

*We come in with a different expectation. You get so many no's, and now this one company has said yes. ...Very rarely do you find that person who wants to blow that opportunity.*

– Jahaun McKinley, Lead Systems Manager, Cascade Engineering <sup>90</sup>

*I came here and I saw other people that were on the prison yard with me and I saw them getting promoted. At the end of every shift my supervisor would come to me and say, "Hey, you're doing great. See you tomorrow!" I knew if I kept working and kept learning and going that extra step that I would make a wage that I could actually live on that I wouldn't have to supplement in other ways. When an employer goes that extra step a person can't help but go that extra step too.*

– Steven, Make-Up Department, Dave's Killer Bread <sup>91</sup>

88 Dewey, C. (2016, May 20). Thinking outside the box. Grand Rapids Business Journal. Retrieved from <http://www.grbj.com/articles/85298-thinking-outside-the-box>.

89 Dewey, C. (2016, May 20). Thinking outside the box. Grand Rapids Business Journal. Retrieved from <http://www.grbj.com/articles/85298-thinking-outside-the-box>.

90 Dewey, C. (2016, May 20). Thinking outside the box. Grand Rapids Business Journal. Retrieved from <http://www.grbj.com/articles/85298-thinking-outside-the-box>.

91 Second Chance Project. Steven's Story. Retrieved from <http://www.daveskillerbread.com/steven>.

# Reward: Boost the Economy and Individual Productivity

**Fair Chance employment has the potential to improve the economic health not just of individual businesses, but of the greater economy, in Minnesota and beyond.**

Currently, Fair Chance workers face considerable barriers to employment for many reasons, including:

- the stigma of incarceration;
- myths and stereotypes of workers with records as untrustworthy and dangerous;
- the erosion of basic job skills and disruption of formal education;
- loss of social and professional networks that can improve job-finding prospects;
- discrimination based on illegal or unreliable screening practices; and
- the deterioration of “people skills” after years of separation and isolation.<sup>92</sup>

These barriers to employment may be compounded by other forms of discrimination based on race, ethnicity, language, gender, and/or disability status.

A study of 2014 employment rates found that barriers to employment faced by formerly incarcerated people and people with felony convictions led to a **loss of up to 1.9 million workers**, costing the U.S. economy as much as **\$87 billion** in gross domestic product.<sup>93</sup> When it comes to race, the breakdown is even more grim. Black men who are formerly incarcerated suffered a 4.7 to 5.4 percentage point reduction in their employment rate in 2014. Latino men saw a reduction of as much as 1.6 percentage points, while the drop was up to 1.3 percentage points for white men.<sup>94</sup>

Through Fair Chance hiring, employers decrease unemployment and increase economic productivity and health.

*“Individuals make decisions that are not always the best decisions in younger years of life. You can’t erase those decisions, but individuals must always learn and build from their experiences. Individuals have proven to change and become an effective, productive employee in the workplace.”*

*- Curt Jasper, Human Resources Professional, EJ Ajax, Inc*

92 Barber, A. & Bucknor, C. (2016). The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies. Center for Economic and Policy Research. Retrieved from <http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf?v=5>.

93 Barber, A. & Bucknor, C. (2016). The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies. Center for Economic and Policy Research. Retrieved from <http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf?v=5>.

94 Barber, A. & Bucknor, C. (2016). The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies. Center for Economic and Policy Research. Retrieved from <http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf?v=5>.

# Reward: Boost the Economy and Individual Productivity

The State of Minnesota and the federal government offer financial incentives to employers to encourage Fair Chance hiring.

## FEDERAL INCENTIVES

### · Work Opportunity Tax Credit (WOTC)

- WOTC is a federal tax credit available to employers who hire and retain workers who face significant barriers to employment, including people with previous felony convictions under any state or federal law. Employers can receive up to **\$9,600 per eligible employee hired** in federal income tax credits.
- The WOTC requires the employee and an employer to fill out **only two forms** each and submit them to a state certification agency. Please see the APPENDIX of this Hiring Guide for more information on how to apply.

### · Federal Fidelity Bonding

- The U.S. Department of Labor (DOL), in partnership with the Department of Economic Development (DEED), provides free “bonding insurance” for private employers who hire workers with previous felony convictions for acts that include employee dishonesty. While only 1% of Federal Fidelity Bonds are ever claimed, the program can give employers peace of mind in the unlikely event of covered employee misconduct. These bonds can range from \$5,000 to \$15,000, and last for six months after they are issued. Both part-time and full-time employees are eligible, including workers hired by temp agencies.<sup>95</sup>
- Fidelity Bonding requires no paperwork from employees or employers! In order to apply, an employer can contact Minnesota’s Department of Employment and Economic Development’s Federal Bonding Coordinator at (651) 259-7521 (Twin Cities area) or Toll Free: 888-234-5521.

## MINNESOTA STATE INCENTIVES

### · Adult Workforce Development Program

- In 2013, Minnesota’s Adult Workforce Development Program granted \$3,118,850 to service providers (\$987,050 from the General Fund, \$2,131,800 from the Workforce Development Fund). Visit <https://mn.gov/deed/about/what-we-do/agency-results/perform-measures/adult-workforce.jsp> for more information about these grants.

### · Hennepin County Program

- Hennepin County’s “Productive Day Enterprises” program provides temporary, minimum-security residents as laborers to businesses in Hennepin County. To take advantage of this opportunity, email Tom Schmalz at [thomas.schmalz@hennepin.us](mailto:thomas.schmalz@hennepin.us).

95 U.S. Department of Labor Federal Bonding Program. (n.d.) Program Background Description. Retrieved from <http://www.bonds4jobs.com/program-background.html>.

# IV. COMMON QUESTIONS ABOUT BUSINESS INSURANCE

**In Section 4, learn about common myths regarding Fair Chance Hiring and insurance costs, as well as best practices for mitigating risk with business insurance.**

## **DEBUNKING THE MYTH THAT FAIR CHANCE HIRING INCREASES INSURANCE COSTS**

Insurance companies should not increase insurance premiums based on an employer's Fair Chance hiring policies that employ people with conviction histories, as this may be illegal. Such a policy would likely have a disparate impact on minorities, which would be unlawful discrimination under Minnesota state law.<sup>96</sup>

### **Factors that insurance companies generally take into account in setting premiums:**

- The number of persons employed;
- Whether the employer has had prior lawsuits lodged against the company;
- Whether the employer has well established rules and practices for workplace safety;
- And workplace incidents on a claims-made basis;
- Other factors that increase or decrease your likelihood of making a claim.<sup>97</sup>

If an insurance company is asking for information about whether you hire people with criminal records and using it to financially penalize your business, you might have a cause of action against your insurer and should consult a lawyer about your options immediately.

## **GENERAL FACTS ABOUT YOUR INSURANCE POLICY**

- Historically, courts protect the policyholder.<sup>98</sup> Thus, an insurance company should not raise the price of your policy without justification (e.g., multiple claims made over a short period of time).
- Fidelity bonds provide free coverage for employers who hire workers with previous felony convictions for acts that include employee dishonesty. Nationally, more than 40,000 fidelity bonds have been issued and only about 1% of those bonds have had claims filed against them.<sup>99</sup> You can purchase your own fidelity bond once the federal bond lapses to further protect your business.
- Courts generally require that insurers are clear and upfront about any provisions they have that would cause them to cancel, decrease, or raise prices on coverage.<sup>100</sup> This means that your insurance provider should not surprise you by charging more or canceling your policy solely because you consider, or hire, people with a criminal record.

<sup>96</sup> Minn. Stat. § 363A.17.

<sup>97</sup> Nationwide. Employment Practices Liability Insurance. Retrieved from <https://www.nationwide.com/employment-practices-liability-insurance.jsp>.

<sup>98</sup> Fleishman, B. J., Michael, H. K., Carl A. Salisbury, C. A., Everitt, J. R., Gold, E. M., Jacobs, G. M., and Niles, J. D., and Townsend, K. & Stockton LLP. "Insurance Policies and Coverage: Overview.": also see *Bodell v. Walbrook Ins. Co.*, 119 F.3d 1411 (9th Cir. 1997).

<sup>99</sup> Minnesota Federal Bonding Program. Retrieved from <https://mn.gov/deed/business/finding-workers/incentives/federal-bonding.jsp>.

<sup>100</sup> For example, see *Fire Ins. Exch. v. Superior Court*, 116 Cal. App. 4th 446 (Ct. App. 2004).

*“The characteristic of job loyalty and company dedication by [formerly incarcerated] workers is repeatedly noted to us by employers.”<sup>101</sup>*

*– Luis Brown-Peña, Administrative Supervisor for the Minnesota Department of Employment and Economic Development*

## Best Practices For Mitigating Risk Through Insurance

For any entity or business with employees, it is important to purchase and carry professional insurance to mitigate different types of risks--none of which are unique to hiring Fair Chance workers. There is no one particular type of insurance that an employer must obtain when hiring people with conviction histories. That said, insurance helps an employer reduce the likelihood of liability if something goes wrong at work.

### COMMON TYPES OF BUSINESS INSURANCE

#### • General Liability Insurance

- This is the most basic type of commercial insurance, which protects against accidents and injuries that occur on company property or on the property of a customer and claims of negligence against the employer.<sup>102</sup> Under most policies, general liability insurance will not cover an employee’s intentional acts causing harm.<sup>103</sup>

#### • Professional Liability/ Errors and Omissions Insurance

- This type of insurance goes beyond general liability insurance to help you defend against and pay damages for lawsuits alleging that you failed or improperly rendered professional services.<sup>104</sup>

#### • Worker’s Compensation Insurance (required by Minnesota law)<sup>105</sup>

- Designed to cover work-related injuries, an employer must provide insurance for its employees or obtain approval from the Minnesota Department of Commerce permitting self-insurance upon proof of the employer’s financial ability to do so.<sup>106</sup>

#### • Directors and Officers Insurance

- This type of insurance helps cover costs and damages in a lawsuit against your company’s directors and officers (as registered with the state) that are a direct result of their actions on the job.<sup>107</sup>

#### • Fidelity/Crime Insurance

- This type of insurance helps cover losses of business assets caused by robbery, burglary, larceny, forgery, embezzlement, or other financial crimes.<sup>108</sup>

Visit the Minnesota Department of Commerce/Liability Insurance to learn more about how business insurance works and how to work with an insurance broker at <https://mn.gov/commerce/industries/insurance/businesses/>.

101 Matt Krumrie, M. (2016, October 4.) “Why You Should Give Candidates with a Criminal Background a Second Chance.” Retrieved from <https://www.ziprecruiter.com/blog/why-you-should-give-candidates-with-a-criminal-background-a-second-chance/>.

102 See Janet L. Kaminski Leduc, Corporate Liability Insurance, <http://www.cga.ct.gov/2008/rpt/2008-R-0183.htm>; Types of Business Insurance, U.S. Small Business Administration, <http://www.sba.gov/content/types-business-insurance>.

103 See Joseph D. Zamore, Insurance for Business Torts, Business Torts (2014).

104 13 Types of Insurance a Small Business Owner Should Have, Forbes (Jan. 19, 2012).

105 Minn Stat. § 176.181, subd. 2.

106 See Workers’ compensation -- About workers’ compensation coverage. Who needs workers’ compensation coverage? <http://www.dli.mn.gov/wc/aboutcov.asp>.

107 See IRMI, “Employment Practices Liability Insurance,” <https://www.irmi.com/online/insurance-glossary/terms/d/directors-and-officers-do-liability-insurance.aspx>.

108 See “Other Types of Liability Insurance Include:” <https://mn.gov/commerce/industries/insurance/businesses/liability-ins.jsp>.

# V. BEST PRACTICES FOR ONBOARDING & TRAINING

**In Section 5, learn about industry best practices for recruiting, onboarding, and retaining Fair Chance workers.**

In most ways, Fair Chance workers are no different than any other employee. So many of the best practices for onboarding and retaining employees, generally, will apply equally well to Fair Chance practices. Fair Chance workers want to know that they're a part of the team, and that they'll be subject to the same expectations and fair treatment as anyone else at the company.

This section shares some best practices and tips from the field that will make Fair Chance workers specifically most successful in transitioning into employment with your company.

## **SEE THE WHOLE PERSON, NOT JUST THE RECORD**

In the hiring and onboarding process, it's important to make sure any job candidate is ready, that they've taken responsibility for what has happened, and that they have the resources and support they need to succeed in full-time work. For a list of workforce development organizations that can assist your company in recruiting talented Fair Chance workers who are a good fit for the job, see the list on page 32.

## **OFFER A WELL-STRUCTURED ORIENTATION & ONBOARDING PROGRAM**

For all employees, not just Fair Chance workers, a well-structured onboarding and orientation program leads to good retention rates. In one study, new employees who attended a structured orientation program were 69 percent more likely to remain at the company for three year or longer.<sup>109</sup> Other studies have shown that good onboarding leads to: higher job satisfaction; organizational commitment; lower turnover; higher performance levels; increased career effectiveness; and lowered stress.<sup>110</sup> Incorporating information about the company's fair hiring and H.R. practices can improve the overall health of a company and retention of its employees.

## **OFFER MENTORSHIP**

Many employers have found that creating a strong mentorship program that pairs experienced employees with new employees can be helpful. Mentorship programs can help provide new employees, including those with records, an open space to ask questions or voice concerns that they may feel uncomfortable sharing with others.

*“Anyone in a new job is going to feel a little timid going into it ... [a mentor] can help relax people's nerves and help them feel like part of the team right away.”*

*– Sara Baier, HR Generalist, Dave's Killer Bread*

## **PROVIDE ONGOING TRAINING FOR ALL STAFF, ESPECIALLY HUMAN RESOURCES PERSONNEL**

It is critical for employers to provide ongoing training for all staff on fair hiring and Second Chance employment, especially anyone involved in upper management or Human Resources and hiring decisions.

In addition, training for all staff, not just upper management and H.R. personnel, can help to reduce the stigma and stereotypes that often attach to Second Chance workers. We hope this Hiring Guide provides employers with factual information and guidance to help quell workplace concerns.

<sup>109</sup> Bauer, T. N. (2010). Onboarding New Employees: Maximizing Success. SHRM Foundation. Retrieved from <https://www.shrm.org/about/foundation/products/documents/onboarding%20epg-%20final.pdf>; Onboarding & Orientation. (n.d.) Dave's Killer Bread Foundation Second Chance Playbook Retrieved from <https://www.dkbfoundation.org/second-chance-playbook/>.

<sup>110</sup> Bauer, T. N. (2010). Onboarding New Employees: Maximizing Success. SHRM Foundation. Retrieved from <https://www.shrm.org/about/foundation/products/documents/onboarding%20epg-%20final.pdf>; Onboarding & Orientation. (n.d.) Dave's Killer Bread Foundation Second Chance Playbook. Retrieved from <https://www.dkbfoundation.org/second-chance-playbook/> (membership required).

## **KEEP RECORDS CONFIDENTIAL**

Fair Chance workers should be given a safe space for discussing the impact of their histories, without being targeted, stereotyped, isolated, or harmed. A best practice is to keep any criminal history information confidential, and to only share it with others at the company when there is a business need for doing so. In interviews with employers for the development of this Hiring Guide, many Second Chance employers reported conflict within the company when a manager disclosed a worker's record without his or her permission.

## **ENGAGE LEGAL COUNSEL**

It is challenging to create a corporate policy for how to collect and consider criminal record background checks that complies with ALL applicable federal, state, and local laws. This Hiring Guide is intended to simplify Minnesota employers' legal obligations and risks, but is not a substitute for legal counsel and is not intended to be legal advice. Involving legal counsel will help an employer consider all of its legal obligations and risks more carefully, and in a way that is tailored to the particular needs of a given company and job position. Legal counsel will be able to make sure a business is compliant in how it collects and considers criminal records.

## **HAVE A DIVERSITY POLICY**

A strong diversity policy improves company performance AND provides a solid foundation for collecting and considering criminal background information in a fair and lawful manner. Diversity is not simply about race, age, or gender; it extends to differences in personal backgrounds and experiences.

An employer looking to increase its hiring of Fair Chance workers in particular may even consider adding a line to the "equal opportunity" statement on its job postings with a note that it will not discriminate on the basis of irrelevant conviction history information. This can create a signal of workplace diversity for those with prior criminal justice involvement.

## **CONNECT WITH WORKFORCE READINESS AGENCIES WHO DO THE HARD WORK FOR YOUR COMPANY**


For employers interested in reaching out to the Fair Chance workforce as potential new hires, below are a number of resources to connect and find the right fit!

### **STATEWIDE**

- **Minnesota's WorkForce Centers:** Allow community stakeholders to connect with employers and employees. For more information about Minnesota's WorkForce Centers, and to locate one near you, go to: <https://mn.gov/deed/>
- **Staffing Agencies:** Experienced staffing agencies can help vet potential employees and know what sorts of needs they have as they reenter the workforce.
- **Reentry Focused Nonprofits & State Agencies:** Many nonprofit organizations in Minnesota focus on helping individuals with criminal histories reintegrate into mainstream society.

## MINNEAPOLIS & ST. PAUL

- **Twin Cities R!SE:** Twin Cities R!SE is a nonprofit assisting individuals with barriers to employment on the path to long-term and stable employment. With 81% of its graduates staying at their jobs after one year, its 12-month job retention rates are nearly twice the national average.<sup>111</sup>
- **Goodwill - Easter Seals:** Goodwill – Easter Seals is a nonprofit serving Minnesota for nearly 100 years as a leader in workforce development, providing job training and placement services to eliminate barriers to work and independence.<sup>112</sup>
- **180 Degrees:** Since 1973, 180 Degrees has helped men reentering communities from correctional facilities to secure employment, with approximately 70% of participants successfully graduating from programming.<sup>113</sup>
- **Visit the following links for more information and lists of programs.**
  - <http://www.mncareerpathways.org/pathways/training-programs.html>
  - <https://www.jobsforfelonshub.com/reentry-programs/minnesota-reentry-programs>
  - <https://mn.gov/deed/programs-services/adult-career-pathways>

 **ACTION STEP**  
Connect with nonprofit workforce development agencies to help your company identify talented Fair Chance workers who have been vetted and prepared to be a good fit for your workplace.

## WATCH ONLINE EDUCATIONAL VIDEOS

We also recommend visiting the Dave's Killer Bread Foundation "Second Chance Playbook" website for educational videos and interviews on Second Chance employment here: <https://www.dkbfoundation.org/second-chance-employer-roadmap/> (create a user name and password, and the content is free!).

One in three employee-partners at Dave's Killer Bread, the fastest growing bread company in the country, has a criminal background. In 2015, Dave's Killer Bread introduced its non-profit, the Dave's Killer Bread Foundation, with the mission to inspire other businesses to become Second Chance Employers to reduce the impacts of mass incarceration and recidivism, and to affect positive societal change.

*"Around 60 million americans have some sort of criminal record ... now, a lot of time, that record disqualifies you from being a full participant in our society – even if you've already paid your debt to society. It means millions of Americans have difficulty even getting their foot in the door to try to get a job much less actually hang on to that job. That's bad for not only those individuals, it's bad for our economy. It's bad for the communities that desperately need more role models who are gainfully employed. So we've got to make sure Americans who've paid their debt to society can earn their second chance."  
- President Obama, November 2, 2015*

<sup>111</sup> Twin Cities R!SE. <http://www.twincitiesrise.org/who-we-are/>.

<sup>112</sup> Goodwill – Easter Seals. <https://www.goodwilleasterseals.org/about/about-us>.

<sup>113</sup> 180 Degrees. <https://www.180degrees.org/adult-residential-services.html>.





# APPENDICES

## Appendix A: Sample List of Evidence of Rehabilitation

### Appendix B: Sample Notices

- “A Summary of Your Rights Under the Fair Credit Reporting Act”
- Sample Adverse Action Notice

### Appendix C: Relevancy Screen & Matrix

### Appendix D: Summary of Minnesota Ban-The-Box-Laws: State & Local

## Appendix A: Sample List of Evidence of Rehabilitation

Hiring the right person is no easy job—it requires an investment of time, money, and training with limited information. Criminal history information may or may not be relevant to the job at hand, but for employers who are conducting individualized assessments, and looking into the context of a person’s history, below are activities and documentation of various types of “rehabilitation,” meaning positive steps a person has taken since his or her criminal justice system involvement.

Below is a sample list of evidence and activities that can demonstrate a person’s rehabilitation, which employers can ask for and consider to get a fuller context of a Fair Chance job applicant’s rehabilitation and readiness for work.<sup>114</sup>

### EDUCATIONAL ATTAINMENT

- Degrees Earned
- Transcript letter from a teacher or school administrator who can attest to the applicant’s school enrollment, course completion, and other aspects of their engagement like attendance, punctuality, leadership, strong grades, motivation to succeed, etc.

### JOB TRAINING OR INTERNSHIPS

- Proof of job training participation
- A letter from a program supervisor or administrator, who can attest to the applicant’s participation, program completion, and other aspects of their performance like attendance, punctuality, skills acquired relevant to the job sought, leadership, motivation to succeed, ability to work well with others, etc.

### EMPLOYMENT

- Letter, email, and/or phone references from previous supervisors and colleagues who can describe the job the applicant previously held, for how long, the responsibilities and qualifications required, compensation, promotions, and other aspects of the person’s performance including punctuality, reliability, skill, ability to work well with others, etc.

### COUNSELING

- A letter or other proof of participation/completion of a program for people with problems related to addiction, mental health challenges, etc.
- Proof of negative drug tests (ideally for 6-12 months prior to working).

### SOCIAL SERVICE PROGRAM

- A letter or other proof of participation in or completion of a program dedicated to social or charitable service.

### VOLUNTEER WORK OR COMMUNITY ENGAGEMENT

- A letter or other proof of volunteer work for a school, nonprofit organization, faith-based community, or other group or program aimed at community improvement, civic engagement, or social support.

### DISMISSAL, CERTIFICATE OF REHABILITATION, OR OTHER “RECORD-CLEANING” REMEDY

- A record cleaning remedy indicates that an individual with a criminal record has satisfied the terms of the rehabilitation, including any parole or probation requirements, to the satisfaction of the court and presiding judge.

### **LETTER FROM PAROLE OR PROBATION OFFICER**

- A letter or other proof of good conduct during a period of parole or probation from a parole officer or other relevant authority.

### **LETTER FROM CLERGY OR FAITH LEADER**

- A letter or other form of endorsement from a clergy or faith leader who has worked closely with an individual, either during or after incarceration.

### **PROGRAM ENGAGEMENT WHILE INCARCERATED**

- Information concerning an individual's engagement in a treatment or other rehabilitative or developmental program while incarcerated.

## Appendix B: Sample Notices

### “A SUMMARY OF YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT”

Available online at the following website: <http://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act/pdf>

#### Sample Adverse Action Notice:

[Name of Applicant]

[Address of Applicant]

[Date of Notice]

Dear [Name of Applicant]:

This letter is to inform you that we have made an initial decision not to further consider your application for employment based on information we have obtained from a consumer report.

While the consumer reporting agency provided us with the information used to make this decision, they were not responsible for the decision itself.

A copy of the report used to make this decision as well as a summary of your legal rights under the Fair Credit Reporting Act (FCRA) have been enclosed.

You have the legal right to contact the consumer agency directly and challenge the accuracy of the information found in the report.

If we do not hear from you within [X] business days, our initial decision will become final.

Sincerely,

[Name of HR Representative]

[HR Contact Information]

Enclosed:

- Copy of consumer report used to make decision
- Summary of legal rights under FCRA

## Appendix C: Relevancy Screens & Matrix

Employers can help ensure that they are considering only relevant information about a job applicant's criminal history by developing what is known as a "relevancy screen." A relevancy screen is a document which helps an employer understand what information about an applicant's criminal history is relevant and what should not be considered, and can also help background check companies understand what information they should provide to employers.

**The National Workrights Institute recommends that employers ask themselves the following questions when developing a relevancy matrix:**

- What are the Actual Responsibilities of the Job? It's important to understand what employees actually do on a regular basis in order to determine what risks are relevant. Often, a written job description will fail to capture all of the real responsibilities of a job.
- What Risks Are Associated with the Position? Any job presents the possibility that an employee will engage in some form of misconduct or another. The key question for employers should be "does this job present a greater risk than others?"
- What Prior Convictions Create these Risks? Some cases present obvious risks. Other risks are subtler. A conviction for involuntary manslaughter might, for example, be based on a fatal accident where a driver was at fault.
- Is the Risk Permanent? Recidivism rates vary greatly by offense, and the risk of reoffending for all offenses declines over time. Eventually, the risk that an ex-offender will commit a new offense become virtually indistinguishable from the general population.
- Determining Look-Back Periods: Analyzing the above factors can help employers develop an appropriate "look-back period." A look-back period is how far back in time an employer would like a background check screen to extend. Common look-back periods for serious crimes of violence or dishonesty range from 5-7 years, while look-back periods for less serious crimes are typically 2-3 years.<sup>115</sup>

**Things to keep in mind as you develop a relevancy screen:**

- Arrests and convictions are treated differently.
- Blanket policies forbidding hiring anyone with a criminal record are usually illegal.
- A policy which screens out job applicants for criminal offenses must measure the person for the job, not the person in the abstract.
- Any policy that screens out applicants based on criminal history must be both job related and consistent with business necessity in order to comply with Title VII.

**It's best to only consider convictions and arrests pending prosecution – arrests which did not lead to convictions are generally irrelevant.**

The EEOC's 2012 Guidance emphasizes that arrests are not proof that an individual committed a crime.<sup>116</sup> Many arrests do not result in criminal charges, much less criminal convictions.<sup>117</sup>

<sup>115</sup> "Best Practice Standards: The Proper Use of Criminal Records in Hiring" (2013), 10.

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**Blanket policies disqualifying anyone with a felony conviction from employment are not permissible (unless required by statute).**

The EEOC's guidance – quoting the United States Supreme Court – stresses that employment policies which screen out applicants must “measure the person for the job and not the person in the abstract.”

**Ban the Box!**

The EEOC's 2012 guidance encourages all employers to eliminate questions about criminal convictions on job application forms, and limit any subsequent inquiries to convictions which are job-related and consistent with business necessity.

**Any exclusions based on a criminal record must be job related and consistent with business necessity.**

In order to meet these two criteria, an employer must show that their policy effectively links specific criminal conduct with the risks inherent in the duties of a particular position. In order to establish a link between an individual's conduct and the risks of a position, employers can develop a relevancy screen based on the Nature-Time-Nature Test which can help them screen individual applicants on a case-by-case basis.<sup>118</sup>

# Appendix D: Summary of Minnesota Ban the Box Laws

## State and Local

This chart, adapted from the National Employment Law Project, summarizes state and local Ban-the-Box Laws, as they apply to both public and private employers.<sup>119</sup>

	Which employers are covered?			When can an employer run a background check?***		Does law require individualized consideration using EEOC criteria?	What are my rights if an employer denies my application?
	Private	Government Contractors & Vendors	Public (Government)	Only after considered for an interview	Before a conditional offer (or if no interview)		
<b>MINNESOTA (STATEWIDE BAN-THE-BOX LAW)</b>							
<b>MINNESOTA (State Law)</b>	X	X	X	X	X	Public Employers	N/C/A*
<b>CITY SPECIFIC BAN-THE-BOX LAWS IN MINNESOTA</b>							
<b>MINNEAPOLIS</b>	X	X	X	X	X	Public Employers	N/C/A*
<b>ST. PAUL</b>	X	X	X	X**	X	Public Employers	N/C/A*

\* N/C/A—Notice of intended adverse action before adverse action; Copy of background check report and opportunity to dispute contents or relevance before adverse action; right to Appeal denial of employment.

\*\* Note: St. Paul has a separate Ban-the-Box law for public employers (city and county agencies) and private employers. The law for public employers only allows background checks for job position finalists, and requires individualized consideration using EEOC requirements.

\*\*\* Note: State licensing boards are not obligated to delay asking an applicant about their criminal record, but they are banned by Minnesota law from considering arrests without conviction, annulled or expunged convictions, and misdemeanor convictions for which no jail sentence was imposed.<sup>120</sup>

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