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**INTER-OFFICE COMMUNICATION**

**DATE:** September 27, 2011  
**TO:** Honorable Committee on Personnel  
**FROM:** Kimberly Walker, Corporation Counsel  
**SUBJECT:** Legality and Liability of "Banning the Box"

The Office of Corporation Counsel has been requested to provide an opinion as to the legality and liability of eliminating the criminal records box from Milwaukee County applications. In our opinion, it is both legal and advisable to remove the criminal records box from employment applications. Doing so will decrease the County's liability for employment discrimination based on arrest or criminal record.

There is currently no federal law directly addressing employment discrimination against individuals with criminal backgrounds. Notwithstanding, the U.S. Equal Employment Opportunity Commission ("EEOC") has taken the position that criminal records should not be used to limit employment opportunities, and has consistently published statements that criminal background checks have disparate impacts on Hispanic and African-American applicants.

Wisconsin is one of several states to prohibit public employers from discriminating based on criminal history. Wis. Stat. § 111.335(1)(a) provides in part: [e]mployment discrimination because of arrest record includes, but is not limited to, requesting an applicant, employee, member, licensee or any other individual, on an application form or otherwise, to supply information regarding any arrest record of the individual except a record of a pending charge..." Employment discrimination does not exist where an employer refuses to hire an individual based on conviction record, if the conviction is substantially related to the circumstances of the job, or when bondability is a requirement for employment and the individual is incapable of being bonded.

The background check should still be completed. In an effort to minimize liability for employment discrimination, the County may remove the criminal records box from the application form and complete the criminal background check once the candidate for hire has been selected. Since the background check will ultimately be completed, the County's level of protection should not be impacted.

Many public and private employers have moved to hiring models in which the background check occurs at the end of the hiring process. Employers complete the background check on the candidate selected for hire prior to extending the offer, or extend the offer contingent upon the candidate successfully passing the background check. Regardless of whether the County continues its current practice, or completes background checks at the end of the process, Human Resources professionals should be integrally involved in hiring given their expertise, and to ensure consistency.

The process outlined below is an example of how the County's background check process could be modified:

1. Applicant completes application form and submits resume for specific role.
2. Human Resources does initial phone screen of applicants, and identifies those who are qualified to be considered as candidates.
3. Human Resources forwards the candidate slate to hiring manager, to either schedule interviews internally or have HR coordinate scheduling of interviews.
4. Final candidate is selected.
5. Written offer extended to selected candidate, with *contingent upon candidate successfully passing the criminal background check, and drug screen* language in the written offer.
6. Selected candidate returns County form, authorizing Human Resources to complete criminal background check.
7. Background check completed.

*Scenarios:*

- Criminal background check returns without discrepancies. Selected candidate commences employment.
- Criminal background check returns with discrepancies. Human Resources professional determines the conviction is not within the established timeline. The conviction is disregarded and the candidate commences employment with the County.
- Criminal background check returns with discrepancies. Human Resources professional determines the conviction is within the established timeline. Human Resources professional consults with the Office of Corporation Counsel to determine if the conviction is substantially related to the circumstances of the job. If the conviction is not substantially related to the circumstances of the job, the candidate commences employment with the County. If the conviction is substantially related to the circumstances of the job, Human Resources professional sends candidate a letter rescinding the employment offer for failure to successfully pass the background check.

The County must be able to determine whether a criminal conviction substantially relates to the position sought by the applicant. As such, the question is not whether to complete a background check. It is when to do so. The County can legally complete background

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checks at the end of the hiring process, and reduce its liability for employment discrimination claims by eliminating the box from applications.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Walker', written over a horizontal line.

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